

## 140: Matters of life and death – 10 – Punishment (2): contractualist & capital

### 1 Contractualism and Retribution

Suppose the laws are generally agreed to be rational and fair. Then in effect we are all agreeing to forgo certain things for the general good. Obedience to the law is then a matter of *doing your bit* to maintain an ordered society, and the criminal is one who takes *unfair advantage* of the forbearance of the rest of us.

Punishment may be seen as *righting the balance* – preventing the criminal from gaining unfair advantage from his actions. This is a backwards-looking, retributivist, justification, set in the context of Contractualist moral framework.

But why punish? Why not simply take the criminal's gains away?

(a) Often this is not possible, where the gain is not transferable.

(b) Since the criminal has acted unfairly it is *not unfair* to make him suffer in order to deter others. A justification of punishment in terms of deterrence can be embedded within a Contractualist framework.

The reason why only those who are guilty who have guilty minds should be punished, is that a breach of the law is only *unfair* if it is *intentional*. And the reason why *diminished responsibility* warrants *diminished punishment*, is that if it was *more difficult* for the criminal to do his bit, his action is *less unfair*.

The reasons why all the guilty should be punished, proportionally to the crime, and why the punishment should be announced in advance and kept to, are all requirements of fairness.

⇒ Contractualism can explain the various strands in our idea of just punishment, at the same time providing a rationale in terms of fairness and in terms of deterrence.

### 2 An instrument of oppression? (Murphy 'Marxism and Retribution' in Wasserstrom & *P.P.Affairs* 1973.)

For the above justification to work, the laws must be generally good, and the social order being protected must be fair. But it can be argued that many existing societies, including our own, are unjust and unfair.

Do the poor, in stealing, take *unfair advantage* of the self-restraint of the rich? Not if the latter's riches are unfairly acquired or unfairly possessed. Then punishment here must be indefensible. It may be better than a system of "treatment", in that at least it treats the criminal as a rational agent. But it is in the same category as bank-robbers acting on their threats.

In such circumstances, punishment is then an instrument of class oppression, not of justice.

### 3 Does Capital Punishment infringe the Right to Life?

Can capital punishment be ruled out immediately, as infringing the right to life of the criminal? But by the same token *all* punishment would infringe *some* rights – e.g. imprisonment would infringe the criminal's right to liberty.

Is the explanation of the justice of punishment that commission of a crime automatically deprives the criminal of *all* rights, so that there is no punishment that could be considered to be unjust in itself (provided that the expected punishment is announced in advance)?

This may seem too strong. Wouldn't it be unjust to execute people, or condemn them to life imprisonment, for shop-lifting? Or is it merely that such punishment would be *barbaric* (that is, inhumane, or inconsistent with the duty of beneficence)? And doesn't the criminal still have a right to a fair trial?

Perhaps anyone who commits a crime thereby only loses their right to protection against acts (imposed after due process of law) of *roughly equal severity*?

This issue does not need to be resolved here, since either way capital punishment need not involve any infringement of the right to life, at least where the penalty is imposed for murder or for other equally serious crimes.

#### **4 Does Capital Punishment Deter?** (See Goldberg, same title, in *Ethics* 1974.)

For a **Utilitarian** capital punishment will be right, provided that the gains in utility from *deterrence* of others and from *protection* of the public outweigh the loss of utility to the people executed and their families.

And Mill argues that capital punishment involves *less* suffering for the criminal than any acceptable alternative (life imprisonment) for *greater* deterrent effect.

(Question: should a Utilitarian count the utility of the criminal *at all*? E.g. is the murder of a Jew *less bad* because it pleases a Nazi? If not, then how to say, in general, *whose* utility should be counted.)

For a **Contractualist** capital punishment will be justified, at least for crimes as serious as murder, provided that there is no injustice involved, and provided that it has a significant deterrent effect. Since the murderer has unfairly taken the life of another, it is not unfair to take their life in return.

**But does capital punishment deter?** Some argue not, on the grounds that most murders are not premeditated, but are rather crimes of passion. Such people are unlikely to be deterred by *anything*, since they are not thinking, at the time, of the illegality of their act or of the possibility of punishment. Moreover, it is argued that in those US states that have reintroduced the death penalty, the murder rate has not fallen significantly.

**Goldberg's reply** – most punishment deters, in fact, not by contributing directly to the criminal's practical reasoning, but by contributing to a climate in which people *internalize* a set of restraints. (Mill, too, makes this reply.) Children who grow up in a society that uses the death penalty will see the ultimate seriousness with which that society views murder, and this will contribute to an internalized value-system that holds them back from murder even in cases of extreme passion or provocation.

So the evidence of short-term murder rates is worthless – one would not expect any significant effects from the reintroduction of the death penalty for a generation.

#### **5. Is any System of Capital Punishment inevitably Unjust?**

Capital punishment is not *immediately* unjust, and it may well deter many potential murderers, if Goldberg is right. But perhaps it must inevitably *involve* injustice.

(a) No judicial system can be perfect, and inevitably some innocent people will be convicted and executed. Once this has happened, then those people *cannot any longer be compensated for the injustice they have suffered*.

⇒ Any system is unjust that does not permit the possibility of compensation for injustice?

(b) With any system of capital punishment, capital punishment cases will have the highest profile, and will attract the greatest public emotion. They will attract the most ambitious public prosecutors, whereas public defenders will be unwilling to take them on. In consequence, those from the middle and upper classes who can pay for their own defense are less likely to get convicted. And where the murder victims are from classes with the most political influence, capital cases will be prosecuted most vigorously. The result is that the operation of the law will inevitably be arbitrary and unfair?

⇒ Any system of punishment is unjust which we can see in advance must lead to injustice?