

The American Death Penalty



Is George W. Bush a serial killer? **Terri Murray** attacks the death penalty with the help of two prisoners executed by the state – Socrates and Jesus.

Then one ought not return injustice for injustice or do ill to any man, no matter what one may suffer at their hands. Look to this, Crito. Do not agree against your real opinion, for I know that few men think or will ever think it true. Between those who accept it and those who do not, there is no common basis for decision; when they view each others counsels, they must necessarily hold each other in contempt. So consider very carefully whether you unite with me in agreeing that it can never be right to do injustice or return it, or to ward off the suffering of evil by doing it in return, or whether you recoil from this starting point. I have long thought it true and still do.

(Socrates, *Crito* 49 d-e)

Then, asked Polus, would you wish rather to suffer wrong than to do it? – I should wish neither for my own part, but if it were necessary either to do wrong or to suffer it, I should prefer to suffer rather than do it, Socrates answered.

(Plato, *Gorgias*, 469 b-c)

Abstract moral arguments have never had much weight in discussions about America's death penalty, at least not in America. Amnesty International has led a long but futile campaign to raise consciousness about the brutalities inflicted in American prisons and to have them, and the death penalty, recognised as human rights abuses. A minority of Americans oppose the death penalty, but even they seldom aim their criticism at the rationale behind the practice of punishing the guilty with death. Instead, their reservations have to do with the possibility of occasionally executing innocent people. Recently the American death penalty has come under renewed scrutiny precisely because increasing evidence of innocence on death row has raised doubts about the legal processes by which the death sentence is handed down. Racial disparities have also caused concern.

Since the reintroduction of the death penalty in 1976, America has executed some 645 people, while 87 have been exonerated after being sentenced to death, which amounts to almost one reprieve for every seven executed. The United States now executes an average of one prisoner per week. Among those killed to date at least 30 were mentally retarded and 12 were killed for crimes committed when they were under 18. This poor track record is astonishing for such a high stakes game, and the *Economist* and other publications have provided ample criticism of the way in which poor

defendants who cannot afford legal representation are railroaded onto death row.

Texas is notoriously responsible for one-third of all executions which have taken place in America since 1976. In his five years as governor, George W. Bush never issued a stay of execution until June first of this year, when he granted Ricky McGinn a 30-day stay of execution, pending DNA evidence. After 134 executions, the McGinn case is the first in which Governor Bush felt there was enough doubt to allow for a further investigation of the evidence.

One reason for the new doubts is that DNA technology can now provide more accurate forensic evidence. In rare cases, DNA testing has been used in the US to correct past mistakes of police, prosecutors and judges. However, most miscarriages of justice have been brought to light through the relentless efforts of journalism students, academics and crusading defence lawyers – all of whom are characterised by hard-liners as bleeding heart liberals. Still, no one knows how many other miscarriages of justice may have gone undetected. In January of this year Illinois Governor George Ryan announced a moratorium on executions, citing his state's shameful record of convicting innocent people.

What all recent commentary has in common is its stress on how the US criminal justice system fails to fulfil its aims. There is as yet no serious questioning of the moral premises on which those aims rest. George Ryan and others have begun to question the machinery of death because it isn't working efficiently, not because they believe there's anything morally wrong with it. Nor, however, is there anything morally right about it, which explains the conspicuous absence of arguments which address the issue in those terms.

Contrary to what American politicians may think, the existence of this draconian practice in the US legal system is unfitting, and it doesn't take anything as elaborate as DNA testing to discover where its problems lie. Let us consider one by one the possible justifications for the death penalty.

Deterrence

Supporters of the death penalty have claimed that it deters people from committing murders and other violent crimes. They argue that even if, despite all safeguards, innocent people are occasionally executed, other innocent lives are saved by this deterrent effect so that overall the death penalty is justified. If this were true, there would still be a number of dubious assumptions here which would be worthy of further investigation. However, despite numerous studies, investigators have failed to identify any deterrent effect from the

death penalty. It seems to have no measurable effect whatever on murder rates or rates of other violent crimes. States with the death penalty have comparable murder rates to neighbouring states without. The murder rate (or in some cases, the rate of increase in the murder rate) has not improved in those states which have introduced it – in a few cases things became worse, in fact. The results of many of these studies can be found on the internet at www.deathpenaltyinfo.org. In a Justice Department news briefing in January, U.S. Attorney General Janet Reno said “I have inquired for most of my adult life about studies that might show that the death penalty is a deterrent. And I have not seen any research that would substantiate that point.” (Reuters, 1/21/00) As the empirical evidence points so conclusively to the lack of any deterrent effect, I will not waste further space on this supposed justification.

Reform

Other forms of punishment, such as imprisonment, are sometimes justified as attempts to reform the wrongdoer for the benefit of all concerned. This justification plainly doesn't apply to capital punishment and I mention it only for completeness. If you want to reform someone, you need to keep them alive.

The abject failure of deterrence has left most support for capital punishment resting on either a thirst for retribution or a desire to rid society of dangerous undesirables. It is to these two ‘justifications’ that I will be devoting the rest of this article.

An Eye for an Eye

It is often said that many Americans favour the death penalty because they see it as consistent with the kind of religious morality in which retribution plays a central role. I won't deny that the retributive rationale can indeed be strongly associated with people who see themselves as Christian. What I will take issue with is the notion that there is anything moral in this interpretation of Christianity. Moreover, while it is fair to say that this retributive rationale is Biblical, the operative interpretation of Christianity in America, precisely because of its fundamentalist emphasis on Old Testament scriptures and legalisms, suffers from an egregious disregard for the Gospels. The remaining question I will not attempt to answer – is American Biblical fundamentalism technically Christian? If so, does this Christianity bear any resemblance to the teachings of Jesus as recorded by his disciples?

Retribution is a kind of repayment. It pays like with like. If one inflicts violence one will receive violence in return. There is a single currency for retribution and all payments are made in that currency. The Hebrew Bible famously endorsed the command to repay an eye for an eye. Jesus, however, took

issue with certain Jewish legalisms, including this one; rather than take an eye for an eye, he asked us to turn the other cheek instead. Nonetheless, the Old Testament retributionists shared some assumptions with modern Americans which make it worthwhile to look further at the scriptures.

The notion of material rewards and punishments was not at all unusual in ancient Judaism. Much like in modern America, there were strong associations between might and right. If you fared well in the world and found yourself healthy, wealthy, and secure you could count yourself morally vindicated by providence. God had smiled on you. The material currency and the moral currency were one and the same – all values were reducible to concrete, empirical, material measurement. God protected his loved ones from disaster, disease, and attack. The rest were on their own in a harsh world.

Likewise, modern Americans believe in a seamless relationship between earthly success and moral righteousness. They see no need to commit to one or the other and generally avoid the kinds of situations which might raise the spectre of such a dilemma. To most Americans, it is completely consistent with Christianity to measure success in dollars and cents, and to have moral contempt for those who fail to achieve the respectable lifestyle deemed good. In a land of opportunity there is a certain Calvinist tendency to ascribe moral blame to anyone who does not achieve material success.

In the ancient Hebrew literature which is still considered Christian Scripture, we see this human temptation to demoralise a victim of disease, catastrophe and fiscal crisis in the figure of Job. His religious friends accuse him of unrighteousness because he suffers misfortune. What they do not know is that God has sent these crises as a test of Job's faith. According to the unorthodox views of the book's author, God has faith in Job. God believes that Job will keep his faith even when he is not successful. And he does – despite his material misfortunes Job is nonetheless portrayed as blameless and steadfast, and is vindicated in the end. It is difficult to understand, from our modern perspective, how subversive this book was within a culture that subscribed wholeheartedly to a materialist understanding of good and evil. The author of Job is endorsing a split between material success and moral righteousness that was unheard of at the time. And he handles the anticipated criticism of his position within the story itself. His critics are the theologians, who will submit that Job's suffering is sufficient proof of his moral failure. They give voice to the popular notion that all material evils – suffering, disease, misfortune – are ordained by God. According to popular religion, the reverse was also true: material rewards were indications of God's blessing. The author of this book took a rare departure from the mainstream literature. With this one exception, the seamless relationship between material

“ I have inquired for most of my adult life about studies that might show that the death penalty is a deterrent. And I have not seen any research that would substantiate that point. ”

Janet Reno, U.S. Attorney General

and moral values went unquestioned in Jewish literature for hundreds of years, and never underwent substantial criticism until Jesus of Nazareth. In modern America this materialism obscures two vital distinctions which show just how mistaken it is to rest the death penalty on the rightness of retribution.

Moral and Pre-Moral Evil

Luckily, American law courts do not cling to this monistic value system any more than Jesus did. The courts acknowledge a basic distinction between pre-moral evil (such as pain, suffering, death, destruction, disease, etc.) and moral evil (when these unpleasant facts are intentionally caused without justification). Only the latter implies moral guilt of the kind that might be applicable in criminal law. Within criminal law, intentions are good or bad in the moral sense, but facts – like the fact that someone is dead – are morally neutral. Of course the courts recognise that the death of any person, is bad – bad in the sense of unfortunate, unpleasant, or tragic. The US legal system reflects a widespread recognition that acts in themselves, prior to any evaluation of the human purpose or meaning of those acts, have no intrinsic goodness or evil attached to them. A physical action is morally meaningless until one evaluates the role of human freedom, or human agency, in performing the act. Moral value is something that must be added by human subjects to an evaluatively neutral (or amoral) world.

In keeping with this outlook, the job of a juror is not to attempt to balance the scales of fate, but to decide, on the basis of the best available evidence, whether or not a bad event happened as a consequence of a bad or evil intention.

In a murder case, guilt is not merely a matter of the accused being responsible for the death of another person, in the sense of there being a causal connection between the accused's actions and that death. Guilt also entails criminal intent. The job of jurors in a murder trial is to make a moral judgement – they must decide whether or not the defendant *intentionally* harmed his or her victim. Unfortunately, the materialist assumptions carried by many jurors tend to obscure their understanding of the distinction between moral and pre-moral evil, and thus of their task as jurors. One of the jurors in the Louise Woodward trial was quoted in a London paper as saying, "I don't think any of us thought [Louise] intentionally murdered Matthew, but ... something happened to that baby and it happened when Louise was taking care of him." This remark comes from a juror who convicted Woodward of criminal guilt, even though he did not think Louise intentionally killed the child!

Under America's jury selection rules the prosecution in a capital case dismiss potential jurors on the grounds that they



Disused guillotine, Paris

oppose the death penalty. The reason is that, in states where the death penalty exists, there would be no point in trying a capital case unless the penalty could actually be inflicted. Since it takes a unanimous verdict to impose the death penalty, all of the jurors must favour it. This has a worrying consequence. As I've said, the US legal system depends on jurors being crystal-clear about the distinction between bad things simply happening and bad things happening because somebody intended them. Yet the very existence of capital punishment means that the jury in a murder trial must be composed solely of death penalty supporters, who are likely to be 'retributionists' and thus, as I have argued, likely to have a shaky grasp of that vital distinction. Hence the jurors in a capital case are in the worst position to judge the defendant on the only grounds that matter to his guilt or innocence.

Suffering Harm and Doing Wrong

The retributive argument for capital punishment is based on a materialist world-view in which the value of human life has less to do with our freedom and our intentions than with the mere fact of physical well-being. What makes me human, or what makes my life valuable, on the materialist view, is that I live and breathe, pump blood, and stay healthy and well. In keeping with this view, the only proper way to compensate a victim and his family for their loss is to take the life of the murderer in return. As I explained, the retributive rationale operates on a single currency and the value of that currency is material well-being. Moral well-being has no place in the system, which is why executioners can sleep at night.

Along with this reductionist model of man goes the belief that the only real harm or evil that can befall a human being is physical evil. To the

ordinary man who would do anything in his power to avoid suffering, Socrates' claim of preferring to suffer rather than do wrong would appear ludicrous, romantic and idealistic. Yet, strangely enough, this ludicrous perspective was also central to the teachings of Jesus.

Socrates' claim – that a man harms himself more in the doing of evil than in the suffering of it – makes material retribution redundant and excessive. Socrates sees his moral commitment to be to suffer rather than to do wrong, that is, what he feels he ought to do, not just a matter of preference; for he says that whatever the world thinks, and whatever suffering we must endure, we ought not to do wrong at all (*Crito* 49 a-e).

Socrates faced execution after asserting his conviction that the good man cannot be harmed. By this he did not mean that the good man could not be persecuted, injured, tortured, or killed. What he meant is that none of these could injure that part of a man which makes him good; none of these exterior circumstances could deprive a man of his moral

dignity, nor harm his soul. Socrates said that the only thing that could harm the good man would be his own wrongdoing. Socrates was one of the first thinkers to erect a philosophy on the distinction between physical (or pre-moral) evil and moral evil.

The writers of the Christian gospels espoused a dualistic view of reality. This included a model of man as a being comprised of both body and soul, matter and mind. Jesus taught men that they could not live on bread alone, and told them not to fear those who hurt the body but cannot touch the soul. His opponents were swift to subject his dualism of body and soul to the ultimate test by handing him over to the Roman state for execution. In the eyes of his disciples, Jesus withstood the test which aimed to reduce him to his physical limits, by proclaiming that material death could never undermine the moral life of a human being. As odd as it may seem to the vindictive materialist, Jesus' kingdom was not of this world, and the advantage of belonging to it could never have been measured by how well we fare amongst men.

According to the moral philosophy of Jesus and Socrates, good and evil are inner dispositions and can neither be bestowed upon us, nor taken away from us, by the actions of others. But we can do ourselves moral harm through our own actions. By executing criminals out of a desire for revenge or retribution, we diminish ourselves and coarsen and brutalise public life.

Waste Disposal

Unlike the confused jurors of today, the 18th century Enlightenment thinkers who framed the US legal system understood the important distinction between moral and amoral facts. This kind of judgement depends for its logic on a particular model of human nature – one in which human beings are regarded as free and able to make conscious choices. To impute criminal guilt within a modern Western justice system presupposes that human beings can be distinguished from the other species of animals. Otherwise we would no more blame a man for killing another man than we would blame a lion for killing and eating a gazelle.

It is precisely because human beings are free rational creatures with choices and the potential for good that we can hold them morally accountable for deliberate abuses of that freedom. Specific legislation such as the McNaughton Rule is targeted at ensuring that the defendant was *compos mentis* when the crime took place. State execution is itself intended as a punishment for moral guilt, i.e. a deliberate, conscious abuse of freedom by an agent who knows right from wrong. Indeed, is there any other kind of guilt that could possibly justify it? Certainly not in modern western law courts. Rational freedom is the one thing that is distinctive of all human beings regardless of their sex, their race, their myriad cultural idiosyncrasies. It is what distinguishes humans from other animal species which act on instinct and without moral consciousness.

Proponents of the death penalty sometimes say that it is precisely in the abuse of this freedom that a convicted murderer forfeits his humanity, and hence his right to life. The criminal is dehumanised by his own wilful actions, and hence there is no reason to treat him as a human agent with rights. In terms of rights and human dignity, he has no more claim to either than an animal. On this view, state executions



are a form of waste management.

The caricature of the convicted murderer as an animal is a familiar one, but there is a glaring contradiction here. As we have shown, criminal guilt was established on the premise that the subject most certainly is a human moral agent. It is only against a background of belief in the subject's genuine potential *not* to do evil that we can deem him/her morally guilty. So the waste management rationale for the death penalty is hopelessly self-contradictory.

That human status and potential not to do evil does not simply vanish once the jury hands down a guilty verdict. Which is why the US penal system ought to function as a place where rehabilitation is at least a genuine possibility. Instead, US prisons notoriously condone routine human indignities such as systematic rape and assault on inmates. US prisons do not just incarcerate criminals; they are also places where cruel and inhumane treatment is the norm. The death penalty is the zenith of this punitive attitude towards prisoners, in that it is intended to serve absolutely no remedial purpose. In fact what is going on is that human people are being convicted on the basis of their humanity, and then subjected to punishments which could only be justified by the nonsensical claim that they are subhuman.

The dehumanisation of the criminal deflects moral guilt from the perpetrators of punitive violence, while failing to explain how this dehumanisation is achieved. It would seem that the aim of punishment is the very dehumanisation that is presupposed. The very presupposition necessary to mitigate the crime of state violence is conspicuously absent.

If its proponents concede that capital punishment is an act of vengeance the sole purpose of which is to inflict maximum pain and anguish on the convicted murderer prior to his death, then it does at least achieve this goal. But this has never been plainly admitted, and certainly not by self-proclaimed Christians. Were Christians to admit a desire for inflicting maximum pain and anguish as the sole reason for the practice, it would be even more difficult to distinguish their own murderous disposition from that which they ascribe to the monster on death row.

© TERRI MURRAY 2000

Theresa Murray is an American-born scholar and philosopher. She has lived in London since 1991, where she earned an undergraduate degree in Philosophy & Theology and a MTh in Christian Ethics, both from Heythrop College, University of London. She is the co-author of Moral Panic: Exposing the Religious Right's Agenda on Sexuality (Cassell, Listen Up! Series, 1995).