

Chapter 17

Death Penalty

17.1 Homework

Movie – *Dead Man Walking*, RTD 24,25

Study Questions • On the movie:

1. What is the significance of the flashback scene of a group of children beating an opossum?
 2. Look for arguments for and against capital punishment as a deterrent.
 3. Look for arguments to the effect that capital punishment is unfairly distributed.
 4. At one point Poncelet's lawyer says: "All we have to do is to present you as a person." What does he mean?
 5. Is a rehabilitative view of punishment represented in the film? A retributive view?
 6. In what ways do Sister Helen's motives come into question?
 7. What is Poncelet's explanation for why he is on death row? Does this change?
 8. What would you say is the most difficult moral judgment Sister Helen faces? Why?
 9. What, above all, does Sister Helen seem to want to accomplish as Poncelet's spiritual advisor?
 10. What are some of the ways that the film portrays denial as a moral failing?
 11. Note anything not mentioned above that particularly strikes or moves you in the film..
- On Bedau and van den Haag:
1. Bedau suggests that the death penalty is unfairly applied and shouldn't be applied because of this. Provide some reasons for thinking so. What is van den Haag's argument that the death penalty should be applied anyway.

2. . Bedau thinks that the death penalty should not be applied because it is irreversible. Why is that? What is van den Haag's argument that it should be applied anyway?
3. Bedau thinks that the death penalty doesn't act as a deterrent. Provide reasons for thinking this. Why does van den Haag think that it should be applied anyway?
4. Bedau thinks that the death penalty is excessive and contrary to human dignity? Why? Why does van den Haag think he's wrong?

17.2 Introduction *Dead Man Walking*

All involved are "persons" :

- Matthew gradually becomes a person in the Kantian sense of a responsible agent. Sister Helen gradually brings him to the point when he takes full responsibility of his crimes, while he first blamed politics, drugs, poverty, Vitello's influence etc.
- Constant reminder of the horror of the crime: the kids, the parents, their suffering

The violence within us all :

- The opossum scene
- The violence in the girl's dad's words and thoughts (regrets to not have taken a gun and killed Poncelet himself + "This is not a person... God's mistake.")

Different views on Punishment : does it promote any? Maybe rehabilitative at the end. In all cases, the movie shows both sides:

- Deterrent, Securing the streets: yes.... but increase hatred
- Retributivism: yes (they deserve it) ... but unfair distribution, influence of politics, race, poverty and social circumstances
- Reconciliation (Victims' peace): yes (they can't stand the idea of him being still alive when their kids are dead).. but hatred still there at the end in Dad's mind
- Rehabilitative: yes (Poncelet admits the crime at the end, and become a full person in Kantian sense)... but this is just before he dies ! (unless we believe in salvation, no much to get out of this)

→ *The movie does not take any stance, but promotes a clear view of the issue: wherever you stand, you should not wear blinders.*

The practical issue :

- Unfair distribution: Vitello had enough money to avoid death penalty / the influence of politics / the problem of race
- Facing the suffering: the hypocrisy of lethal injection: there is no clean way to kill

- What about killing innocent people: the Governor: If there is no obvious proof that he is innocent, then I won't do anything – what is normally to be proved is guilt, not innocence! What is worse: not killing guilty people or killing innocent people?

Conclusion – So, what do you think? Was killing Poncelet the right thing to do? Here are some of the various questions that you need to answer in order to take a stance:

- Does he *deserve* it?

- Will it *serve* him, the victims, or the society?

- Are these reasons sufficient to *justify morally* that we inflict pain and death on a human being?

17.3 Interludes: Law and Facts

Is Death Penalty cruel and excessive? – There is an obvious sense in which death penalty *is not* the worse of the punishment: torture, for example, is more cruel. That said, there is a sense in which death penalty *is* the worse of all punishment: because it is irreversible.

Some history:

8th Amendment : “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

Is inflicting death a “cruel and unusual” punishment?

1972 Furman vs. Georgia – The court ruled yes, mainly on the the grounds that it failed to be consistently applied: it would be acceptable only if it was assured that it would not be administered in a capricious or discriminatory manner. Death sentences are cruel and unusual when people who are guilty of the same crimes do not get the same punishment.

1976 Gregg vs Georgia – The court ruled no, mainly because the change in the law, which was taken to assure “the judicious and careful use of the death penalty”. Death penalty is not *always* cruel and unusual.

2005 Roper vs Simmons – Christopher Simmons was sentenced to death when he was only 17 – Does the execution of minor constitute a cruel and unusual punishment? The court ruled yes.

→ *Questions:*

- Is the arbitrary application an argument against death penalty?

- Is death penalty cruel by itself?

- Why do we think that killing minors is too cruel?

Is Death Penalty Arbitrary Applied? – Quoted from www.innocenceproject.org

Facts on Post-Conviction DNA Exonerations :

There have been 223 post-conviction DNA exonerations in the United States.

- The first DNA exoneration took place in 1989. Exonerations have been won in 32 states; since 2000, there have been 158 exonerations.
- 17 of the 223 people exonerated through DNA served time on death row.
- The average length of time served by exonerees is 12 years. The total number of years served is approximately 2,754.
- The average age of exonerees at the time of their wrongful convictions was 26.

Races of the 223 exonerees:

138 African Americans
59 Caucasians
19 Latinos
1 Asian American
6 whose race is unknown

The true suspects and/or perpetrators have been identified in 88 of the DNA exoneration cases.

Pre-Conviction DNA exoneration :

- Since 1989, there have been tens of thousands of cases where prime suspects were identified and pursued until DNA testing (prior to conviction) proved that they were wrongly accused.
- In more than 25 percent of cases in a National Institute of Justice study, suspects were excluded once DNA testing was conducted during the criminal investigation (the study, conducted in 1995, included 10,060 cases where testing was performed by FBI labs).
- About half of the people exonerated through DNA testing have been financially compensated. 25 states, the federal government, and the District of Columbia have passed laws to compensate people who were wrongfully incarcerated. Awards under these statutes vary from state to state.
- 33 percent of cases closed by the Innocence Project were closed because of lost or missing evidence.

Leading Causes of Wrongful Convictions – These DNA exoneration cases have provided irrefutable proof that wrongful convictions are not isolated or rare events, but arise from systemic defects that can be precisely identified and addressed. For more than 15 years, the Innocence Project has worked to pinpoint these trends.

- **Eyewitness misidentification testimony** was a factor in **77 percent** of post-conviction DNA exoneration cases in the U.S., making it the leading cause of these wrongful convictions. Of that 77 percent, about 40 percent of cases where race is known involved cross-racial eyewitness identification. Studies have shown that people are less able to recognize faces of a different race than their own.

These suggested reforms are embraced by leading criminal justice organizations and have been adopted in the states of New Jersey and North Carolina, large cities like Minneapolis and Seattle, and many smaller jurisdictions.

- **Limited, unreliable or fraudulent forensic science** has played a role in **65 percent** of wrongful convictions.

In over half of DNA exonerations, the misapplication of forensic disciplines such as blood type testing, hair analysis, fingerprint analysis, bite mark analysis, and more has played a role in convicting the innocent. In some cases, forensic scientists and prosecutors presented fraudulent, exaggerated, or otherwise tainted evidence to the judge or jury which led to the wrongful conviction. Three cases have even involved erroneous testimony about DNA test results.

- **False confessions and incriminating statements** lead to wrongful convictions in **25 percent** of cases. More than 500 jurisdictions now record interrogations to prevent false confessions.

False confessions are another leading cause of wrongful convictions. Twenty-five percent of cases involve a false confession or incriminating statement made by the defendant. In 35 percent of those cases, the defendant was 18 years old or younger and/or developmentally disabled. The Innocence Project encourages police departments to electronically record all custodial interrogations in their entirety in order to prevent coercion and to provide an accurate record of the proceedings. More than 500 jurisdictions have voluntarily adopted policies to record interrogations. State supreme courts have taken action in Alaska, Massachusetts, Minnesota, New Hampshire, New Jersey, and Wisconsin. Illinois, Maine, New Mexico, and the District of Columbia require the taping of interrogations in homicide cases.

- **Snitches** contributed to wrongful convictions in **15 percent** of cases.

Another principal factor in wrongful convictions is the use of snitches, or jailhouse informants. Whenever snitch testimony is used, the Innocence Project recommends that the judge instruct the jury that most snitch testimony is unreliable as it may be offered in return for deals, special treatment, or the dropping of charges. Prosecutors should also reveal any incentive the snitch might receive, and all communication between prosecutors and snitches should be recorded. Fifteen percent of wrongful convictions that were later overturned by DNA testing were caused in part by snitch testimony.

→ *How does this information influence your view on death penalty? Is the wrongness of killing innocent people outweighed by the rightness of killing guilty people?*

Let's look at the argument in more detail

17.4 The issue of Unfair Distribution

There is no question that the death penalty is unfairly applied. There is a question of whether this constitute an argument against death penalty altogether.

The Bias :

Race – It is not so much the race of the convict (difficult to prove that the conviction is unfair in this case) than the *race of the victim*. Even after the amendments post Furman, the bias remains. *The capital punishment is much more likely to be given when the victim is white.*

“Our criminal justice system essentially reserves the death penalty for murderers (regardless of their race) who kill white victims”

Gender – Women receive death penalty much less often than men

Socioeconomy – “There ain’t no poor on death row”.

Bedau: The Argument from Unfair Distribution – goes like this:

1. If punishments are not applied fairly to all, they are unjust
2. Capital Punishment is not applied fairly to all
3. So: CP is unjust

An example (from Nathanson): Several students cheat on an exam. The professor decides to

1. fail all the cheaters
2. fail one of them only
3. fail male cheaters only

Would it be better to fail no one than to fail only one, or only the males cheaters?

→ *It seems that whether one is treated justly or not depend on how other are treated and not solely on what one deserves.*

van den Haag: counter-arguments : “Guilt is personal” (RTD p.231)

1. The fact that some escape punishment does not make the guilty less guilty
2. It is just to punish guilty people
3. So: CP for the guilty is never unfair, regardless of problems with distribution

“To put the issue starkly, if the death penalty were imposed on guilty black, but not on guilty white, or if were imposed by a lottery among the guilty, this irrationally discriminatory or capricious distribution would neither make the penalty unjust, nor cause anyone to be unjustly punished, despite the undue impunity bestowed on others.” (RTD 232)

→ *This is an interesting point: What does make punishment just: whether you are guilty, or, even if you are guilty, whether every other guilty gets treated the same? If you are guilty, are not you guilty and hence deserving to be punished, whatever happens to the others? That the distribution is unfair does not make the personal punishment unfair.*

17.5 Miscarriages of Justice and Irreversibility

There is no doubt that miscarriages of Justice are inevitable. The question is whether it constitutes an argument against death penalty

The Facts : about 57 people who were *proved* to be innocent were killed between 1900 and 1985 (Bedau and Radelet 1987) – plus all the exonerated... what if we had not DNA? What about the cases in which DNA analysis is not an option (loss of evidence etc.)?

Bedau: The argument from the necessary miscarriages of justice :

1. Miscarriages of justice are inevitable
2. Because Miscarriages of justice are inevitable, we should not apply irreversible penalties
3. CP is irreversible
4. SO: we should not apply death penalty

The idea is not to suppress all punishments just because there will necessary be some mistakes (that would be absurd). The idea is that death is definitive, and hence, no correction will be possible if we realized we made a mistake. It is terrible to spend 10 or 20 years in prison when you are innocent, but you still can be freed. No return for dead innocent.

van den Haag counter-argument – So be it: some innocents will be executed, but that's the cost of doing business – the beneficial consequences outweigh these considerations.

“[...] for those who think the death penalty just, miscarriages of justice are offset by the moral benefits and the usefulness of doing justice” (RTD 232)

1. Miscarriages of justice are inevitable: some innocents will be killed
2. If the moral benefits of an activity outweigh the costs, one should permit the activity (example: building construction)
3. The moral benefits of capital punishment outweigh the costs that result from the miscarriages of justice
4. SO: CP should be permitted

→ *This argument works only if we can show that capital punishment indeed has beneficial consequences. Is it true?*

17.6 Deterrence or Brutalization?

Empirical Findings not Conclusive :

- Some have claimed that CP can save 7 or 8 lives a year (Errlich 1975)
- Some have claimed that the number of capital crimes increases after an execution (Bowers and Pierce 1980)

To make up our minds, we can also compare :

- the amount of capital crimes in western countries with and without CP: French, British and Canadians much less likely to get killed by crime than the average American
- One can compare contiguous states in the USA: North Dakota (no CP) vs South Dakota (CP): one has CP, the other has not: no less capital crimes in the state with CP.

Minimally, the conclusion from empirical data is that nothing shows clearly that CP is an effective deterrent.

Bedau does not rely on findings: rather, he gives an analysis of why CP cannot be an effective deterrent.

Bedau: the argument that CP is not an effective deterrent :

1. For a punishment P for a crime C to be an effective deterrent:
 - a. P must be swiftly and consistently administrated after C
 - b. C must be an action which requires deliberation
2. CP is *not* swiftly and consistently administrated
3. Most murders are *not* the result of deliberation
4. SO: CP cannot be an effective deterrent to murder

While we could consider that a change in our ways of doing justice could answer the concern that CP is not applied quickly enough and consistently enough, it seems that nothing can change the fact that *a vast majority of murderers did not intend to murder*, did not deliberate before they acted, and hence do not even think about getting punished by CP.

van den Haag: counter-argument :

1. admits that no empirical finding is conclusive
2. believes that CP is an effective deterrent in the long run for every body
3. believes that it will be for the few who considers deliberately murders – and hence may save some innocent lives

But the most important is not deterrence: what is important is to know whether CP is just or not. If it is just, then it should be applied whether or not it is a deterrent. If it is unjust, then it should be applied whether or not it is a deterrent.

17.7 Is Capital Punishment the right thing to do?

Is CP proportionate to the crime? :

Bedau: CP is not proportionate to the crime – some of its victims are not murderers (drug trafficking, kidnapping, espionage, treason)

Camus (RTD 245): “For there to be an equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months”

van den Haag: heinous crimes – there are certainly some crimes that are so heinous that it would warrant the practice.

Is CP compatible with the dignity of the executed convict? :

Bedau: There is a limit to severity – Death penalty is inhumane and anachronistic — this is the general assessment of most of western countries outside of the United States

van den Haag: Kantian argument – “Execution, when deserved, is *required* for the sake of the convict’s dignity” (236)

Is CP compatible with the dignity and moral integrity of the executors? :

Coretta Scott King:

“As one whose husband and mother-in-law have died victims of murder and assassination, I stand firmly and unequivocally opposed to the death penalty for those convicted of capital offenses. An evil deed is not redeemed by an evil deed of retaliation. Justice is never advanced in the taking of a human life. Morality is never upheld by a legalized murder.”

The argument from retribution, when taken seriously, has absurd consequences:

- Is it right to rape a raper? torture a torturer? Put Nazis in camps, naked and with no food, and make them work until they die of exhaustion and starvation? Would it be right to put nazis in gas chambers?

- One last example: Darfur: if you are a Dinka , and if an Arab has raped / murdered / mutilated all the members of your family, are you justified to rape / murder / mutilated all the members of his family?

There must be a point beyond which doing these actions is wrong: doing so would diminish us. The question is, of course, whether or not death penalty enters in the category of punishments which diminish us. There is at least one sense in which it seems to diminish us: it is an act of despair, the admittance that no hope is left (hence the increased cruelty when it is applied to minors).

17.8 Conclusion

There are two very different questions concerning death penalty:

1. A theoretical question, which is whether or not inflicting death is right.
2. A practical question, which is whether or not the way in which we apply death penalty is just

The theoretical question: Retribution and Dignity – Regardless of the practical matters of application, in and by itself, is CP the right thing to do?

For the convicted murderer – murderers deserve to be murdered – required by their dignity as free agents

For us – Is CP unworthy of us? The argument from retribution cannot justify any punishment. The question is where we put the line.

The practical question – Do the practical condition of application of CP make it wrong?

Death Penalty not justly distributed? – true, but it is not clear that it follows from this that capital punishment is not right.

Death Penalty not an effective deterrent? – unclear – but even if so: would a deterrent effect justify innocent killings?

What is worse: not kill the guilty or kill the innocent? – Can we compensate the innocent lives taken by beneficial consequences of killing the guilty?

Part VII

Social Contract Theories