Chapter 3: Crime and Punishment

Case Study: The Death Penalty

This case study examines the continuing moral and political controversy over the use of the death penalty. Capital punishment is, in general, a declining practice globally, though movement in the direction of abolition is not entirely smooth. According to Amnesty International, the number of countries that have legally abolished the death penalty rose from 16 to 98 between 1977 and 2013, and over two thirds of the countries in the world (140 in total) have now abolished the death penalty either in law or in practice (i.e. by not performing an execution for at least ten years).[1] On the other hand, the organization's most recent report on capital punishment worldwide shows that, in 2013, the number of known executions around the world was up somewhat on the previous year (a 14 per cent increase from 682 to 778), owing mainly to increases in its use in Iran and Iraq, and that 4 countries (Indonesia, Kuwait, Nigeria, and Vietnam) had resumed their use of capital punishment (Amnesty International, 2014). Only 9 countries, according to Amnesty, continuously practised capital punishment over the five years to 2013—Bangladesh, China, Iran, Iraq, North Korea, Saudi Arabia, Sudan, the USA, and Yemen. The number of executions in China is considered a state secret, and thus not tallied into Amnesty's calculation of the worldwide total, but is believed to exceed all those taking place elsewhere combined. The USA was the only country in the Americas, as well as among the 56 member states of the Organization for Security and Co-operation in Europe, to carry out executions in 2013. But its rate of executions has fallen significantly since the 1990s, and, following Maryland's decision in 2013, 18 US states have now abolished the death penalty.

For all that the use of capital punishment is in decline, of course, it is still highly controversial, with significant numbers of advocates, including in countries in which it has been abolished. According to the polling company YouGov, for example, the British public in 2014 still supports the reintroduction of the death penalty by 45-39 per cent, 50 years after the last execution in the country took place.[2] Meanwhile, according to Gallup, support for the death penalty for convicted murderers among US citizens stood at 60 per cent in 2013—a clear majority, though still down substantially on the company's recorded peak of 80 per cent in 1994.[3]

Capital punishment may not be, strictly speaking, the *ultimate* sanction, as it is sometimes described. For there are some conceivable punishments that might be worse than death. Nonetheless, however, because loss of life is clearly among the most severe deprivations that the state can inflict, as well as being impossible to reverse or compensate, the use of the death penalty must be justified with particular care. Reasons of space prevent our being able to discuss and evaluate here all of the various moral justifications that have been put forward for the practice of capital punishment. Instead, then, in what follows we shall focus on whether the death penalty might be justified (or indeed required) under two of the principal theories of punishment canvassed in Massimo Renzo's chapter on crime—namely *consequentialism* and *retributivism*. In doing so, we will encounter some of the most prominent and routinely repeated arguments deployed by advocates of the death penalty, while hopefully shedding some interesting new light on the aforementioned theories.

Consequentialism and the death penalty

As Renzo explained, consequentialists argue that punishment is justifiably imposed insofar as it has good overall effects on society, of which the most significant are standardly taken to be the *incapacitation*, *deterrence*, and *reform* of criminals. It goes without saying, of course, that capital punishment cannot be justified as a way of *reforming* criminals. On the other hand, however, it strikes many people as simple common sense that execution must be an extremely effective form of incapacitation and deterrence. After all, once dead, an individual can obviously commit no crimes—including against fellow convicts. And since few eventualities are feared by most people more than death, one would expect it to follow that the threat of execution would provide a particularly strong motivation for people to obey the law.

On closer examination, however, the incapacitation and deterrence-based rationales for the death penalty are far from unassailable. Consider first incapacitation. Imposing the death penalty does, to be sure, offer a solid guarantee that an offender will not recidivate. On the other hand, however, so does solitary confinement for the duration of the period in which the criminal continues to pose a threat to others (which may not extend to his or her entire life). Whether the consequentialist ought to endorse execution or solitary confinement, then, depends on which policy delivers the benefits of incapacitation at a lower cost, thus making the outcome for society better on balance. And it is far from clear that capital punishment will indeed turn out to be the policy that brings about the best overall consequences. For a start, it seems plausible to suppose that, in the standard case, execution will be more harmful and traumatic to offenders and their families than incarceration. And notice that, since it is difficult to predict which criminals will go on to reoffend, using the death penalty effectively as a means of incapacitation is likely to involve using it frequently, so as to be sure of catching future recidivists, and thereby spreading the additional harms associated with this form of punishment widely (Bedau 2005, p. 708). In addition, notwithstanding that an executed prisoner need no longer be fed and clothed, keeping the death penalty may well not be more economical for the state than abolishing it. In the US, for instance, the greater legal complexity of capital cases has been estimated to make them around three times more expensive to try in court, and since the 2008 recession, this has led some US states to consider abolishing the death penalty on cost-cutting grounds (Urbina, 2009).

Next, consider deterrence. While it may strike some people as self-evident that the threat of execution is a more effective inducement to law-abidingness than the threat of mere imprisonment, to assume as much would be too quick, given the remoteness of the threat, from the perspective of a person contemplating committing murder, or some other serious crime. As H. L. A. Hart notes (2008, p. 86), 'the existence of the death penalty does not mean for the murderer *certainty* of death *now*; it means a not very high probability of death in the future. And futurity and uncertainty, the hope of escape, rational or irrational, vastly diminishes the difference between death and imprisonment as deterrents, and may diminish it to vanishing point.' Add to this the fact that, as Hart also notes (ibid, pp. 86-7), many of those who are in danger of committing crimes of a gravity that would attract the death penalty are not in a state to weigh up the costs of their actions, and the fact that those who *are* in a position to consider the prudential costs should be able to recognize that, even in the absence of capital punishment, they would risk being killed during apprehension or incarceration if they were to go ahead with their wrongdoing, and we can see that the deterrence-based case for capital punishment is by no means to be taken for granted. Rather, it turns on the empirical evidence as to whether execution does indeed deter crime more effectively than imprisonment. Indeed, the consequentialist advocate of the death penalty requires not merely evidence that execution is a marginally more effective deterrent than incarceration, but, more demandingly, evidence that the deterrent effects of capital punishment are sufficiently strong to outweigh its various costs. As it happens, however, the evidence on the deterrent effects of the death penalty are heavily contested, and proof of its effectiveness often thought to be crucially lacking (see, e.g., Kramer 2011, pp. 30-8; Donohue and Wolfers, 2005).

We can see, then, that consequentialist arguments for the death penalty —whether they appeal to the benefits of incapacitation or deterrence—are contingent on the facts about their effectiveness in bringing about better consequences than alternative modes of punishment. In addition to their contingency, however,

there is, of course, also the deeper worry about consequentialist rationales for punishment to which Renzo pointed. This is that those rationales do not provide principled reasons for confining punishment to the guilty, or making it proportionate to the crime. In the case of the death penalty, consequentialist reasoning implies that, if executing the innocent, or minor offenders, would have overall beneficial deterrent effects, or if the most advantageous means of incapacitating future criminals would be to, say, round up and execute people whose backgrounds and characteristics suggest that they are at risk of committing serious crimes, irrespective of whether they would in fact turn out to offend, then these policies are justified. That these implications of consequentialism seem intolerable has inclined many philosophers towards alternative theories of punishment, and in particular towards retributivism. Let us consider next, then, how the case for capital punishment fares on a retributivist view.

<A>Retributivism and the death penalty

The retributivist justification of punishment, you recall, holds that wrongdoers *deserve* to be punished, in either the sense that doing so restores fairness between law-abiding citizens and law-breakers, or in the sense that the suffering of wrongdoers is intrinsically good. The retributivist justification for the death penalty, then, claims that certain wrongdoers deserve to be punished, specifically, by death. On first inspection, it might appear that the case for capital punishment can proceed much more smoothly under retributivism than under consequentialism. For unlike the consequentialist claim that the death penalty has positive social effects, the moral thesis that some wrongdoers deserve death is not dependent upon, or rebuttable on the basis of, the empirical facts. The crucial question, however, for the retributivist view, is whether we are warranted in drawing the conclusion that death *is* indeed what certain criminals deserve.

Now, some retributivists argue that, because the notion of what a person deserves is ineluctably vague, their theory of punishment can only specify that wrongdoers should be sentenced from within a certain band of punishments (those that seem neither clearly unjustly lax or harsh in the particular case at hand), and never prescribes any single penalty as uniquely warranted (see, e.g., Finnis, 1999, p.103, and, for a survey of retributivists who have taken this view, Kramer, 2011, pp. 116-19). On this view, then, retributivism itself does not have the power to specify whether some murderer deserves death as opposed, say, to lifelong imprisonment without parole. And if that is the case, then one might plausibly think, following Matthew Kramer (2011, ch. 3), that retributivists ought *not* to endorse the death penalty, on grounds that, if another, less harmful and invasive course of action, such as life imprisonment without parole, would also satisfy the end of retribution, then, other things being equal, the state ought to opt for it.

Not every retributivist, however, would agree that the idea of just deserts cannot point in favour of particular determinate punishments. In particular, some who subscribe to the principle of *lex talionis* (sometimes known as the 'eye-for-an-eye' principle), whereby what offenders deserve is, specifically, a punishment that matches their crime, like for like, would say that only death can be the appropriate punishment for wrongful deprivation of life. Kant spoke for this view, for instance, in claiming that if a criminal commits murder,

> he must die. Here there is no substitute that will satisfy justice. There is no similarity between life, however wretched it may be, and death, hence no likeness between the crime and the retribution unless death is judicially carried out upon the wrongdoer… (Kant, 1996, p. 106)

When a retributivist cashes out what offenders deserve by means of the *lex talionis*, then, she may be drawn to the conclusion that only the death penalty satisfies the demands of retribution. However, the *lex talionis*, is widely denounced as intolerably barbaric, insofar as it appears to demand that the state impose such penalties as rape, torture, and blinding on convicts, if their crime is to have carried out such attacks on others. And one might think that, if the case for the death penalty relies on appeal to such a barbaric principle, it is perforce a failure. Yet, to reject the *lex talionis* on the latter basis may be too swift. For it is

open to a proponent of the principle to adopt the view that punishments should be tailored to fit the crime only to the extent that other moral requirements or constraints allow. That the operation of the principle must be subject to moral constraints was emphasized, for instance, by Kant, who, after defending the death penalty with the words quoted above, went on to add (ibid.) that some punishments may not be imposed, because they would corrupt the moral characters of those who authorized them or carried them out. Thus, on his view, murderers must be executed, but must not be abused.

According to Kant, then, the *lex talionis*, even when qualified by the proviso that morally corrupting punishments must not be employed, requires the death penalty. But as Jeremy Waldron (1992) has argued, in an important philosophical examination of the *lex talionis*, other retributivists might dissent from Kant, in thinking that, just like torture, the death penalty is ruled out by the appropriate moral constraints on a permissible punishment. For instance, Waldron suggests (ibid., pp. 38-9), someone might be sympathetic in general to the *lex talionis*, while arguing that, as clearly fitting as the death penalty is for murderers, it must be rejected because it carries an unacceptable danger of coarsening attitudes towards human life, and breaking down the taboos against harming others from which we all benefit. Or they might reject it because of the omnipresent dangers of miscarriages of justice, for which, unlike wrongful imprisonment, there can be no possibility of making amends to the victim. Moreover, and interestingly enough, according to Waldron, a retributivist who rejects capital punishment on moral grounds such as these will not thereby necessarily be compromising or sacrificing her commitment to the *lex talionis*. For on Waldron's analysis, the *lex talionis* should not be interpreted as requiring, narrowly, that the state visit the exact same deprivation on offenders as they imposed on their victims, but can be satisfied, rather, by alternative punishments that successfully mirror the underlying, more abstract wrong-making characteristics of the original crime. In the case of murder, for instance, Waldron suggests (ibid., p. 36) we might think of the fundamental wrongness of the act as lying in the fact that it 'disrupts and terminates the conscious self-direction of one's life'. And if that is so, Waldron claims, the *lex talionis* need not be discharged by executing the offender, but might instead be met by, e.g., confining him for life without the ability of pursuing any goals or projects.

If Waldron is right, then, even the version of retributivism that is generally assumed to be most uncompromisingly committed to capital punishment can in fact be satisfied without the death penalty. For imposing a like-for-like punishment on a murderer, as the *lex talionis* demands, need not involve killing him. Moreover, recall here Kramer's principle that, if more than one possible criminal sentence equally satisfies the aim of punishment, the least invasive should be selected. On the basis of that principle, Kramer contends (2011, pp. 134-5), even adherents to the *lex talionis* ought to reject the use of the death penalty. This is clearly a surprising conclusion.

To sum up, in this case study we have considered some of the most commonly invoked rationales for capital punishment—those which focus on its role in securing incapacitation, deterrence, and retribution. Each of those rationales, we found, is subject to considerable doubts. Moreover, it is worth noting that, because we have been concentrating primarily on the question of whether the death penalty can be justified in principle, we have said very little with respect to a different question, on which democratic debate just as often focuses—namely that of whether, in practice, the state can be trusted to administer capital punishment fairly and competently. Insofar as proponents of the death penalty must be able to defend an affirmative answer to the latter question as well as the former, our discussion suggests that the obstacles to making their case successfully are significant indeed. That said, however, we have not here been able to consider all the possible arguments which advocates of capital punishment do or might make. We have not, for instance, considered whether the Hartian, communicative, and duty-based accounts of punishment described by Renzo towards the end of his chapter could provide a basis for justifying the death penalty (though as it happens, the respective proponents of those accounts themselves all reject capital punishment—see Hart, 2008, ch. 3; Duff, 2001, pp. 152-5; Tadros, 2011, pp. 307-10 and 348-51). Nor have we been able to consider the innovative 'purgative' justification for capital punishment recently developed by Matthew Kramer (2011, ch. 6). Interested readers, then, will find that there is much more to this protracted and lively debate for them to uncover in future research.

References

Amnesty International (2014) 'Death Sentences and Executions 2013', London: Amnesty International Publications.

Bedau, H. A. (2005) 'Capital Punishment', in H. LaFollette (ed), *The Oxford Handbook of Practical Ethics*, Oxford: Oxford University Press.

Donohue, J. and Wolfers, J. (2005) 'Uses and Abuses of Empirical Evidence in the Death Penalty Debate', *Stanford Law Review* 58, pp. 791-846.

Duff, R. A. (2001) *Punishment, Communication, and Community*, New York: Oxford University Press.

Finnis, J. (1999) 'Retribution: Punishment's Formative Aim', *American Journal of Jurisprudenc*e 44, pp. 91-103.

Hart, H. L. A. (2008) *Punishment and Responsibility: Essays in the Philosophy of Law*, John Gardner (ed.), Oxford: Oxford University Press.

Kant, I. (1996) *The Metaphysics of Morals*, M. J. Gregor (ed.), Cambridge: Cambridge University Press.

Kramer, M. H. (2011) *The Ethics of Capital Punishment: A Philosophical Investigation of Evil*, Oxford: Oxford University Press.

Tadros, V. (2011) *The Ends of Harm: the Moral Foundations of Criminal Law*, Oxford: Oxford University Press.

Urbina, I. (2009) 'Citing Cost, States Consider End to Death Penalty', *New York Times*, 24 February.