

The Death Penalty and the Principle of Goodness

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1 Abstract

This paper examines the death penalty question from the perspective of the new ethical theory, the Principle of Goodness. At first sight, the Principle seems to be a strictly tighter moral principle than Kant's categorical imperative; yet we find that the application diverges from the recommendations of Kant in this case. Unlike many discussions of this question, which often argue either no, or yes with a discussion of which crimes are 'bad enough' to deserve the penalty, we find that the ethical guidance from this Principle allows one to either argue for no death penalty, or for a death penalty, the conditions for its application being remarkably clear compared with much contemporary and historical argument. It will be assumed that the reader is familiar with a range of existing argument on the topic, and the paper will develop its own theme with contrast where necessary against Kant's principles and utilitarian-style arguments.

2 Introduction

The purpose of this paper is to analyse the logic and justifications for or against the death penalty from the perspective of one particular ethical theory, namely the Principle of Goodness. Therefore the primary thrust here is an argument *de novo*, as there is no previous paper on this topic. However, just as the new ethical theory has both similarities and contrasts with previous ethical theories, so, too, the analysis of a specific ethical question must have such comparisons, and it is therefore necessary to devote at least some space to discussing those. Further, although this is intended to be a philosophical enquiry, this topic is so hotly debated that it will be necessary to include at least a very brief discussion of contemporary viewpoints, if only to situate the philosophical considerations. But it is no part of the purpose here to attempt a complete coverage of such a huge field.

2.1 Brief Introduction to the Principle of Goodness

The Principle is introduced and discussed in the papers listed in the References by this author. It is a realist theory, positing that there are two realities, good and evil, which may be described as follows:

Goodness is to attempt to benefit everyone;
evil is to attempt to harm any innocent one.

We can easily identify some salient characteristics of this theory. Firstly, it is a competitor to utilitarianism and all other consequentialist ethical theories in the sense that it delivers alternative definitions of these key ethical terms. As consequentialism must surely also be a realist theory, and as the above definition is obviously at variance with any theory that attempts to maximise any measure, the two are incompatible and (under their common assumption that ethics is real) at least one must be wrong.

Secondly, we may compare with Kant's categorical imperative, and we note immediately that the Principle of Goodness is a stricter, yet compatible, theory: compatible because [Kant]

insists that we must act so as to accord with a general rule, and the Principle of Goodness *is* a general rule (or becomes one as soon as we say “act such as to avoid evil and pursue goodness”); stricter because not any general rule satisfies the Principle.¹

[House 2005] in part compares the Principle with utilitarianism.² In brief, both ethical theories recognise that the world is inherently imperfect: we shall never be able to act such as to ensure optimally beneficial outcomes for everyone without exception. Both theories must accommodate this deficiency of our universe. Utilitarianism says “therefore, do the best you can—actually achieve the best outcome available given your opportunities, resources, skills, knowledge, and so on.” But the Principle of Goodness says “therefore, continue to pursue the goal of optimally benefiting everyone, but recognise that you might fail; your duty, therefore, is, not to actually benefit everyone, but to *attempt* to benefit everyone.

Although a great deal of ethical discussion concerns the nature of terms such as “benefit”, and whether benefit is synonymous with happiness (or absence of misery, etc. etc.) it is not the prime discriminator between the Principle and consequentialist ethics; it is a secondary problem whose nature changes with our knowledge, understanding, and wisdom. The primary discriminator is whether we accept the ethic of being obliged to actually achieve the best outcome possible, or of attempting to achieve the optimal outcome. Although this paper does not delve into that issue, it must be recognised in order to understand the different approach towards a practical issue (here, the death penalty).

Another important characteristic of the Principle is that there is a realm of non-morally significant action. Many actions are undertaken with neither any attempt to cause harm nor any attempt to benefit everyone, and are therefore neither proscribed nor recommended.

3 Concrete Rules from Abstract Principles

3.1 Sources of Considerations

To derive concrete recommendations or guidance from an abstract principle, there must be ways in which the properties of the abstraction intersect with the needs of the concrete application. In the case of normative ethics, these typically manifest as reasons for the punishment in the sense of justifications. Such reasons typically include:

- 1 Obtaining or restoring justice,
- 2 deterrence,
- 3 rehabilitation,
- 4 protection of the community.

They are also affected by reasons of sentiment, such as:

- a) repentance,
- b) mercy,
- c) popular sentiment,
- d) victims’ wishes³.

Then there are reasons of pragmatism, most importantly

1 Kant’s over-wide principle causes problems for his philosophy, such as those discussed in [Cicovacki].

2 For an account of the prototypical utilitarian analysis of our question, see [Bedau].

3 In addition, illegitimate factors such as race are sometimes either alleged or actually practised, but for our current purposes we may set such factors aside.

I. precaution against irreversibility, in case the convicted is actually innocent.

None of these are simple factors, and any of them can interact. For example, a crime committed under duress will be evaluated differently from the perspective of pure justice, as well as obtaining different effects in popular sentiment and victims' reactions to sentencing.

3.2 Development of the Abstract Ethics

To see how the Principle of Goodness can speak to some or all factors such as those listed here, we must first consider the kind of reasoning that the Principle typically promotes.

In the first place, it is very easy to see that the Principle implies a hierarchy of rights where those of the involved actors conflict, such that:

- The rights of the innocent trump the rights of the guilty.

This is because one may not deliberately harm an innocent, but one may do so to the guilty. This concerns guilt or innocence in context, not in general. For example, one might be guilty of failing to pay postage on a letter, but this would not grant someone the right to use you as a human shield against an armed terrorist with whom you had no involvement. But, one might argue, if you conspired to arm that terrorist and someone was now going to be shot, it should be you rather than anyone uninvolved in the happenings. Now there can be, of course, no expectation that every reader will agree with this, so the proposition is advanced only as something that the Principle of Goodness clearly entails.

As an aside, once guilt and innocence are understood in context in the way such considerations imply, we may see further consequences, for example, in the treatment of prisoners. If a just sentence has been passed upon a convicted person, then, as far as the prison authorities are concerned, outside the scope of administering the sentence, nothing remains of the prisoner's guilt, and so the prisoner is to be regarded as innocent. Thus they must be protected against assault and sexual crimes within the prison, must not be maltreated, and so on. The positive (goodness) part of the Principle also implies that opportunities for rehabilitation and self-improvement should be available, since doing good is not limited only to the innocent, but also includes the guilty. Whilst many accept such recommendations, the point to note here is that they follow from a reasonable consideration of this basic ethical principle.

Also, we may straightforwardly show that:

- The Principle implies the need for a justice principle.

This does not follow in the sense of axiomatic logic, but it reasonably does follow once one introduces the concept of society. Personal safety is essential to operate at all in a community, and cooperation and community-based actions are, as a practical matter pertaining to the exigencies of human life, necessary if there is to be any great likelihood of success in one's attempts to benefit everyone. Although one is not obligated by the Principle to succeed, society indirectly incurs the onus of organising itself such as to make success (or near-success) as practical as possible. Further, cooperative endeavours require contracts, including everything from a business contract, to a marriage contract, to informal deals to obtain mutually beneficial action. All of these require either or both of a civil and a criminal justice system.

3.3 Connections to the Concrete

Implications of the Principle do not stop there. We may return to the list of reasons from justification, sentiment, and pragmatism (again, without implying that the lists above are comprehensive). Of our four reasons from justification, we have briefly discussed (1), justice; furthermore all but (2), deterrence, can be easily related to either protecting innocents or benefiting someone, and are therefore admissible. (2) is problematic. With reference to the previous discussion of the context of innocence, the question is to what extent a guilty person is implicated in similar crimes committed by others. Sometimes they clearly are. For example,

if a person knows that only one in ten shoplifters are caught, and if the penalty is a fine, then a fine related solely to justice would likely be argued to be commensurate with the value of goods stolen. But such a shoplifter would clearly see that on average, after budgeting for being occasionally caught, shoplifting is nevertheless a profitable activity. The innocents (victims of shoplifting) will not be protected in such circumstances by a fine that does not take into account the prevalence of shoplifting and the need to deter it as a crime overall.

On the other hand, a "heat of the moment" crime will be undertaken without such calculations. It will usually, though, still include a consideration, however brief, of the consequences. The thought "Kill him and you'll hang" can take but a moment. So, too, can the thought "Put graffiti on that wall and you'll hang;" yet we can clearly see the difference in the reasonability of using hanging as a deterrence to murder versus graffiti. Where does the difference come from, according to the Principle of Goodness?

Once again, the difference is found in the context of innocence and guilt. The context of graffiti is property damage, not threat to or taking of life (at least, not in normal cases). But the context of murder is violence. Where the punishment is violent, therefore, a graffitist would be regarded as an innocent whereas a murderer would be regarded as guilty.

The context also refers to the chain of causation. The harmful act against the guilty must be part of the same chain as the crime for which they are guilty. One reason is because the fact that one commits a crime in one circumstance does not mean that the same person will commit a similar crime under different circumstances. For example, a person might murder an adult, but scrupulously refrain from murdering a child; they might even be counted on to protect and defend a child against attack, so harming that person for the benefit of a child would be (in that context) to harm an innocent.

Another reason is a more subtle interaction between the two parts of the Principle: the positive aspect of promoting the benefit of all and the negative aspect of avoiding harm to any innocent. Suppose, for example, it is proposed to harvest the organs of murderers. Such an act is not at all required to punish the murderer, and is performed purely for the localised interests of the recipients. To see the problem here, we must understand that deliberately causing harm to a criminal as part of a punishment is inherently a failure to successfully benefit everyone: this aspect of a justice system is not good in the moral sense, according to the Principle, but rather represents failure to find a way to promote the good, in light of the acts of the criminal. Pure harm to the criminal as part of a just sentence, then, is failure to do good, but is not evil; it is a resort to which the criminal's own acts have forced us. But harvesting the criminal's organs is in intent the gaining of profit from harming the criminal: the harm to the criminal is intentional for a self-serving, tainted reason, and is not just a failure to find a way to perform good. These consequences follow from the fact that the Principle describes states of intention, inner mental states of the moral actor, rather than comparisons of outcomes. This is a key difference between this moral system and consequentialism: surely any consequentialist must say that, given that the harm to the criminal happens anyway, putting the wasted organs to use to save another must maximise some measure of well-being?

3.4 Historical Motivations for the Death Penalty

Radelet and Borg provide us with a useful analysis of attitudes towards the death penalty. In the early 1970s, the most common argument was general deterrence. When studies showed that the deterrent effect was small or nonexistent, the argument shifted to incapacitation; that is, by executing killers, they are prevented from killing again. This argument in turn failed because only about 1% of killers whose sentences were commuted actually did kill again, and that figure is almost the same as the number of innocent people wrongly sentenced to death. Furthermore, numerous American studies showed that for comparable crimes, the death penalty was three to four times more likely to be imposed when the victim was black (as opposed to white).

These factors all tell against the death penalty, in practice if not in principle. The surprising suggestion that support for the death penalty is symbolic (See [Tyler and Weber]) fares no

better⁴. Lately, therefore, the debate has shifted to retribution. Whereas the factors listed earlier are all practical, motivated by ethics indirectly through the ethical desirability of preventing murders, this modern reason is a classic ethically-motivated argument, without an intermediate practical step. Walter Berns, for instance, flatly calls modern objections to the death penalty “a product of modern amoral political philosophy”.

But an argument can easily be made to put the boot on the other foot: it is very easy to see that, although enacted equivalent retribution (death for death) might be *consistent* with some ethical principle, it cannot realistically be *deduced* from it, unless one wishes to accept some other conclusions that, I think, would be abhorrent to most moderns. For example, if death for death is justified by reason of retribution, then should not also terrible torture for terrible torture, or horrific mutilation for horrific mutilation, be equally entailed? What kind of abhorrent punishment should have been administered to some of the twentieth-century mass murderers? Whatever they might deserve, would we not prefer that there be some limit to the bestial depths to which one would have to fall to deliver retribution to certain criminals? And if we stop short of torture or torture-execution, by what principle do we not stop short of execution plain and simple?

I shall briefly dispose of one common argument that might be used to mark the difference, before assuming that there is none, and that the retribution argument fails along with all the others previously mentioned. Perhaps, so one might argue, community standards are the thing that determines how far we are prepared to go in actually carrying out punishments equivalent to the crime? Perhaps as a practical matter it does, but for philosophers, that is surely an uncomfortable place to be. Philosophy, after all, is surely intended to inform and enlighten just those community standards, by awakening people to important, yet perhaps subtle, ideas and arguments. To contribute anything, a philosopher must reach beyond community standards.

If there is a limit to retribution, the Principle of Goodness draws it prior to the death penalty, not after, simply because comparisons of the numbers of wrongly-executed versus repeating murderers do not have the persuasive effect they do in consequentialist ethics. That there are *any* wrongly-executed cannot be sidestepped simply by numbers: firstly, it is final and cannot be corrected; and secondly, the wrongly-executed are deliberately killed by us (meaning society), whereas we do not commit the murders of those who kill again. We can commute all death sentences *and* attempt to prevent those who really are killers from killing again.

4 Breaking Out of Categories

I wish to make a general point here, but one of importance to our topic. Namely, that the distinctions amongst various human institutions (in the widest sense, including practices, laws, cultural artefacts, etc.) make sense for us of the undifferentiated world, but do not always correspond to firm boundaries in wider reality. (As we are assuming a realist stance in this paper, I do not stop to quibble about the existence of reality here.) To illustrate this point, consider the energy that has been devoted over the last few decades to whether homosexuality is “a disease”. Philosophers will easily recognise the many levels of confusion inherent in imagining that solving this word puzzle makes any difference to reality.

Yet this same fallacy is played out repeatedly in the legal system: whether a crime is “rape” or “sexual assault”, whether a killing is “manslaughter”, “unlawful killing”, or “murder”. Huge variations occur in punishment depending on just which side of a line certain behaviour is deemed to fall. Again, this is not an argument that there are no distinctions, just that the distinctions are probably much fuzzier, and do not fit in discrete compartments. Such considerations might lead us to suspect deficiencies in our handling of justice, quite apart from the question of capital punishment.

This leads us to consider the two categories of defence of the populace and criminal justice. That they are closely related is seen in the existence of ‘defence’ reasons for punishment, as discussed previously. Once we recognise that these two categories are not entirely separate, perhaps we can advance further in arriving at more precisely reasoned arguments for

4 For an argument involving clearly symbolic factors, see [Lehtinen].

deciding when or if to apply the death penalty?

5 A Proposal

If the Principle of Goodness is a genuine foundational ethical principle, it will offer moral guidance, but it will not be so specific as to mandate just one policy or course of action: conditions change, people's comfort zones alter, understanding grows (in particular, what constitutes benefit and harm), the relative safety of societies differ, and so on. Any worthwhile ethical philosophy must be flexible enough to work throughout all these changes and more. This means that any specific proposal regarding a given problem most likely cannot be deduced from the Principle after the fashion of a mathematical theorem. I do not intend, therefore, to justify the following minutely from the Principle. However, in the light of the matters discussed so far, the rationale should be sufficiently clear.

In summary, some relevant considerations from our discussion are:

- the need to protect every innocent to the best of our abilities;
- innocents include the wrongly convicted and also the innocent victims of crime;
- we might need to consider defence of society and the justice system as an integrated whole;
- a proposal informed by the Principle of Goodness will include a justice principle;
- there is a limit to the extremities to which retribution can be taken, as a result of the need to resist falling into savagery.

Here is one proposal that attempts to harmonise these factors.

- The justice system should be reconstructed so as to place obtaining truth at the foundation of all its processes. All reliable and relevant evidence should be admissible. Guilty verdicts for serious crime should only be obtained after the most stringent "quality checks" on the reliability of the reasoning. (This might, and perhaps will, require major revisions of such things as the jury system.)
- A just sentence for deliberate, malicious murder of the innocent by a competent adult is death. This sentence should be passed in all such cases.
- But a civilised society will not itself use violence as retribution; therefore all death sentences should be suspended in favour of genuine whole-of-life imprisonment. In other words, the death penalty will never be used for pure retribution, and should exonerating evidence be uncovered, reversal of the verdict and compensation may be possible.
- However, those murderers who are now still alive and still capable of acting are still guilty, and their further acts in their life form a chain of causation, as discussed earlier.
- If, therefore, the commuted sentence proves insufficient to stop that person from committing serious crimes of violence against innocents (for example, they commit further serious violence in prison or after a jailbreak, or they commission crimes by outside associates), then the sentence will be reinstated and actually carried out—not as retribution, but as defence of the innocents in the community who are placed at risk by the continued life of the criminal.

This proposal attempts to protect the innocent, both by keeping alive those innocents wrongly convicted, and by protecting future would-be victims by making sure that convicted murderers still have "something to lose" by committing further crimes. It removes the emotional element from death sentence deliberations by passing it upon all who commit those serious crimes that merit it by principles of proportional returns, at the same time making it clear that the sentence will with certainty be suspended. Only the criminal's own future behaviour, not the uncertain emotions of judges and jurors regarding past behaviour, will determine if a death sentence is actually carried out. An actual execution is, therefore, the

death *defence of society*, not the death *penalty*. In this respect, it differs from common American practice today (for example, see [Reza]).

Are there any other situations where actually carrying out the sentence should be considered? I believe there is just one: the case where a murder is committed to prevent detection or apprehension for another, prior crime. The reason is, again, defence of the innocent rather than retribution. A criminal, no matter how serious their crimes to date, must still have something to lose by committing further crimes to cover up past crimes.

6 Conclusion

As mentioned previously, this proposal is by no means deduced in the pure logical sense from the Principle of Goodness, but it is nevertheless strongly inspired by it, and relevant connections with the earlier sections of this paper will be readily apparent. The clarity of the proposal contrasts strongly with existing practice in countries using the death penalty, where emotions, outrage, race of the victim, and other illogical factors continue to make the death penalty more of a gamble than an element of a decent justice system.

Is there any reason to be found in the nature of the Principle of Goodness, why a proposal based upon it has this kind of clarity? I believe there is. In any consequentialist ethic, the calculation of relative amounts of benefit or harm, happiness or misery, is largely uncertain, if not incoherent as a meaningful measure. This opens the door to emotion and to bias due to one's own position as an actor in whatever debate is being conducted. And even if one somehow removes all this uncertainty, the calculation of future effects of actions and accurate predictions of realised amounts of benefit and harm is arguably close to impossible. But the question of whether an attempt is being made to harm a single innocent is very much less susceptible to such uncertainty, and no future effects prediction is required, as the Principle concerns intention, not outcome. In other words, the questions posed by the Principle of Goodness are inherently more securely answered than those posed by consequentialist ethics.

There are, however, still important questions to be considered. What is innocence? What is justice? A great deal of progress in moral argument can be made, I believe, without further in-depth analyses of these questions, purely owing to the superior clarity of the Principle of Goodness. It remains to be seen how much additional progress can be made after further investigations such as these are carried out.

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