

To what extent do modern developments of natural law give a better response to issues surrounding the death penalty?

Aquinas

Aquinas believes in an eternal law, which is the nature of God and cannot be fully understood by humans. God made part of his eternal law known through revelation, such as when he gave Moses 10 commandments, including “Do not kill”. Such revealed law is Divine Law. Humans do not need revelation to know how they should behave – synderesis is an innate principle directing all humans to do good and avoid evil, in which humans partake of the eternal law. Through practical reason, humans can know that our purpose includes to “protect and preserve the innocent”. From the primary precepts of natural law, we derive human laws, which are more specific than the primary precepts, but because of this they may vary in some respects according to different customs, such as which side of the road to drive on.

Natural law allows all humans to agree upon some basic principles that apply universally, such as human rights. All countries agree that murder is wrong. This is a strength of natural law, as consequentialist theories might allow the murder of an innocent person if it led to the greater good. It is clear that human purpose requires an ordered society with fair laws. However, natural law theorists disagree about how to respond when someone behaves unjustly, such as by murdering someone else. We will look at three specific approaches: Aquinas’, Finnis’ and Hoose’s.

Aquinas looks at the nature of the act, and would not justify an evil act based on the common good. However, Aquinas does support capital punishment. Aquinas’ theory holds that the circumstances surrounding an act (not the consequences) affect whether it is right or wrong. For example, it is not intrinsically evil to cut open someone’s chest – you may be a surgeon operating on his heart. In the same way, natural law justifies killing during war. Aquinas also says:

“if any man is dangerous to the community and is subverting it by some sin, the treatment to be commended is his execution in order to preserve the common good.” Summa theologiae 2-2, q. 64, a. 2.

It is clear why it may be necessary for armed police to shoot a terrorist, for example. However, in the same passage, Aquinas goes further than this, suggesting a murderer might lose his value as a human:

“to kill a man who retains his natural worthiness is intrinsically evil, although it may be justifiable to kill a sinner just as it is to kill a beast, for, as Aristotle points out, an evil man is worse than a beast and more harmful.”

Finnis explains Aquinas’ argument for capital punishment as:

“restoring the order of justice violated by the one killed who, moreover, by his violation of justice, his fault, had removed himself from the dignity of the human.” Moral Absolutes: Tradition, Revision and Truth, 56

This response to capital punishment does not fit modern society. It seems vindictive, and treats criminals as less than human. It seems to contradict the central theme of natural law – how can execution fulfil a person’s God-given nature? Peter Black argues (citing Germain Grisez):

“the direct taking of a human life, even though it be a guilty human life, is a direct attack against a basic human good and cannot in fact be rendered a right act because of any circumstances.”
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However, in the Old Testament, Moses taught “an eye for an eye, a tooth for a tooth, a life for a life.” As Aquinas believed Divine Law would not contradict Natural Law, he may have been influenced by scriptures. Aquinas can be seen as arguing that an ordered human society needs capital punishment to deter wrongdoers, and that we need capital punishment to protect and preserve innocent life.

Finnis

According to John Lamont, Finnis is completely opposed to capital punishment, summarising as follows:

“human life is a basic good; acting against a basic good is always wrong; so the deliberate taking of human life is always wrong. He uses this reasoning to argue that capital punishment is immoral. He realises that this conclusion is not that of Christian tradition, but argues that it is a development of doctrine.” Finnis and Aquinas on the Good Life, p3

Finnis believes that Natural Law forms the basis of human law in society. He holds that the basic goods are self evident (“a set of basic practical principles which indicate the basic forms of human flourishing as goods to be pursued and realized”), and the purpose of law is to allow people to work together for the common good. He says:

“A theory of natural law claims to be able to identify conditions and principles of practical right-mindedness, of good and proper order among persons, and in individual conduct.” Natural Law and Natural Rights, p18

Finnis claims that the principles of natural law require that:

“authority be exercised, in most circumstances, according to the manner conveniently labelled the Rule of Law, and with due respect for the human rights which embody the requirements of justice, and for the purpose of promoting a common good in which such respect for rights is a component.” ibid, p23

Finnis believes the role of punishment is often to maintain a rational order of fairness in society. Criminals gain an unfair advantage through crime. Finnis says:

“Punishment does not negate the crime, but it does negate, cancel out, the advantage the offender gained in the crime.” Natural Law and the Ethics of Discourse, p102

This is straightforward in the case of theft, but with other crimes, Finnis talks about the self-indulgence of criminals, and the advantage “of having pursued one’s own purposes even when the law required one to refrain from doing so.” Finnis is among those who are labelled ‘desert-focussed retributivists’, meaning that he believes criminals deserve punishment, and that retribution is one of the main reasons why we punish criminals.

Punishments are different from damages that are awarded when someone breaks a contract. Putting someone in jail doesn’t give anything back to the person who was wronged, but it does restore the disruption of society’s moral order. It is the unfairness to society as a whole that is sorted out by desert-focussed retributivist punishment. In terms of the death penalty, Finnis is opposed to it and sees it as one option among many:

“Penalties must be chosen by the judge from a range... there is no ‘natural,’ i.e. rational, requirement that murder, even the most atrocious, be punished capitally.” Ibid, p103

It is important to note that desert-focussed retribution is not revenge. It is carried out on behalf of the community as a whole, so it is more a form of impersonal justice.

Finnis sees human life as a basic good, and believes it is intrinsically wrong to intend to harm a basic good. He would support allowing killing in warfare, because the intention is not to kill enemy combatants. Consider the case of a battle after which some of the enemy surrender. It is expected that soldiers will try to kill the opposing side while fighting, as their intention is to protect their country. However, we would consider it monstrous if they opened fire on the surrendered enemy soldiers. The intent was never to kill them, just to protect our society. In the same way, it might be necessary to kill a murderer whilst he tries to take another victim, but completely unnecessary and contrary to basic goods to kill him in cold blood.

Proportionalism

A Proportionalist would consider the death penalty an 'ontic' evil. This is something that is wrong in a 'pre-moral' or 'non-moral' sense. For example, it is wrong to cut someone's leg off. However, we wouldn't say of a doctor "He performed the amputation, which was wrong, but the fact he saved the man's life as a result makes up for it." We would say it wasn't actually morally wrong to perform the amputation.

Proportionalists would support the death penalty if they believed that capital punishment was proportionate. They could argue for the death penalty on a number of grounds, claiming that each of these aims of punishment might justify capital punishment:

1. Retribution

Above, we learned that Finnis believes a murderer should be severely punished to restore moral order. A life in prison would be a suitable option. The death penalty has the drawback that some people will be unfairly executed. 144 people on death row have been exonerated since 1973. The National Academy of Science suggested one in 25 people executed are innocent. As such, life imprisonment is preferable. If innocent people are repeatedly being executed, this does not restore moral order. A proportionalist might disagree with Finnis, because an individual case might justify the use of capital punishment. For example, in extreme cases such as a terror attack where many people were killed and there is a public outcry for retributivist justice, a proportionalist may support the death penalty.

2. Deterrence

It is also claimed that capital punishment deters potential murderers. As such, proportionalists could see the death penalty as useful in establishing the common good for society. It would depend on the situation. Crimes of passion are not carried out rationally, so it is very unlikely that the death penalty would have any deterrent effect on these crimes. However, gangland executions or drug trafficking may be different. There are criminals who would think twice about smuggling drugs into countries where drug smuggling carries a death penalty. Studies argue this both ways, and are inconclusive. Proportionalists would not be in principle against the death penalty as a form of deterrence, but might argue that other serious punishments are as likely to deter someone from carrying out a premeditated serious crime.

3. Protection

Another argument is that the death penalty may be necessary in order to keep society safe from the most violent criminals. In fact, this is the only argument the Catholic Church currently gives to justify capital punishment:

"Today, in fact, as a consequence of the possibilities which the state has for effectively preventing crime, by rendering one who has committed an offence incapable of doing harm--without definitively taking away from him the possibility of redeeming himself--the cases in which the execution of the offender is an absolute necessity are rare, if not practically non-existent." Pope John Paul II, The Gospel of Life

Conclusion

Aquinas gives a weak argument that a sinner loses his natural worthiness, and can therefore justifiably be killed. Finnis gives a much stronger argument that capital punishment is contrary to basic moral goods. These goods are intrinsically valuable, so there is no way to justify the deliberate taking of a human life. Proportionalists like Bernard Hoare would look at the aims of punishment – retribution, deterrence, protection, vindication, reparation and reformation. Whilst they would agree with the idea that murderers still have human rights, they would judge each situation on its own merits – if there was a proportionate argument for the death penalty, they would consider it. For example, following a terror attack, it may be necessary to take swift action to remove a perceived threat and restore confidence and order. The Proportionalist position seems stronger, as it is more coherent than Aquinas', but more flexible than Finnis'.

Aquinas

Brief summary of his position on capital punishment

Evaluation of this position

Finnis

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Proportionalism – Bernard Hoose

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