

COMMENTARY

THE FUTILE DEBATE OVER THE MORALITY OF THE DEATH PENALTY: A CRITICAL COMMENTARY ON THE STEIKER AND SUNSTEIN-VERMEULE DEBATE

by
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The current issue of the Stanford Law Review reveals (or at least may spark) a surprising resurgence of interest in the morality of the death penalty, an interest different from the empirical inquiry into the effectiveness and reliability of capital punishment as a penological tool. With her deontological moral outlook, noted abolitionist Professor Carol Steiker takes aim at Professors Cass Sunstein and Adrian Vermeule's consequentialist argument that if recent studies showing the significant deterrent impact of the death penalty are valid, then we are morally bound to accept capital punishment as a government crime-fighting tool. I contend that a deontological critique of the Sunstein-Vermeule claim, which is rooted in consequentialist ethics, must fail when it comes to the moral question of capital punishment.

Steiker's effort to debunk Sunstein and Vermeule's bold contention nicely illuminates why abstract moral theorizing is futile when it comes to capital punishment. She agrees with Sunstein and Vermeule that we must abandon the act-omission distinction when it comes to evaluating the moral worthiness of government policy options. I show that Steiker's concession to abandon the act-omission distinction—a distinction crucial to deontology—dooms her critique of Sunstein and Vermeule's consequentialist claim that the death penalty is morally obligatory. I also show that Sunstein and Vermeule's argument is pure question-begging, that their collapse of the act-omission distinction to drive their moral argument smuggles in the unproved assumption that the death penalty is already morally justified. The lesson here is that moral claims about the death penalty arising from a deontological or consequentialist

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foundation inevitably collapse under the weight of real life. This 6,000-word article calls for continued focus on the realities of the death penalty as a practice, and thus discourages futile argumentation over that practice by resorting to abstract moral theorizing.

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I. INTRODUCTION

Just when we thought we've read and heard all there is to be written and said about the morality of the death penalty, along comes a new debate. In a recent issue of the *Stanford Law Review*, Professor Carol Steiker, a committed death-penalty abolitionist, takes aim with abstract moral theory at the provocative moral musings of Cass Sunstein and Adrian Vermeule.¹ Sunstein and Vermeule argue that, *if* the death penalty substantially deters murders—and they cite to recent studies that suggest as much, though the quality of those studies is subject to vigorous challenge²—then the state is morally obliged to use it as a form of punishment. There is, they say, a life-life tradeoff that cannot be shoved out of the way with the deontological slogan that it is *wrong to kill, period*. There is killing either way—the state kills to save innocent lives or murderers kill knowing that their own right to life will receive full sovereign protection. To Sunstein and Vermeule, hard evidence trumps moral kitsch. Steiker responds that a deontologist—a non-consequentialist, rights-based person—ought not be persuaded by this claim of moral obligation because deontological moral theory commits us to an abolitionist stance, no matter what a utilitarian calculus might otherwise obligate us to do.

The debate, though engaging, proves what we already know: the entire enterprise of abstract moral theorizing, using the conventional moral categories of consequentialism and deontology, to somehow resolve disagreement over the highly politicized issue of capital punishment is futile. The debate takes on the flavor of most moral debates, both sides arguing from incompatible premises and neither can articulate a neutral premise against which to evaluate their arguments. The philosopher Alasdair MacIntyre put it best:

¹ See Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 *STAN. L. REV.* 703 (2005); Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 *STAN. L. REV.* 751 (2005).

² John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 *STAN. L. REV.* 791 (2005). For more on the empirical side of the issue, see Michael L. Radelet & Ronald L. Akers, *Deterrence and the Death Penalty: The Views of the Experts*, 87 *J. CRIM. L. & CRIMINOLOGY* 1 (1996).

If two reasonable parties to . . . a moral debate cannot discover criteria, appeal to which will settle the matter impersonally for both, then neither party can be basing his own conviction on such an appeal. Confronted with the dilemma which creates the debate, each individual can only make explicitly or implicitly an arbitrary choice. Unreason and arbitrariness are internalized.³

II. COLLAPSING THE ACT-OMISSION DISTINCTION

Sunstein and Vermeule believe they have hit upon a neutral criteria to resolve the moral conundrum of capital punishment: the desire to preserve life.⁴ The only way to evade the implications of that criteria in the face of hard evidence that the death penalty saves lives, they insist, is to invoke the act-omission distinction. That distinction generates space to assert that the government's *act* of killing is morally distinguishable from the *omission* of acquiescing to more murders that are preventable. The key to Sunstein and Vermeule's argument is their disavowal of the act-omission distinction when it comes to the moral issue of capital punishment. Not that the act-omission distinction is intrinsically meaningless or morally irrelevant. Claiming a distinction lacks moral significance in one context does not imply that the distinction never has moral significance. Rather, by positing as a fact that the death penalty actively deters many murders (upwards of eighteen for each execution carried out), Sunstein and Vermeule exploit *their* collapse of the act-omission distinction (as opposed to its philosophical collapse) to press a moral argument in favor of the death penalty that is overtly consequentialist.

When I say *consequentialist*, I have in mind, broadly speaking, utilitarianism. Sunstein and Vermeule may want to eschew that categorization, but the fact is that their argument ultimately rests on a calculation of benefits—the aggregate good in saving eighteen lives exceeds the aggregate good of foregoing capital punishment and opting instead for imposing life imprisonment on the convicted murderer. This Essay is not the place to explore the richness of utilitarianism as a way of moral theorizing, but it is worth very briefly considering the claim that there may be good reasons for a utilitarian to reject the simplistic calculation that is at the heart of Sunstein and Vermeule's argument. A rule-utilitarian—a person who focuses on the utility of adhering consistently to a rule rather than evaluating a particular act through that act's perceived utility in maximizing the aggregate good—may conclude, after calculating the aggregate good by considering the good and bad consequences of having a system of capital punishment, that the life-life tradeoff that Sunstein and Vermeule identify is not sufficiently compelling to overcome a utilitarian *rule* against capital punishment. The problem with this claim is that a rule-utilitarian would have to admit that there exists some life-life tradeoff

³ Alasdair MacIntyre, *Patients as Agents*, in *PHILOSOPHICAL MEDICAL ETHICS: ITS NATURE AND SIGNIFICANCE* 198–99 (Stuart F. Spicker & H. Tristan Englehardt, Jr. eds., 1977).

⁴ Sunstein & Vermeule, *supra* note 1, at 705.

(twenty-five lives, or maybe fifty, or one hundred saved for each execution) that would justify an exception to the anti-death penalty rule. That is, rule-utilitarianism, when pushed hard enough, collapses into conventional act-utilitarianism. And if it doesn't, then we would rightly question whether the rule that the rule-utilitarian embraces is rooted in utilitarianism at all. That is, the rule-utilitarian may be a disguised deontologist, or vice versa. All this is to say that Sunstein and Vermeule's life-life tradeoff argument is, at bottom, utilitarian in the most basic sense. And that, in turn, means that they are committed to a system of moral obligation rooted in comparing states of affairs arising from pursuing one course of action over another.

Deontologists and utilitarians have been trading blows for a long time. Steiker's attack on Sunstein and Vermeule, then, is not a surprising event, philosophically speaking. It happens to be another occasion for witnessing the collision of these two approaches to moral theorizing. Steiker's deontological objections to capital punishment are built upon a belief that killing murderers as a form of punishment violates their rights to life and corrodes the value we place on our own. I'll leave aside for this Essay the speculative, though attractive, idea that we ought to reject capital punishment for the sake of our own souls. I want to home in on Steiker's deontological thesis that vindicating the right of one convicted murderer not to be executed necessarily trumps the aggregate good of saving eighteen victims of murderous violence. Steiker undoubtedly would prefer not to package the issue this way—she is an astute enough advocate to know that packaging the issue is vital to persuasion. But deontology necessarily treats rights as trumps over competing claims for social utility.⁵ So the upshot of any deontological attack on Sunstein and Vermeule must own up to the fact that what is being trumped by vindicating the convicted murderer's purported right to life are the lives of innocent people.

We should note here that Sunstein and Vermeule's consequentialism seems especially well-suited to state action, where the name of the game is to produce good states of affairs for the populace. The consequentialist question, *what outcome did the action produce?*, is exactly what we want to know when it comes to good government. The deontological desire to know what virtue there is in the action itself, in the action as an intrinsic matter, seems self-indulgent, abstract, too philosophical. After all, good governments exist, presumably, to produce states of affairs conducive to the well-being of the people. Indeed, the very idea of ethics, and the concomitant inevitability of moral discourse structured around notions of *obligation*, presupposes that action by rational agents is motivated by a desire to bring about some outcome.⁶ So, assuming executing certain murderers produces a highly desirable outcome, we must ask what deontological "virtue" is being tarnished by embracing capital

⁵ See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

⁶ That is not to say, of course, that all ethics boils down to some utilitarian calculus with regard to competing outcomes. It is to say that all ethical discourse necessarily concerns itself with human states of affairs and the choices we confront in pursuing different possible outcomes. Simply stated, ethics concerns itself with the "oughts" in life, and all "oughts" entail some vision of a future state of affairs—to wit: an outcome.

punishment. That is, the real force and value of Sunstein and Vermeule's consequentialist argument is that it demands an answer to this question: *why would we accept eighteen murders that could in fact be averted by executing one convicted murderer who, after a fair trial, has been deemed death-worthy under the law?*

Steiker really has no non-consequentialist answer to that question.⁷ But her struggle to overcome the question (which is different from answering it) is worth our attention because she refuses the escape-hatch of empiricism and bravely accepts three key propositions that serve as a launching pad for Sunstein and Vermeule's moral argument that *bona fide* deterrence makes capital punishment morally obligatory: one, that the state is a moral agent, dedicated through its actions to pursuing particular outcomes; two, that its actions must be guided by and evaluated according to moral principles; and three, that the act-omission distinction cannot shield the state, as a moral agent, from its responsibility for certain outcomes, even those affirmatively undesired, arising from its policy choices. The inadequacy of Steiker's answer to Sunstein and Vermeule doesn't mean that Sunstein and Vermeule are right in their moral claim about capital punishment under the stipulation that executions save lives. What I contend here is that Steiker's inadequate, though valiant, effort to counter the intuitively compelling claim put forth by Sunstein and Vermeule underscores the futility of debating capital punishment through abstract moral theories.

I want to underscore that the problem with Steiker's attack on Sunstein and Vermeule's moral argument has nothing to do with the skill and acuity she brings to the task. Rather, the effort to trump through deontology Sunstein and Vermeule's consequentialist claim of moral obligation to support capital punishment inevitably fails once we concede that the act-omission distinction is nothing more than a bit of analytical bad faith. The reason the concession is fatal to Steiker's attack on Sunstein and Vermeule lies in the nature of consequentialism itself. Steiker mistakenly believes that Sunstein and Vermeule's removal of the act-omission distinction as an available shield against moral judgment is a remarkable twist in the death-penalty debate.⁸ It isn't. The act-omission distinction, so crucial to deontological thinking,⁹ inevitably collapses under the weight of any consequentialist moral system. And so, when Steiker hops on board to disavow the act-omission distinction,

⁷ Steiker's affirmative case against capital punishment amounts to a portrayal of an outcome that capital punishment produces in society, and that outcome—that state of affairs, if you will—is too distasteful to countenance. Steiker, *supra* note 1, at 769–82. She packages her argument as deontological, but it is actually consequentialist in that the bottom line to her abolitionist argument is that her portrait of the state of affairs capital punishment produces in society is worse than the state of affairs Sunstein and Vermeule portray in their pro-death penalty argument.

⁸ *Id.* at 754.

⁹ See J.J.C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR AND AGAINST 94–95 (1973).

she necessarily abandons the very moral system that she hopes to use against Sunstein and Vermeule, and instead, embraces theirs.¹⁰

III. RE-CONTEXTUALIZING MORAL ASSESSMENTS

Steiker's primary analytical move to avoid crashing headlong into consequentialism is to change the subject. She takes aim at what she considers an illegitimate assumption undergirding Sunstein and Vermeule's act-omission argument. While she approves of their insight that the act-omission distinction is no shield against moral judgment for government inaction, she argues that they improperly disavow the distinction between purposeful and non-purposeful killing. Steiker insists that the single life of the murderer that is taken through execution cannot be equated with the lives of future murder victims because the government purposely kills when it executes but only knowingly accepts that certain people will be murdered as a result of its refusal to execute. Steiker agrees that the state is morally responsible for the death of the executed murderer and the executed innocents, but the nature of that moral responsibility differs. Differs, Steiker insists, because we have purposeful killing versus knowing death. Rejecting the act-omission distinction, Steiker argues, does not commit oneself to equating killings that are purposeful and those that are knowing. The former, she says, are more morally reprehensible than the latter, and so the state is morally obligated to regard the convicted capital murderer's right to life as a trump over the lives that could be saved by his execution.

¹⁰ See *supra* note 7. The trap of accepting Sunstein and Vermeule's collapse of the act-omission distinction is particularly inescapable for Steiker because her style of deontological reasoning is entirely monological. She joins Sunstein and Vermeule in disavowing the act-omission distinction, rather than engage the challenge of refining its applicability when it comes to public policy, but then continues to insist upon a deontology that operates as an individualized, solitary moral mental arithmetic. Meanwhile, Sunstein and Vermeule collapse the act-omission distinction and insist that deontologists embrace within their morality a dialogical style of moral reasoning that is reminiscent of Jurgen Habermas's re-fashioning of Kantian morality. Roughly speaking, Habermas reformulates the Kantian moral imperative so that to validate a norm, one must not simply ask oneself as a solitary rational agent, *would I universalize such conduct*, but must consider whether all persons affected by that norm would accept it, taking into account all foreseeable consequences and side effects arising from the observance of that norm. See JURGEN HABERMAS, *THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY* 42 (Ciaran Cronin & Pablo De Greiff eds., MIT 1998) (1996). See also JURGEN HABERMAS, *JUSTIFICATION AND APPLICATION: REMARKS ON DISCOURSE ETHICS* 49 (Ciaran Cronin trans., MIT 1993) ("Each of us must be able to put themselves into the position of all those who would be affected by the performance of a problematic action or the adoption of a questionable norm."). A monological style of moral reasoning, which characterizes conventional deontology, simply cannot abandon the act-omission distinction in the way that Steiker does and still remain deontological. For an illustration of a deontological attack on Sunstein and Vermeule that resists the wholesale collapse of the act-omission distinction, see Eric Blumenson, *Killing in Good Conscience: Comments on Sunstein and Vermeule's Lesser Evil Argument for Capital Punishment and other Human Rights Violations* (June 30, 2006), <http://ssrn.com/abstract=897870> (cited with author's permission).

Steiker's emphasis on the purpose-knowing distinction bespeaks more the lawyer's mind than the moral philosopher's. Even if true that criminal law posits, as a general matter, that purposeful killings are more blameworthy than other sorts of killings, it doesn't make it so, morally speaking.¹¹ A purposeful mercy killing is not as blameworthy as a depraved-heart reckless rooftop sniper who knows that his indiscriminate shooting will likely result in harm. An impulsive decision to kill may be more despicable than a purposeful killing by a "brooding, self-doubting, self-reflective offender."¹² Blameworthiness is, at best, only partially captured in categorizing an act as purposeful or knowing or reckless, and often categorizing in that way as a shorthand for moral judgment actually warps the assessment of blameworthiness. It is the *why-ness* of the killing that allows for genuine moral judgment, not the mere *what-ness* of it. That's why it is simply untrue that criminal-law blameworthiness is unconcerned with motive, with why a defendant has killed. The myth, I suspect, sustains itself from the misleading assertion, often stated in criminal trials, that the prosecution need not prove motive to secure a conviction. Prosecutors and defense lawyers know that motive is crucial to adjudicating criminal cases. On the doctrinal level, motive is smuggled into the analysis through various defense claims, such as provocation, duress, necessity, self-defense, etc. These defense claims are ways to soften the rigidity of the *mens rea* categories—to bend them, really, to accord with our moral intuitions—precisely because those conventional *mens rea* categories are inadequate vessels for moral evaluation.¹³ Through her unquestioned use of legal categories as proxies for moral judgment, Steiker engages in a form of moral decontextualization in her effort to pursue a moral attack on Sunstein and Vermeule—a process of moral decontextualization that animates criminal law theorizing in its pursuit of universal rules and standards that are always threatened by too much subjectivity.¹⁴

So, one direction to take Sunstein and Vermeule's premise that the state is a moral agent is that we are obligated to evaluate state policies about the death penalty from a morally infused contextual point of view. Let us compare two states. State A has the death penalty because, as a moral agent, it has chosen to execute certain death-worthy murderers in order to save the lives of innocent residents. State B refuses to enact the death penalty because, as a moral agent,

¹¹ Capital jurisprudence makes this precise point. In *Tison v. Arizona*, 481 U.S. 137 (1987), the Supreme Court upheld the constitutional validity of a death sentence predicated on acts of extreme recklessness.

¹² SAMUEL H. PILLSBURY, *JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER* 104–05 (1988).

¹³ See Carissa Byrne Hessick, *Motive's Role in Criminal Punishment*, 80 S. CAL. L. REV. (forthcoming 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=921111; ALAN NORRIE, *LAW AND THE BEAUTIFUL SOUL* 59–60 (2005); PILLSBURY, *supra* note 12, at 105 ("what premeditation misses is the moral importance of the motive for the homicide"). Cf. MODEL PENAL CODE AND COMMENTARIES § 3.02 cmt. 2, at 14–15 (Official Draft and Revised Comments 1985) (arguing the moral acceptability of knowingly or purposely killing some to save many more innocents).

¹⁴ For one among many investigations into this process, see CYNTHIA LEE, *MURDER AND THE REASONABLE MAN* (2003).

it does not want to increase the tax burden of its citizenry, the death penalty being an extremely expensive policy to pursue. State B, then, sacrifices the lives of innocents for financial reasons. That State B's policy against the death penalty may accord with one's moral sentiments does not mean—or at least, doesn't necessarily mean—that State B, as a moral agent, has acted in a morally superior way when compared to State A, *even though State A has chosen to purposefully kill certain murderers*. What may be most useful, then, in Sunstein and Vermeule's argument is the simple challenge to abolitionists to give a non-empirical, non-consequentialist answer to why we must vindicate the murderer's purported right to life through the acceptance of the empirical reality that eighteen innocents will lose theirs. *What morally defensible motive could a state have not to use capital punishment, in the face of such a life-life tradeoff?*

Steiker cannot meet this challenge, avoiding the whole issue of motive and lapsing instead into a form of rule-utilitarianism that inevitably devolves into a form of consequentialism that Sunstein and Vermeule advocate. To be sure, I understand Steiker to be arguing for the moral limits of state action, and that therefore motivations, on her account, are irrelevant to her deontological objections to capital punishment as a criminal-justice tool. But her attack on Sunstein and Vermeule's utilitarian position with the argument that purposeful killings are more morally blameworthy than other sorts of killings necessarily invites consideration of motivation in the moral calculus precisely because blameworthiness depends on such consideration. But more importantly, we can now see why Steiker's deontological deployment of certain hypothetical moral quandaries doesn't undercut Sunstein and Vermeule's utilitarian position. She points, for example, to the famous Jim-and-the-Indians quandary, made famous by the moral philosopher Bernard Williams.¹⁵ Suppose a diabolical South American military commander intends to kill twenty Indians, but he is willing to spare nineteen if Jim will choose one to kill. Should Jim save the nineteen—which is to say, should he kill? Take another famous hypothetical that Steiker calls upon, this one from Judith Jarvis Thomson—the brakeless trolley scenarios.¹⁶ Suppose the only way to stop a brakeless trolley from crashing and killing five bystanders on the track is to push one innocent bystander onto the track so that the bystander's body will act as a brake on the speeding trolley. The bystander will die, but the five others will live. What do we make of the act of pushing the bystander onto the track? Suppose, instead, the driver of the trolley switches it onto a different track where an unwitting bystander will be struck, but the five others will be saved. Is there something different here about that saving act than the saving act of pushing the bystander onto the track?

As an initial matter, it is clear that in evaluating the moral quality of the agent's act in each of these hypothetical scenarios, we would rightly consider the actor's motivation. If, for example, Jim allowed the Indians to die because of cowardice rather than moral principle, we would look upon Jim in a

¹⁵ See SMART & WILLIAMS, *supra* note 9, at 98.

¹⁶ JUDITH JARVIS THOMSON, RIGHTS, RESTITUTION, AND RISK: ESSAYS IN MORAL THEORY 94 (William Parent ed., 1986).

particularly unfavorable moral light, even if the outcome itself may be considered morally justified. Likewise if the bystander were shoved onto the track because he is a hated colleague. But leaving aside the moral significance of contextualizing the act by taking into account motive, the deontological approach would reason from the proposition that it is wrong to use one Indian or one bystander as a means to serve some utilitarian end—or to put it more bluntly, the lives of nineteen Indians or five bystanders must be sacrificed to vindicate the right to life of the one. Of course, the deontologist necessarily resorts to the act-omission distinction to argue that Jim's omission (his refusal to kill) absolves him of any moral responsibility for another's act of killing. But Steiker, as deontologist, has removed that possibility for herself, having accepted Sunstein and Vermeule's premise that the act-omission distinction cannot shield the state from moral evaluation. Similarly, a deontologist would condemn pushing the individual onto the track to save five but would not condemn running over an individual who happens to be on the track—again, resorting to the moral significance of the act-omission distinction, a distinction nurtured in this scenario by the injunction against violating one person's right to life to achieve the greater good of saving five others (or ten? or a hundred? or a thousand?).

The philosopher Robert Nozick insists upon the deontological commitment to preserving rights through the act-omission distinction by asking, "Why . . . hold that some persons have to bear some costs that benefit other persons more, for the sake of the overall social good?"¹⁷ Why, indeed, should any one Indian, or an unwitting bystander pushed in front of the trolley, pay with his life for the preservation of the lives of others? But what Sunstein and Vermeule ask of us has a quite different moral flavor: why not have the convicted capital murderer bear the cost of saving the lives of people who would otherwise be murdered? Steiker's deontology would answer, *because the murderer has the right to life, too, and that right can't be sacrificed to promote the greater good.*

There you have it: the boiled-down essence of the deontological claim. The capital murderer cannot be forced to pay for, with his tarnished life, the preservation of eighteen innocent lives. Maybe so, but deontological theorizing doesn't, as an analytic matter, get us to that conclusion, as Steiker seems to think. First, there is the consideration that the Kantian injunction against being treated as a means to an end might be forfeitable. Deontology posits that this Kantian injunction must have deliberative priority in moral evaluation—which is to say, that when we deliberate on conflicting obligations, this injunction must take priority in the weighing of considerations bearing on the competing arguments supporting one or the other obligation. But this deliberative priority may be forfeitable.

Certain convicted murderers, one might insist, have forfeited their right to impose upon the injured collective the obligation to give deliberative priority to the injunction never to be treated as a means to a socially useful end. This is

¹⁷ ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 32 (1974).

different from making the more conventional claim that murderers have forfeited their right to life.¹⁸ It is only saying that the right-to-life trump-card may lose some of its value as a deliberative priority—not all, just some—when the holder of the card has committed a particularly egregious murder. Put in Kantian terms, the murderer forfeits his right to invoke the injunction against being used for utilitarian gain by virtue of his crime, which entailed precisely that immorality—depriving the victim of the right not to be used to gratify the murderer’s appetite for killing. I’m not suggesting here that Kantian ethics demands this view, but only that it partakes of the Kantian idea that what a person deserves is related to what he does. Kant argues that a murderer deserves execution because the murderer has killed; I posit as an idea to reckon with the reap-what-you-sow proposition that a murderer forfeits the injunction against utilitarian treatment because the murderer engaged in his own privatized utilitarian calculus when he killed.¹⁹

So, an innocent bystander may have the right not to be pushed in front of a trolley to save others, and each Indian may have the right not to be singled out and killed to save others—their rights to life trump those utilitarian calculations—but the deontologist, reasoning monologically as if morality were a solitary exercise in moral mental arithmetic, has no dispositive moral argument that the convicted murderer is on the same ontological footing as these innocents who are to be used for the greater social good. Steiker simply ignores the availability of constructing the ontological categories of guilty people and innocent people and then infusing those categories with moral significance when it comes to deciding when it is appropriate to use utilitarian reasoning. If we accept guilt and innocence as ontological categories and commit ourselves to treating those categories as morally significant—deontology doesn’t, as an analytic matter, help us out here—then it may well be persuasive to a deontologist that a convicted murderer ought to be executed to save eighteen innocents because that murderer has forfeited the right not to be treated in a way that satisfies utilitarian demands. The point here is not that a deontologist *must* accept the utilitarian demands—Sunstein and Vermeule reach too far in making that claim—but that deontology is not by itself a way to defeat the “forfeiture” argument that, in some people’s minds, supports the thrust of Sunstein and Vermeule’s moral claim.

¹⁸ See, e.g., JOHN LOCKE, TWO TREATISES OF GOVERNMENT 172 (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1970) (1690). For an attack on this forfeiture argument, see Hugo Adam Bedau, *Capital Punishment*, in MATTERS OF LIFE AND DEATH 148 (Tom Regan ed. 1980). Kant’s endorsement of capital punishment is associated with the theory of retributivism, the offender getting his just deserts. Only within that moral framework would Kant accept the notion of the murderer forfeiting his life. See IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 101 (John Ladd trans., MacMillan Publ’g Co. 1965) (1797) (“[I]f you kill,” Kant says, then “you kill yourself.”).

¹⁹ Note that this point doesn’t imply, as Kant’s more direct argument favoring capital punishment arguably does, that an offender deserves getting the same treatment as he inflicted on the victim (rape rapists, burn arsonists, steal from thieves, etc.). It only posits that the offender loses the entitlement to insist upon the Kantian injunction against being used as a means to promote the aggregate good.

Steiker's deontology thesis doesn't refute Sunstein and Vermeule's argument even if we bracket the "forfeiture" idea. Let us posit that convicted murderers retain their Kantian immunity against being treated as means to an end. What that means in a legal regime built upon a discourse of rights is that convicted murderers have a *claim of right* that bars the state from using the aggregate good as a justificatory basis for executing them. That claim of right imposes upon the state a duty not to use capital punishment. A utilitarian would recognize this claim of right, and the entire regime of rights, as worthy of respect only to the extent that the rights-regime promotes the aggregate good. A utilitarian, then, would be open to withdrawing support for this claim of right if the utility calculation demands it. A deontologist, one would think, would insist upon the claim of right, no matter how the aggregate good is increased or decreased.

But the matter isn't that simple when we accept Sunstein and Vermeule's key premise that the state is a moral agent whose actions must be evaluated through moral principles, suitably contextualized. The state as moral agent owes a duty not only to the convicted murderer, by virtue of the murderer's purported claim of right not to be executed, but also a duty to protect the law-abiding citizenry against being murdered, a duty derived from the citizenry's claim of right to bodily security. The act-omission distinction, which might in some contexts be available as a shield against moral judgment, has been stipulated away by Steiker. And the purposeful-nonpurposeful distinction is useful but inadequate to evaluate moral action. So, what the deterrence argument asks the deontologist to consider is the moral worthiness of breaching one duty so as to honor the other. Maybe at bottom it is nothing more than sentiment, but most people are inclined to honor the duty owed to the law-abiding citizenry rather than breach it for the sake of vindicating the claim of right asserted by the convicted murderer not to be executed for his crime. This particular intuition derives from another intuition: one guilty person's claim of right to life is not as weighty, not as deserving of respect, as the exact same claim of right asserted by, say, eighteen innocent persons who will die if the state withholds capital punishment as a juridical tool. This latter intuition rests on the indisputable proposition that the state must give near-dispositive deliberative priority to the people's claim of right not to be killed, assaulted, or otherwise arbitrarily impeded in pursuing their own productive aims in life.

Now, suppose we combine the forfeiture idea with this conflicting-rights idea. Kantian ethics allow for the relinquishment of rights through the device of consent. The convicted murderer presumably has an *actual* interest in not being executed for his crime, an interest rooted in the brute fact that he wants to keep living, even if life has been reduced to the miserable conditions of a concrete-and-steel penitentiary. But that doesn't mean the convicted murderer's actual interest must be equated with his *antecedent* interest, as a rational agent of the Kantian sort, in seeing to it that convicted murderers are executed for the sake of vindicating the citizenry's claim of right to be protected against being murdered. That is, the convicted murderer could be understood to have granted consent to execution by virtue of his membership in the community. Put another way, the convicted murderer's execution is the debt he owes to society,

a debt that he, as a Kantian rational agent, agrees to own up to.²⁰ Recall Nozick's question, "Why . . . hold that some persons have to bear some costs that benefit other persons more, for the sake of the overall social good?" We might say that the convicted murderer must bear the cost of saving the lives of eighteen innocents as part of his debt to the community. The convicted murderer, on this account, forfeits his claim of right, not by the mere fact of the crime, but by a consent that is embedded within his membership in the community through the force of his Kantian agency.

IV. SLIPPERY SLOPES

No attack on a consequentialist claim would be complete without the tried-and-true slippery-slope arguments, and Steiker trots them out.²¹ If the death penalty deters, and if the moral evaluation of it comes down to simple life-life tradeoffs, then why not torture, why not execute the offender's loved ones, why not extend capital punishment to more crimes, why not do all sorts of horrific things to scare the criminality out of all of us? First, a philosophical point: some, not all, slippery-slope arguments focus on what is at the bottom of the slope, the horrible endgame immanent within an argument. Others emphasize the slipperiness of the slope, that there is no way to get off of it, which means all we are left with are arbitrary distinctions. Steiker focuses on the bottom of the slope. But is the slope actually slippery?

Steiker's point in focusing on other horrible practices that utilitarianism may countenance is really not a warning that we will actually embrace those practices if we institute capital punishment. So she is not suggesting we actually will slide to the bottom. Rather, she is arguing that the fact that these horrible practices exist at the bottom of the utilitarian slope reveals that the practice of capital punishment on actual death-worthy murderers (leaving aside whether the concept of death-worthiness is morally coherent) is itself intrinsically immoral. The horrible practices at the bottom of the slope merely help to illuminate that supposed intrinsic immorality.

But pointing to what is at the bottom of the slope is unpersuasive because certain activities within any acceptable moral system can have no deliberative priority, simply because they are so horrible. In deliberating on how to make the populace safer, we can rightly insist that government killing of innocents, or the torturing of anyone, be given no priority at all (which is to say, the slope isn't slippery). Why? Because a deliberative process to arrive at policy imperatives must give ultimate priority to *reliability*, meaning the maintenance of a state of affairs whereby people can reasonably insist that certain things—like the killing or torturing of innocents, *by anyone*—ought not occur, under any circumstances. The whole point to crafting a system of obligations, be it utilitarian or deontological in its foundation, is the cementing of feelings of

²⁰ See HERBERT MORRIS, ON GUILT AND INNOCENCE: ESSAYS IN LEGAL PHILOSOPHY AND MORAL PSYCHOLOGY 33–36 (1976). See generally ANDREW VON HIRSCH, DOING JUSTICE 66 (1976); ANDREW VON HIRSCH, PAST OR FUTURE CRIMES (1985).

²¹ Steiker, *supra* note 1, at 775.

reliability. Without those cemented feelings of reliability—and government brutality upon innocents that is justified through a utilitarian calculation would be inimical to that—social and civic life would be impossible.²² Indeed, in such circumstances, human life as a worthwhile value would be impossible. For this reason, it is possible to reach a societal consensus that allowing X (say, capital punishment) will not imply an allowance of Y (torturing or killing the murderer's loved ones). A slope is slippery when such consensus is unattainable, because without that consensus, allowing X does in fact threaten to produce Y.

One other point regarding the weakness of Steiker's slippery-slope arguments deserves mentioning. Punishment is not simply an act of inflicting unpleasantness upon another. Punishment is itself a practice, one tied to a larger scheme of socio-political practices. Capital punishment, then, denotes not just the act of executing an offender; the term embraces an entire institutional practice of accomplishing that aim within a regime of norms.²³ So, a defender of capital punishment is not defending the killing of the offender in and of itself, but is defending an institutional practice, and that institutional practice has its own boundaries that are off the utilitarian calculus. Specifically, the institutional practice of punishment is bounded by the principle that only properly adjudicated guilty persons can be punished. So, a consequentialist defense of capital punishment cannot be attacked with slippery-slope arguments predicated on the absurdity that the practice of punishment has no institutional constraints. There is no slippery slope, in short, where our real-life practices take place on solid footing and the supposed slipperiness is not true to our experiences.²⁴

V. THE FUTILITY OF IT ALL

There is no analytic resolution to the quandary between a rights-based outlook and a consequentialist outlook. The deontological argument, like the utilitarian argument, inevitably collapses with the weight of real life. Even if capital punishment deters—I highly doubt that it does, and I remain convinced that it is unprovable—there is still the *reality* that the human mind is incapable of making judgments that even utilitarians agree must be made in any arguably just capital-sentencing scheme, judgments mired in psychological facts so thick with ambiguity that mistakes in evaluating death-worthiness are bound to be made.

²² I think we have to admit that government brutality against “enemies”—be they convicted criminals, communists, Islamist fundamentalists, illegal aliens, etc.—does not render social and civic life impossible. In fact, much government brutality (we call it foreign policy) takes place to promote our unsustainable standard of living. But I digress.

²³ Cf. John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955) (articulating punishment as an institution or practice).

²⁴ Cf. Andrew von Hirsch, *Lifeboat Law*, 4 CRIM. JUST. ETHICS 88, 90 (1985) (discussing utilitarianism and the need to consider the ramifications of institutionalizing certain brutalizing practices).

It is in this respect that Sunstein and Vermeule fail in luring deontologists to convert Kantian ethics into a dialogical process, where rational consensus that takes into account foreseeable consequences of a particular norm or policy is key to moral reasoning. There can never be the sort of rational consensus that Sunstein and Vermeule believes is mandated by the pure empirical supposition that the death penalty marvelously deters when immanent in the practice of executing offenders is the monumental, and perhaps insurmountable, linguistic challenge that capital jurisprudence faces: how do we articulate a meaningful standard for evaluating when an offender has forfeited his Kantian immunity against being used for utilitarian ends? Sunstein and Vermeule concede, as any decent human being must, and as any dialogical moral-reasoning process demands, that there are huge constraints on utilitarian thinking (we cannot simply sacrifice innocent lives simply because doing so will preserve more lives—that's a recipe for such horrors as organ harvesting). And so they are obliged to concede that capital punishment, even if it is a marvelous deterrent tool, must be reserved only for the deserving, whatever *desert* might mean. The linguistic challenge, which I suspect is in fact insurmountable, is to articulate a notion of desert that allows for mistake-free judgments about death-worthiness. That puts the death-penalty debate in the frame of human cognition, of our capacities as rational beings. Moral judgments, in my view, derive from that frame of reference—essentially from judgments about what is healthy and unhealthy, what promotes and what impedes human flourishing—not from abstract commitments to one philosophical school or another. Steiker's futile quarrel with Sunstein and Vermeule exemplifies this observation.

VI. CONCLUSION

There's a beauty and a problem with Sunstein and Vermeule's argument. The *beauty* is that non-progressive, hard-line law-and-order types who want to seize on Sunstein and Vermeule's claim that capital punishment is morally obligatory will find themselves trying to disentangle their way out of a very politically progressive net. The consequentialism we find in Sunstein and Vermeule is, as they themselves recognize and endorse, a recipe for very active government, one that is morally obliged to attack all sorts of injustices that government inaction directly produces.²⁵ The *problem* is precisely what plagues consequentialism generally as a decisional tool for policy-making. It rests on an empiricism that cuts out too many complicating factors and considerations. That's a nice way of saying that their consequentialism is, ultimately, too simplistic, too crude a tool, that it can't adequately account for the practical difficulties of pursuing something that is itself morally problematic from a deontological point of view.

We can put our criticism of Sunstein and Vermeule within the same terms that they have used to frame their argument; that is, we can take back Steiker's ill-advised concession. The act-omission distinction *does matter* in this context.

²⁵ See Cass Sunstein & Adrian Vermeule, *Deterring Murder: A Reply*, 58 STAN. L. REV. 847, 849 (2005).

Sunstein and Vermeule's collapse of that distinction generates a pure question-begging argument, for it smuggles in the un-argued assumption that the "omission" (not implementing capital punishment) equals an "act" (killing innocents) because implementing capital punishment is in fact viable. This smuggled-in assumption is crucial because, when we collapse the act-omission distinction, we are necessarily saying that the omission has, in some meaningful way, *brought about* the outcome in question. In this context, this means that the absence of capital punishment brought about the additional deaths of innocents; and that necessarily implies that capital punishment is, in fact, a morally available option, for an omission matters (such that the act-omission distinction collapses) only if something other than the purported non-action could have been done. But is that implication true? Maybe, and maybe not. What is precisely at issue in the debate over capital punishment is exactly that question, its *moral* viability. If capital punishment is not morally justifiable, then we cannot have a normative expectation that it be implemented. And without that normative expectation, it makes no sense to speak of an omission that matters—that is, an omission that has genuine salience when considering the moral significance of higher murder rates in jurisdictions that don't have the death penalty. Sunstein and Vermeule assume that the normative expectation rightly exists when, in fact, that is precisely what the debate has yet to resolve. Collapsing the act-omission distinction conceals that question-begging assumption through the heated emotionalism of the ensuing argument that the morality of the death penalty boils down to a utilitarian calculus that puts a premium on saving lives.

One other point: Moral squabbles make no sense when feasible alternatives to a course of action exist that moot the moral dilemma or change the frame of the debate. Any moral debate about the death penalty would be incomplete without incorporating within it the feasibility of alternatives to killing offenders for their particularly heinous crimes. This reflects the fact that moral arguments cannot be divorced from social necessity. This truth can be directed at the deontologists, too. An abstract moral claim that the death penalty is wrong would lose its force if it were shown that no alternative existed to deal with particularly reprehensible murderers—an implausible scenario, in my view, except perhaps in the case of prison killings by inmates already serving parole-ineligible life sentences.

So, deontology may be no answer to consequentialism, but in the capital punishment context, consequentialism is no trump over deontology, not because of the power of deontology as a moral system in the abstract, but because of the practical considerations that a deontological moral system invites us to consider. Jack Greenberg wrote twenty years ago that "any current debate over the death penalty cannot ignore the deep moral deficiencies of the present system."²⁶ I take him to mean, at least in part, that it is futile to engage in a moral squabble when what is being defended or proposed is an idealized

²⁶ Jack Greenberg, *Against the American System of Capital Punishment*, 99 HARV. L. REV. 1670, 1678 (1986).

version of a system that bears almost no resemblance to reality. That was true twenty years ago, and it remains true today.