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Lecture Notes, November 22

I. Utilitarian defenses of capital punishment:

Utilitarian defenses of punishment focus on deterrent of others, deterrent of self, and general social benefits.

We'll examine these three cases, applied to the case of capital punishment, in turn.

1) Deterrence of others.

The Court (Stewart) says whether capital punishment deters is inconclusive, p 124.

Marshall quotes the UN, p 127.

Perlmutter, a retributivist, thinks this question is irrelevant.

It can't be a sufficient defense, by itself.

Otherwise, you could be justified in executing an innocent person

Van den Haag concedes that there's no clear deterrent effect.

But he argues that common sense tells us that it must deter.

Also, he thinks that it creates a more subtle kind of deterrence, establishing social norms, p 140.

Reiman rejects the common sense argument, p 146.

He urges that we should not argue a priori in such matters, but look to the evidence.

Consider the Best-Bet argument: It's better to play with murderer's lives, than with those of innocent people.

Let's assume that we don't know whether capital punishment really serves as a deterrent, but that if it were a deterrent, it would be morally acceptable.

We can either have capital punishment or not have capital punishment, and it can serve as a deterrent, or not.

This yields four cases.

In two of those cases, there is a basic error in trying to use deterrence as a justification.

If we have capital punishment and there is a deterrent effect, and if we don't have it and there's no deterrent effect, there are no errors.

But if we have capital punishment and there is no deterrent effect, we unnecessarily kill some criminals.

And if we fail to have capital punishment and there would be a deterrent effect in having it, we unnecessarily allow some people to die, viz. the victims of those who would have been deterred had the death penalty been in effect.

The best-bet argument, then, is that it's better to have capital punishment, since the error would lead to the deaths of people convicted of capital crimes, whereas if we failed to have capital punishment the error would lead to the deaths of innocent people.

Note that the Best-Bet argument may smuggle in a retributive aspect to the defense of the death penalty.

We feel it appropriate, only if the person in some sense deserves it.

Also note that this kind of error is different than the practical errors of implementation.

We may make mistakes and execute innocents.

van den Haag rejects the mistaken execution of innocents as a reason for abolition, anyway, 139-140.

He's looking, appropriately, for a theoretical justification, separating the problems of implementation. Thus, his emphasis on the irrelevance of maldistribution, 139. van den Haag's defense of the Best-Bet Argument, 151.

A possible response to the Best-Bet Argument:

The *Acts and Omissions Doctrine* says that it is worse to cause harm, than to fail to act to prevent harm. Consider the trolley car example.

Even if a few lives could be saved via the death penalty, we must not use it, because then we are actively doing the wrong.

Remember Kant's counsel to get your own moral house in order; we are not responsible for the acts of others, only our own acts.

This Acts and Omissions doctrine is suspect, for a utilitarian, who makes no distinction between acts and omissions.

The utilitarian just looks to maximize happiness, by whatever means possible.

If this means acting, then act; if this means omitting, then omit.

If we conclude that a particular punishment is too severe, regardless of its utility, then we are rejecting utilitarianism, in favor of acts and omissions.

We are saying it's better not to act, despite the greater utility that could arise.

If we choose Acts and Omissions, we are rejecting the assumption of the Best-Bet argument that capital punishment would be justified if it did, in fact, deter.

A utilitarian who wants to defend capital punishment can't rely on acts and omissions doctrine.

In the absence of conclusive evidence about the deterrent effect, the Best Bet Argument seems to yield a utilitarian argument for capital punishment.

The utilitarian can not appeal to the Doctrine of Acts and Omissions to block this conclusion.

Reiman argues that the deterrent effect is nil, so the best-bet argument is moot.

We already have life imprisonment, p 146 (#1)

Plus, there is the likelihood that a criminal will be killed in the commission of his crime, (#2)

He even thinks that abolition can be a deterrent, via a civilizing effect on society (#3)

(Though van den Haag says that this last argument is bunk: pp 150-151.)

2) Deterrence of offender

Certainly, capital punishment achieves this.

But there are easier, less severe ways of doing this, ones that create less pain.

A utilitarian wants to minimize pain.

Reiman points out that capital punishment involves submission and psychological pain, pp 144-5.

van den Haag thinks that life imprisonment causes more pain, even though it is preferred, pp 151b-2.

But Stewart, quoting Powell, in *Furman*, pp 123-4, says we can't eliminate capital punishment just because lesser punishments may suffice.

3) General social benefits: prevention of anarchy

Quote from Stewart in *Furman*, p 124

Stewart says that this is retributive, but it's not, in essence

This really means that the people want revenge, even though it might not be justified, and so we had better give it to them, or else they'll riot.

Blood thirst doesn't really seem an appropriate defense of social policy.

That's irrational, emotional behavior.

While it may be understandable, it shouldn't be the basis for a rational, public policy.

We should comfort the victims, but this can't be the only way to achieve finality, closure, and acceptance

It looks like the utilitarian can't really defend the death penalty.