

**“Passion for Justice”
& “What is Justice”**

Annotations # 2 & 3

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After reading Robert Solomon’s “A Passion for Justice” and the classic and contemporary essays in “What is Justice?” - edited by the same Robert Solomon along with Mark Murphy (Oxford University Press 2000), plus participating in revealing (and animated) seminar discussions, I felt inclined to proffer a few notes and thoughts against capital punishment from a utilitarian point of view.

To do so, I compiled by own feelings into a few major “categories,” and in some instances, complemented my persuasions with relevant passages from several notable essayists included in the latter volume mentioned above.

Economically non-sustainable – Incarceration, despite myriad faults and drawbacks, is less expensive than the court costs associated with the numerous trials and motions, which are inevitable when prosecuting for the death penalty. Estimates suggest a cost of \$31,000 per year to incarcerate a prisoner, but a trial

can cost into the millions when all is said and done – yet the result is no “better” for society.

Does not provide “closure” – Is there any more sense of closure for the victim’s families when the offender is put to death rather than incarcerated? Heather discussed in seminar that: often times, victim’s families aggressively pursue the death penalty for the offender seeking a sense of closure or even vengeance however, after the “event” occurs, they feel no closer to relieved than had the offender not been put to death. It seems to me that grief and trauma counseling for the additional “victims” (ie: families, friends, witnesses) would provide the foundation for emotional rebuilding with a more positive outcome for all the victims of the crime.

Absence of doubt – At what point is guilt absolute? Must there be a confession? How many reliable witness testimonies are required to expunge all doubt? How similar must witness accounts be before doubt? What alibi is considered sufficient? Or must there be factual evidence (i.e. a videotaping) rather than circumstantial evidence? What about a crime in which two people went into a bank, when they came out two people were dead – can we know who killed? What if one person went to the police first and blamed the other and pled as an accomplice but not the “trigger-man”?

Ernest van den Haag offers a (rather chilly in my opinion) view on the burden of proof and on which side should society and the courts error. He says, "I believe we have no right to risk additional future victims of murder for the sake of sparing convicted murders; on the contrary, our moral obligation is to risk the possible ineffectiveness of executions (pg. 276)"

I think that the finality of capital punishment is the penultimate reason for the rigors of due process, and capital punishment requires (at a minimum) a rarely attainable standard of establishment of guilt to even be considered. Certainly the advent of DNA testing, which has exonerated falsely imprisoned offenders (including wrongly convicted murders), is an pertinent example of how the scientific standard for determining innocence or guilt changes with technological advances, and serves as a warning post as to the de facto "infallibility" of the judicial process.

Evolution of society - In his essay "Capital Punishment," Hugo Bedau puts forth, "A system like this does not enhance respect for human life; it cheapens and degrades it. However heinous murder and other crimes are, the system of capital punishment does not compensate for or erase those crimes. It only tends to add new injuries of its own to the catalogue of our inhumanity to each other" (pg. 274).

Both Solomon and Camus contribute to this thought in which the emotional surge for retribution acknowledged but is tempered by the rational arbitrator of law. But first, a bit from the Koran (a heavy “law and order” religious text to say the least) extolling the virtue of mercy by offering a benefit to the kind-hearted, “But if any one remits the retaliation by way of charity, it is an act of atonement for himself.” Though the Koran in the same passage, ordained the taking of a life for a life, eye for an eye, ... Allah (through Mohammed as the story goes), suggests (though faintly), a more civilized way of acting by not choosing revenge.

Camus says (quoted from his essay “Reflections on the Guillotine” as reprinted in “What is Justice”): “Retaliation is related to nature and instinct, not to law. ... If murder is in the nature of man, the law is not intended to imitate or reproduce that nature. It is intended to correct it” (pg 277).

Robert Solomon himself (somewhat “gushingly”) puts forth that, “To transcend revenge is to become keenly aware of the suffering of others with an urgency that eclipse the blows to our own fragile egos and gives our sense of compassion priority over the urge to vengeance” (pg 260).

Burden of the Jury – Starting with the yoke that is the “blood on their hands,” plus the opportunity for intimidation plus internal and/or external coercion are just a few variables cast in with the jury process. Further, the moral quandaries and

turmoil (which may well haunt jurors well past the trial) further extend the offender's circle of influence and creates more tacit victims as it were.

Additionally, the complexities faced by a jury when deciding between "classes" of murder are bewildering and anyone but the most informed are woefully unqualified to arbitrate life. These challenges are described by former US Supreme Court Justice Benjamin Cardozo: (as quoted in Hugo Bedau's "Capital Punishment" in "What is Justice?"). "I am not at all sure that I understand it myself after trying to apply it for many years and after diligent study of what has been written in books. Upon the basis of this fine distinction with its obscure and mystifying psychology, scores of men have gone to their death" (pg. 271).

Former Supreme Court Justice, Thurgood Marshall adds to this point, "In *Furman*, I observed that the American people are largely unaware of the information critical to a judgment on the morality of the death penalty, and concluded that if they were better informed they would consider it shocking, unjust, and unacceptable" (pg 266).

Inconsistency of punishment – At what point is a crime severe enough to warrant capital punishment?

As Hugo Bedau discusses in his essay "Capital Punishment": "In our own recent history, persons have been executed for aggravated assault, rape, kidnapping,

armed robbery, sabotage, and espionage. ... This entails that either such executions are not justified or that they are justified on some ground other than retribution” pg. 270.

How is justice served when one defendant testifies against another in exchange for leniency? Who is to be believed when one accomplice finks on another with an equally plausible story?

Where is “justice” for murderous war-mongers, dictators, or government sponsored assassins who perform a similar action (deliberately causing death to another person) despite the license or authority of a government?

Bedua also quotes an attorney arguing in 1972’s *Furman v. Georgia* as he addresses the inconsistency of the death penalty *vis a vis* the relatively massive overall criminal homicide rate coupled with society’s own tolerance for punishment by pain of death. “It is freakish aberration, a random extreme act of violence, visibly arbitrary and discriminatory – a penalty reserved for unusual application because, if it were usually used, it would affront universally shared standards of public decency” (pg. 273).

Discriminatory – Specifically, capital punishment is more likely to be exacted upon segments of offenders who are represented by overworked or inexperienced counsel, are members of racial minorities, or members of society

who are otherwise unable to leverage their due process for a fair and balanced trial. Though economics is a major stumbling block to gain a quality defense, the disproportionate number of black men executed smacks of yet another serious problem in how “we” decide who is killed.

Again from Bedau’s article “Capital Punishment,” he quotes Supreme Court Justice William O Douglas (discussing *Furman v. Georgia*) “One searches our chronicles in vain for the execution of any member of the affluent strata of society” (pg. 273).

Indeed, contemporary news media provides numerous examples of the wealthy on trial with a phalanx of attorneys defending their honor and liberty – often resulting in commuted, generously pled, or otherwise reduced sentencing.

Public Platform for Offender - While it is beyond the scope of my brief discourse to offer specific case notes and detailed examples; suffice it to say that clearly some murderers (particularly serial killers), seek the public’s attention and media publicity. Such infamous luminaries such as Bundy, Dahmer, Manson, and Ridgway all seemed to seek the public’s infatuation and such deep rooted desire for recognition for their deviant behaviors.

Related to this topic is the awkward feeling of empowering the offender with a public platform for their heinous actions to be recounted over and over again

during the legal proceeding during prosecution for the death penalty. This seems to allow the offender to assert their control over the lives of judges, witnesses, prosecutors, juries and public record by making him/herself the topic and object of most all their activities.

Not a deterrent – In the minority opinion for *Furman v. Georgia*, Supreme Court Justice Thurgood Marshall extolled, “capital punishment is not necessary as a deterrent to crime in our society” (pg. 267).

Justice Marshall also cites a United Nations study which states, “It is generally agreed between the retentionists and abolitionists, whatever their opinions about the validity of comparative studies of deterrence, that the data which now exist show no correlation between the existence of capital punishment and lower rates of capital crime” (266-267).

In conclusion, it seems to me that if it cost society more to kill than not to, and if there is no significant social benefit to killing, than we (speaking as a society), simply should not kill. Rather we should seek alternative punishments and deterrents which emphasize the preciousness of human life instead of propagating a vicious cultural circle of violence in turn for violence.

