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Lecture Notes: Capital Punishment

A simple argument against capital punishment:

1. Murder is wrong.
 2. Capital Punishment is murder.
- ∴ Capital Punishment is wrong.

You might argue with premise 2.

You can replace 'murder' with 'killing'.

But then you need to change premise 1, in order for the conclusion to follow.

And killing isn't always wrong. (Consider killing a harmful bacteria or insect, for easy example.)

You might change premise 1 to 'Killing a human being is wrong'.

But that still might be debatable.

We make exceptions in cases of war, and self-defense.

What about punishment? Is this an acceptable reason?

Basic defenses of punishment, generally:

Forward looking: Utilitarian

These emphasize the benefits of punishment, both to society and to the punished person.

The child is punishment for betterment, later.

We call prisons 'correctional facilities', and we construct rehabilitation centers.

But, this sometimes backfires, permits punishments that don't fit the crime

We could punish too little, if we don't see benefits of a more severe punishment.

E.g. repeat drug offenders: will incarceration be an improvement?

Or we could punish too much, if we think the deterrent effect would be large.

E.g. public executions.

Backward-looking: Retributive, or Kantian model.

Lex talionis (law of retribution).

There is for the retributive case a generally accepted proportionality requirement.

The classical proportionality requirement is 'an eye for an eye'.

But this can be seen as too severe.

Do we really want to rape the rapist?

Van den Haag: "Punishment is to vindicate the law and the social order undermined by the crime." (141)

(Is this backwards-looking or forwards-looking?)

Practically, we balance these forward and backward looking justifications, imperfectly, in laws.

Utilitarian defenses of capital punishment:

Recall that utilitarian defenses of punishment focus on deterrent of others, deterrent of self, and general social benefits. We'll examine these three cases in turn.

1) Deterrence of others.

The Court (Stewart) says it's inconclusive, p 124.

Marshall quotes the UN, p 127.

Perlmutter, a retributivist, thinks this is irrelevant.

It can't be 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 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.

One should not argue a priori in such matters.

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 serves as a deterrent, but that if it were a deterrent, it would be theoretically morally acceptable.

We can either have 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 this 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: executing innocents.

van den Haag rejects this as a reason for abolition, anyway, 139-140.

He's looking, as is appropriate, for a theoretical justification, separating the problems of implementation.

Thus, his emphasis on the irrelevance of maldistribution, 139a

van den Haag's defense of the Best-Bet Argument, 151.

A possible response to the Best-Bet Argument: The *Acts and Omissions Doctrine*: It's worse to cause harm, than to fail to act to prevent harm.

Consider the trolley car example.

So, even if a few lives could be saved via the death penalty, we must not use it, because then it's us 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 doctrine is suspect, for a utilitarian, who makes no distinction between acts and omissions: just create the greatest happiness.

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's 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.

There are further 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?

There's still the intuitive deterrent case, and the setting of norms for society.

We might be able to prevent a large number of murders through a few executions.

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 that this won't be the case.

Consider unrehabilitatable 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.
(Note that to achieve deterrence, with the utilitarian, we need not punish the guilty!)
When behavior is caused by mental or emotional defect, such as addiction, then we consider the person not responsible.

Basic criticism:
Utilitarians look to reform, protection, and, maybe, deterrence.
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.

Retributive defense concerns desert.
Lex talionis: 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.

Consider, as Van den Haag does, a strict lex talionis.
This seems too severe, since we don't want to rape the rapist.
Is capital punishment too severe, generally?

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 or 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.

Van den Haag argues that it can't in fact be unjust: the criminal asked for it, p 141.
Reiman argues that the justness of a punishment doesn't entail that we should implement it.
We should not do horrible things, like torture.
Capital punishment is just another horrible thing we can do.
It's always cruel and unusual.
He grants that death might be justly deserved given lex talionis.
But it doesn't thus follow that we should have capital punishment, p 143-144.
Again, abolition is a mark of civilization.

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

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.
Alleging that the society degrades the criminal by executing reverses the direction of causality.
It is the criminal who is degrading himself.

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 123b.
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 (also assuming 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.