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Desert and Deterrence: An Evaluation of the Moral Bases for Capital Punishment

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§ 5.04 The Death Penalty

NOTE

Because the death penalty was so influential in its development, the law of homicide cannot be thoroughly understood without considering the subject of capital punishment. The question of whether or not the State is justified in taking an offender's life has for centuries been fraught with controversy. Moreover, the law on the subject has become enormously complicated as the courts have attempted to assure that the death penalty is fairly administered.

These materials can do no more than highlight some of the main moral and legal issues in hopes that the reader will pursue matters in more depth on her own. In considering the moral and policy dimensions of the death penalty, much of the material on the justification of punishment in general in Chapter 2 should be kept in mind. Justificatory issues are again taken up in this Chapter because these issues are treated in the capital punishment context by a special and voluminous body of literature.

[A] Moral and Policy Issues

[1] Retribution

Lempert, DESERT AND DETERRENCE: AN ASSESSMENT OF THE MORAL BASES OF THE CASE FOR CAPITAL PUNISHMENT

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Those who make out a moral case for the death penalty argue in a variety of ways that those who kill others deserve to die. Indeed, to some it is our willingness to execute the murderer which affirms the high value that all participants in the debate place on human life. This is the essence of what is usually called the retributivist position. The moral argument against the death penalty starts with the

principle that it is wrong intentionally to take human life. For those who regard this principle as an absolute, the fact that it is wrong to kill does not make it right to take the murderer's life. Opponents of the death penalty correctly point out that in an era when the "eye for an eye" approach to punishment has been abandoned for almost every crime, no self-evident principle demands that it be retained for homicide. They also make the more debatable argument that the state's action in taking a life degrades the values it allegedly asserts.

Both sides of the argument from morality are concerned with issues of justice. No principle of retribution allows the taking of an innocent life. Nor does the just desert theory allow personal characteristics such as sex, race, or national status to dominate indicia of moral culpability in determining punishment. Retributivists justify the death penalty despite substantial evidence that it has been inequitably applied by arguing that inequitable application is not inherent in the penalty, and that it is better that some receive their just deserts, however biased the sample executed, than that none do. For some opponents of capital punishment the inconsistency with which it is applied is enough to condemn it. These opponents need not confront the question of whether it is ultimately just to execute the murderer, for regardless of ultimate deserts, extreme penalties cannot be allowed so long as aspects of personal disadvantage play an important part in determining who from among an equally culpable lot will be subject to the extreme sanction.

. . . .

There is no necessary connection between moral positions on the justice of capital punishment and empirical judgments as to whether executions deter, but, not surprisingly, moral opponents find comfort in evidence that executions do not deter while moral supporters are heartened by those studies that suggest they do. It is difficult for those whose essential case against the death penalty rests on the value of life to maintain their positions if an execution in fact trades one guilty life for several innocent ones. Even the argument from equality is clouded if the execution of each killer, however inequitably each is selected from among a larger number, prevents the death of several innocent people. Since the same features of social class which make one peculiarly eligible for capital punishment make one disproportionately likely to be a homicide victim, there may even be a kind of rough justice within classes if executions deter.

Although retributivists trace their heritage to Kant and before him to the *Bible*, utilitarianism is pervasive enough in modern thought that most retributivists would be troubled if a plausible case could not be made for deterrence. Death by execution is both brutal and final. It is hard to make the case for such a penalty when the only end promoted is the unprovable intuition that it is just. Nevertheless, modern retributivists have been less concerned than their opponents with the evidence bearing on deterrence. This may in part be because until recently there was virtually no empirical evidence that gave them comfort. Indeed, a desire to justify capital punishment on grounds other than deterrence has probably contributed to the revival of retributivist theories of punishment. The retributivist justification is possible — although nondeterrence be proven — because justice, however intuitive its grounding, is itself a valued end. Thus, the argument from justice does not necessarily take us beyond the questions of whether an offender

deserves execution. The opposing moral claim, from the value of life, pulls us almost irresistibly to the question of whether taking an offender's life will be compensated by the preservation of lives that would otherwise be lost to murder — the empirical question addressed by the research on deterrence.

. . . .

Once we acknowledge that not everyone who kills another should die — and virtually all modern retributivists acknowledge this — doubts about the fairness of the process by which we select those we execute arise. I have already mentioned the difficulties some see in justifying executions when the poor or the black are over-selected for the ultimate punishment, but even less invidious inconsistencies must trouble the retributivist. For absent some self-evident principle separating murderers who deserve to die from those who do not, a *principled* basis for retributivism may only be determined inductively. If inconsistent sentencing prevents the derivation of a socially validated principle, the person who applauds the execution of the murderer is applauding what is literally unprincipled state action. While unprincipled state action may be more common than most of us would like, we usually try to avoid theories which, when applied, lead us to applaud it.

If there is solace for the retributivist, it is in his sense that the state's lack of principle leads it to spare life rather than to take it. People who deserve to die but are spared death can hardly prick one's conscience. While this view may satisfy some moralists who would otherwise have qualms about espousing an inevitably capricious system of capital punishment, it offers nothing to the skeptic. When one criminal is executed and another of apparently equal culpability spared, there is no self-evident reason why the sparing and not the execution is wrong. When a state cannot act consistently in such an important matter as determining who shall die, those who invoke moral philosophy to demand that the state be allowed to make that determination should be able to point to a consensually validated principle which assures us that the inconsistency is benign.

Retributivism is also haunted by those executions of the innocent which inevitably occur if the death penalty is allowed. It is true that documented cases in which the wrong person is executed are quite rare, and likely to remain so. But, as a purely philosophical matter, this is of little help to the retributivist. Retributivism, on its own terms, allows life to be taken only when death is deserved; it does not tolerate killing as a means to some greater social good. Retributivists are proud of their Kantian heritage, which demands that life be treated only as an end. Thus, however good a just punishment system and however much such a system demands the death penalty, the philosophy of retributivism apparently forbids the sacrifice of innocent lives as a condition for the maintenance of such a system. Ideally, of course, a system of capital punishment would not take innocent lives, but we know as a statistical matter that if a state executes often enough, some innocent lives will be lost. Although it may be a comfort not knowing what lives will be mistakenly taken, nothing about retributivism allows us to sacrifice the lives of unknown innocents in the interest of just vengeance.

As I have noted, few modern retributivists believe that all killers deserve death. They respect the law's determination that capital punishment should be reserved for the most morally culpable: those who fully intended, and perhaps rejoiced in,

the suffering and death they inflicted and who, in some meaningful sense, could have done otherwise. Moral culpability, thus conceived, is a subjective state. To truly determine who are the most evil and thus the most deserving of death one would have to search people's minds. Our inability to do so means that in deciding whether to inflict the death penalty we often attend more to the circumstances of the crime than to the circumstances of the criminal. The person who slays in a peculiar or brutal way is more likely to receive the death penalty than one who dispatches his victim with a single bullet, yet the former may have been insane under all but the narrowest legal test while the latter was cool and calculating.

Indeed, the former may have been insane even under any legal test. While the mistaken conviction of those who have not killed is certainly rare, the mistaken allocation of responsibility to those who have killed may be uncomfortably common. To the retributivist one mistake is almost as bad as another, for in most retributivist schemes the unpremeditated murderer or the insane killer no more deserves to die than the innocent victim of a misidentification. In arguing from a retributivist philosophy to an actual system of state executions, retributivists are again advocating a system that will work substantial injustice as measured by the standards of the philosophical system they espouse.

The time lag between the time of the crime and the time of execution also poses problems for retributivism. Executions are justified only when the offender deserves to die. Assuming that all those sentenced to death deserved to die at the time they committed the crimes for which they were sentenced, it does not follow that they deserve death at the time it arrives. People so change with their experiences that one may sensibly conceive of individuals as different people deserving different fates at different points in time. Being on death row may be an experience that is especially likely to promote such a change in moral identity.

In short, there is a fundamental irony to the usual retributivist position. Basic principles of moral justice that are believed to justify or even demand the death of those who maliciously kill others are necessarily offended by the attempt to impose a system of state executions in an imperfect world. The emphasis that retributivists place on human beings as ends and not as means, the high value they place on innocent human life, and their insistence that retributivism (unlike revenge) respects the bounds of law combine to form a philosophy from which one cannot derive a policy that trades the wrongful execution of a few for the proper execution of many. Capital punishment implements such a policy. Conversely, any policy derived from a philosophy that is rooted in our intuitions regarding justice will be suspect if the system it prescribes distributes rewards or punishments in an invidious or inconsistent fashion. Capital punishment is such a system.

The preceding discussion focuses on the logic of deriving a system of capital punishment from the premises of retributivism. As such, it speaks to the scholarly debate but does not address the more primitive appeal of retributivism. When one person wantonly kills another we are — if our senses have not been jaded by murder after murder — outraged. Retribution in the form of killing the offender seems like an honorable thing to do.

Why do we feel there is honor in repaying death with death? I believe the reasons are largely cultural. Once we understand them we will see how it is possible —

injustices aside — to be attracted by retributivism while simultaneously opposing capital punishment.

Both our history and fiction are replete with characters and communities that are thought to have acted admirably in securing the death of grievous offenders. But it is not the fact of vengeful killing that we admire. Rather, it is the process by which retribution is achieved. We honor individuals not because they redress some cosmic balance sheet, but because they risk their lives for an idea of justice. The Arthurian epic nicely highlights the way in which the degree of honor depends on the element of personal risk. The legend is also interesting for its message that the honor sought by the avenging champion is secondary to that which may be found in search of the holy.

In the case of communities the infliction of death has, historically, a different meaning. The pursuit and execution of criminals were cooperative endeavors that brought communities together to reaffirm their central values. It is not the fact that a death was repaid with a death which is salutary; rather, it is the process necessary to bring this about. Just as the linkage of a positive reinforcer with a neutral stimulus will give the stimulus a positive quality, so do the efforts associated with past accounts of retribution give retributivism its lingering good name. But once the state assumes the burden of executing, the character of the retributive process is fundamentally changed. There is no honor in watching the state execute one who in the past would have been a just target of the watcher's vengeance, nor does honor attach to the person who sets a noose or straps a convict into a chair. The meaning of executions has also changed considerably for communities. Specialized law enforcement means that citizens no longer have to come together to secure retribution, and the execution itself has become a source of passionate controversy rather than the occasion for a reassertion of communal solidarity.
