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Capital Punishment

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Capital punishment – the legally authorized killing of a criminal offender by an agent of the state for the commission of a crime – stands in special need of moral justification. This is because execution is a particularly severe punishment. Execution is different in kind from monetary and custodial penalties in an obvious way: execution causes the death of an offender. While fines and incarceration set back some of one's interests, death eliminates the possibility of setting and pursuing ends. While fines and incarceration narrow one's routes to happiness, death eliminates its possibility. Given the severity of execution, it is not surprising to find much philosophical controversy about the moral permissibility of capital punishment. This entry maps the terrain of the debate. The first section discusses justifications of the death penalty as they appear in major theories of punishment. The second section surveys moral objections to execution that apply to most justifications. The third addresses procedural criticisms, which do not target the morality of execution so much as the justice of its implementation.

Justifications of the Death Penalty in Major Theories of Punishment

The shape of the death penalty debate depends on the different conceptual resources found in major theories of punishment. More specifically, the terms on which the debate proceeds depend on specific theories of *sentencing*. (Both Rawls (1955) and Hart (1968) famously argue that justifications of penal institutions and justifications of individual punishments can operate on distinct, even conflicting, moral grounds.) Because we are focused on the permissibility of sentencing someone to death, we need not discuss the strengths and weaknesses of general justifications of punishment. This section thus surveys how different approaches to sentencing address the morality of execution.

Retributivism

Retributivist theories of sentencing hold that legal penalties should be proportionate to legal offenses. Roughly put, a penalty is proportionate to an offense when the severity of the penalty fits, or is appropriate to, the moral gravity of the crime. The moral gravity of a crime is a function of the amount of harm caused and the culpability of the offender. Culpability comes in degrees: intentional harm is worse than reckless harm, which is worse than negligent harm. Someone who intentionally kills is more culpable than someone who kills through negligence, though they inflict the same amount of harm. A penalty is disproportionate when it fails to

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fit the crime – when it is too harsh (life in prison for petty theft) or too lenient (parole for attempted murder).

Proportionality comes in two flavors, ordinal and cardinal. A punishment *p* for crime *c* is *ordinally* proportionate when *p* is less severe than those punishments imposed on crimes graver than *c* and when *p* is more severe than those punishments for crimes less grave than *c*. A punishment is *cardinally* proportionate when the severity of *p* matches the seriousness of *c* in a quantitative sense. A few philosophers defend capital punishment in light of ordinal proportionality. Edward Feser contends that execution is permissible in some cases just because it is the most severe punishment in the state's arsenal (2011). He believes that ordinal proportionality would be violated if the most serious crimes were not punished with the most severe punishments. But as Benjamin Yost (forthcoming) points out, an ordinal proportionality vindication of execution ultimately relies on assertions of cardinal proportionality. Perhaps for this reason, most of the debate has centered on cardinal proportionality. Retributivist proponents of execution contend that it the penalty is permissible because it is cardinally proportionate to murder. Opponents argue that execution is excessively severe. (Interestingly, philosophers make almost no attempt to explain why execution is so bad for the offender; Michael Cholbi (forthcoming) is an exception.)

Cardinal Proportionality and the *Lex Talionis*

The classic retributivist justification of the death penalty employs the *lex talionis*, or the principle of "like for like." Immanuel Kant's *Metaphysics of Morals* is the *locus classicus* of this strategy. Kant asserts that "whatever undeserved evil you inflict upon another within the people, that you inflict upon yourself" (6: 332). Accordingly, "if [an offender] has committed murder, he must die" (6: 333). Because the murderer takes a life, he must be punished with death.

This literalist interpretation of cardinal proportionality, while accepted by some philosophers, especially Van den Haag (1986), and alive and well in the popular imagination, faces decisive objections. It would require the state to punish the rapist with rape and the torturer with torture. These are clearly morally impermissible acts – if not for the state, then for the official charged with implementing them. (Benjamin Yost (2019) argues that Kant has a more plausible argument than is commonly understood.)

Inspired by Kant, Tom Sorell develops a more flexible version of the *lex talionis*. For Sorell, the *lex talionis* stands for the proposition that "the punishment imposed on the criminal should reflect the costs of the crime to the victim," where costs are deprivations of goods (1993). This approach does not require that punishments mimic crimes, but it still attaches execution to murder. Sorell argues that the good of life differs in kind from all others (the goods of a rewarding job, friendship, etc.). Life, we might say, is a fundamental good, as it is the condition of the achievement and enjoyment of every other good. Murder thus differs in kind from all other crimes, which attack non-fundamental goods. Because the murderer wrongs his victim by robbing her of the fundamental good, proportionality demands that he suffer this hardship in turn (see also Waldron 1992).

Sorell's improvements might not be sufficient. Because the rapist robs his victim of the good of sexual autonomy, it seems like the rapist must be punished with rape after all. This illuminates a general problem with the *lex talionis*. Retributivists accept the existence of moral constraints on types of punishment – sexual violence is clearly impermissible. Accordingly, death penalty proponents must show that there is no prohibition on execution. But as both Claire Finkelstein and Sarah Roberts-Cady have argued, even sophisticated versions of the *lex talionis* have no principled way of rejecting types of punishments as immoral or inhumane (Finkelstein 2002; Roberts-Cady 2010). This means that retributivist justifications of the death penalty hinge on the success of arguments external to the *lex talionis* itself. (For example, retributivist Mike Davis argues that capital punishment is permissible when it does not "shock" the moral sensibility of a community (1981). But this is clearly not a test AU2

of proportionality.) And so *lex talionis* seems theoretically incapable of justifying execution.

Fair Play Retributivism

Fair play theories hold that a lawbreaker deserves punishment because she helps herself to an unfair advantage over her fellows. That is, she benefits from others' compliance with the law, while refusing the burdens of obedience herself. Criminal desert is here associated not with culpable harm, but with what one wrongfully gains from free-riding.

While many philosophers find fair play theory an attractive general justification of punishment, whether it can provide meaningful sentencing guidance is an open question (see, e.g., Dagger 1993). George Sher suggests that criminals take freedoms that law-abiding citizens don't and should be punished in proportion to the amount of freedom illicitly taken (1987). He thinks that more serious criminal acts embody more objectionable thefts of freedom. And so the most serious criminal act, whatever it is, should be punished with the most severe punishment, namely, execution. But this defense of capital punishment exhibits serious problems (in addition to those mentioned in the previous section). First, it misdescribes what is wrong with murder. Murder is not wrong just because the murderer helps himself to an excess of freedom. Murder is wrong because it takes a life. And so fair play theories conflict with basic moral intuitions. Second, the vast majority of citizens have no inclination to murder. The legal prohibition of murder does not restrict their freedom because they have no interest in killing! So it doesn't look like the murderer acts unfairly: he does not take a liberty others are denied. Fair play thus offers little reason to punish murderers (and rapists, child molesters, etc.), much less execute them.

The fair play theorist can respond that everyone is tempted to disobey *some* law or other, yet most people successfully combat that temptation. What the murderer takes advantage of, then, is his fellow citizens' general compliance with the law. He enjoys the benefits of general compliance while refusing to comply himself (Dagger 1993). But now the problem is that every crime is wrong for the same reason and to the same degree, and so there is no reason to punish murder more harshly than theft. Put differently, this version of fair play sentencing fails to respect ordinal proportionality.

Communicative and Expressive Retributivism

Expressivists believe that publicly condemning criminals is part of the point of punishment. Communication theorists add that punishment should communicate this condemnation to the wrongdoer as well; in so doing, punishment can help offenders repent and reform. For both theories, the harshness of penal expression is intrinsic to its important message, and in this way, punitive hard treatment is justified. Expressivism has little to say about the kind or amount of punishment to be imposed, so it need not detain us. Communication theorists like Antony Duff (2001) and Dan Markel (2005) reject the death penalty as incompatible with the rehabilitative ambitions of punishment. But Jimmy Hsu (2015) replies that in cases of extraordinarily evil crime, execution may be needed to counteract the wrongdoer's message to society.

Consequentialism

Consequentialist theories of sentencing choose punishments the severity of which achieves good outcomes. The best-known consequentialist theory is utilitarianism, according to which punishment is justified in terms of its contribution to aggregate social welfare. Utilitarian theories of sentencing direct officials to choose the kind and amount of hard treatment that has the greatest net benefit to society. Here the question is not whether execution is morally permissible in the abstract, but whether capital punishment secures social benefits that outweigh the costs.

General Deterrence

One of the most popular justifications of the death penalty is that it deters potential murderers from killing their victims. Deterrence promotes important social goods, most notably the lives saved, but also the feelings of safety that accompany lower incidences of murder. (The issues surrounding specific deterrence, which aims at deterring actual offenders from repeating their crime, are virtually the same, so I will set that view aside.)

Utilitarian justifications of capital punishment will succeed if they can show that (a) execution has a marginal deterrent effect and (b) this effect outweighs the costs of the practice. The viability of utilitarian justifications thus hinges on empirical claims. However, these claims are not supported by evidence. The conclusion of a meta-study conducted by the National Research Council's Committee on Deterrence and the Death Penalty is that existing research "is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates" (Nagin and Pepper 2012). Some of the studies analyzed by the Committee show that the death penalty decreases murder rates, others that it has no effect on murder rates, and still others that it increases homicides (the phenomenon captured here is often labeled the "brutalization effect"). There is an even more serious problem with the literature. To assess the marginal deterrent effect of execution in a jurisdiction – the amount of deterrence in excess of imprisonment – one needs to measure the baseline deterrent effect of noncapital penalties for murder. But none of studies even tries to do this, and so the deterrent effect of custodial penalties "contaminates" their estimation of the deterrent effect of capital punishment, rendering them useless.

Because there is no conclusive evidence supporting the existence of a marginal deterrent effect, deterrent justifications are in hot water. For utilitarians, severely harmful state actions are prohibited unless there are plausible cost-benefit analyses favoring them. The proponent of capital punishment thus shoulders the burden of proof. And without evidence for a marginal deterrent effect, cost-benefit analyses cannot recommend the death penalty, because (at least in the USA) it is much more expensive to pursue a death sentence than a lengthy custodial sanction.

Deterrence theorists might acknowledge these epistemic hurdles but insist that the death penalty *must* deter because it is so much more fearsome than incarceration (e.g., Pojman in Pojman and Reiman 1998). Given the utilitarian commitment to empirically sound policy-making, this commonsense vindication is suspect. And there are additional reasons to reject it. Jeremy Bentham, the godfather of deterrence theory, observes that a potential offender is more likely to be deterred by a modest but certain penalty than a more severe penalty she believes she is likely to elude. Contemporary research suggests that most offenders judge the likelihood of being caught to be so low that the threat of prison is meaningless (Anderson 2002). The fact that very few murderers are executed makes it even less likely that potential murderers will be deterred by capital punishment.

Utilitarian proponents of capital punishment make one more attempt to cope with these empirical hurdles: the Best Bet argument, first formulated by Ernst van den Haag and developed by Louis Pojman (Pojman and Reiman 1998). Best Bet has two key premises. First, it says that failing to employ the death penalty is just as much a utilitarian gamble as using it, on account of the possibility that execution does marginally deter. Second, it stipulates that innocent lives are more valuable than the lives of murderers. Best Bet concludes that it is better to gamble with less valuable lives – executing murderers hoping that deterrence will follow – than with more valuable lives, incarcerating murderers hoping that murder rates will not rise. The claim that murderer's lives are less valuable (at least half as valuable according to Best Bet) is contentious. Even if we set this controversy aside, it remains the case that Best Bet presumes the existence of a marginal deterrent effect, and as we have seen, no evidence supports that assumption (for further analysis, see Yost (2019)).

Incapacitation

The incapacitation rationale for capital punishment characterizes some criminals as so dangerous they cannot be trusted to walk the earth. (Incapacitation resembles specific deterrence. But incapacitation via execution is incompatible with specific deterrence, insofar as executed murderers have no capacity to be deterred.) On this view, execution is warranted because it prevents especially threatening offenders from committing further heinous crimes. A commitment to incapacitation is evident in the "future dangerousness" aggravators present in many US states' capital sentencing schemes. But proponents must wrestle

with empirical findings that cast doubt on courts' ability to predict dangerousness (Golash 2005). They also face a significant moral objection: incapacitation approaches ignore culpability and moral responsibility. When someone is executed for something they *might* do, they are not being executed for a wrong they have actually committed. It is doubtful that legal authorities have the moral right to execute the innocent.

Purgation

The most recent innovation in the death penalty literature does not appear within the context of a general theory of punishment (although it has clear deontological affinities). Matthew Kramer's "purgative rationale" (2011) is noteworthy due to its focus on extreme cases of wrongdoing and its correspondingly narrow scope. Kramer argues that moral communities have a duty to purge defilingly evil offenders. Defilingly evil offenses are those that are of the most extreme gravity, marked by the most serious harm and the most thoroughgoing contempt for humankind. The state must execute such offenders to avoid complicity with the offender's disparagement of humanity. According to Kramer, when states expend resources on a defilingly evil offender, e.g., by feeding him in prison, they incur responsibility for prolonging his repudiation of dignity. To avoid this objectionable complicity, they must execute him.

Kramer endorses the widely shared view that only morally responsible offenders may be executed. Accordingly, putting his argument into practice depends on distinguishing between defiling evil and psychopathology. Psychopathic offenders are not culpable for their misdeeds and therefore not liable to execution (Levy 2007). But this is a hard line to draw. Psychopaths exhibit an absence of empathy during the criminal act, a subsequent lack of guilt, and extreme egocentrism. Because these are also properties of defilingly evil offenders, Kramer's emphasis on defiling evil seems to undercut his view (Steiker 2015). Critics have also claimed that there are noncapital punishments that appear to satisfy the purgative rationale (Danaher 2015; Yost 2019); if they are correct, there is no affirmative reason to employ capital punishment.

Substantive Objections to Capital Punishment

We have so far considered debates about whether leading theories of punishment justify capital punishment. The present section will examine criticisms of the death penalty that issue from moral considerations external to those views. These criticisms are meant to get traction with the various theoretical justifications either by reflecting values shared by the theories or by establishing side-constraints that apply to them.

The Right to Life

Some death penalty abolitionist arguments appeal to an inviolable right to life. Right to life abolitionism is nevertheless worth considering due to its international visibility and prevalence within human rights discourse; see, for example, the Second Optional Protocol of the International Covenant on Civil and Political Rights. The associated view is rooted in Enlightenment doctrines of pre-political natural rights. Roughly speaking, to say that P has an inviolable right to life is to say that everyone else has a strict duty not to kill P. P enjoys this right in virtue of P's status as a human being and thus cannot forfeit it. Accordingly, even murderers possess it, and because execution offends this right, the death penalty must be abolished.

This argument works only if the right to life is absolute. If the right to life is only a prima facie right, it may be overridden by considerations favoring execution. But asserting the inviolability of the right requires one to endorse other rights that are far more controversial than the right not to be executed. If the right to life were exceptionless, military officials would be barred from sending citizens into combat, even in the face of an existential threat to the nation. The killing of enemy combatants by volunteer soldiers in the prosecution of a just war would also be immoral. An absolute right to life would also rule out killing in self-defense. (For other worries about pacifist approaches to capital punishment, see Corlett (2013)). These unpalatable consequences are likely why most philosophers shy away from the

view, Hugo Bedau (1986) being a notable exception. Even the Enlightenment philosophers who emphasize the existence of pre-political natural rights believe that rights can be forfeited; they are untroubled by execution because they believe that murderers forfeit their right to life (Bedau 1986).

Dignity

Human dignity and right to life objections to execution both reject the notion of treating human lives as means to an end. However, dignity objections appeal to the fundamental moral status that grounds our specific rights. Dignity names the property possessed by all human beings that grants them the same rights and the same claim to others' respect. Dignity expresses the notion that the status undergirding our equality is an elevated one; in Jeremy Waldron's words, it is the status of a person who is "sui juris," who can "demand to be heard and taken into account" by others and by the legal and political systems (2012).

While most philosophers agree that punishments that violate human dignity are morally prohibited, there is less consensus on whether the death penalty numbers among these. A common strategy for determining whether a sanction violates dignity is to identify the human capacities definitive of dignity and then ask whether the penalty destroys or corrupts those capacities. Philosophers like Ronald Dworkin (2011) and Jeremy Waldron (2010) conclude that torture violates dignity because it shatters the victim's will or subjects it to the whims of her torturer. Dan Markel argues that the death penalty violates human dignity because it destroys the rational and volitional capacities that constitute our dignified status (2005). He concludes that the penalty should be abolished (see also Bedau 1987). But Dworkin, Waldron, and others reply that torture offends dignity because it is degrading – the torture victim is aware of being reduced to an animal or a tool of her oppressor. Modes of execution like lethal injection do not share this characteristic, and so might not count as a violation of dignity.

Proponents of dignity arguments have at least one response. They can point out that because life is a condition of whatever else is a condition of dignity, taking a life deprives someone of whatever it is that grounds their dignity. Execution is thus prohibited because it eliminates the possibility of having dignity. For this argument to go through, however, it must be shown that disposing of the condition of some valuable thing *v* is an offense against *v*. And there are reasons to be skeptical here: killing someone eliminates his capacity to express himself, yet killing someone is not understood to violate his free speech rights. Ultimately, even if it is true that killing abrogates dignity, the abolitionist will be saddled with the dialectical burdens of right to life arguments. An absolute requirement to respect dignity would prohibit some acts, like killing in self-defense, that are clearly permissible. And if the requirement is a prima facie one, the abolitionist owes an explanation of why execution violates dignity and other types of killing do not.

Procedural Objections to Capital Punishment

Proceduralist objections to capital punishment make no substantive claims about the morality of execution. Rather, proceduralists argue that the implementation of the death penalty is irredeemably unjust and that execution is therefore impermissible. This view is meant to show that capital punishment should be abolished even if some murderers deserve death.

Arbitrariness

Stephen Nathanson contends that legal punishments are legitimate only when they are imposed on the basis of good reasons, or reasons relevant to the moral assessment of an offender's act. Bad reasons include morally irrelevant reasons and repugnant reasons, like those based in the race or class of the accused. When sentences are imposed for repugnant or irrelevant reasons, the associated punishments are inflicted arbitrarily and therefore unjustly (Nathanson 1985, 2001). Nathanson's abolitionism flows from this normative premise and the idea that it is difficult, if not impossible, for capital punishment to be imposed on the basis

of good reasons. (Legal scholars also develop arbitrariness arguments against the death penalty; see Charles Black (1981), Austin Sarat (2002), and Justice Harry Blackmun's famous *Callins v. Collins* dissent (1994)).

To substantiate his descriptive claim, Nathanson adverts to statistical patterns showing that the distribution of executions varies with the race, class, and jurisdiction of the victim and offender. He takes particular note of the geographical disparities in the application of statutory aggravators (factors which are used to establish death eligibility at trial). The capital sentencing schemes of both Georgia and Florida, and many other states, feature the following aggravator: "the murder was especially heinous, atrocious, cruel, or depraved." Nathanson cites a study showing that in Georgia, 46 percent of murders were deemed especially heinous, while juries in Florida found that 89 percent of murders met this description (2001). Because there is nothing in Florida's water that causes its murderers to be significantly more depraved than Georgia's, the sentencing differences are utterly arbitrary. These and other disparities lead Nathanson to conclude that executions are imposed on the basis of irrelevant considerations.

However, if arbitrariness precludes the death penalty, it will rule out most other punishments as well. The wide amounts of discretion enjoyed by police, prosecutors, and judges to arrest, charge, and sentence means that arbitrariness permeates every aspect of the criminal justice system. Nathanson responds to worries about wholesale penal abolition by distinguishing capital from noncapital punishment. He argues both that capital sentencing is subject to a higher standard of rationality and that the death penalty is not as necessary for crime control as punishment *simpliciter*. While the second response is somewhat plausible, the first seems to fall flat, insofar as *any* unjust type of punishment should be prohibited, even if it is not as severe as execution.

The arbitrariness argument meets with other criticisms. Van den Haag insists that when a murderer gets what she deserves, her treatment is just even if the legal system applies the penalty unfairly. In short, he believes that noncomparative justice in sentencing always trumps comparative justice (1985). While Van den Haag's position is short on argument, Patrick Lenta and Douglas Farland (2008) make a stronger case. They turn Nathanson's argument on its head, arguing that the difference in severity between custodial and capital sentences leads to the conclusion that non-comparative considerations of desert may trump comparative considerations of fairness.

Discrimination

Some critics of the death penalty focus on the ways in which capital sentencing disproportionately targets racial minorities and the poor. In this context, the principles that motivate arbitrariness arguments apply with even more force, because the improprieties in question emerge from morally objectionable structures or attitudes. Jeffrey Reiman asserts that the death penalty discriminates against the economically disadvantaged (2010), but there is an unfortunate dearth of research in this area. By contrast, the racially discriminatory nature of capital punishment is fairly well-established, though it is discriminatory in some complicated ways. While black murderers are more likely to be sentenced to death than white ones, racial disparities are most pronounced at the victim level: those who murder whites are much more likely to receive death sentences than those who murder black people (Baldus et al. 1983). Daniel McDermott takes this evidence of racial discrimination to ground a decisive objection to capital punishment (2001). He argues that a discriminatory criminal justice system lacks the authority to punish. Unlike Nathanson, McDermott bites the bullet and concedes that discriminatory legal systems forfeit the right to punish as such. For many, however, this implication will serve as a reductio of the abolitionist program.

Michael Cholbi argues for a moratorium on the death penalty in light of a principle of equality: everyone ought to face the same legal costs for committing the same offense (2006). For Cholbi, the fact that the criminal justice system imposes higher costs on black murderers and on those who murder whites means that the criminal justice system treats the class of black Americans

unjustly. Because the practice of the death penalty violates equality, he concludes, it ought to be suspended, if not abolished. (For a response to Cholbi, see Lenta and Farland (2008)). Cholbi and Alex Madva develop this argument by analyzing implicit racial bias research (Cholbi and Madva 2018, 2021). They agree with Nathanson that states may continue to employ discriminatory noncapital punishments while implementing procedural reforms, owing to the lesser severity of those punishments.

Irrevocability

Because the dead cannot be brought to life, execution is irrevocable. Accordingly, erroneous executions cannot be remedied or put to right. Some philosophers hold that this feature of execution renders it morally impermissible. Mike Davis argues that the death penalty is *not* irrevocable or that it is no less revocable than everyday custodial sanctions (1996). If Davis is correct, the irrevocability argument either fails on its own terms or commits its proponents to the wholesale abolition of punishment. But Benjamin Yost rejects Davis' claims, insisting that they rely on an overly narrow conception of revocation (2011). A greater challenge to irrevocability arguments is posed by cases where the defendant's guilt appears to be incontrovertible. As Matthew Kramer (2011) observes, we seem to have little reason to worry about irrevocability in such contexts. Yost develops a view that attempts to meet this challenge (2019). Yost contends that what he calls "higher-order uncertainty" permeates the criminal justice system and that all capital cases thus fall prey to the irrevocability argument.

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