

Philosophy 104, Ethics, Queens College, Spring 2005
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Lecture Notes, May 9

I. Punishment, generally

We saw last week that punishment can be justified in either forward-looking (utilitarian) or backward-looking (retributive, or Kantian) ways.

van den Haag writes, "Punishment is to vindicate the law and the social order undermined by the crime," p 134.

Is this backwards-looking or forwards-looking?

In practice, we balance the two types of justifications, imperfectly, in laws.

Now, we'll apply this general strategy to the specific case of capital punishment.

First, we separate retributive justifications and utilitarian ones.

Then, we'll look to a resolution.

II. Utilitarian defenses of capital punishment:

Utilitarian defenses of punishment focus on deterrent of others, deterrent of self, and general social benefits.

We examine these three cases in turn.

1) Deterrence of others.

The Court (Stewart) says whether capital punishment deters is inconclusive, p 119.

Marshall quotes the UN on the lack of evidence of deterrence, p 121.

Van den Haag concedes that there is no clear deterrent effect.

But he thinks that it creates a more subtle kind of deterrence, establishing social norms, pp 133-134.

Also, he argues that common sense tells us that it must deter.

This is a kind of a priori argument, an argument independent of the evidence.

Reiman rejects the common sense argument, p 139:

1. The less feared penalty may already deter all who can be deterred.

2. Criminals already face a substantial risk of death die while committing their crimes.

3. Any social norms that might be created by instituting a death penalty might better be set by refusing to execute even the most heinous criminals.

van den Haag says that this argument is vague and unpersuasive, p 143.

4. If the more feared penalty deters more, then we should torture prisoners, but we don't want to do that.

Here's another a priori consideration.

Consider the Best-Bet argument: It's 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 a 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 matters.

We should look to the evidence.