



Applied Ethics
(other than Bioethics)

A Non-Pacifist Argument Against Capital Punishment

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ABSTRACT: In this paper I present a moral argument against capital punishment that does not depend upon the claim that all killing is immoral. The argument is directed primarily against non-philosophers in the Judeo-Christian tradition. Oddly, the moral argument against capital punishment has not been effective in the United States despite the biblical injunction against killing. Religious supporters of the death penalty often invoke a presumed distinction between 'killing' and 'murdering' and avow that God forbade the latter but not the former. Self-defense and just wars are cited as cases of morally justified killing. Accepting these premises, I point out that when cases of justified killing in self-defense are altered to include an element of delay, disarming and premeditation, they too become murder. Since the death penalty clearly involves the elements of delay, disarming and premeditation, I conclude that the death penalty is murder in the biblical sense and ought to be abolished in any God-fearing (or otherwise moral) society.

Traditional opposition to capital punishment has generally been based on one or more of the following claims: (1) Capital punishment is immoral because all killing is immoral, (2) Capital punishment is unjust because killing is irreversible, or (3) Capital punishment is ineffective because killing is not a deterrent to killing.

I propose to argue instead that capital punishment is immoral because of the kind of killing it is, rather than because it is a kind of killing *simpliciter*. This is a specifically moral argument, but it differs from the usual pacifist argument in that it does not assert or depend upon the claim that all killing is immoral.

Herbert H. Haines has written that "The...predominantly moralistic critique [of capital punishment] has never met with much success in the United States..." (1) I believe that there are two principal reasons for this lack of response to the usual moralistic argument. One is that Hume was right in his suggestion that one of the chief roots of morality is our sympathy for our fellows, and the murderer is about as unsympathetic a character as anyone in society. By his awful act he (and most murderers *are* male) causes our sympathy to shift from the inhuman killer to the pathetic victim. We no longer feel for the murderer the bonds of sympathetic concern that underlie much of moral protection. But the other reason is the one that I am most interested in – it is that the moral teaching of our dominant Judeo-Christian religious community has been that capital punishment is not murder.

Those of us who were raised in the Judeo-Christian morally tradition that is significantly based on the Ten Commandments often were initially perplexed to see that our respected

elders permitted or even engaged in various kinds of killing despite the clear Biblical injunction "Thou shalt not kill." If we ventured to ask about this, we generally were told something like "The Hebrew word translated as 'kill' in the King James Version of the Bible really meant something more like 'murder'; hence God did not forbid all kinds of killing, only murderous killing. It is alright to kill in self-defense or in a just war, for example."

I do not know if this is good theology, or even if it is good translation, but I believe it is sound moral reasoning. I believe that deadly force is justifiable in self-defense broadly construed and in just war construed a bit more narrowly than our ancestors were inclined to practice it. I deny, however, that capital punishment is a similarly justifiable form of killing.

The defense of capital punishment that I intend to attack is thus the one that proceeds by direct analogy to those forms of killing that are widely accepted as justified: self-defense and just war. Just as individuals and nations have a right to kill in self-defense, it is argued, so does society. Capital punishment is society's version of self-defense.

There are several things wrong with this argument. The most obvious and frequently mentioned disanalogies are (a) "Society" (whatever that might mean) is not in eminent danger of destruction, as individuals and nations must be for killing to be justified, (b) Deadly force is not the only reasonably available means for Society's self-preservation, as must be the case for killing to be justified, and (c) the death penalty is not effective at achieving the purpose that is supposed to justify it.

I believe these criticisms are sound and ought to be persuasive. Experience in the public arena has shown, however, that these three good arguments are not usually sufficient to convince the American public. We need a more compelling demonstration that capital punishment is importantly different from self-defense. I have found the following line of reasoning to have considerable impact in public debates and offer it to the philosophical community for criticism and development.

Since most of the people I am concerned to persuade are non-philosophers, I have found it most effective to depend on examples and parables rather than systematic discursive reasoning. The following examples have been found to have a telling effect in political debate.

Killing in a just war

As a Lieutenant in the US Army, I was taught by my country that it was permissible, indeed it was obligatory, for me to bring about the death of enemy soldiers who opposed our forces. (The killing of civilians is less easily justified, so I set that issue aside for the sake of clarity.) In the Infantry Officers Basic Course at Fort Benning, Georgia, I was told, for example, that if I were leading a platoon whose mission was to capture a bridge, I had the right to kill or capture any soldier who fired on my platoon or who posed any threat to it or its mission. But I was also taught that if I elected to capture an enemy soldier and had the means to return him or her safely to our base, I then gave up my right to kill. The U.S. Army specifically teaches that the killing of unarmed prisoners of war is murder and is both morally and legally forbidden.

Killing in Self-defense

The State of Florida and the religious community of my youth agree that I have the right to kill in defense of myself or my family. (Killing in defense of property is less easily justified, so, again, I set the hard case aside in the interest of clarity.) The well-known political difficulty encountered by Michael Dukakis during his presidential campaign when

he hesitated about his willingness to kill in defense of his family illustrates how widespread and strong is the support of self-defense, and how much of the American public views pacifism as unacceptable public policy.

But suppose that a burglar invades my house and threatens my family and, instead of killing him, I knock him out with my trusty baseball bat and tie him up. Then I have a beer to calm my nerves and sit around stewing about it and getting madder and madder. Finally, I get so mad at the thought of what he has done that I pick up his gun and shoot him. In such a case, the State of Florida and most religious communities would agree that my actions are *not* justifiable and are, in fact, murder.

Fleeing felons

One other form of killing that is frequently said to be justified is the use of deadly force by police officers who are not acting out of self-defense but are instead killing to prevent the commission of a crime or the escape of a criminal or suspected criminal. This legal and moral debate is frequently cast in terms of a fleeing felon who can be stopped by shooting but not by any other readily available means. The defenders of deadly force argue that police are justified in firing in such cases – opponents, of course, deny that such killings are justified. But, again, suppose that the fleeing felon trips over an obstacle and breaks a leg. The pursuing officers capture, disarm, and handcuff him. Then, perhaps out of fear that a lenient judge will let him off the hook, they shoot him, uncuff him, and throw him in the ditch. Again our nearly universal intuition is that such actions are not justifiable and are, in fact, murder.

The central feature of these examples of clearly *unjustified* killings is, it seems to me, that the person killed has already been captured by the forces of good and no longer constitutes an immediate threat to anyone. In such cases, it seems clear, the warrant to kill is withdrawn *even by those who would otherwise approve the killing*.

Now, of course, I invite comparison to the case of capital punishment. Here the criminal has been convicted of doing something so awful that most ordinary citizens would gladly have sanctioned deadly force to prevent it. Indeed, the defenders of capital punishment usually claim that they are sanctioning deadly force primarily to prevent such a thing from happening in the future. But now the analogy to the examples should be obvious. *Of course* we would kill the criminal to forestall the crime – the actual crime as it constituted an immediate threat not otherwise defeatable – but in all cases we withdraw the warrant when the criminal or enemy is captured and disarmed, whether any serious harm has been done or not. *The killing of unarmed prisoners who constitute no immediate threat to life and limb is murder, not justified killing*.

The defining conditions of first degree murder have, perhaps, the clearest conception of the features at issue here – the features that define the difference between capital punishment and justified killings.

Since first degree murder is a technical term defined separately in the laws of each nation, and, in the case of the United States of America, by each state individually, there is no single canonic description of first degree murder. Typically, the definition will include essential reference to premeditation and malice aforethought. Older definitions often referred to "lying in wait" as a characteristic of murderous intent. The central idea is that first degree murder is more reprehensible than other degrees of murder because it is more fully intentional, or even rational, and less the product of "uncontrollable urges," passions, involuntary reflexes, or response to real or perceived immediate threats.

The moral view that premeditated killings by individuals is more reprehensible than killing in the face of immediate provocation is, I believe, as near to universal as any of our considered moral judgments. It has been strongly developed in law and in the theory of retributive punishment. I contend that the very same set of distinctions should be applied to killings by the state. Some are justified (though undesirable) by the presence of immediate threats to the wellbeing of the state and its citizenry. But as the immediacy of the threat recedes, as the perpetrator is rendered immobile and nondangerous, and as the time between the stimulus of threat and the response of killing becomes less a period of the urgent activity of killing and more a period of reflective contemplation of the possibility of killing, the act becomes an instance of premeditated murder rather than self-defense.

The strength of this line of reasoning, it seems to me, is that, like Judo, it uses the opponents' own strengths against them. It refutes the conclusion of death penalty advocates without having to refute their moral premises – it shows that *even if some forms of killing are morally justified*, capital punishment is not.

Philosophically, one could say that the argument demonstrates that defenders of capital punishment treat the analogy to self-defense the way Schopenhauer said the theologians treated the Principle of Causality: like a hired cab to be taken to their destination and then dismissed as irrelevant. Just as some theologians argue that God must exist because the Principle of Causality requires that everything must have a cause, and then these very same theologians violate the Principle of Causality by allowing that God, of course, need not have a cause — just so, the defenders of capital punishment argue that the death penalty is justified in the very same way that killing in self-defense is justified, except, of course, that the death penalty specifically violates the restrictions that render analogously similar killings *unjustified*.

But more importantly, from the political and public advocacy point of view, this argument also has considerable rhetorical strength, because it shows why capital punishment is not properly construed as one of the forms of killing exempted from God's command – it is specifically the kind of killing (murder) that He intended to forbid. Thus, many of the surprisingly large number of Americans who cling to the Divine Command theory of ethics can be brought to see that capital punishment is, on their own terms, morally forbidden, without their having to give up the other forms of killing that they believe are morally justified.

The main difficulty that I have encountered in using this argument against predominantly religious advocates of the death penalty is that many passages in the Bible actually seem to *require* the death penalty for certain crimes. Among those specifically mentioned are "adultery (Leviticus), both parties involved in criminal assault in the city, a rebellious son, and an unchaste bride (Deuteronomy), striking or cursing one's parent, slave procurement, sodomy, and sacrifice to any god other than Jahweh, as well as murder (Exodus)." (2)

There is much that can be said for and against this apparent sanctioning of the death penalty. Perhaps the most persuasive line to use with the average American is that a literal acceptance of these requirements would obviously be beyond the pale of desirable social policy, so the argument is not about the rules laid down for a primitive tribal society but about the fundamental moral guidance provided by the Decalogue. With the inchoate but widespread view that "times have changed" since the Bible was written, the discussion can then proceed to reasoning about the kinds of killing that God intended to permit or forbid. The average person then seems to feel quite strongly the force of the element of premeditation involved in capital punishment.

Finally, there are, of course, defenders of the death penalty who make no appeal to a biblical foundation for ethics. Since their moral theories and axioms may vary widely, no

single argument can be expected to refute them all. But the present argument comes closer than most, because it does not need to establish a universal prohibition of killing – it just points out that, while the death penalty shares some of the characteristics of justified killing, it also has those characteristics of delay, disarming, and premeditation that render such killings unjustified. This line is effective against most reasonably well-developed moral theories. The obvious exception is Kant's view that capital punishment is primarily justified as a species of retribution. To refute such a view would, indeed, require more than my analogical reasoning, since Kant does not justify capital punishment in the same way he justifies self-defense or just wars, and my argument is directed against those who do. To refute the retributionist view of capital punishment does require debate about fundamental moral principles. But while a surprisingly large number of non-philosophers cling to retributionist views, that is not, I think, the case amongst either philosophers or morally advanced ordinary citizens.

To recapitulate, then, the moral argument against capital punishment has not been effective in the United States despite the biblical injunction against killing. Religious supporters of the death penalty often invoke a presumed distinction between "killing" and "murdering," and avow that God forbade the latter but not the former. Self-defense and just wars are cited as cases of morally justified killing. Accepting those very premises, I point out that when cases of justified killing in self-defense or just wars are altered to include an element of delay, disarming, and premeditation, they too become murder. Since the death penalty clearly involves the elements of delay, disarming, and premeditation, I conclude that the death penalty is murder in the biblical sense and ought to be abolished in any God-fearing society.

Notes

(1) Haines, Herbert H., *Against Capital Punishment*, p. 163

(2) Shin, Kilman, *Death Penalty and Crime: Empirical Studies*, p. 4-5

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