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Thumbs Up for Retribution: Capital Punishment, Neuroscience, and Culture

Introduction

The American criminal justice system does not exist apart from society; how we conceive criminality and how we punish criminals institutionalizes certain philosophical assumptions and intuitions about human nature and free will. Philosophical justifications for punishment can be bifurcated into the consequentialist and deontological ethical categories, the former including utilitarian rationales such as deterrence, incapacitation and rehabilitation, and the latter theories of retribution (retributive justice). The closely related question of free will can be likewise distributed into “libertarian,” “compatibilist” and “determinist” frameworks. An intractable relationship emerges between retributive justice and libertarian free will, owing to their shared inheritance from Cartesian dualism. America’s criminal justice system is eclectic, but capital punishment emerges as a potent symbol and endorsement of retributive justice, and its power extends to American society, reifying intuitive assumptions through cultural texts. Moreover, vast scholarship demonstrates that the utilitarian rationales for punishment offer insufficient support for capital punishment, and mounting EEG and fMRI evidence from the field of cognitive neuroscience likewise undermines—through its inextricable link to libertarian free will and dualism—the deontological theory of retribution. Although capital punishment becomes wanting of philosophical justification, it maintains immense power as a cultural symbol. Scholars have observed that America’s approach to criminal justice differs dramatically from most European nations; popular culture helps explain this unexpected disagreement. An analysis of the early American literature of Charles Brockden Brown and the modern cinema of Quentin

Tarantino, exemplifies the trend in American popular culture towards heightened retributive instincts. The abstract and symbolic—as well as philosophically unsound—institution of capital punishment thus radiates into American culture, impacting society concretely, and reinforcing negative intuitions and frames of mind that create new, and exacerbate old, sources of inter-group conflict.

Terminology

There are many different justifications for punishment, ranging from deterrence to revenge. Justifications can be grouped into the philosophical categories of consequentialism and deontology. Usually, these two ethical systems work at cross purposes and are opposed to one another (Stanford Encyclopedia of Philosophy). For deontological theories, the moral value of an action is intrinsic to the action itself. Deontology, in other words, is concerned with how an action is carried out. In contrast, consequentialist theories calculate moral worth in terms of what the action produces; they are more concerned with outcome and consequence. As a result, consequentialist justifications for punishment, such as incapacitation or deterrence, function to promote favorable ends in the future, such as “social welfare” (Greene and Cohen 1775). On the other hand, deontological theories, like retribution or retributive justice, do not simply view punishment as a means to a desirable end, but instead assert that wrongdoers deserve to be punished (Stanford Encyclopedia of Philosophy). Consistent evidence from social psychology suggests, moreover, that people on average intuitively tend toward retributive justifications over consequentialist ones (Fousiania et al 875). Neuroscientists Joshua Green and Jonathan Cohen agree, claiming that “retributivism captures the intuitive idea that we legitimately punish to give people what they deserve for their behavior” (1777). Even still, proponents of capital punishment

invoke arguments from both deontology and consequentialism, so both systems need to be interrogated.

Deontology and consequentialism are not the only philosophical theories relevant to the discussion of punishment, however, and it will be useful to clarify what is meant by “free will.” Both philosophers and neuroscientists approach the question of free will according to three positions: “libertarianism,” “compatibilism” and “determinism” (Greene and Cohen 1776, Harris 15). Libertarianism asserts that free will exists, and that humans govern their behavior through “agency” (Harris 15). Libertarianism and determinism, therefore, are not friends. According to Greene and Cohen, libertarianism is also closely linked to a dualistic (mind/body) conception of cognition (1775, 1779). This relationship is important for questions of punishment, they argue, because judges and juries often want to know if a criminal has a “mens rea,” or “guilty mind” (1775). Both libertarianism and dualism, moreover, become important foundations for the retributive justification for capital punishment. In contrast to these theories are compatibilism and determinism, which both assert that prior events determine human behavior (Harris 15). Unlike “determinists,” compatibilists do not believe that determinism precludes free will, and assert that people retain it so long as they possess “freedom from coercion” and “the ability to choose otherwise” when making decisions. (Vervoort and Blusiewicz 358). In response to evidence from neuroscience that challenges libertarianism and dualism, compatibilism is rapidly becoming the preference for philosophers and neuroscientists (Fischborn 495). These questions are especially relevant for the discussion of capital punishment due to their implications for retributivism.

Analysis of Justifications for Capital Punishment
Incapacitation and deterrence

“It is probable that in early times the penalties for the greatest offenses were less severe, and that, as these were disregarded, the penalty of death has been by degrees in most cases arrived at, which is itself disregarded in like manner. Either then some means of terror more terrible than this must be discovered, or it must be admitted that this restraint is useless; and that as long as poverty gives men the courage of necessity, or plenty fills them with the ambition which belongs to insolence and pride, and each of the other conditions of life remains subjugated to some fatal and master passion, so long will the impulse never be wanting to drive men into danger.”

(Thucydides, 481)

That was 435 BCE, during one of the Peloponnesian wars of Ancient Greece. Diodotus, the speaker addresses an Athenian assembly as to the most effective punishment to impose on the insurrectionist city of Mytilene (481). The severity of the crime is clear to everyone present; the Mytileneans are violent traitors and guilty of war crimes—they are people who threaten the health of the Athenian empire and their position in the war against Sparta (481). Even still, Diodotus, whose argument “wins the day,” argues that the Mytileneans should be spared (481). His speech raises two important challenges to deterrence-based justifications for capital punishment. On one hand, he points out that the logic of deterrence can be used to justify absurd conclusions, such as “more terrible” punishments that make a mockery of human dignity (481). He also argues that it is a mistake to assume all people engage in cost/benefit analysis prior to crime, and he recognizes that factors like “poverty” and “master passion” influence people’s behavior (481). To Diodotus, then, human volition is not a given, and people are vulnerable to external constraints.

Moreover, contemporary scholarship also demonstrates that capital punishment offers no deterrence to violent crime. In their analysis of the deterrence effect of capital punishment in America, for instance, Braswell et al assert that institutions do not even meet the criteria of “deterrent theory” (198). Deterrence usually requires a balance of “certain,” speediness and “severity,” but, owing to procedural holdups, American capital punishment is neither “quick” nor “certain” (198). Braswell et al also extend Hugo A. Bedau’s analysis of various American states, which suggests that capital punishment has no effect on crime rates (Braswell et al 198, Bedau 462-3). Even proponents of capital punishment have begun to avoid using deterrence as an argument for death. Pro-death penalty scholar Peter Barry, opting instead for retributivism, maintains that because “coercive circumstances” preclude rational planning, deterrence is an inadequate justification (261). Although deterrence is important historically, therefore, it is not a sufficient justification for capital punishment.

As a justification for capital punishment, incapacitation is even older than deterrence, but unlike deterrence it is still frequently invoked. Legal scholar Deborah Denno, for instance, reports that prosecutors in capital trials frequently invoke “future dangerousness” as an “aggravating factor” for the sentence of death (526). As a justification, incapacitation is not fundamentally flawed, but it has lost its relevance for capital punishment over time. Indeed, Braswell et al emphasize that while in ancient times death might have been the only available means of incapacitation, it is no longer needed in a world full of prisons and life-without-parole (199, 209). In other words, incapacitation legitimized capital punishment in some historical moments, but not all. Presently, if conceived as an apparatus of incapacitation, capital punishment is at best superfluous and at worst immoral. Another serious problem with the incapacitation rationale is that it often morphs into what legal scholar Joshua Kleinfeld calls

“banishment, including punishments like life-without parole and death (949). To Kleinfeld, “banishment is the sign that a system of punishment has decided that the offender is an ‘other’ who must be excluded” (949). This process thus provides a space in which criminals can be thought of as evil and out-group prejudice can be exercised, all of which provides fuel for retributivism

Retributivism, Free Will, and Neuroscience

Since neither incapacitation or deterrence (the principal consequentialist justifications) offer support for capital punishment, retributivism is the only likely defense remaining. Although retributive theories vary, they for the most part demand that a criminal be punished because they deserve to be punished (Stanford Encyclopedia of Philosophy). To Immanuel Kant, this deservingness derives from the criminal’s “internal wickedness”; to Peter Barry, it comes from “evil” (Greene and Cohen 1777, Barry 246). Of course, no definition of “evil,” which also seems to be what Kant is getting at, holds up to serious scrutiny.” The bigger problem for retributivism, however, is that growing EEG and fMRI evidence from the field of cognitive brain science poses a serious threat to libertarian free will and dualism. Neuroscience, as Deborah Denno points out, already figures prominently in capital punishment sentencing (493). While that particular kind of neuroscience evidence typically involves cognitive deficits, newer findings—following Benjamin Libet’s flagship 1983 study—suggests that volition itself may be fundamentally constrained. Conclusions from neuroscience do not threaten to undermine individual or moral responsibility, as is commonly supposed, but mainly cause problems for libertarianism, dualism and retributivism.

The source of much controversy and debate, Benjamin Libet’s infamous experiment has been widely replicated and has fundamentally altered the way many philosophers and

neuroscientists understand volition. Following a clock, participants in Libet's study recorded the time at which they "decided" to make a finger movement, while electroencephalography (EEG) monitored the person's brain activity (Vervoort and Blasiewicz 358). Shockingly, Libet found that brain activity related to movement—"readiness potential"—preceded the participant's own "conscious awareness" (358). In other words, brain activity related to the participant's movement began to occur before they became aware of the intention. Since 1983, numerous "Libet-style" experiments have replicated this unintuitive finding (Matsushashi and Hallett 2344). While some overzealous determinists like Sam Harris have been quick to conclude that free will is a complete illusion, other scholars like Marc van Duijn and Sacha Bem argue for more caution (700). Karim Fiedel further suggests that Libet's experiment is limited and that the results cannot justify conclusions about free will (786). He evaluates the studies of Alexander et al (2016) and SchulteKraft et al (2016), and concludes that "pre movement RP [readiness potential] is not sufficient for the enactment of a motor action (786). Marcel Fischborn, Eddie Nahmias and Adina Roskies all agree that "Libet-style" experiments do not yet offer the kind of evidence that determinists like Sam Harris, Joshua Greene and Jonathan Cohen suppose (Fischborn, 495, Roskies and Nahmias 186). Even still, Fischborn acknowledges (although Roskies and Nahmias disagree) 9 that "neuroscience... in principle, can establish moderate determinist claims" (495). Neuroscience has indeed set this precedent, and research continues to bolster it.

Most of this debate has centered on determinism, but libertarian free will is on even shakier ground. Eddy Nahmias and Adina Roskies check Fischbein's argument—and do so fairly well—that attempts to draw a line from "Libet-style evidence" to "modest determinist claims" (Fischbein 495, Roskies and Nahmias 191). What Roskies and Nahmias do acknowledge, however, is that there is a real potential challenge of "physicalism" and "epiphenomenalism,"

which assert that conscious thought is caused by brain activities and that dualism is false (194). Philosophers Louis Vervoort and Tomasz Blasiewicz address the question of physicalism in depth, responding to the arguments of the prominent dualist and libertarian Christof Koch (350). They conclude that when viewed in combination with the absence of evidence for an “immaterial mind,” the precedent set by Libet cannot be adequately answered by libertarians like Koch (350). The only options remaining for free will, therefore, are compatibilism and determinism. With the foundations of dualism and libertarianism sufficiently rattled, it is now evident that retributivism is fundamentally problematic. Capital punishment, therefore, finds no support in either the consequentialist or deontological camps.

Although sometimes contrary to our intuitions, the disillusion of libertarian free will need not be daunting. Neuroscientist Richard Passingham argues that “the fact that awareness follows subliminal activity in the brain does not change the fact that they are generated by my brain” (94). “It is no longer ‘me’ or ‘my brain,’ it is simply ‘me’ (94). Importantly, although neuroscience can now help explain how volition works, it will not change how we experience it. The Earth, for instance, is currently spinning rapidly through space, but we do not experience the world that way. However, when the serious question of how to deal with criminals arises—or when we simply must process violent or distressing crimes—it may be productive to foreground the limitations to volition that neuroscience suggests. One of Sam Harris’ most compelling theses is that a change in our “moral intuitions” could increase empathy (54). As far as criminals go, Harris concludes that “we may not hate him or condemn him as evil” (54). The practical consequences of this idea become important when considering the survival of capital punishment in American culture, despite its philosophical indefensibility.

Culture

“April 4th, 1984. Last night to the flicks. All war films. One very good one of a ship full of refugees being bombed somewhere in the Mediterranean. Audience much amused by shots of a great huge man trying to swim away with a helicopter after him. First you saw him wallowing along in the water like a porpoise, then you saw him through the helicopters gunsights, then he was full of holes and the sea round him turned pink and he sank as suddenly as though the holes had let in the water. Audience shouting with laughter when he sank.” (Orwell 9).

Here we have one of the more grotesque and exaggerated passages from George Orwell’s dystopian novel 1984. Winston Smith, the protagonist, reflects on the cinematic slaughter of the enemies of his home country “Oceania” (9). Throughout the novel, all foreigners are thoroughly abstracted, othered, and made objects of hate. In his forward to the 2003 edition, Thomas Pynchon quips that “there is a game critics like to play... in which one makes lists of what Orwell did and didn’t ‘get right.’” (xv). If we were to humor Pynchon, a quick glance at 11 Winston’s synopsis of the cartoonish “war film” would seem to place it squarely in the “didn’t” group. When Winston’s description is compared to popular American cinema, however, certain similarities become difficult to ignore. Suddenly, our top-grossing genre films, like thriller and horror, do not seem so far away from Oceania’s. In contrast, Michel Foucault, observing the transformation of French criminal justice after the Enlightenment, commented that “we are now far away from the country of tortures, dotted with wheels, gibbets, gallows, pillories” (307). Execution had become a site of shame, so “the guillotine was brought indoors” and “capital

punishment fundamentally remains... a spectacle that is actually forbidden” (16). It is true that federally-sanctioned execution no longer takes place in the public eye, but it seems Foucault did not anticipate the extent to which punishment “festivals” would survive through cultural creations like film. The high-grossing thrillers of Quentin Tarantino particularly exemplify the copious indulgence in retributive justice that heralds the survival of Medieval views toward punishment. His 2019 *Once Upon A Time In Hollywood*, for example, tells a revisionist tale of Hollywood in the 1960s, centered on the life of Sharon Tate (Tarantino). Of course, Tarantino ought to be praised for his creative use of historical revisionism and unique narrative framing. He initially presents a compelling film of witness, foregrounding the tragic murder of Sharon Tate and others, while at the same time contemplating what her life could have led to in other circumstances (ibid). Despite his creativity and skill as a director, however, the film violently climaxes with the gratuitous, on-screen slaughter of the historical perpetrators of the “Manson murders.” The violence is excessive and cartoonish; Brad Pitt’s character directs his pitbull to tear into the criminals, who are afterward bludgeoned by Pitt. The scene climaxes with the 12 comedically-timed flamethrowing of the final criminal by Leonard DiCaprio (ibid). Even more shocking, this execution occurs right after the criminals swap acid trip stories in their car (ibid). It is as if Tarantino deliberately offers potential mitigating factors, only to kill them anyway. Any attempt to give these characters nuance is quickly overturned by the retributive finish. The film, formerly centered on Sharon Tate, now gives way to a spectacle of killers. Instead of a film that bears witness to a life that could have been, the film indulges in an execution that never was, and glorifies the perpetrators over the victims. Tarantino’s flat villain characters reflect a problematic view of criminals that many Americans seem to hold, and which his films undoubtedly help to perpetuate. In his comparative analysis of European and American “cultures of punishment,”

Joshua Kleinfeld highlights their divergence in terms of punishment severity and justification (935). America, for instance, is more likely to treat their criminals as “evil” or “immutable,” and to choose punishments that effectively “banish” the criminal from society (944). There is no doubt that Tarantino’s representation of villains reflects these discordant intuitions. America, says Kleinfeld, typically imposes “actor-oriented” punishment” (977). Foucault observed a similar trajectory after the Enlightenment: “judges have gradually [...] taken to judging something other than crimes, namely, the ‘soul’ of the criminal” (19). We thus arrive back at the question of dualism and libertarian free will, which Tarantino seems to assume. The example of *Once Upon A Time In Hollywood* foregrounds the survival of the dualistically-informed retributive justice in culture. Film does not accomplish this feat alone, moreover, and always has support from the notion of federal-sanction, not just federally-sanctioned capital punishment, but federally-sanctioned retributivism. 13 It is worth noting that America did not always inhabit this vengeful frame of mind; Orwell’s anticipation was not inevitable. Kleinfeld emphasizes that America experienced a significant change in how it approaches criminality, at one point being a “leader” in humane punishment but eventually becoming much more severe than “countries with which it is typically associated” (937). In the late eighteenth and early nineteenth centuries, for instance, the literature of an America fresh with Enlightenment ideals offered a very different view of punishment. Charles Brockden Brown’s popular *Edgar Huntly* or *Memoirs of a Sleep-Walker*, creates a dialogue between crime and physiology. Before the field of neuroscience even existed, Brown questions the extent of volition, especially in a criminal context. There are criminals, murderers, and simply cruel people in the novel, but Brown does not condemn them as fundamentally evil, and he avoids outright caricatures. In the case of one of the central figures, the villainous Clithero Edny, Brown exposes the readers to his backstory and encourages reader

sympathy (32). As a backdrop to Clithero's wrongdoing, Brown plagues the character with physiological impediments to volition, e.g. sleepwalking and chronic delirium (45). Acting as a narrator, the protagonist Edgar evaluates both physiology and volition, observing that his "brain seemed to suffer some severe constriction" (46). When he shares his personal history with Edgar (the protagonist), Clithero himself invokes a sort of automatism: "I was impelled by an unconscious necessity... had the assailant been my father the consequence would have been the same" (52). Such descriptions cohere with modern evidence from neuroscience, and it becomes difficult to determine what exactly precipitates Clithero's often criminal actions. Clithero certainly can be found individually and morally responsible for his actions, but it no longer seems to be the case that his "mind" is the conscious initiator. Through the useful medium of fiction, Edgar Huntly 14 offers a hypothetical space where the contemporary findings from neuroscience can be interrogated alongside questions of justice and free will. In contrast to *Once Upon A Time In Hollywood*, Brown's novel offers a nuanced representation of criminality which acknowledges the reality of volitional constraints.

Conclusion

Philosophically, the institution of capital punishment in America does not stand up to scrutiny. Consequentialist defenses cannot be reconciled with the available scholarship, and neuroscience has fundamentally destabilized the deontological position. Despite this shaky position, capital punishment persists in America, and its retributive instincts circulate throughout society and culture, finding life in cultural texts. This durability of retributivism is alarming, and merely functions to inflame brain processes conducive to prejudice. Just as we naturally display an aversion to difference and display prejudice towards out-groups, retributive justice provokes us to cast criminals in like manner. It is important to become conscious of our problematic

intuitions —our pitfalls to empathy—in order to mitigate their negative effect. As it stands, capital punishment offers an endorsement of these unproductive habits of mind, and cultural creations reinforce them. This is not a problem with violent film *per se*, but rather films that open up discourses of punishment, only to justify the violent execution of the “evil” and “hated” criminal. This is a significant deviation from the more prosocial views America has entertained in the past, and it is important to reverse this trend yet again, starting with abolition of the death penalty.

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