

## The Death Penalty and Deterrence

### 1. Justifying the death penalty

We've seen that there are several possible justifications for punishment. The question arises whether the death penalty is ever justified.

A *retributivist* answer depends on whether it is ever the case that someone deserves to die for their crime. In considering whether execution is deserved, one should consider, e.g., whether the death penalty is "cruel and inhuman," whether it violates human dignity, whether it treats persons as ends in themselves, and whether criminals have relinquished their rights to these constraints.

A *utilitarian* answer depends on whether executing the criminal will have the best overall consequences, e.g., whether it will protect society from further crimes by that individual and deter others from that kind of crime better than other penalties, with no greater costs.

Let us suppose that it is possible to impose a sentence of life in a secure prison without parole. Considering this as the alternative, the death penalty is not needed in order to protect society from other crimes by the criminal in question. It has also been demonstrated over and over that the financial cost of the death penalty—given the lengthy appeal process that is judged to be necessary in order to be justified in taking someone's life—is a greater burden on the taxpayer than life in prison. So the utilitarian argument depends heavily (though not exclusively) on the argument for deterrence.

### 2. How should we evaluate whether the death penalty deters?

Bedau argues that to answer this question in a way relevant to the issue it must be made more precise. Specifically, we must consider whether the death penalty is a superior deterrent to another punishment such as life imprisonment where:

A punishment  $p_1$  is a superior deterrent to another punishment  $p_2$ , with respect to some crime  $c$  and some population  $h$ , iff if the members of  $h$ , believing they are liable to  $p_1$  upon committing  $c$ , commit  $c$  to the degree  $d_1$ ; whereas if the members of  $h$  believe that they are liable to  $p_2$  upon committing  $c$ , they commit  $c$  to the degree  $d_2$ , and  $d_1 > d_2$ .

So the question that needs to be addressed is not whether the death penalty deters, nor is it whether the death penalty deters more effectively than life imprisonment, but whether, for a given crime such as first degree murder, the death penalty deters more effectively than life imprisonment.

### 3. Is there evidence for the deterrent effects of the death penalty?

Van den Haag argues that we do not have compelling evidence for:

(1) The death penalty deters.

But this is not equivalent to having evidence that:

Not-(1) The death penalty does not deter.<sup>1</sup>

Van den Haag holds it plausible that the more severe the punishment the greater the deterrent effect, so in the absence of direct evidence one way or the other, we may assume that the death penalty deters. Bedau argues, however, that we have indirect evidence that disconfirms:

(2a) The death penalty is a superior deterrent to "life" imprisonment for the crime of criminal homicide.

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<sup>1</sup> Notice that the text in the book is corrupted at the bottom of page 236. The first sentence of the paragraph that begins 7 lines up in the first column should read: "He writes as if his chief contentions were these two: we must not confuse (a) the assertion that there is no evidence that (1), with (b) the assertion that there is evidence that not-(1) (i.e., evidence that (1) is false); and abolitionists have asserted (b) whereas all they are entitled to assert is (a).

The evidence rests on comparisons of the incidence of homicide in relevantly similar jurisdictions that differ with respect to the death penalty. Studies consistently show that homicide is lower in abolition jurisdictions. Although this does not constitute “proof” of deterrent effects, and depends on some background empirical assumptions, all the evidenced we have points to the conclusion that the death penalty does not deter. Moreover, whether a penalty deters depends on much more than its severity, so the assumption that “the greater the severity the greater the deterrence” is misguided. In fact, there is just as much evidence that severe penalties encourage martyrs, promote widespread brutality, etc.

**4. Are there cases in which the death penalty is the only possible deterrent?**

Consider: the rebels involved in a *coup d'état*, someone sentenced to life imprisonment.

**5. Is the death penalty a risk we must take to protect society?**

Compare with: gambling, investment.

**6. Is there a retributivist defense of the death penalty?**

Kant is a retributivist about punishment in general and the death penalty in particular. Recall the Respect for Persons Principle: one should treat another as an end in themselves and never as a means only. It follows from this that deterrence is not a permissible defense of the death penalty. Punishment must be meted out based on a principle of justice that balances the punishment with the crime; this is considered a principle of “just deserts”. Justice requires that “whoever has committed murder, must *die*.” “This ought to be done in order that everyone may realize the desert of his deeds, and that blood guiltiness may not remain upon the people; for otherwise they might all be regarded as participators in the murder as a public violation of justice.” (Kant, MM 227)

**7. Is there a retributivist argument against the death penalty?<sup>2</sup>**

Consider the principle of just deserts: criminals should get the punishment they deserve, “making the punishment fit the crime.” This could mean one of two things: either (a) “punishments are unjust unless they are like the crime itself,” or (b) “the severity of punishments must be proportional to the gravity of the crime.”

Interpretation (a) is not an acceptable principle: “It would require us to rape rapists, torture torturers.” This looks a lot like “an eye for an eye, a tooth for a tooth,” which is broadly recognized to be barbaric.

Interpretation (b) is acceptable, but it does not have the result that murderers may be executed. “If, however, the principle of just deserts is understood to require that the severity of punishments must be proportional to the gravity of the crime, and that murder being the gravest crime deserves the severest punishment, then the principle is no doubt sound. But it does not compel support for the death penalty. What it does require is that crimes other than murder be punished with terms of imprisonment or other deprivations less severe than those used in the punishment of murder.”

But isn't the death penalty the only way to remedy the pain caused to the victim's family, and as Kant suggests, to right the balance of wrongdoing? “Some whose loved one was a murder victim believe that they cannot rest until the murderer is executed. But the feeling is by no means universal. Coretta Scott King has observed, “As one whose husband and mother-in-law have died the victims of murder assassination, I stand firmly and unequivocally opposed to the death penalty for those convicted of capital

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<sup>2</sup> This argument is presented in Hugo Bedau, “The Case Against The Death Penalty,” broadly reproduced on the web and at: <http://www.soci.niu.edu/~critcrim/dp/dppapers/aclu.antidp> See especially the section entitled “Retribution”.

offenses. An evil deed is not redeemed by an evil deed of retaliation. Justice is never advanced in the tacking of a human life. Morality is never upheld by a legalized murder." (Bedau, op.cit.)