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Capital Punishment: How Effective Is It?

Julia Armenta
Macalester College

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Orlov [who, Dostoevsky informs us, had murdered many old people and children in cold blood] was unmistakably the case of a complete triumph over the flesh. It was evident that the man's power of control was unlimited, that he despised every sort of punishment and torture, and was afraid of nothing in the world. . . . I imagine there was no creature in the world who could have worked upon him simply by authority. . . . To my question he answered frankly that he was only waiting to recover in order to get through the remainder of his punishment as quickly as possible, that he had been afraid beforehand that he would not survive it; 'but now,' he added, winking at me, 'it's as good as over. I shall walk through the remainder of the blows and set off at once with the party to Nerchinsk, and on the way I'll escape. I shall certainly escape! If only my back would make haste, and heal!' [Dostoevsky, *Crime and Punishment*]

The above quote describes in brief detail the manner in which punishment is regarded in terms of deterrence. Certain individuals who commit crimes do so at their own free will, and many have no qualms as to the consequences of their actions. To some, it matters not the possibility that if they are caught, there is the chance they may be executed. Sometimes the crimes committed by certain persons are done so in a manner that would bewilder any other human being.

Why does anybody commit a crime? The reasons are unknown, but there have been many speculations as to why people do the things they do. Some have said it is the fault of the individual, while others speculate blame falls on the side of society. In either case, something needs to be done in order to deter criminals from committing some of these heinous crimes.

Criminal law reform began 200 years ago when Cesare Beccaria applied liberal principles to crimes and punishment. The state of nature too closely resembled the state of war, and something needed to be done in order to secure the rights of free men. In following his lead, Thomas Hobbes felt that peace was endangered by the seditious doctrine, according to which every private man is judge of good and evil actions and of the justice and injustice of the laws. This doctrine was facilitated by the clergy, and if the clergy remained intact, then men would offer a conditional obedience to the sovereign because the fear of eternal

damnation was greater than the fear of the laws of the sovereign. As time advanced, and men began to cast doubt on beings of a "ghostly" nature, peace required enlightenment. It was then that the notion of fear in the laws was described as the basis for peace. The true measure of crimes was not in their intrinsic character, but in the "harm done to society."

The reasons why people commit crimes vary, and quite possibly, external factors such as the environment of the individual are also part of the problem. Berns states, for example:

> We might speculate that the number of murders by poison depends to some extent on the availability of lethal poisons—whether they may be obtained without prescription and whether the drugstores selling them are distributed throughout the area being studied—as well as on their price and the ease with which they can be administered (Berns, 88).

As is quite obvious, this dilemma surrounding capital punishment is complex and necessitates further study. Numerous studies have been conducted to determine the validity of capital punishment. The debate has also focused upon whether or not the offender should be rehabilitated, or if the only means of deterrence is through death.

My personal belief is that there is no need for capital punishment in our society. Advocates say that capital punishment is needed in order to deter future criminals, but this is not entirely the case. Research has shown that capital punishment, as a deterrent, has no positive or negative effect. An influential student of the deterrence question, Thorsten Sellin, conducted a study that would attempt to determine the effect of capital punishment on future crime. He studied the homicide rates in contiguous states, some with and some without the death penalty, on the assumption that these states were as alike as possible in character of population, social and economic conditions, etc. His conclusion was that the death penalty had no effect on the murder rate (Sellin, 63).

This is not to say that the study performed by Sellin was perfect, for it did contain flaws. In his attempt, he looked for correlations between the homicide rate and the legal status of the death penalty, rather than the number of executions actually carried out in the states where it was legal punishment. As it may be true that contiguous states are similar in certain respects, their differences may be quite apparent. Sellin looked for characteristics evident in all of the states he compared, but these same factors may not be part of the real reason that leads to homicide. He had no way of knowing if these states were equal in all other respects, such as apprehending and convicting those who commit murder. There is simply no absolute in controlling all factors.

The issue of deterrence has been the basis on which advocates or abolitionists have grounded their arguments. It would be fairly safe to assume that both sides have varying definitions for the term "deterrence" and the manner in which they utilize that definition to their advantage. Gertrude Ezorsky offers a dichotomous definition of deterrence that is useful in deciphering the meanings behind the arguments.

Ezorsky makes a distinction between the effects of a *threat* of a punishment and the effects of the *actual* punishment. The threat of punishment is directed to all members of society. It is grounded in the criminal law and is enforced by members of the police, prosecution attorneys, courts, and prisons. There must be a connection between the law and the system of justice for there to be any sort of control in society. As long as the threat of punishment has a restraining effect in regards to criminal conduct, this is called *general deterrence*.

Ezorsky makes three points in her definition of general deterrence. Her first point is the need to take into account the danger of generalization. Distinction must be carefully made in the different types of offenses because they vary in motivation. Any discussion of general deterrence must be in the contexts of norms and an analysis of the deviations from those norms. The second point of her definition is that people react differently. She divides the population into three distinct groups: (1) the good, law-abiding citizens who do not require the threat of law to live by the rules set by society; (2) the criminal group--those who fear the law, but not to the extent that they do not break the law; and (3) the potential criminals who would have broken the law had it not been for the threat of punishment.

There are two problems I find with this categorization. The first is the ability to decipher which individuals fall into which category. Granted, there will be those who are easily categorized, but those who are not—how, and where, do we draw the line? What sort of criteria should be set to pinpoint one individual from another? The second problem is that we are not answering the problem of how to punish those who break the law; rather, we are simply further subdividing the guilty from the innocent. While this may benefit those who have already committed a crime, how will it affect those who are contemplating a life of crime? And more importantly, how will we ever really know who is capable of committing a crime?

The third point offered by Ezorsky is what is called the moral or educative effect of the criminal law. She further states that punishment is not only the artificial creation of a risk of unpleasant consequences, but also a means of expressing social disapproval. Again, I see another potential problem in her analysis. Those individuals who commit crimes, many times, care not about what society thinks of them. They do what they do because of social environments,

insanity, and other reasons that we do not know about. Those who do care what society thinks of them would have been rehabilitated in the penal system anyway.

The second aspect of this dichotomy is called *special deterrence*. This occurs when an individual who has already been punished is still under the threat of the law, yet the motivation for future activities is more complex than before. The difference is that the person knows what it's like to be prosecuted and punished. The threat of punishment has vanished because, if individuals are to commit future crimes, they were not deterred in their actions; the law was not able to conform the individual. Deterrence is in the presence of the actual experience of punishment.

Special deterrence refers to actual punishment and is usually discussed in terms of reform and rehabilitation. *Prima facie* it seems natural for the experience of punishment to strengthen fear. But again, the effect of punishment depends on the individual. First-time offenders are probably going to regret the crime they committed from the very moment they get caught. (Another question to ask is whether or not people would feel guilty if they were never caught.) Now, professional criminals will try to talk their way out of the incident until they realize that is useless and accept the notion they will be punished.

The above description highlights the theory that fear bears, at least in some form, influence on individuals who commit a crime. They realize that they have committed a shameful act, and the incident acts as a moral eye-opener. Most criminals, before arrest, do not think of themselves as criminals, but that notion of breaking the law finally hits home when they are caught. Even if they are not prosecuted or given any form of punishment, they will feel shameful because of the aspect of detection.

Another view of capital punishment is offered by Jerry Cederblom. He acknowledges the two main theories advanced by contemporary debaters of capital punishment: the first being utilitarianism, where punishment is justified by appeal to consequences such as deterrence; and the second, retributivism, which has traditionally appealed to the notion of "just desserts." He believes both of these theories are flawed and attempts to provide a compromise which he calls the Retributive Liability Theory of Punishment. The theory presented by Cederblom contends that it is preferable (on retributive grounds) that harm fall on the guilty. Utilitarians view deterrence simply as a future benefit of punishment; this theory deploys deterrence as a retributive rationale for punishment.

The Retributive Liability Theory (RLT) can be summarized as follows. A person should be punished for an offense only: (1) if the person committed the offense, or (2) if offenses of this kind go unpunished, then more offenses would occur. The punishment should be no more harmful than the intended acts of the individual. The rationale is that the individual has created a situation which

dictates that if the individual is not harmed (by being punished), then harm will fall on some innocent victim (in society).

Considering that RLT does not base punishment on "just desserts," how can it be a retributive theory?

> The answer is that according to RLT it is guilt that justifies punishing an offender, and the predictable harm of an offender's intended act limits the amount of punishment the offender should receive, even though circumstances can allow the amount of punishment within this limit to vary (Cederblom, 307).

In essence, the reasoning behind RLT is in its objective, which is to distribute harm toward the guilty rather than toward the innocent.

In recognizing the advantages of RLT over its rivals, it is also necessary to point out the flaws in this theory. The first problem is that RLT claims that the punishment should be no greater than the intended acts of the offender. How can harm to a victim be measured? Cederblom attempts to compensate for this problem. He states, "A punishment is excessive if the offender would reasonably prefer to suffer the probable consequences of the offense . . . rather than suffer the probable consequences of the punishment" (*Ibid.*, 313).

The second problem is the extent to which punishment actually deters crime. It should also be emphasized that in no way does RLT assert or depend on the proposition that punishment deters crime. Evidence obtained to determine the effectiveness of punishment in deterring crime is unreliable.

Thirdly, how well does RLT answer the question of "Why punish?" We maintain that if an individual commits wrong against another, or to society as a whole, then it is morally preferable to punish that individual. Retributive liability allows the same autonomy as retributivism (our own voluntary acts determine what harm can be inflicted on us), but harm is inflicted only if the result is savings in harm to victims.

It is evident that the issue of capital punishment is complex and intricate in its understanding and comprehension. The future of this form of punishment is unclear because the evidence in favor of it, and against it, is interpreted in different ways that allow proponents or opponents to advance their own views. What also hinders the advance of this debate is that fact that the installation and implementation of capital punishment is inconsistent, for it is abolished, then brought back again. Many factors are taken into account in determining whether or not capital punishment is effective, but I am in complete agreement with Peter Passell when he says, "proof is simply beyond the capacity of empirical social science" (Passell, 79).

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