SYMPOSIUM

The Death Penalty

Foreword

On December 29, 2001, the American Philosophical Association’s Committee on the Philosophy of Law sponsored a symposium on the death penalty at the Annual Meeting of APA’s Eastern Division in Atlanta, Georgia. It was, perhaps, a fitting location, given the Supreme Court’s landmark decision in Furman v. Georgia some thirty years before. In that 5-4 decision, which attracted nine full opinions, the Court narrowly accepted the view that, as it was currently administered, the death penalty violated the Eighth Amendment’s prohibition on cruel and unusual punishment. Only four years later, however, in Gregg v. Georgia, a majority of the justices accepted that the deficiencies it had previously noted were curable and the death penalty was reinstated. As with the previous decision, however, this one did not resolve the moral issues reflected in its earlier deliberations. If anything, they enlivened the debate at a time at which other democratic nations were ridding themselves of the death penalty. Nevertheless, the past decade in the United States has witnessed an increased imposition and execution of the death penalty, moderated only by a slowly growing sense that what Charles Black once referred to as “the inevitability of caprice and mistake” might dictate caution in if not a moratorium on its use. In the APA Symposium, Hugo Bedau led the three main presentations, the other two coming from Claire Finkelstein and Tom Sorell. Each was followed by a respondent—Maimon Schwarzschild, Michael Davis, and Seana Shiffrin, respectively. The papers have been revised for publication, and the symposium chair, Bill Edmundson, has graciously contributed an editorial Afterword.

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The Minimal Invasion Argument Against the Death Penalty

HUGO ADAM BEDAU

I Introduction

When abolitionists attack the death penalty, they typically do so with a wide variety of arguments. Norms such as the value of human life and respect for human life often play a decisive role. For some abolitionists, the death penalty is wrong because it violates the offender’s right to life. Others object on the ground that the state has no right to kill any of its prisoners. Some oppose the death penalty because they regard it as an affront to human dignity. Others argue that it is the unfair administration of the death penalty that warrants its abolition. Still others insist that the risk of executing the innocent outweighs whatever alleged benefits the death penalty provides; or that, all

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things considered, a policy of selective death sentences has less overall social utility—in particular because it squanders more scarce resources than a policy of no death sentencing. Still others (borrowing language from the United States Supreme Court) insist that “evolving standards of decency” condemn the death penalty today, even if they did not in previous centuries. Some oppose the death penalty not just because of what it does to the offender, but for what it reveals about us in tolerating, let alone advocating, such killings. All these moral concerns can be connected in various ways, but even without exploring such connections it is evident that there is much to think about from the moral point of view in evaluating and criticizing the death penalty.

This is not the occasion to develop an adequate review and critique of the arguments that are implied by the aforementioned norms and relevant facts. I propose instead to present and discuss the one argument that I now think is the best argument against the death penalty. Its lineage can be traced back to the little book by Cesare Beccaria, An Essay on Crimes and Punishments, the tract usually credited with inspiring the abolition movement in Europe and beyond during the Enlightenment. A version of this argument reappears in the concurring opinions of Justices Brennan and Marshall in Furman v. Georgia, as well as in the recent papal encyclical, Evangelium Vitae. The argument rests on a fundamental normative principle: given a compelling state interest as the goal or purpose, the government must use the least restrictive means sufficient to achieve that goal or purpose. More expansively, the principle (which is closely related to what students of American constitutional law recognize as a principle of “substantive due process”) holds that if individual privacy, liberty, and autonomy (or other fundamental values) are to be invaded and violated, it must be because the end to be achieved is of undeniable importance to society and no lesser degree of interference will suffice. For convenience of reference, let us call this the Minimal Invasion Argument against the death penalty and the principle that generates it the Minimal Invasion Principle. To put it as bluntly as possible, the Minimum Invasion Argument amounts to declaring that the death penalty fails to satisfy a necessary condition of justified punishment.

Before proceeding further, I should note two things. First, in what follows I refer exclusively to evidence and data from the United States. Extending the argument to apply around the world, or even only to European nations, is feasible but beyond my present purpose. Second, the Minimal Invasion Argument can also be extended without much difficulty to other severe punishments, such as life imprisonment without the possibility of parole.

II The Minimal Invasion Principle

If an argument against the death penalty is to be constructed around this principle, at least three propositions must be accepted. First, punishment for crime must be in principle a legitimate practice in society under a liberal constitution. (The Minimal Invasion Argument is not designed for radical pacifists.) Second, the death penalty must be understood by its very nature to be more severe, invasive, and irremediable than the alternative which, for all practical purposes in contemporary society, is long-term imprisonment. Third, the death penalty must not play a necessary role in securing public safety either by way of general deterrence or specific incapacitation. If these three propositions are true, as I think they are, then in conjunction with the Minimum Invasion Principle they lead to the conclusion that we ought to abolish the death penalty for all crimes and all offenders. A brief outline of this argument comprises six steps—five premises and a final conclusion—as follows:

(1) The Principle: Governmental invasions of an individual’s privacy, liberty, and autonomy (or other fundamental values) are justified only if no less invasive practice is sufficient to achieve an important social goal.
(2) Therefore, punishment is justified only if it is necessary as a means to some socially valid end.
(3) The death penalty is more severe—more invasive—than long-term imprisonment.
(4) To achieve valid social goals, long-term imprisonment is sufficient as an invasion of individual liberty, privacy, and autonomy (and other fundamental values).
(5) Therefore, society ought to abolish any lawful practice that imposes greater violation of individual liberty, privacy, or autonomy (or other fundamental value) in cases in which a less invasive practice is available.
(6) Conclusion: Society ought to abolish the death penalty.
III Defending the Minimal Invasion Argument

Premise (1): How much defense does the Minimal Invasion Principle require? Surely it is clear that only extreme socialists, fascists, theocrats, or totalitarians who for various reasons want to extend state power and intervention in the lives of citizens farther than is necessary will quarrel with this principle. Liberals and conservatives alike, who accept the basic tenets of constitutional democracy, should readily embrace it. The only issue calling for further discussion among these supporters is whether, in certain cases, this principle might ever conflict with, and have to yield to, other principles more worthy of respect. What might such incompatible but superior principles be? What sort of case might arise where such a conflict occurs? A fuller account of the rationale behind the Minimal Invasion Principle would require us to connect it with more fundamental principles of social justice, a topic that cannot be pursued here.

Premise (2): When affirming the legitimacy of a system of punishment, no supporter of the death penalty and few of its opponents will challenge this proposition. No one disputes that public security—that is, protection against criminal victimization—is a salient value and that intervention by government into the behavior of its citizens to achieve that goal is warranted. But the pursuit of this goal is subject to constraints. Not every imaginable weapon to fight crime is morally permissible—principles of various sorts (for example, due process of law) restrict the tactics of intervention. These constraints aside, it is an empirical fact that, as things stand, society must have recourse to punitive methods as a necessary condition of public safety. This is not, however, because punishment is an end-in-itself, it is because we have not figured out any less invasive response that will serve as a sufficient means to the end of public safety. If we did, then it would be difficult and perhaps impossible to defend punishment as a morally permissible practice. After all, by its very nature punishment involves deprivations and harms that, if inflicted by private citizens, would be crimes. So, punishment needs to be justified, and the only justification available is that it is a necessary means to a fundamental social goal. For present purposes, then, we can say that there is little dispute over the truth of Premise (2).

Premise (3): Few will deny the greater brutality and violence of the death penalty when compared to imprisonment. From time to time one does hear a friend of the death penalty—and even on occasion some of its enemies and some under its sentence—claiming that life in prison is a much more severe punishment than death. I think it is sufficient by way of a reply that those in the best position to know usually behave in a manner that suggests otherwise. Few death-row prisoners try to commit suicide and fewer keep trying until they succeed. Few death-row prisoners insist that all appeals on their behalf be dropped. Few convicted murderers sentenced to life in prison declare that they wish they had been sentenced instead to execution. Few if any death-row prisoners refuse executive clemency if it is offered to them. No doubt prison life can be made unbearable and hideous; no doubt death row can be managed by the authorities in an inhumane fashion. No doubt not all life-term prisoners are able to find ways to make their imprisonment something other than a cruel endurance test. Nevertheless, it should hardly come as a surprise that the vast majority of those on each side of the death-penalty controversy believe that execution is worse than imprisonment. This is why its opponents want to abolish it and why its supporters want to keep it. So we ought to accept Premise (3) without further ado.

Premise (4): Turning to the third and last proposition, we can now affirm that whatever the legitimate purposes of punishment, imprisonment serves them as well as or better than the death penalty. This claim rests on a variety of empirical evidence, ranging from statistical research on deterrence, to the behavior (in prison and on parole) of convicted murderers not sentenced to death and executed, and, above all, to the experience of American jurisdictions such as Michigan that have gone without the death penalty for decades.

Here is what the record shows: first, there is conclusive evidence that the death penalty fails as a deterrent in thousands of cases each year. No one denies that murder is frequently committed in death-penalty jurisdictions. There is conclusive evidence that the rate of murder in death-penalty jurisdictions is typically higher than in abolitionist jurisdictions. There is also evidence that the legitimacy of the death penalty inspires or incites some offenders to commit murder. There is no evidence that prison officials, guards, or visitors in prisons where there is no death penalty are more at risk than their counterparts in the death-penalty states. There is no evidence that citizens of abolition jurisdictions are at greater risk of murderous victimization than citizens in the death-pen-
ality jurisdictions. (In recent years, Washington, D.C., an abolition jurisdiction, has had a very high homicide rate, but there is no evidence that connects the one fact with the other.) Although it is true that some convicted murderers commit another murder while in prison or after release—the U.S. Bureau of Justice Statistics reports that nine percent of current death-row prisoners had a previous "homicide" conviction\—there is no way to predict in advance which convicted murderers are likely to recidivate. Were there, their recidivism could be prevented by keeping them under appropriate confinement, just as a typhoid carrier may be quarantined as a public health menace. The only way to prevent such recidivism would be to execute every convicted murder, a policy that is politically unavailable and morally indefensible. Today's defenders of the death penalty must accept a pick-and-choose system of death sentences and executions, with all the adverse effects—as they see them—of such a system on prevention and retribution.

However, opponents of the death penalty who would rest their case on the argument under discussion are vulnerable to evidence (were there any) showing that the death penalty is a better deterrent than imprisonment. Faced with such evidence, opponents would have to rely on some other argument. (I have not claimed that the Minimal Invasion Argument is the only argument for abolition; I claim only that I find it the most persuasive.) But since there is so little reason to suppose that the death penalty is even a marginally superior deterrent over imprisonment, or that such superiority (if any) can be detected by the currently available methods of social science, the "what-if" nature of this counter-argument can be put to the side and disregarded.

Is there reason to believe that, were the death penalty to be abolished in the United States, the police would take to administering curb-stone justice and the public would revolt? Would the clamor of surviving family members of murder victims force the authorities to restore the death penalty? Would outspoken abolitionists become targets for violent rage, as have some doctors in abortion clinics? Nothing of the sort has happened in any current American abolition jurisdiction. However, given the utter lack of political leadership on all aspects of the death penalty in states in the deep South, where the death penalty has been so conspicuously used, I must admit to some uneasiness regarding what might happen if Texas were told—say, by a Supreme Court ruling—that it could no longer have the death penalty. The heirs of those who plastered the South in the 1950s with billboards shouting "Impeach Earl Warren" (the Chief Justice of the U.S. Supreme Court largely responsible for the Court's racial equality decisions) might rise to the occasion and denounce whatever political leadership brought about abolition. Fundamentalist Christians, Mormons, and others who have persuaded themselves that the Bible decrees the death penalty for murder pose a somewhat different problem. How members of these religious groups, clergy and laity concentrated in (but by no means confined to) the Bible Belt across the South, would behave may well be a matter worth worrying about.

Aside from these concerns, evidence has shown that Premise (4) in the argument under discussion is reasonably supported by the available facts.

**IV The Empirical Objection**

Nevertheless, many supporters of the death penalty will not be persuaded by the Minimal Invasion Argument. They will advance at least two objections, one empirical and the other conceptual. First, they will insist on the superiority of the death penalty as a deterrent. Second, they will object that the argument simply ignores the crucial consideration of retribution that, when properly taken into account, leads to a different conclusion.

As to the first, they will point to a quarter-century of research, pioneered by econometrician Isaac Ehrlich in the mid-1970s, continued by his student, Stephen Layson, in the mid-1980s, and recently revived by faculty in the economics department at Emory University, purporting to show that there is a measurable deterrent effect of executions.\[7\] The subject is recondite and not readily simplified without distortion; accordingly, I shall not attempt to explain and evaluate here the adequacy of the statistics, the variables, the data, and mathematical equations on which the research rests. Instead, I invite the reader to consider the conclusions of criminologists William C. Bailey and Ruth D. Peterson, who have carefully surveyed all the available literature on the subject (as of 1996): "The available evidence remains 'clear and abundant' that, as practiced in the United States, capital punishment is not more effective than imprisonment in deterring murder."\[9\] I predict that the latest research out of Emory will not alter this conclusion.

Today deterrence is no longer the main argument, as it
once was, for would-be death penalty defenders in America. And that is just as well, because defense of the death penalty on grounds of deterrence, relying on the principle that the more severe the punishment the greater the deterrent effect, invites one to go further. If death deters more effectively than imprisonment, death preceded by torture presumably deters more than death alone. If so, on what ground is the defender of the death penalty able to resist embracing torture as well as death? Surely all sides agree that morality and politics require that there be some upper bound to the severity of punishments no matter what their deterrent effect might be. The dispute is not over whether there is such a limit, but where to place that limit. The Minimal Invasion Argument provides a reasonable solution to that problem. Supporting the death penalty because of its superior deterrent effects does not.

V The Retributive Objection

In place of deterrence, now that murder has become virtually the only capital crime in the United States, the principal defense of the death penalty is retributive: “Murderers deserve to die,” it is said. Accordingly, the second objection to the Minimal Invasion Argument is that it completely ignores the role of retribution in a system of punishment, and so it ignores the proper, even unique, role that the death penalty plays in providing appropriate retribution for murder, the gravest wrongdoing.

But is it rational to assign as one of the legitimate goals of a system of punishment the exaction of retribution in some special fashion that goes beyond the inherently retributive nature of any system of punishment? I think not. We need to keep in mind that a system of punishment is by its very nature a retributive system, in the sense that it is designed to apply to all and only the guilty and that it deliberately imposes hardship and deprivation on wrongdoers because of their wrongdoing. Thus, life imprisonment for murder is every bit as retributive as the death penalty for murder. And it is retributive without imitating the crime, as though a lawful punishment of death could wipe out or cancel the lawless wrongdoing in murder. The doctrine of punishment as cancellation of wrongdoing has had its distinguished supporters, but I do not believe that it will withstand scrutiny. It might work in cases in which a thief is punished by being required to return what was stolen or to compensate the owner, but it is of no use to those who would lengthen the reach of the death penalty beyond the punishment of murder.

I will not quarrel with the appeal to a principle of desert—that is, “wrongdoers deserve to be punished.” By itself this principle provides no defense of the death penalty; it is satisfied by imprisonment as the deserved punishment. The proposition that murderers deserve to die obviously does support the death penalty, but it does so by essentially begging the question: why do murderers deserve to die when rapists do not deserve to be raped? (Or do they? Rape by whom?) Why do murderers deserve to die when we do not have the faintest idea what punishment traitors or embezzlers or kidnappers or auto thieves deserve? It is impossible to build a systematic schedule of punishments for crimes by relying on some version of *lex talionis,* “a life for a life.”

We could safely and sensibly say that offenders deserve whatever punishment the law provides. This would entail that murderers deserve life imprisonment in Michigan and they deserve death in Indiana, and what they deserve today may not be what they deserve tomorrow. True enough, this is what deserved punishment amounts to under the law. But what we need to know is not what the law provides; we need to know what the principles of morality tell us offenders deserve as their punishment. Yet this is precisely what our current principles fail to tell us in anything like a uniform and non-arbitrary manner. In sum, retributive considerations may be sufficient to tell us *who* deserves to be punished—it is the guilty. But retribution fails to tell us *what* they deserve as their punishment. The attempt to make an exception in the case of murder (“a life for a life”) is irrational because it begs the question.

A similar conclusion is reached if we invoke another retributive principle: “the graver the crime the greater the punishment deserved.” No doubt some such principle of proportionality will be acceptable in any reasonable theory of punishment. By itself, however, this principle does not defend the death penalty. If murder is the gravest crime it warrants the severest punishment—but that could surely be (as it is in most abolition jurisdictions) life imprisonment.

I conclude that defenders of retribution face a dilemma. Conceived after the fashion of *lex talionis,* retribution does not yield a coherent system of punishment. Understood as a necessary feature of any system of punishment, it is trivially satisfied by whatever punitive methods we em-
ploy. Singled out as a requirement for the punishment of murder, it begs the question.

Why should life imprisonment be thought of as an inadequate retribution for the crime of murder? Are we to believe that the many jurisdictions worldwide that have enacted laws repudiating the death penalty have done so without noticing that they have embraced an inadequately retributive punishment? “Inadequate retribution” seems to be little more than a euphemism for punishment not as severe as the complainant desires.

There is a certain irony that goes unnoticed by retributivist defenders of the death penalty. Deserved retribution as punishment presupposes that the offender is fully responsible for his crime. Yet in the United States we currently have several juveniles on death row; few of us are prepared to argue that juveniles are typically fully responsible for what they do. We also regularly execute offenders who suffer from various forms of incapacitating mental illness, disability, or retardation. (Remember Rickey Ray Rector in 1992, who in all seriousness during his last meal asked the guards to set aside some of his dessert so that he could have it later.) If retribution is such a crucial and fundamental consideration in shaping deserved punishment of crimes, why do retributivists not use their theory to protest the execution of the young and the mentally incapacitated offenders just as they do to demand the execution of those they regard as normal adult offenders? One is tempted to conclude that retributivists either do not take the presuppositions of their own theory very seriously or that they are prepared to be wildly inconsistent in its applications.

Moreover, if it is true (as some have persuasively argued) that a retributive theory of punishment requires us to impute to others no small responsibility for the violence, child abuse, and negligence that provide the context in which young men (especially) grow up in our ghettos, then it may be that even normal adult offenders do not “deserve” to be executed. If, as this reasoning implies, murderers themselves are victims first and offenders only later, then our entire criminal justice system is badly in need of a radical overhaul. Nothing of the required sort will be accomplished by executing two or three hundred murderers each year.10

VI Conclusion

More than two centuries ago Beccaria and Bentham were right: the death penalty is unnecessary in a modern civilized society. As abundant experience with abolition jurisdictions proves beyond a reasonable doubt, effective alternatives are available. They were also right (albeit only implicitly) in recommending that we rest our opposition to the death penalty, substantially if not solely, on the principle that I have put as the foundation of the Minimal Invasion Argument against the death penalty. As I noted at the outset, many different moral principles are currently invoked to criticize the death penalty but their merits for the task often vary. Therefore, I think the Minimal Invasion Argument may best provide the rational grounds on which to support complete abolition of the death penalty in (but not only in) the United States.

NOTES

1 I have discussed some of these considerations elsewhere; see, Abolishing the Death Penalty for the Worst Murderers, in THE KILLING STATE 40-59 (A. Sarat, ed. 1999).
3 408 U.S. 238 (1972).
5 Beccaria and his English admirer, Jeremy Bentham [1748-1832], both staunch abolitionists, believed that life in prison involved far more suffering than a few moments on the gallows.
7 Rubin, Dezhbakhsh, & Mehlihop Shepherd, Capital Punishment and Deterrence: County Level Estimnates Using Recent Execution Data, Unpublished ms, Department of Economics, Emory University, Atlanta, GA (2001).
9 Other schemes of trying to make the punishment fit the crime have also been developed by philosophers in recent years, but without conspicuous success. See, e.g., M. Davis, To Make the Punishment Fit the Crime (1992); and A. Von Hirsch, Doing Justice (1976).