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DEATH PENALTY

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Fewer and fewer crimes are punishable by death even in countries where execution is legal, and crimes that are widely considered to be extremely serious, such as murder, often lead to prison sentences rather than capital punishment. In 1991, offenses under the laws of over ninety countries carried a penalty of death. In eighty-five, execution was illegal or had ceased to be imposed. These included virtually all of the nations of western Europe, as well as Canada, Australia, Hungary, and Czechoslovakia. In the United States, in addition to military and federal jurisdictions, thirty-six states impose the death penalty. Not all of these states do so regularly, however; and in those where capital punishment has become routine, it is sometimes a relatively new development. From 1967 to 1977 there were no executions in the United States; between 1977 and 1992, there were 190, and over 2,500 people in 34 states were on death row. In a few countries in which the death penalty was still used in the 1980s—Brazil, Argentina, and Nepal—it had been reintroduced (in Brazil and Argentina by military governments) after a long period of abolition.

The reintroduction of capital punishment after centuries of decline has once again raised the question of the morality of execution. No code of law now prescribes death for the theft of fruit or salad, as Draco's code did in ancient Athens; and boiling to death is no longer a recognized punishment for murder by poisoning, as it was in England under the Tudors and Stuarts. Can a principle that explains why these developments are good also explain why it is good that some codes of law no longer prescribe death as punishment for murder? Or can a principle that condemns the death penalty for some crimes also support its imposition for others? These are live questions, for one of the arguments commonly presented against the death penalty turns on the suggestion that retaining it or reintroducing it is a case of being morally behind the times. According to this argument, standards of humane punishment have now risen to a point where killing a human being—even one who is guilty of a terrible crime—can only be understood as cruel, and therefore immoral. Such an argument is sometimes used to counter another that is perhaps even more familiar: that the

death penalty is justified because of its power to deter people from violent crime. The argument from deterrence will be examined later.

The Argument from Cruelty

The language of this argument is sometimes taken from the Eighth Amendment of the U.S. Constitution (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted”); or from human-rights declarations that outlaw “cruel, inhuman or degrading” treatment or punishment. Thus, a brochure titled *When the State Kills*, issued by the British Section of Amnesty International (1990), contains the following passage under the heading “Cruel, Inhuman and Degrading”: “International law states that torture or cruel, inhuman or degrading punishments can never be justified. The cruelty of the death penalty is self-evident.”

Certain methods of execution are quite plausibly said to be so painful that any application of them must be cruel. Amnesty International cites the case of a Nigerian military governor who in July 1986 ordered successive volleys of bullets to be fired at convicted armed robbers. The shots would first be aimed at the ankles, to produce painful wounds, and only gradually would the firing squad shoot to kill. Other methods, believed by some authorities to be painless, can undoubtedly cause suffering when clumsily applied. According to eyewitness reports, the first death sentence carried out by use of the electric chair in the United States; in August 1890, was very painful. But these ill effects may not be typical. Certainly the electric chair was not introduced because it was thought to be painful; on the contrary, along with other methods of execution, such as the guillotine, it was thought to spare the convicted person suffering.

Execution by lethal injection is the latest in a series of supposedly humane methods of execution to be introduced. It is now being used in a number of states in the United States. Is this technique cruel? Perhaps not, if severe pain is the test of cruelty. Deliberate poisoning is normally cruel, and Amnesty International classifies the use of lethal injection as deliberate poisoning. But is it clear that poisoning in the form of lethal injection is always cruel? What if the injection is self-administered in a suicide or given at the request of someone who is dying in intense pain? If poisoning is always cruel, then it must be so in these cases. On the other hand, if it is not cruel in these cases, then it is not necessarily cruel in the case of execution. It is true that execution is usually not in line with the wishes of the convicted person, as it is when poison is administered to

someone at his or her request. But that by itself cannot make execution cruel, unless virtually all punishment is cruel: Virtually all punishment is inflicted on people against their wishes. If it is not pain and not the unwillingness of the criminal to undergo it that makes lethal injection cruel, then what does? If nothing does—if lethal injection is sometimes painless and not cruel in other respects—then there may be principles that consistently explain why it is good for murderers, for example, to be punished with death (severe crimes deserve severe punishments); why it was bad for murderers to be put to death in the past by boiling (torture is wrong); and why it is not necessarily bad for murderers to be put to death today by lethal injection.

Arguments from Finality and Arbitrariness

Arguments against the death penalty sometimes emphasize its finality. There are several versions of the argument from finality, some religious, some secular. One religious version has to do with the way the death penalty removes all possibility of repentance or a saving change of heart on the part of the offender (Carpenter). Capital punishment writes off the offender in a way that, for example, imprisonment combined with education or religious instruction does not. It arguably refuses the offender the sort of love that Christianity enjoins, and it presumes to judge once and for all—a prerogative that may belong to God alone.

Secular arguments from finality are almost always combined with considerations about the fallibility of judicial institutions and doubt whether people who are accused of crimes are fully responsible agents. In some views, society contributes to the wrongdoing of criminals (Carpenter), so that they are not fully responsible and should not be punished. This argument shows sympathy for those who are accused of wrongdoing, but because it does not take wrongdoers as full-fledged agents it may not show them as much respect as apparently harsher arguments do. As for fallible judicial institutions, certain factors—such as prejudice against some accused people, and poor legal representation—can produce wrong or arbitrary verdicts and sentences; even conscientious judges and juries can be mistaken. When errors occur and the punishment is not death, something can be done to compensate the victims of miscarriages of justice. The compensation may never make up entirely for what is lost, but at least a partial restitution is possible; but where what is lost is the accused person's life, on the other hand, the possibility of compensation is ruled out. This argument is particularly forceful where evidence exists that certain groups (black males in the United States, Tibetans in China) are disproportionately represented among those receiving

harsh sentences, including the death sentence (Amnesty International, 1991; Wolfgang and Reidel). In these cases, the possibility of an error with disastrous consequences starts to grow into something like a probability. What is more, the evidence of certain groups being disproportionately represented suggests that the law is not being applied justly. This adds to the argument that the death penalty should not be applied, for it suggests that people are fallible, the background conditions for the existence of justice are not being met, and consequently that some miscarriages of justice result from factors other than honest error.

Arguments from Side Effects

EFFECTS ON PROFESSIONALS. Executions are carried out by officials who are not always hardened to their task, and at times they rely on the services of medical people, who have sworn to preserve life. The burdens of those who officiate and serve in these ways; the suffering of those who are close to the convicted person; and the ill effects on society at large of public hangings, gassings, or electrocutions are sometimes thought to constitute an argument against capital punishment over and above the argument from cruelty to the offender.

The side effects on medical personnel have recently been brought into prominence in the United States by the use of lethal injection. The method involves intravenous injection of a lethal dose of barbiturate as well as a second drug, such as tubocurarine or succinylcholine, that produces paralysis and prevents breathing, leading to death by asphyxiation. Doctors have sometimes had to check that the veins of the convicted person were suitable for the needle used and, where death took longer than expected, to attend and give direction during the process of execution. In Oklahoma, which was the first state to adopt lethal injection as a method of execution, the medical director of the Department of Corrections is required to order the drugs to be injected; the physician in attendance during the execution itself has to inspect the intravenous line to the prisoner's arm and also pronounce him dead.

Of course, doctors have been in attendance at executions carried out by other methods, and some of the moral objections to their involvement are applicable no matter which method is used. What is different about intravenous injection, in the opinion of some writers (e.g., Curran and Cassells), is that it involves the direct application of biomedical knowledge for the taking of life. This practice is often said to be in violation of the Hippocratic Oath (Committee on Bioethical Issues of the Medical Society of the State of

New York); and many national and international medical associations oppose the involvement of doctors in the death penalty. The fear that nurses might assist at executions led the American Nurses Association in 1983 to declare it a “breach of the nursing code of ethical conduct to participate either directly or indirectly in legally authorized execution.”

The conflict between providing medical services to further an execution and abiding by the Hippocratic Oath makes the moral problem facing doctors particularly sharp, but other professionals may face difficulties as well. Judges and lawyers may be caught up unwillingly or reluctantly in prosecutions that will lead to the imposition of the death sentence. They, too, have a reason for withdrawing their services if they are sincerely opposed to capital punishment; but if all the professionals with qualms acted upon them, the legal process, and the protections it extends to those accused of capital crimes, might be compromised as well (Bonnie). This argument probably understates the differences between legal and medical professionals: the latter recognize a duty of healing and of relieving pain; the former are committed to upholding the law and seeing that justice is done, which does not necessarily conflict with participation in a regime of execution.

EFFECTS ON PERSONS CLOSE TO THE CONDEMNED AND ON SOCIETY. In addition to the effects of the death penalty on involved professionals, the effects on persons close to condemned prisoners are sometimes cited in utilitarian arguments against the death penalty (Glover). These effects are undoubtedly unpleasant, but it is unclear whether they are to be traced to the existence of capital punishment or to the commission of the crimes classified as capital. As for the effects on society at large, they are harder to assess. Samuel Romilly, who campaigned successfully for a reduction in the very large number of capital offenses recognized in English law at the beginning of the 1800s, maintained that “cruel punishments have an inevitable tendency to produce cruelty in people.” In fact, Romilly’s success in law reform owed something to the benevolence of juries, who had consistently, and often against evidence, found accused people innocent of capital offenses as minor as shoplifting. Whoever was made cruel by the existence of cruel punishments, it was not ordinary English jurors. Judges avoided imposing the death penalty for minor crimes by transporting criminals to the colonies.

Deterrence

The death penalty has often been introduced to act as a strong deterrent against serious crime, and the deterrence

argument is commonly used to justify reintroduction. In a British parliamentary debate on the reintroduction of capital punishment in May 1982, one legislator said, “The death penalty will act as a deterrent. A would-be murderer will think twice before taking a life if he knows that he may well forfeit his own in so doing” (Sorell, pp. 32–33). He went on to argue that the absence of the death penalty had been associated with a rise in the number of ordinary murders, and an increase in the rate of murder of police officers. But the evidence for its having the power to discourage, or for its having a greater such power than imprisonment, is inconclusive (Hood). Indeed, deterrence generally seems to depend on potential offenders expecting to be caught rather than on their judging the punishment for an offense to be severe (Walker). In the case of murder, the deterrent effect is particularly doubtful: Murder is often committed in a moment of high passion or by those who are mentally disturbed (Sorell). Either way, the serious consequences of the act are unlikely to register so as to make the agent hesitate. An American review of statistical studies concludes that the deterrent effect of capital punishment is definitely not a settled matter, and that the statistical methods necessary for reaching firm conclusions have yet to be devised (Klein et al.).

Incapacitation

A purpose of punishment that is more convincingly served by the death penalty is the incapacitation of offenders. The death penalty undoubtedly does incapacitate, but this is just another aspect of its finality, which has already been seen to be morally objectionable from some points of view. Again, for incapacitation to be a compelling general ground for the imposition of the death penalty—that is, a ground that justifies the imposition of the penalty in more than the occasional case—there has to be strong evidence that people who have the opportunity to repeat capital crimes frequently do so. Although killers sometimes kill again, it is not clear that they are *likely* to reoffend. Finally, life imprisonment without parole may be sufficiently incapacitating to make the death penalty unnecessary.

Retribution

Another argument in favor of the death penalty is based on the value of retribution. Here the idea is that the evil of a crime can be counterbalanced or canceled out by an appropriate punishment, and that in the case of the most serious crime, death can be the appropriate punishment because it is deserved. Appropriateness should be understood against the

background of the thought that penal justice requires what Immanuel Kant called an “equality of crime and punishment.” His examples show that he meant an act of punishment not identical to the crime but proportionate to its severity; Kant held that death was uniquely appropriate to the crime of murder. John Stuart Mill, in a famous speech in favor of capital punishment delivered in the British House of Commons in 1868, argued that only those guilty of aggravated murder—defined as brutal murder in the absence of all excusing conditions—deserved to be executed. Mill called the punishment “appropriate” to the crime and argued that it had a deterrent effect. He meant “appropriate” in view of the severity of the crime.

Retribution should not be confused with revenge. It is generally considered revenge, not retribution, when there is love or sympathy for the one who has suffered an injury; retribution requires a response even to injuries of people no one cares about. Its impersonality makes the injuries of the friendless have as much weight as the injuries of the popular. Again, revenge is still revenge when the retaliation is utterly out of proportion to the original injury, but the retributivist *lex talionis*—an eye for an eye—limits what can be done in return.

One question raised by the retributivist defense of capital punishment is how a punishment can counterbalance or cancel out an evil act. Retributivists sometimes refer in this connection to the ideal case in which the offender willingly undergoes a punishment as a sign of remorse and of wishing to be restored to a community from which he or she has been excluded due to a criminal act (Duff). In that case the punishment is supposed to counterbalance the crime. But it is unnecessary for retributivism to be committed to the idea that a punishment cancels out an offense. One can appeal instead, as Kant did, to a punishment’s fitting an offense—being proportional in quality to the quality of the offense—and one can justify the imposition of punishment by reference to the following three considerations: (1) laws have to promise punishment if people who are not wholly rational and who are subject to strong impulses and temptations are to obey the laws, and promises must be kept; (2) offenders who are convicted of breaking laws in a just society can be understood to have been party to a social contract designed to protect people’s freedom; and (3) threats of punishment in a just society are intended to prevent encroachments on freedom.

This is not a justification of capital punishment, until one specifies a crime that capital punishment uncontroversially fits. Murder is not always the right choice, since such factors as provocation, the numbers of people who die, and the quality of the intention can make some murders much more

serious than others; while crimes other than murder—crimes in which, despite the criminal’s best efforts, the victim survives—can be as bad as or worse than those in which death occurs. Aggravated murder is, as Mill maintained, a more plausible candidate for capital crime than is plain murder. But execution even for aggravated murder has something to be said against it: the danger of executing the innocent in error, and the suspicion—which goes to the heart of retributivism—that it is bad for pain or unpleasantness to be visited even on wrongdoers.

TOM SORELL (1995)
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SEE ALSO: *Conscience, Rights of; Human Rights; Justice; Medicine, Profession of; Nursing, Profession of; Prisoners, Healthcare Issues of; Prisoners as Research Subjects; Profession and Professional Ethics; Race and Racism; Warfare: Medicine and War; Women as Health Professionals*

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DEEP BRAIN STIMULATION

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Electrical stimulation of the brain is an important therapy for refractory neurological disorders such as drug resistant Parkinson's disease and severe tremor and has become an area of active clinical research in both neurology and psychiatry. Using a technique called *deep brain stimulation* (DBS), small electrical leads are placed into the brain using stereotactic localization. A special head frame is attached to the skull under local anesthesia, and electrodes are implanted using internal brain targets located with reference to anatomical landmarks determined by brain imaging techniques such as computed tomography (CT) or magnetic resonance imaging (MRI). This technique allows for the precise targeting of specific brain sites or nuclei. Insertion of electrodes can be done without damage to adjacent tissue. These electrodes are connected by a wire to a pacemaker implanted in the chest that generates electrical stimulation. Stimulation parameters can be modified by manipulation of the pacemaker.

Unlike ablative surgery that results in irreversible damage of brain tissue from the intentional destruction of targeted areas, the effects of DBS are reversible. The stimulator can be turned off, and the electrodes can generally be removed without any significant aftereffects. DBS differs from other methods that employ electrical stimulation of the central nervous system. Electroconvulsive therapy (ECT), primarily used to treat severe depression, stimulates the brain using electrodes placed on the scalp. Transcranial magnetic stimulation induces electrical currents in the brain using external magnetic coils. Electrical stimulation in the neck of the vagus nerve has been demonstrated to reduce epileptic seizures. Cortical stimulation of the brain is also employed as a treatment for chronic pain disorders (Greenberg).

Electrical stimulation of the brain is also used as a diagnostic tool in the treatment of epilepsy and as a means to localize specific brain areas in order to avoid injury