

Philosophy 104, Ethics, Queens College, Spring 2006  
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Lecture Notes, May 8

I. Quiz: How does a utilitarian defend punishment, generally?

II. Utilitarian defenses of capital punishment, Part I: Deterrence of others, continued

Last week, we say that van den Haag and Reiman disagree about a common sense defense of deterrence. Van den Haag argues that capital punishment must deter. Reiman responds in several ways, which we discussed.

Here is another a priori consideration, at which van den Haag hints.

The Best-Bet argument: It is better to play with murderer's lives, than with those of innocent people.

Let's assume that we don't know whether capital punishment really serves as a deterrent, but that if it were a deterrent, it would be morally acceptable.

We can either have capital punishment or not have capital punishment, and it can serve as a deterrent, or not. This yields four cases.

In two of those cases, there is a basic error in trying to use deterrence as a justification.

If we have capital punishment and there is a deterrent effect, and if we don't have it and there's no deterrent effect, there are no errors.

But if we have capital punishment and there is no deterrent effect, we unnecessarily kill some criminals.

And if we fail to have capital punishment and there would be a deterrent effect in having it, we unnecessarily allow some people to die, viz. the victims of those who would have been deterred had the death penalty been in effect.

The best-bet argument, then, is that it's better to have capital punishment, since the error would lead to the deaths of people convicted of capital crimes, whereas if we failed to have capital punishment the error would lead to the deaths of innocent people.

Note that the Best-Bet argument may smuggle in a retributive aspect to the defense of the death penalty. We feel it appropriate, only if the person in some sense deserves it.

Also note that this kind of error is different than the practical errors of implementation.

We may make mistakes and execute innocents.

van den Haag rejects the mistaken execution of innocents as a reason for abolition, anyway, p 133.

He's looking, appropriately, for a theoretical justification, separating the problems of implementation.

Thus, his emphasis on the irrelevance of maldistribution, 133.

van den Haag's defense of the Best-Bet Argument, 143.

A possible response to the Best-Bet Argument:

The *Acts and Omissions Doctrine* says that it is worse to cause harm, than to fail to act to prevent harm.

Remember the trolley car example.

Applying Acts and Omissions to the Best Bet argument, we observe that even if a few lives could be saved by retaining the death penalty, we must not use it, because then we are actively killing some one.

It may be that some innocent lives are lost, victims of those who would be deterred by the harsher punishment, but we are not actively killing them.

Remember Kant's counsel to get your own moral house in order; we are not responsible for the acts of others, only our own acts.

The Acts and Omissions doctrine is unavailable to a utilitarian.

The utilitarian just looks to maximize happiness, by whatever means possible.

If this means acting, then act; if this means omitting, then omit.

If we conclude that a particular punishment is too severe, regardless of its utility, then we are rejecting utilitarianism, in favor of acts and omissions.

We are saying that it is better not to act, despite the benefits of acting.

If we choose Acts and Omissions, we are rejecting the assumption of the Best-Bet argument that capital punishment would be justified if it did, in fact, deter.

A utilitarian who wants to defend capital punishment can't rely on acts and omissions doctrine.

In the absence of conclusive evidence about the deterrent effect, the Best Bet Argument seems to yield an a priori utilitarian argument for capital punishment.

Reiman argues that the deterrent effect is nil, so the best-bet argument is moot.

He urges, more generally, that we should not argue a priori in such important matters.

We should look to the evidence.

He urges that since there is no clear evidence of the deterrent effect on others, we can not support the death penalty on this basis.

A retributivist, like Perlmutter, thinks the deterrence question is irrelevant, of course.

Deterrence by itself can not be a sufficient defense.

For, deterrence might justify executing an innocent person

Perhaps the other two strategies can support capital punishment.

### III. Utilitarian defenses of capital punishment, Part II: Deterrence of offender

Certainly, capital punishment deters the executed criminal.

But there are easier, less severe ways of doing this, ones that create less pain.

A utilitarian wants to minimize pain.

Reiman points out that capital punishment involves submission and psychological pain, pp 137-138.

van den Haag thinks that life imprisonment causes more pain, even though it is preferred, p 144.

Stewart, quoting Powell, in Furman, p 118, says we can not abolish capital punishment just because lesser punishments may suffice.

Depending on how we interpret the needs of penology, this may be a defense of retributive punishment.

### IV. Utilitarian defenses of capital punishment, Part III: General social benefits

Most importantly, some people claim that capital punishment prevents vigilantism and anarchy.

Stewart claims, in Furman, that people generally believe that some crimes deserve death, p 124 (in Perlmutter's article.)

This amounts to the claim that people want revenge, and so we had better give it to them, lest they act on their own.

Blood thirst does not seem an appropriate defense of social policy.

It is irrational, emotional behavior.

It may be understandable, but it should not be the basis for public policy.

See Marshall, 121, on popular support.

We should comfort the victims, but this can't be the only way to achieve finality, closure, and acceptance

## V. Utilitarian defenses of capital punishment, summary

The utilitarian focuses on deterrence, but there's no clear deterrent effect.  
So, he can rely on commonsense reasoning, and the best-bet argument.  
The common sense argument isn't very compelling, as Reiman noted.  
If we are going to execute some one, we should have real evidence of the benefits.

Any benefits have to be weighed against the bad consequences of capital punishment:  
Effects on the condemned's family, who are innocent.  
Effects on executioners.  
Inculcating bloodlust in our society.

Given the failure of the three strategies to support capital punishment, except on an a priori basis, it looks like the utilitarian can not really defend the death penalty.

Recall also that there are basic problems with utilitarian defenses of punishment, in general.  
Punishment necessarily entails harming the wrongdoer.  
Harm involves increase of pain, or decrease in pleasure.  
Utilitarians want to increase pleasure, and decrease pain.  
So, the only possible utilitarian defense of punishment is one where the long-term benefits outweigh the short-term harms.  
But, it's possible, in any particular case, that there will be no long-term benefits.  
Consider un-reformable prisoners, and stubborn children.  
If we are utilitarians, we should adjust our standards: reform, rather than punish.  
We do, in many cases, shift from criminality analyses to mental/emotional problem analysis.  
When behavior is caused by mental or emotional defect, such as addiction, then we do not consider the person responsible.  
Further, for the utilitarian, the person punished need not even have committed a crime.

Still, it is unlikely that we would abandon the notion of punishment altogether.  
We only believe that we can punish when the person is responsible.  
Remember that to deter crime, we may not need to punish the guilty.  
We can punish any one, to set an example.  
The basic problem with utilitarian defenses of capital punishment is that utilitarians look to reform, protection, and deterrence as justification, but these are not the essence of punishment, which must be backwards-looking, p 127.  
So, let's look at the retributive case for capital punishment.

## VI. Retributive, or Kantian, justifications of capital punishment

The retributive defense concerns desert.  
Lex talionis: the punishment must fit the crime.  
Perlmutter, a retributivist, argues that wrongdoers deserve their punishment.  
Indeed it is their right, and interest, to be punished, p 129.  
It is in their interests to be treated as members of the moral community.  
This is an Hegelian, or Kantian, notion.  
Recall that for Kant, the essence of morality is universalization.  
So, if a person murders, he is actually willing his own death.

Call this 'eye-for-an-eye' policy a 'strict lex talionis'.  
Van den Haag discusses this.

The strict policy has no obvious application for people who commit multiple murders, or poke out three eyes. Further, it is too severe, since we do not want to rape the rapist. The question is whether capital punishment is too severe, as well.

We have a problem, for the retributivist, in the absence of a strict *lex talionis*, of how to match punishments to crimes.

Imagine two lists, one of crimes and one of punishments, each ordered serially.

(Ignore the problems here of ranking crimes, e.g. whether grand larceny or minor assault is worse.)

The question is how to match the punishments with the crimes.

Surely there are punishments beyond which one can not, morally, abide.

E.g. raping the rapist, cutting off limbs, torture.

The Eighth Amendment to the U.S. Constitution prohibits cruel and unusual punishment.

This just embodies our intuition that certain punishments are too severe.

The big question becomes where to draw the line between acceptable punishments, and ones which we will not allow.