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Lecture Notes, November 29

I. Utilitarian defenses of capital punishment, redux

The utilitarian focuses on deterrence, but there's no clear deterrent effect.
So, he can rely on commonsense reasoning, and the best-bet argument.
The common sense argument isn't very compelling, as Reiman noted.
If we are going to execute some one, we should have real evidence of the benefits.

Any benefits have to be weighed against the bad consequences of capital punishment:
Effects on the condemned's family, who are innocent.
Effects on executioners.
Inculcating bloodlust in our society.
Do these outweigh the deterrent effects?

Recall that there are basic problems with utilitarian defenses of punishment, in general.
See Perlmutter's article.
Punishment necessarily entails harming the wrongdoer.
Harm involves increase of pain, or decrease in pleasure.
Utilitarians want to increase pleasure, and decrease pain.
So, the only possible utilitarian defense of punishment is one where the long-term benefits outweigh the short-term harms.
But, it's possible, in any particular case, that there won't be any long-term benefits.
Consider un-rehabilitatable prisoners, and stubborn children.
If we are utilitarians, we should adjust our standards: reform, rather than punish.
And we do, in many cases, shift from criminality analyses to mental/emotional problem analysis.

Still, it's unlikely that we would abandon the notion of punishment altogether.
For example, we only believe that we can punish when the person is responsible.
Remember that to deter crime, we may not need to punish the guilty!
When behavior is caused by mental or emotional defect, such as addiction, then we consider the person not responsible.

The basic problem with utilitarian defenses of capital punishment is that utilitarians look to reform, protection, and, maybe, deterrence as justification, but these are not the essence of punishment, which must be backwards-looking, p 133.

So, let's look at the retributive case for capital punishment.

II. Retributive, or Kantian, justifications of capital punishment

The retributive defense concerns desert.
Lex talionis: the punishment must fit the crime.

Perlmutter, a retributivist, argues that wrongdoers deserve their punishment.
Indeed it is their right, and interest, to be punished, pp 135-6.
It is in their interests to be treated as members of the moral community: p 136.
This is an Hegelian, or Kantian, notion.
Recall that for Kant, the essence of morality is universalization.
So, if a person murders, he is actually willing his own death.

Call this 'eye-for-an-eye' policy a 'strict lex talionis'.
Van den Haag discusses this.
The strict policy seems too severe, since we don't want to rape the rapist.
The question is whether capital punishment too severe, as well?

We have a problem, for the retributivist, in the absence of a strict lex talionis, of how to match punishments to crimes.
Let's say we have two lists: we can order serially both punishments and crimes.
(We'll ignore the problems here of ranking crimes; e.g. which is worse, grand larceny or minor assault? etc.)
The question is how to match the punishments with the crimes.
Surely there are punishments beyond which one can not, morally, abide.
E.g. raping the rapist, cutting off limbs.
The Eighth Amendment to the U.S. Constitution prohibits cruel and unusual punishment.
This just embodies our intuition that certain punishments are too severe.

Van den Haag argues that capital punishment can not be unjust, since the criminal asked for it, p 141.
(Again, notice the Kantian presumption.)
Reiman argues that the justness, in this Kantian sense, of a punishment doesn't entail that we should implement it, p 143-144.
We should not do horrible things, like torture.
Capital punishment is just another horrible thing we can do.
It's always cruel and unusual.
Abolition of the death penalty is a mark of civilization.

Stewart argues that we can avoid the problem of cruelty by making sure that a penalty isn't too painful, or grossly out of proportion, p 123.
Van den Haag urges shootings, rather than injection, for this reason, p 151.

Brennan agrees that it is too severe, and below the acceptable limits required by human dignity, p 126.
Perlmutter says that it's consistent with dignity.
Van den Haag responds to Brennan, p 142, and alleges that the criminal is the source of the degradation.
The criminal who is degrading himself.

The retributive case thus seems to turn on how we interpret 'dignity'.

III. Capital punishment: a summary

Of course, the death penalty is unnecessary and wanton, we have the prisoner in custody.

If we really wanted to, we could prevent escape and pleasant lifestyles.

Stewart's defense seems to be that it is deemed acceptable by the Framers, and by legislators today, p 123.

A similar defense is made by Perlmutter, p 135.

Marshall argues that people's desire for the death penalty is no indication of the moral rectitude of the punishment. The American people don't know enough about the punishment. If they did, they would reject it, p 127. There needs to be a (morally and factually) informed citizenry.

There are further pragmatic questions:

Can the government be trusted to handle it?

The Court's Furman decision, 1972, argued that capital punishment was illegal since it was applied in a "freakish and wanton manner".

But in *Gregg v Georgia*, 1976, it reversed itself, allowing capital punishment as long as the jury is guided and mitigating circumstances are considered.

Perlmutter and van den Haag see it as a question of justice.

Though van den Haag sees the deterrence argument as sufficient practical justification.

Reiman grants the justness (assuming a strict *lex talionis*) but argues that deterrence hasn't been proven, and that it works on the other side.

That is, Reiman argues that abolition actually creates a greater deterrence.

We can try to determine the deterrent effect.

Van den Haag argues that common sense dictates that a more feared penalty must serve as a greater deterrent.

Reiman notes that this entails that we should implement death by torture.

Van den Haag responds that this is repugnant, but so may be capital punishment, to some.

Durkheim quote, 148.

IV. Abortion introduction

Abortions were not illegal until the late nineteenth century. At that time, before antibiotics, it was a dangerous procedure, mortality rate was high. Even the Church didn't have an official anti-abortion stance; this was left as a practical matter to women and their midwives. But, in large part in response to the high mortality rate, state laws arose prohibiting abortion.

In 1973, after a period of emphasis on civil rights and, in particular, women's rights, the Supreme Court ruled in *Roe v Wade* that states may not ban abortions. They also ruled, that states may impose certain limits on abortions.

Some philosophical questions surrounding abortion:

- 1) Who has rights?
- 2) What kinds of obligations do we have toward others?
- 3) What is a person?

Some non-philosophical questions:

- 1) What is the law?
- 2) When is a fetus viable?
- 3) How does the fetus develop?

These may or may not be relevant to a philosophical position.

On absurd examples:

Abortion is a difficult subject, so we look toward easier cases, to refine our intuitions.

We wonder about those cases, and then apply them here.

Some of those cases may look pretty weird, but that's not necessarily relevant.

We're taking a stand where none is obviously right.

V. Roe v Wade

The question at hand: Is the law that prohibits abortion constitutional?

This is not a question of morality, per se, but if the law is based on morality, maybe we can get an insight into the moral question.

Three classic anti-abortion arguments:

- 1) To discourage illicit sex.
- 2) To protect the mother.
- 3) To protect pre-natal life.

Notice that the second is clearly an instance of paternalism.

A law is paternalistic if it attempts to protect the individual from himself.

We generally oppose paternalism.

But, we do have some paternalistic laws, e.g. drug laws, suicide prohibitions, seat belt laws.

So, should the case of abortion be one of these limited exceptions?

The Court responds:

To 1) that it's not their place to do this.

To 2) that with current medicines, it's more dangerous for a woman to carry to term than to get an early abortion.

This is especially true for very young women.

As the fetus grows, an abortion procedure becomes more dangerous.

Perhaps it would make sense to prohibit dangerous late term abortions.

To 3) that the fetus is not protected by the fourteenth amendment, p 192.

So, the Court ruled, there is no defense for outlawing abortions.