

CAPITAL PUNISHMENT: A BALANCED EXAMINATION

Moral Arguments About the Death Penalty – An Introduction

The ethical debate over capital punishment is strikingly and uniquely robust. In most matters of public policy, those on different sides usually can find some consensus among them. In the debate over affirmative action, for example, it is not seriously disputed that affirmative action leads to violations of the right to equal treatment. Those who nevertheless support affirmative action believe that it is permissible, or required, to depart from the principle of merit in order to achieve broader social aims: they believe that preferential treatment is required to compensate past wrongs, or to create role models to attract young minorities to professions previously viewed as unavailable to them, or that the whole notion of merit and qualification is itself riddled with prejudice. But across one axis there is agreement: affirmative action departs from the principle of merit in selection and substitutes grounds generally regarded as unacceptable, namely race and sex. In the best of all worlds, both sides agree, affirmative action would be unnecessary.

Death penalty proponents and abolitionists share no such common ground.

Many different kinds of arguments are made about the death penalty. They are usefully divided into three broad classes: utilitarian arguments, retributive arguments, and egalitarian arguments. Utilitarian arguments are appeals to the common good. Such arguments are forward-looking – they seek to punish offenders for the future benefit that might be gained from punishment: for the deterrent effect the punishment might have against other prospective offenders and the offender himself, for the benefit to public safety from having the offender incapacitated. In short, utilitarian arguments consider the costs and benefits of competing forms of punishment.

Retributive arguments, by contrast, are appeals to desert. These arguments are backwards-looking – the future benefit that might be gained from punishment is irrelevant, all that matters is that the offender is given what he deserves. To retributivists, the costs and benefits of punishment are inconsequential. Religious arguments might usefully be grouped under this heading. The ultimate source of authority in religious arguments is God, whereas retributivists appeal to reason, but the ultimate aim of retributivists and those appealing to religion is the same: to do the right thing regardless of the consequences.

Egalitarian arguments are appeals to equity; people in the same position should be treated the same. There is some logic to thinking of egalitarian arguments as subset of retributive arguments: people, of course, deserve to be treated fairly. But in the context of the death penalty, at least, egalitarian arguments are persuasive (or unpersuasive) in a different way than basic retributive arguments. Several studies have shown a strong race-of-victim effect in the administration of the death penalty in America: people who kill whites are far more likely to receive the death penalty than people who kill blacks. Some proponents of capital punishment offer a classic retributivist response: this means only that justice is not being done in the black-victim murder cases. Pointing to an injustice in other similar cases – that is, too little punishment – does not mean that an injustice has been done in this case. Other proponents reject the desirability of equity entirely: evenhandedness is not generally a goal of the criminal justice system. Police and prosecutors do not succeed in capturing

all offenders, and all convicted defendants are not treated the same way. Yet no one seriously contends that the distribution of criminal penalties should be halted because it is anti-egalitarian. It thus seems useful to consider egalitarian arguments as a separate grouping.

These are the clearly differentiable modes of discourse, the different battlefields upon which this war is fought. Neither side is inclined to give an inch in any theatre. Some advocates may emphasize the significance of retributive arguments, others utilitarian concerns, but neither side has made any meaningful concessions. Abolitionists tend to say things such as: “It violates the dignity of man for the state to take a human life. Thus the death penalty would be wrong even if it did deter and save money, but in any case it does not deter and costs more than life imprisonment.” Opponents say things like “The death penalty gives murderers what they deserve, and thus would be the proper punishment even it causes a brutalization effect – that is, it led to more murders – but in any case it does not lead to more murders; it deters murder and saves the public the cost of keeping inmates in prison for long terms.” And so it goes. The only subject of consensus is that the death penalty is conclusively incapacitory. Executed defendants will never kill again, though even here there is debate. Abolitionists dispute that incapacitation is a special concern for murderers. Some evidence suggests that they are no more likely to recidivate than other kinds of criminals, hence abolitionists say people who emphasize incapacitation should either support the death penalty for all criminals or none.

The object of this section is to evaluate each kind of argument on its own merit. This is the more interesting and constructive way to debate the issue. If someone tells you they support the death penalty because the Bible teaches an eye for an eye, it is far more effective to be able to respond by offering competing passages from the Old Testament than to argue that religion should have no place in public policy discourse. I term the first kind of argument horizontal, the second vertical. The succeeding sections all approach the issues horizontally. Some but not much will be said about whether deterrence is a legitimate aim of the criminal justice. Rather, the focus will be on the quality of the competing studies that have examined the issue and what lessons, if any, may be drawn from the data.

The data on public opinion, discussed in the Introduction, suggest that most people’s opinions on capital punishment are heavily influenced by vertical arguments. Theists are far more likely to support the death penalty than atheists (although, paradoxically, the Catholic Church opposes capital punishment). Blacks, perhaps more sensitive to issues of race and equity, are more likely to oppose the death penalty than whites. So in some sense horizontal arguments are beside the point, since often people will argue past one another on this issue. But in another significant sense argumentation of this kind is even more important: if people are committed to a worldview, if they are strictly utilitarian for example, and if they can be persuaded on their own terms that their position is mistaken, say by conclusive evidence of deterrence or savings, then their minds can be changed.

Chapters 1 and 2 consider retributive concerns and religious arguments. Chapters 3-6 address the utilitarian issues of deterrence, risk of recidivism, and cost. Chapter 7 considers the risk of executing innocents, which has both utilitarian and retributive consequences.

Chapter 1 – Retribution

Retribution – Introduction

Retribution is the notion that punishment is imposed because it is deserved. Murderers are to be given the death penalty because that is the penalty they have earned by their offense. The philosopher Immanuel Kant wrote that retribution is grounded in respect for the autonomy of the offender. If a criminal is punished to deter others from committing a similar crime then they are being treated as a means to an end. If a criminal is punished too little or not at all, perhaps because of some mitigating factor in his personal history, then the notion of his free will is denied. Modern theorists offer competing formulations of retribution and different bases for its grounding, but all stand in contrast to consequentialist defenses of the death penalty. The death penalty is right or wrong, regardless of whether it deters crime or its cost. It is right even if it serves no purpose other than to give the criminal his due. As Kant famously put it, “Even if a civil society were to dissolve itself by common agreement, the last murderer remaining in prison must first be executed.” Kant’s teachings are excerpted in the Critical Documents section below.

This is unquestionably a powerful idea, and public support for the death penalty is – at least on the surface – largely based on notions of retribution. In most recent polls, “an eye for an eye” or “punishment fits the crime” is the plurality reason offered by proponents for their support for capital punishment. In the most recent Gallup poll, 48 percent of respondents cited retribution as the basis for their support, more than twice the level of support offered for any other justification.

The concern here is with the quality of the argument on its own terms. If retribution is the true currency of justice, does it dictate support for the death penalty? As we will throughout the book, we ask the horizontal question: should a retributivist support capital punishment? The retributive argument for the death penalty has considerable appeal. Murderers have committed the most serious offense imaginable; they deserve to be treated in the most severe manner.

One objection to retributive theory is that it presumes a baseline condition of equality in society that is not present in practice. An essential presupposition of retribution is that the offender is fully responsible for his crime. Yet, the United States executes juveniles and the mentally ill. Hugo Bedau suggests that it is hypocritical for retributive defenders of the death penalty not to object to with equal force to the execution of these less responsible individuals. The retributivist response to this claim is that even the young and the mentally ill understand the difference between right and wrong, and that so long as they do understand this difference it is just to hold them accountable for their actions.

Professor Bedau’s argument raises an important point about retribution – it has both a positive and negative requirement. Retribution requires that offenders be given as much punishment as they deserve and no more than they deserve. Appeals to retribution often do not consider the full implications of retributivism. This is true of both abolitionists and defenders of the death penalty. Abolitionists often point to the execution of innocents as a retributive injustice and cause for abolishing the death

penalty without recognizing the retributive injustice of not giving defendants deserving the death penalty their due. Defenders of the death penalty sometimes make the same mistake and demand the death penalty on retributive grounds without acknowledging the problem of innocence and determining with certainty which defendants deserve to die and which do not, each a serious concern from the standpoint of retribution.

Another commonly raised objection is that while retribution offers a compelling definition of who should be punished – the guilty and no one else – it is less good at defining the quantity of punishment that the offender should receive. Why does the murderer deserve death and not life imprisonment without the possibility of parole? It is not useful to rely upon *lex talionis* – “an eye for an eye” – to resolve this question. We do not generally think that rapists deserve to be raped, nor that car thieves deserve to be punished by having their cars taken from them. For some crimes, it is not even possible to imagine the equivalent punishment. How would one defraud a fraud? What would be the appropriate punishment for a traitor or a kidnapper or an embezzler? Albert Camus argued that the death penalty is too much punishment for murderers:

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.

One response to the uncertainty of the appropriate quantity of punishment might be to say that criminals deserve the punishment the law provides, a legalistic notion of retributivism. If the law says that car thieves are to be punished by twenty years in prison, and the law is known within the community, and the thief chooses to steal anyway, then this is the punishment the offender deserves. This also means that murderers deserve death in Texas, but not in Massachusetts, and that what they deserve may change from year to year as new legislators enter office. This is an unsatisfyingly arbitrary notion of retributivism. Even the most devoted retributivists generally concede that the calculation of punishment requires a more nuanced formula than either legalistic retributivism or *lex talionis* provide.

The leading modern solution to this problem has been a notion of proportionate retributivism. Penalties are ranked in order of harshness, crimes are ranked in order of severity, the most severe crime is paired with the harshest punishment, the second most severe crime is paired with the second harshest punishment, and so on until all crimes have been paired with proportionate punishments. This method dictates relative levels of desert – a murderer deserves a harsher punishment than a thief – but does not dictate any absolute levels of punishment. If murder is the most severe crime, the murderer may justly receive a ten-year prison term if that is the harshest punishment the society deems just, and