

July 2006

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Recommended Citation

Blumenson, Eric, "Killing In Good Conscience" (2006). *Suffolk University Law School Faculty Publications*. 27.
https://lsr.nellco.org/suffolk_fp/27

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KILLING IN GOOD CONSCIENCE

Comments on Sunstein and Vermeule's Lesser Evil Argument for Capital Punishment and other Human Rights Violations

Eric Blumenson[⊗]

Abstract:

In a recent article, Cass Sunstein and Adrian Vermeule argue that capital punishment is morally required if it will deter more killings than it inflicts. They claim that the state's duty is to minimize murders, and that recent deterrence research shows that state executions, even if deemed murders themselves, can do so. If these findings are true, they argue, the state is morally obligated to undertake such "life-life tradeoffs."

The logic of Sunstein and Vermeule's argument justifies not only state executions, but any state-perpetrated injustice that promises to reduce the incidence of similar injustices overall. Recently such lesser evil arguments have been invoked to justify state torture, detention without trial, and other human rights violations. In this essay, I identify problems that are common to all of these arguments. My aim is to demonstrate that, however valid the lesser evil approach may be in some domains, it fails when invoked to defend state violations of the right to life and other fundamental human rights.

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*In Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs,*¹ Cass Sunstein and Adrian Vermeule argue that capital punishment is morally required if it will deter more killings than it inflicts. They claim that the state’s duty is to minimize murders, and that recent deterrence research shows that state executions, even if deemed murders themselves, can do so.² If these finding are true, they argue, the state is morally obligated to undertake such “life-life tradeoffs.”³

¹ Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life -Life Tradeoffs*, 58 STAN. L. REV. 703 (December, 2005)[hereinafter “Sunstein & Vermeule”]

² *Id* at 709 (regarding moral obligation to reduce killings), and 706 n. 9 (citing several studies attributing a deterrent effect to capital punishment). One study cited found that each execution deters 18 murders on average. Hashem Dezhbakhsh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 AM. L. & ECON. REV. 344 (2003). *Id.* at 706 n. 10. Other research studies and reports cited by Sunstein and Vermeule are H. Naci Mocan & R. Kaj Gittings, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J.L. & ECON. 453, 453 (2003); Joanna M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment’s Differing Impacts Among States*, 104 MICH. L. REV. 203 (2005); Joanna M. Shepherd, *Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment*, 33 J. LEGAL STUD. 283, 308 (2004); Paul R. Zimmerman, *Estimates of the Deterrent Effect of Alternative Execution Methods in the United States*, 65 AM. J. ECON.

This is a lesser evils argument, but interestingly, it is particularly directed to abolitionists who believe that state executions are so intrinsically wrong, whatever their consequences, that they should never be inflicted. Sunstein and Vermeule want these abolitionists to recognize that the state is responsible for the murders it fails to prevent as well as the killings it directly perpetrates. Therefore, they argue, “killing is on both sides” of the capital punishment question, if the death penalty deters murders;⁴ and if it deters significantly more killings than it inflicts, an opposition to killing on principle “is most naturally understood to support capital punishment rather than to undercut it.”⁵ On their argument, the

& SOC. (forthcoming 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=355783; Paul R. Zimmerman, *State Executions, Deterrence, and the Incidence of Murder*, 7 J. APPLIED ECON. 163, 163 (2004). *Id.* at 706 n. 9.

The deterrent findings Sunstein and Vermeule rely on are questioned in John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 794 (2005).

³ Sunstein & Vermeule, *supra* n. 1, at 749-750. For other arguments for this point, see Tom Stacy, *Acts, Omissions, and the Necessity of Killing Innocents*, 29 AM. J. CRIM. L. 481, 499, 508 (2002) (noting “an invisible and questionable reliance on the act/omission distinction” in cases condemning lesser evil killings, and stating that “the inviolable nature of an innocent person's right to life does not furnish a basis for condemning necessity killing, at least when the actor bears responsibility for all of the available choices”); Gary A. Becker, *On the Economics of Capital Punishment*, ECONOMISTS VOICE (March 2006), available on-line at www.bepress.com/ev; Richard A. Posner, *The Economics of Capital Punishment*, Economists Voice, (March 2006), available at www.bepress.com/ev, at p. 2.

⁴ Cass R. Sunstein and Adrian Vermeule, *Detering Murder: A Reply*, 58 STAN. L. REV. 847, 855 (December, 2005) [hereinafter “Sunstein & Vermeule Reply”]. *Cf.* Sunstein and Vermeule, *supra* n. 1, at 731 (“it is extremely desirable to prevent arbitrary or irreversible deaths, but this consideration is on both sides of the ledger”).

⁵ Sunstein & Vermeule, *supra* n. 1, at 738. See also *id.* 749; 718-719 (stating that even if taken in its most sympathetic light, “a deontological objection to capital punishment is unconvincing if states that refuse to impose the death penalty produce, by that very refusal, significant numbers of additional deaths”).

morality of capital punishment reduces entirely to a question of numbers.⁶

In this essay I explore their argument and several reasons I believe it fails.

The proper place of lesser evil arguments is a discussion that takes place in almost infinite contexts and never ends. But Sunstein and Vermeule's lesser evil argument is of a particular kind, far removed from more common arguments about the propriety of petty corruption or law-breaking to serve the greater good. The lesser evil they propose is execution, and because its justification is the collective benefit, it may be fairly characterized as a kind of human sacrifice. Their argument is a particularly stark instance of a type of lesser evil claim that has proliferated since 9/11, which targets the human rights of some in the name of human rights for all. Recently such arguments have been invoked to justify detention without trial, warrantless wiretapping, coercive interrogation, and torture.⁷ The Sunstein-Vermeule argument and these

⁶ *Id.* at 705-706.

⁷ See, e.g., Charles Krauthammer, *The Truth About Torture*, 11 WEEKLY STANDARD ____ (Dec. 5, 2005), available at www.theweeklystandard.com/Content/Public/Articles/000/000/006/400rhqav.asp; Eric Posner and Adrien Vermeule, *Should Coercive Interrogation be Legal?* 104 Mich. L. Rev. 671 (February, 2006); ALAN DERSHOWITZ, "PREEMPTION, A KNIFE THAT CUTS BOTH WAYS (2006)(arguing that the threat of terrorism and weapons of mass destruction may require a shift from "responding to past events to preventing future harms," [p. 7], and advocating an open-minded analysis of preemptive policies potentially including preventive detention, extrajudicial executions of terrorists, preventive war, and other methods) [introduction]; Eric Posner, *A Threat that Belongs Behind Bars*, N.Y Times, June 25, 2006 at p. 12 (arguing for preventive detention without charge of suspected terrorists). Cf. Michael Ignatieff, *Lesser Evils: What It Will Cost Us to Succeed in the War on Terror*, N.Y. Times Magazine, May 2, 2005, at ____ (stating that civil libertarians "don't want to think about lesser evils...But thinking about lesser evils is unavoidable"); Sunstein & Vermeule, *supra* n. ---, at 734 (arguing that "torture would be morally obligatory on certain factual assumptions").

other proposals may each be critiqued on their individual merits.⁸ My concern here is limited to the fundamental defects they share in common. My aim is to demonstrate that, however valid the lesser evil approach may be in some domains, it fails when invoked to justify state violations of the right to life and other fundamental human rights.

The lesser evil principle requires choosing whichever option will cause less net “evil,” however defined. This is the focus of the Sunstein-Vermeule argument, and of my critique here. Sunstein and Vermeule also offer a second justification for executions with sufficient deterrent value, invoking a moral view variously described as a “catastrophic exception” or “threshold deontology” theory.⁹ Unlike the lesser evil principle, which requires killing one if necessary to save two, this approach retains human rights prohibitions in all but catastrophic cases (when the “threshold” is met). I offer some brief comments on this second argument, and its purported application to the capital punishment issue, at the conclusion of sec. II(C) *infra*.

⁸ Some persuasive examples include Carol S. Steiker, *No, Capital Punishment is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 755 (December, 2005)(arguing that Sunstein and Vermeule’s attempt to construe criminal punishment as a form of government regulation produces unjust punishment); Owen Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 Minn. L. Rev. 1481 (2004).

⁹ Sunstein & Vermeule, *supra* n. 1, at 719.

I. THE SUNSTEIN-VERMEULE ARGUMENT TO ABOLITIONISTS

Sunstein and Vermeule seek to sidestep the consequentialist-deontological divide, and claim that their argument for capital punishment is fully consistent with deontological constraints on killing.¹⁰ In their view,

sectarian commitments at the foundational level are for the most part irrelevant to the issues here. If it is stipulated that substantial deterrence exists, both consequentialist and deontological accounts of morality will or should converge upon the view that capital punishment is morally obligatory.¹¹

This is an ambitious claim, given that the deontological account they have in mind is one which deems state killing to be so egregiously wrongful that it can never be justified by its deterrent value or other benefits. “Deontology” refers to the anti-consequentialist moral view that some acts are intrinsically wrong -- neither reducible to the goodness of their consequences nor justifiable by them. And most people do believe that sometimes the ends cannot justify the means. The best example of such a proscription is the transplant hypothetical; everyone agrees that it is immoral for a doctor to kill a healthy person in order to distribute his organs to five desperate transplant candidates, even though her act of killing would save five lives at the cost of one.¹² Promises should be kept,

¹⁰ Sunstein & Vermeule Reply, *supra* n. 4, at 855.

¹¹ Sunstein & Vermeule at 717. *See also* 718 (claiming that “our claims here do not depend on accepting consequentialism or rejecting the deontological objection to evaluating unjustified killings in consequentialist terms”); 707 (arguing that “any deontological injunction against the wrongful infliction of death turns out to be indeterminate on the moral status of capital punishment *if* the death is necessary to prevent significant numbers of killings”).

¹² For the initial discussions of this hypothetical, see Philippa Foot, *The Problem of Abortion and the Doctrine of Double Effect*, 5 *Oxford Rev.* 15 (1967); JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 135-48 (1990).

lies foresworn, and rights observed—these putative constraints on maximizing utility all illustrate a deontological position that some acts are required or forbidden regardless of how much good they might produce.¹³ For the deontological abolitionists the authors are addressing, capital punishment is one of these prohibited wrongs. (Kant famously took a contrary position, holding capital punishment to be the only just punishment for murder and therefore mandatory¹⁴).

What Sunstein and Vermeule propose has a very different moral structure. In arguing that the state must kill if it would reduce killings overall, they advocate a form of consequentialism, albeit a less familiar version than one that measures the goodness of consequences solely in terms of aggregate welfare. They present a version sometimes labeled “utilitarianism of rights,” in which the measure of utility is the degree of compliance with rights and duties, and one should act in whatever ways will minimize their violation.¹⁵ Sunstein and Vermeule seek to minimize

¹³ See, e.g., John Rawls, *Justice as Fairness*, 67 *PHILOSOPHICAL REVIEW* 164, 194 (1958)(arguing that maximizing utility is limited to means that are fair); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 28-33 (1974)(describing "side constraints" on maximization); Thomas Nagel, *Autonomy and Deontology*, in *CONSEQUENTIALISM AND ITS CRITICS* 142, 143-44 (Samuel Scheffler, ed., 1988).

¹⁴ IMMANUEL KANT, *METAPHYSICS OF MORALS* 98 (Mary Gregor ed. & trans., Cambridge U. Press 1996) (1797) (arguing that capital punishment must be carried out even by a society about to disband, despite the lack of future utilitarian benefits for anyone). Kant thought that only the principle of *lex talionis*, colloquially translated as “an eye for an eye,” would conform to retributive principles. “Only the law of retribution (*jus talionis*) can determine exactly the kind of punishment [All other standards] cannot be compatible with the principle of pure and strict legal justice.” IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 101 (John Ladd trans., Bobbs-Merrill 1965) (1797).

¹⁵ ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA*, 28-33 (1974)(explicating this concept). The concept is sometimes labeled “consequentialism of rights,” because as Philippa Foot notes, strictly speaking, utilitarianism is that version of consequentialism that defines the good exclusively in terms of aggregate welfare, “but it is of course

violations of the right to life in particular, and they may believe they have obviated deontological objections by affording this right a privileged moral status. But this is not a status that imposes strict limits on what we may do, as in the deontological conception; it is a status that instead requires the state to abridge someone's right to life whenever it would prevent more violations than it inflicts.¹⁶ This principle is the antithesis of deontological morality because the choice of means has no significance apart from the value of the outcome it produces.¹⁷

Why then do the authors believe that their lesser evil argument should persuade deontological abolitionists? Sunstein and Vermeule think they can demonstrate that, taken entirely on its own terms, deontological morality demands a more nuanced application than its abolitionist

possible also to count a theory as utilitarian if right action is taken to be that which produces 'good states of affairs', whatever these are supposed to be; and then 'utilitarianism' becomes synonymous with 'consequentialism'." Philippa Foot, *Utilitarianism and the Virtues*, in *Consequentialism and its Critics* 224, 224-5 (S. Scheffler, ed., ---).

See also Amartya Sen, *Rights and Agency*, 11 *PHIL. & PUB. AFFAIRS* 3 (1982). Sen proposes a similar conception he calls a "goal rights system," which incorporates "rights in the evaluation of states of affairs [and gives] these rights influence on the choice of actions through the evaluation of consequent states of affairs." *Id.* In this system, the fulfillment of rights is only one element of the goodness of the state of affairs, and therefore the violation of a right may make "the outcome worse *both* because of the violation of that right itself and because of the negative effect it has on other objectives..." *Id.* At 15-16.

¹⁶ Nozick, *supra* n. ---, at 28-29.

¹⁷ The only indispensable marker of consequentialism is the view that the moral significance of a choice derives from its consequences, and one should do whatever will produce the best outcome, impartially considered. There are all sorts of instrumental questions about the relation between acts and their results that lead to a bewildering variety of forms of consequentialism (for example, would incessant instrumental calculating reduce utility?), and there are also a great many conflicting claims on what constitutes a good state of affairs (for example, does it include rights? Or satisfaction of an individual's self-destructive desires?). But what they all share in common is the view that the rightness and wrongness of actions must be traced to the goodness of the consequences they produce.

proponents recognize. Their specific target is the distinction between “acts” and “omissions” – between what we do and what we allow to happen by inaction. An act of fatally shooting someone is deemed “killing”; usually failing to stop someone else from doing so when one could is not. Sunstein and Vermeule seek to show that the deontological basis for this distinction loses its force when transposed from personal decisions to government policy choices: “Where government is concerned, failures of protection, through refusals to punish and deter private misconduct, cannot be justified by pointing to the distinction between acts and omissions.”¹⁸ Executions and murders the state chose not to deter therefore stand on the same footing, according to the authors, and the state should choose whichever capital punishment position will kill the fewest overall.

Although it cannot carry the weight placed on it, the point that the unique role of government generates different deontological requirements than those that govern individuals is well taken. It is surely right that governments cannot disclaim responsibility for inaction by invoking a rationale that only makes sense in the case of private moral choices. That rationale is in large part based on the respect due a rational, self-directing person’s right to control the essential shape of her own life. To hold us responsible for our failures to aid others would deny us this right: there

¹⁸ Sunstein & Vermeule, *supra* n. 1, at 707. The authors argue that “unlike individuals, governments always and necessarily face a choice between or among possible policies for regulating third parties. The distinction between acts and omissions may not be intelligible in this context, and even if it is, the distinction does not make a morally relevant difference.” *Id.* at 721.

would be no end to our obligations regarding strangers, and no space for the special relation we have to family, friends, community, and one's own life. The deontological distinctions that limit the scope of our obligations -- between acts and omissions, between intended and unintended consequences, between our own acts and those of others in response -- place us in control of our lives; and most of the time, they correspond to our everyday intuitions about moral requirements.

This rationale makes no sense, however, when applied to government decisions rather than private choices.¹⁹ Governments have no moral claim to a private sphere in which to favor particular individuals and pursue their own goals. Most importantly, as Sunstein and Vermeule point out, although an individual has no deontological obligation to assist strangers or control others, governments are in the *business* of doing so; they must, for example, prevent individuals from committing crimes.²⁰ Therefore, although Sunstein and Vermeule are willing to concede that a state execution may be as wrongful as a private murder, they also insist that to the degree the state can prevent the latter, it is morally responsible for both in equal measure.

The point that governments cannot hide behind the act-omission distinction is the linchpin of Sunstein and Vermeule's argument, and in

¹⁹ Sunstein & Vermeule, *supra* note 1, at 725-726.

²⁰ Sunstein and Vermeule, *supra* note 1, at 726. Nor can the state properly claim that it is not responsible for deaths resulting from its failure to deploy police in high crime neighborhoods because these deaths were not "intended" but only foreseen. *Id.* at 722. Michael Walzer similarly argues that deontological duties must be modified in the case of political leaders. Michael Walzer, *Political Action: The Problem of Dirty Hands*, in *WAR AND MORAL RESPONSIBILITY* 70 (Marshall Cohen et al. eds., 1974).

their view, the “convergence” of deontologists and consequentialists follows directly from it. If government kills when it utilizes capital punishment, but also kills when it doesn’t by failing to deter murders, then a deontological prohibition on killing cannot resolve the capital punishment question. The only basis for decision is a comparison of the consequences of choosing each option. So on this account, deontologists concur with consequentialists, but on different grounds. The means we use to achieve our goals still matter, but because in this case the prohibited acts of killings are “on both sides” of the question, they cancel out.²¹

II. PROBLEMS AND OBJECTIONS

A. Deontology?

Thus do Sunstein and Vermeule appeal to deontological abolitionists to rethink their position. The next sections delineate what I see as fatal problems with their appeal, but preliminarily it is worth noting several important gaps in the authors’ *arguendo* acceptance of deontological morality, and the corresponding weaknesses in their claim to have disabled deontological objections. Consider whether deontologists should be satisfied with --

²¹ Sunstein & Vermeule, *supra* n. 1, at 705, 720, 747 (“Where capital punishment of murderers is at issue, the taking of life is the only morally relevant action in the picture, and the state’s taking of life is entirely commensurable with the crimes it deters”).

-- *the argument's claim that state action and inaction are morally indistinguishable.*²² To establish that (even on a deontological account) governments are responsible for both its acts and omissions does not entail that the two are the same in all other respects necessary to justify life-life tradeoffs. For example, the state's duty to refrain from killing could be stronger than its duty to assist potential victims, just as a citizen's negative right against state violation could be stronger than her positive right to state assistance.

-- *the argument's treatment of state executions and individual murders as equivalent wrongs.* Sunstein and Vermeule say that "the state's taking of life is entirely commensurable with the crimes it deters."²³ This statement, which lays the foundation for the life-life tradeoff calculation, may seem to accommodate, at least *arguendo*, the deontological abolitionist's objection that executions are simply state murders. Sunstein and Vermeule do not significantly press any claim for the death penalty based on the desert of the defendant, which would have no purchase on those abolitionists who believe the death penalty is an unjust or disproportional punishment for *everyone*. Nor do they suggest that "the life saved [by deterrence is usually] better than the life taken," as economist Gary Becker does in arguing that even a 1:1 deterrent value

²² Sunstein and Vermeule Reply, *supra* n. --, at 850 ("where governments are concerned, the distinction between acts and omissions is both conceptually obscure and morally irrelevant").

²³ Sunstein & Vermeule, *supra* n. 1, at 747.

would justify capital punishment.²⁴ On the contrary, they seem to be willing to grant that state executions may be no less wrongful than private murders.²⁵

But there are two problems with this stipulation, if it is designed to establish common ground with deontologists. The first is that it is incomplete. It does not allow that state executions may be *worse* than private murders, not merely equivalent, as I shall argue shortly. If it is worse, a life-life tradeoff policy may perpetrate great injustice absent from their calculations.²⁶ The second problem is the extreme positions this

²⁴ Gary A. Becker, *On the Economics of Capital Punishment*, ECONOMISTS VOICE (March 2006), available at www.bepress.com/ev, at p. 2. Becker illustrates this by asking us to consider “a person with a long criminal record who holds up and kills a victim who led a decent life and left several children and a spouse behind. Suppose it would be possible to save the life of an innocent victim by executing such a criminal. To me it is obvious that saving the lives of such a victim has to count for more than taking the life of such a criminal.”

²⁵ Sunstein & Vermeule, *supra* n. 1, at 707-708, 718-719. Sunstein and Vermeule argue that “any deontological injunction against the wrongful infliction of death turns out to be indeterminate on the moral status of capital punishment *if* the death is necessary to prevent significant numbers of killings...By itself, the act of execution may be a wrong....But the existence of life-life tradeoffs raises the possibility that for those who oppose killing, a rejection of capital punishment is not necessarily mandated. On the contrary, it may well be morally compelled.” *Id.* at 707-708.

I say the authors “*seem* to be willing” to grant that state executions are as wrong as street murders, because they do refer in passing to the fact that executions are inflicted on people who are likely to be guilty. See eg., ---- Sunstein & Vermeule, *supra* n. 1, at 716, 717. In any event, this point is unnecessary to their argument and they do not press it, nor can they if they want to appeal to deontological abolitionists for whom the guilt of death row defendants does not justify execution. See also *id.* at 710 (“our argument is limited to the setting of life-life tradeoffs—in which the taking of a life by the state will reduce the number of lives taken overall”); *id.* at 738 (“If capital punishment strongly deters killings, and if the government that eschews capital punishment can fairly be charged with those killings, then the government’s only choices are to kill more or to kill fewer; the deontological injunction might then be interpreted to require rather than to forbid capital punishment”).

²⁶ In that case, an additional problem would afflict the Sunstein-Vermeule argument. In their rendition, the only goods involved are all “wrongful killings,” which allows them to avoid relying on contentious consequentialist claims about the commensurability of all goods. See Sunstein & Vermeule, *supra* n. 1, at 747-748 (noting that “the taking of life is the only morally relevant action in the picture,” so they need not address questions like,

stipulation generates for the authors, a parade of horrors of the kind that fueled the deontological project to begin with. Even proof that the state was *deliberately* executing innocent people for its positive deterrent value (such as might result were Israel to kill the parents of every suicide bomber) would seem to provide no objection to capital punishment on their argument, since that merely shows a level of wrongfulness they have already assumed, and their appeal to deontologists is based simply on reducing the number of wrongful killings.

-- *the argument's conception of persons as fungible instruments of the collective interest.* Even if Sunstein and Vermeule could show that killing alone is "on both sides," this does not establish that the proper response is an aggregative trade-off approach. That requires a further argument to overcome deontological objections to treating human beings as fungible instruments of the collective interest, rather than intrinsically valuable individual beings belonging to themselves. Whether one may be sacrificed for the greater good is the essential dividing line between consequentialists and deontologists, and the Sunstein-Vermeule argument does nothing to erase it.

These lacunae in the authors' argument each give rise to fundamental deontological objections that are the subject of the remaining pages of this essay.

Should the state violate someone's right to life if doing so would deter enough rapes?). But if state killings turn out to be worse than street murders, they will be worse in ways other than the mere fact that they are killings; and there will need to be further argument to show that these other wrongs are commensurable and aggregable, and thus subject to tradeoffs.

B. Destroying rights to save them

Let us begin the analysis with a conceptual problem regarding Sunstein and Vermeule's understanding of the "right to life" they are seeking to protect. In propounding their version of rights-utilitarianism, Sunstein and Vermeule assume that one can maximize the right to life by repeatedly violating it. But this is by no means clear, and certainly at odds with one common view of rights as "trumps".

The term "utilitarianism of rights" sounds oxymoronic -- and for good reason. Rights essentially *are* the idea that with regard to certain vital interests, each individual is inviolable; she is entitled to not have these interests confiscated or traded off to benefit others. Put in different words, rights exist to "secure the distribution of control over the central features of one's fate."²⁷ One cannot simply and surgically separate human rights from this distributive foundation.

Some may believe that Sunstein and Vermeule retain the essence of the right to life by privileging it as the overriding goal to be promoted. Without a prohibition forbidding authorities to use some as a resource for others, however, what we have is not a system of rights, but rather a utilitarian pecking order of interests. To be sure, placing "rights" at the

²⁷ James Griffin, *Towards a Substantive Theory of Rights*, in *UTILITY AND RIGHTS* 137, 140 (R.G. Frey, ed., 1984). See also Terrance C. McConnell, *Moral Blackmail*, 91 *ETHICS* 544, 554 (no. 4, July 1981); Thomas Nagel, *Libertarianism without Foundations*, 85 *YALE L. REV.* ____, 144 (1975) (stating that "a general feature of anything worthy of being called a right is that it is not translatable into a mere assignment of disvalue to its violation").

top of this pecking order is an improvement over the more traditional utilitarian metric. It does away with one kind of extreme utilitarian calculation, in which a frivolous pleasure outweighs someone's right to life by virtue of overwhelming numbers.²⁸ Under this theory, one can't justify a Roman gladiatorial spectacle by the transient pleasure it would provide the assembled masses. It also preserves each person's right to life against trade-offs serving collective interests in social convenience, economic welfare and so on.

Nevertheless, like all forms of utilitarianism, the numbers count, and in this version that will require killing someone whenever necessary to save two. Its conception of one's "right to life" does not reflect self-ownership, but instead derives from, and is contingent on, the collective interest in affording it. In this respect, the theory embraces a degree of governmental ruthlessness and power that bears little resemblance to respect for human rights: it requires the state to treat all lives as fungible, which is what the idea of rights most opposes.

*

Of course, one might deny the value of rights and duties as so conceived, and this is really what Sunstein and Vermeule have in mind. They believe that governments *must* treat lives as fungible, and dismiss the traditional conception of rights as itself unjust – a conception that unjustifiably favors the "rights holders" who just happen to be before

²⁸ Assuming that maximizing compliance with rights is lexically superior to all other interests. Lexically superior interests must be entirely satisfied before one can move on to an inferior interest. See JOHN RAWLS, A THEORY OF JUSTICE 43 (1971).

them, such as the individually-identifiable capital defendants who benefit at the expense of the faceless future victims of murders the state chose not to deter.²⁹ The Sunstein-Vermeule thesis is most sensibly understood as a claim about justice, a claim that justice requires the state to minimize killing rather than respect any particular individual's right to life when the two conflict. How persuasive is the argument for this claim?

C. Missing Links

As noted earlier, the central move in this argument is its denial that state actions (here executions) have a moral significance that its omissions (here failure to prevent murders) lack. What the argument in fact shows is something less: it shows that the act-omission distinction is irrelevant to the scope of state responsibility. The authors are surely correct that the state is responsible for its failures to prevent "private" killings as well as for its own; but exactly how useful is this point to their cause?

Intuitively, it certainly doesn't take them as far as they want to go. It is perfectly coherent to believe that a mayor has responsibility for protecting her city from criminals, but is also enjoined from perpetrating crimes herself to do so. Or consider the parallel case of a parent, who has duties to his children that also transcend the act-omission distinction. If my child's life is threatened by organ failure, it is clear that I cannot shirk my duty to seek treatment by claiming it is a mere omission; but it is also

²⁹ Sunstein & Vermeule, *supra* n. 1, at 710, 740-743.

clear that this does not entitle me to undertake a life-life tradeoff by killing the only medically fit donor available. According to the Sunstein-Vermeule theory, however, I would kill in either case, so it should be a matter of moral indifference which I choose. (Some capital punishment proponents will say that the convicted murderer has forfeited his life by his crime, while the involuntary organ donor has not. But the Sunstein-Vermeule argument to abolitionists does and must accept their view that *no one* deserves execution, and its minimization-of-killing principle does not depend on the guilt of the person sacrificed.³⁰)

What precisely is the problem with this argument, and what would Sunstein and Vermeule need to do to fix it? Stripped to its essentials, their argument is that (1) because the state's moral responsibility extends to both its own acts and the wrongful acts of others it could prevent, (2) its moral obligation is to kill when necessary to minimize killings overall. The problem is that the argument is a non-sequitur. Two links are missing between their premise and their conclusion: the expanded scope of the state's responsibility does not entail that its acts of killing and its failures to prevent killing are morally equivalent, and even if it did, it also does not entail that aggregation and minimization are the method by which the state should fulfill its responsibilities. Sunstein and Vermeule provide no

³⁰ Sunstein & Vermeule, *supra* n. 1, at 710 (stating that “our argument is limited to the setting of life-life tradeoffs—in which the taking of a life by the state will reduce the number of lives taken overall”); 749 (arguing that “deontological injunctions against unjustified killing. . . are of little help in these settings. Unjustified killing is exactly what capital punishment prevents”); 738 (arguing that, assuming capital punishment deters, “the government’s only choices are to kill more or to kill fewer; the deontological injunction might then be interpreted to require rather than to forbid capital punishment”).

argument to establish either of these necessary steps, without which nothing connects their claim about the scope of state responsibility to their conclusion regarding what means are permissible to fulfill it. Let us consider whether arguments are available to establish either point.

1. The “life-life” claim: Are state executions and state failures to prevent killings equivalent?

The idea that, granting executions are wrongful killings, governments nevertheless should inflict them if it would reduce the incidence of wrongful killings overall, assumes that state killings and private killings the state fails to prevent are morally identical, or at least morally equivalent, wrongs. This equivalency is a necessary element of the life-life tradeoff argument. All that Sunstein and Vermeule have to say on this point is the assertion that “the state’s taking of life is entirely commensurable with the crimes it deters....[and not] a morally different act from the ‘private’ taking of life that is made possible by the state’s choice of a criminal-justice policy that does not include capital punishment.”³¹ They obviously believe that by showing that the state has some moral responsibility for the murders it fails to prevent they have proven this, but there are many other points of comparison between state and individual killings, so rebutting one supposed distinction cannot establish that they are morally equivalent. Nor can the author’s observation that state executions and individual killings share certain

³¹ Sunstein & Vermeule, *supra* n. 1, at 747 and 747 n. 130.

defects in common, such as irreversibility and arbitrary infliction.³² We know that a person and a horse each have two eyes, sometimes wear shoes, and share 98% of the same genes, but that hardly shows them to be physically identical or equivalent creatures.

In fact, from the moral viewpoint, state killings and the murders it fails to deter are not equivalent wrongs -- even though the state must seek to prevent both. Some differences relate particularly to the institution of punishment. Albert Camus observed that “[f]or there to be an equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life”³³ Carol Steiker argues that unlike a street killing, capital punishment includes an attribution of blame for heinous wrongdoing, and as practiced in contemporary America also frequently includes a racial animus that is lacking in most private killings.³⁴ Any one of these points is enough to show that, *contra* Sunstein and Vermeule, the number of lives at stake is not the only moral issue involved in the decision whether to adopt a death penalty.³⁵

³² Sunstein & Vermeule, *supra* n. 1, at 729, 731.

³³ ALBERT CAMUS, *RESISTENCE, REBELLION, AND DEATH* 199 (1961).

³⁴ Steiker, *supra* n. ---, at 764-770.

³⁵ Sunstein and Vermeule, *supra* n. 1, at 747 (claiming that “the taking of life is the only morally relevant action in the picture”).

My focus here will be on another distinction between wrongs inflicted by the state and similar wrongs inflicted by individuals -- one that presents a problem for “lesser evils” arguments in general, whether that argument is deployed to justify state executions, detention without trial, torture, or other grave human rights violations. This is the difference between killings and other violations that are *authorized by a state life-life tradeoff policy* and those that are not, and the very different implications that flow from each. Sunstein and Vermeule note the issue, but consider it a distinction without a difference:

[I]n a regime of capital punishment the executioner acts pursuant to an explicit government policy, whereas...there is never a government policy to murder the particular citizens whose deaths would have been deterred by capital punishment...and intuition seems to suggest that its absence is important, but the moral relevance of its absence is obscure. If the point appears intuitively important, it is only because of the abstract or statistical character of the eighteen persons whose murders are deterred by each execution...³⁶

For Sunstein and Vermeule, whether killings are pursuant to state policy or not is immaterial: “the taking of life is the only morally relevant action in the picture,”³⁷ and the contrary intuition is a result of “cognitive failure.”³⁸ But consider an alternative explanation for the intuition that a state policy authorizing wrongful executions is worlds apart from a street murder, and of singular moral gravity: When an individual criminal

³⁶ Sunstein & Vermeule, *supra* n. 1, at 722-723. *See also id.* at 720 (stating that the government “authorizes its agents to inflict capital punishment, but it does not authorize private parties to murder; indeed, it forbids murder”).

³⁷ Sunstein & Vermeule, *supra* n. 1, at

³⁸ Sunstein & Vermeule, *supra* n. 1, at 710, 723, 740-743.

unjustifiably kills someone, he is *violating the particular victim's right to life*, and the state that unreasonably fails to use its legitimate powers to prevent this is violating its duty to protect that life. But when the state kills pursuant to a life-life tradeoff policy, it is *abolishing the right to life for everyone*. Then no one has a legal right to life, because no one is legally inviolable.

Legal inviolability is the state's recognition of the intrinsic value of each human life, which generates duties of justice to each person individually. It is the obligatory legal response to this moral status, a status most compelling described in the deontological arguments of Kant and such modern moral philosophers as Quinn, Kamm, and Nagel.³⁹ Under the rights-utilitarian tradeoff regime the authors suggest, individuals have a very different legal status, that of instruments that may be used for the collective benefit. If torturing some would reduce torture overall, or executing drunk drivers would deter some greater number of fatal vehicular manslaughters, the state would presumably be obligated to do so as well. Citizens are no longer right-holders; instead, the state claims the right to decide some shall die so more can live. The authors' minimize-

³⁹ See Thomas Nagel, *Personal Rights and Public Space*, *supra* n---; F. M. Kamm, *Harming Some to Save Others*, 57 *PHILOSOPHICAL STUDIES* 227 (1989); F. M. Kamm, *Non-consequentialism, the Person as an End-in-Itself, and the Significance of Status*, 21 *PHILOSOPHY & PUBLIC AFFAIRS* 381 (1992); Warren S. Quinn, *Actions, Intentions, and Consequences: The Doctrine of Doing and Allowing*, 98 *THE PHILOSOPHICAL REVIEW* 287-312 (1989).

On a human rights conception, moral inviolability is a moral status that cannot be taken away so long as the person exists. The state should reflect this moral right by enacting certain kinds of legal inviolability. Unlike moral inviolability, legal inviolability is a status that can be repealed by the state or violated by others.

injustice calculation takes no account of *this* injustice, which arises when the state in particular undertakes such life-life tradeoffs.⁴⁰

Because legal inviolability is a status that states but not individuals can destroy, it is not true that state killings are “entirely commensurable” with the criminal killings it fails to deter,⁴¹ and therefore not true that the proposed program of life-life tradeoffs simply makes justice “efficient” at no cost.

2. The “tradeoff” claim: is trading lives a permissible state activity?

I have just argued that Sunstein and Vermeule conflate the state’s minimization of killing with its recognition of a right to life, substituting the former for the latter. Is it open to them to adjust their calculations by recognizing both as goods to be counted in the balance, and therefore assigning asymmetrical weights to state and private killings? Could they reformulate their thesis to hold that a necessary and sufficient moral condition for state executions is not merely a positive deterrent value, but a deterrent value high enough to compensate for the loss of inviolability all citizens would suffer?

It is not possible to solve the problem in this way because the legal inviolability of one’s life, body and mind is in large part a guarantee

⁴⁰ For another illustration that the minimize injustice calculation takes no account of the denial of human dignity that it itself generates, see Eric Posner and Adrien Vermeule, *Should Coercive Interrogation be Legal?* 104 Mich. L. Rev. 671 (February, 2006)(arguing that a law allowing “coercive interrogation” would “do no more than symbolize the government’s willingness to produce the greatest possible good overall”).

⁴¹ Sunstein & Vermeule, supra n. 1, at 747.

against such balancing. It is the legal status of belonging to oneself, of *not* being a resource for the benefit of others. I do not mean to deny that there may be exceptional, catastrophic threats in which such a sacrifice is demanded, as in wars of necessity;⁴² but that is not a proper principle of governance generally. To govern according to a calculus establishing how much others must benefit before someone's life may be intentionally extinguished is to decide that a person's life is not his own. So there is no question of recognizing an individual's legal inviolability while also declaring a price on his life. The fundamental choice is whether or not the state affords each individual the legal status of self-ownership. A policy of executing some solely in order to save more is necessarily a rejection of that status.

If the state must choose, what choice -- minimizing crime by any means necessary, or minimizing crime without invading individual rights -- should it make? To see what is at stake more clearly, ask yourself whether you would prefer to live under a government that practiced the life-life tradeoffs the authors advocate, solely by virtue of the increase in your odds of survival. You shouldn't, because in exchange for a minute improvement in these odds, you would be giving up something of great value: the state's recognition of your personhood, or in different words, of your status as an inviolable and intrinsically valuable being. This legal status is of fundamental significance for every person, separate and apart

⁴² For discussion on the "catastrophic exception," including whether it undermines the non-aggregation principle, *see infra* at ---.

from whether that person is victimized or not. Thomas Nagel says, “to be tortured would be terrible; but to be tortured and also to be someone it was not wrong to torture would be even worse.”⁴³ By authorizing others to decide how long a person may live, a power now exercised only over animals, the life-life tradeoff policy constitutes a fundamental denial of human autonomy and dignity.

Sunstein and Vermuele deny that their trade-off approach to rights leads down this slippery slope: “because arguments about policies such as capital punishment and torture are hostage to what the facts turn out to show in particular domains, slippery-slope arguments are disabled; instead of a slope, there is just a series of discrete policy problems.”⁴⁴ But their point only demonstrates that there is *no* stopping point, and there is none precisely because they have removed the principles of justice that would stand in the way. What is “disabled” is any reason to object to the deliberate execution of an innocent person when its deterrent value would produce the right cost-benefit ratio.⁴⁵

⁴³ Thomas Nagel, *Personal Rights and Public Space*, *supra* n---, at 93.

⁴⁴ Sunstein and Verrmeule, *supra* note 1, at 735. Indeed, they argue, “not only is there no slope, there is no a priori reason to believe the ground slippery.” *Id.*

⁴⁵ To the objection that their theory would permit show trials to frame and convict an innocent person given sufficient benefits, they argue that we are highly unlikely to be confronted with such a scenario, but also say that moral intuitions that it is wrong to sacrifice one innocent to save more could be erroneous given the right cost-benefit ratio. *Id.* at 735-737. See also 734 (accepting that their hypothesis entails that “torture would be morally obligatory on certain factual assumptions...In our view, the ban on state torture reflects a use of the act/omission distinction in a context in which the distinction is not easy to defend”); 738 (stating that if executions deter, “then the government’s only choices are to kill more or to kill fewer; the deontological injunction might then be interpreted to require rather than to forbid capital punishment”); 735 (asking, “if our argument is correct...might not the failure to conduct show trials or to exonerate innocent people be a way of taking the lives of innocent people, too?”).

It is certainly true that this fact-dependent formula cuts both ways, and as the authors stress, will most often not “require execution of the innocent, in which case the deontological position is unaffected.”⁴⁶ But it will not do to advance a moral principle and then excuse its defects by arguing that they will not matter too often. A putative moral principle should be assessed *as* a principle, and its defects should lead us to discard or revise it. In its most general form, the central principle put forward here is a universal lesser evil principle that regards no atrocity as unacceptable *per se*, but as morally indeterminate pending investigation into “what the facts show.”⁴⁷ The sweep of this principle is breathtaking. Should we intentionally bomb civilians to terrorize a population into abandoning its war effort? According to this principle, the answer depends on the numbers. Should the state mandate the sacrifice of organ donors? If each sacrifice would save multiple lives, and one accepts the act-omission and aggregation arguments of the authors, the state is morally obligated to do so.⁴⁸ The life-life tradeoff criteria would have supported

⁴⁶ Sunstein and Vermeule Reply, *supra* n. 4, at 856.

⁴⁷ See, e.g., Sunstein & Vermeule, *supra* n. 1, at 707 (“in the abstract, any deontological injunction against the wrongful infliction of death turns out to be indeterminate on the moral status of capital punishment *if* the death is necessary to prevent significant numbers of killings”); 734-735 (“arguments about policies such as capital punishment and torture are hostage to what the facts turn out to show in particular domains”); Sunstein and Vermeule Reply, *supra* n. ---, at 856 (“If the consequentialist objection to the killing of innocents is “unsatisfactorily contingent,” so be it; almost all consequentialist arguments are contingent, in the sense that they depend on (contingent) consequences”).

⁴⁸ On the Sunstein-Vermeule argument, which denies any moral significance to the distinctions between state acts and omissions, and between its intended and foreseen consequences, the natural death of an untreated transplant candidate becomes a state killing if the state could have prevented it by ordering the harvesting of someone else’s organs. Given the purported commensurability of such indirect state “killings” of

the Incas' practice of human sacrifice, if one remembers that the Incas thought their gods had the causal efficacy over famine and pestilence that deterrence is claimed to have now over crime rates. (Is our objection merely to the naiveté of their science, or to the idea of using one person's life as a means to communal ends?) At the least, the unrestrained sweep of the life-life tradeoff principle turns what most of us understand as morality on its head. If we cannot accept the morality of such human sacrifices, we have all the reason we need to reject the life-life tradeoff principle that would justify them.

Despite this, some people may doubt that there is any genuine alternative to tradeoffs: they may think that if we are clear-eyed enough, we will have to recognize that sometimes we confront the unavoidable power to determine whether a wrong is inflicted more times or fewer, and the only rational option in such cases is fewer. But there *is* an alternative to policies that use individuals as mere resources for others in this way: the alternative of a system of civil liberties that limits the field of consequential calculation to its appropriate realm, and recognizes the most vital interests of an individual as matters beyond such calculation. One's very existence is the most fundamental of these interests, and a law

transplant candidates with the state's intentional killing of a potential organ donor, the government's obligation must be to redistribute the body parts of individuals until it preserves the maximum number of lives possible.

Strictly speaking, the transplant case and the other examples above do not raise a slippery slope problem. Slippery slope critiques show that what is intended as a limited principle can be too easily applied to situations far removed from its justification. The difficulty with the Sunstein-Vermeule rights-utilitarian principle is rather that it *embraces* the parade of horrors without regret.

permitting the state to extinguish this existence to benefit others the ultimate violation.

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Two clarifications are in order that will serve to address some additional points in the Sunstein and Vermeule argument as well. First, to reject the authors' life-life tradeoff proposal is obviously not to say that all killing is unjustifiable. Deontological rules are never so general as "thou shalt not kill," because morality is not so simple. All sorts of discrete exceptions must be recognized to adequately reflect the appropriate powers and rights individuals have in relation to each other and the state in a system that respects every person's equal moral status. One may kill another in self-defense, for example, and according to many, in circumstances warranting euthanasia. Sunstein and Vermeule point to the duty of police to kill a hostage-taker when necessary to free the hostages as analogous to their life-life tradeoff policy,⁴⁹ but this example is better understood as part of this deontological system of rules, not the abrogation of that system. Hostage-takers may be shot not because it would minimize killings, as is clear from the fact that several may be shot when necessary to free a single hostage,⁵⁰ but because of a confluence of morally important considerations absent from the simple life-life tradeoff policy

⁴⁹ Sunstein & Vermeule, *supra* n. 1, at 719.

⁵⁰ Carol Steiker makes this point, see Steiker *supra* n. ---, at 758 n. 21, to which Sunstein and Vermeule respond that this "fact makes our argument *a fortiori*." Sunstein and Vermeule Reply, at 853. It is difficult to see how it can strengthen their claim; rather, it shows that something other than their minimization-of-killing policy is at work.

the authors suggest. These include the forfeiture of rights by someone who himself intentionally constitutes the threat, the strong possibility of an imminent killing of the victim, the exceedingly limited alternatives, and the near-certainty that all these factors exist when a gun is being held to the head of a hostage.⁵¹

But is there another exception to the prohibition on killing: an exception when complying with it would lead to disaster? And if there is, could it have implications for the capital punishment issue? As to the first question, most people and most deontological philosophers probably do believe that normal moral rules may run out *in extremis*.⁵² This view gets much of its force from the intuitive response almost everyone has to extreme scenarios such as the ticking bomb hypothetical, where torturing a terrorist's child is the only way to reveal the location of a nuclear bomb in time to defuse it. Some theorists describe this intuition as the

⁵¹ The forfeiture of rights justification for capital punishment is not available to the authors for reasons detailed *supra* at ---. Regarding the imminence of the killing to be prevented, Sunstein and Vermeule are perplexed why "the expansion of the temporal horizon [should] undermine the analogy," *id.*, but surely that should instill concern that the state killing may not actually be necessary. At the least, when the projected chain of causation between the state's killing and its anticipated effect is distended in time and space, and relies heavily on influencing human volition, one's confidence in the consequential calculus should be greatly weakened.

⁵² Most prominent contemporary anti-utilitarians, such as Rawls, Fried, Moore, and Nagel, also discern a limit to their deontological claims when the costs become extremely high. See JOHN RAWLS, *THEORY OF JUSTICE* 244-251 (1971); JOHN RAWLS, *POLITICAL LIBERALISM* 355-356 (1993); CHARLES FRIED, *RIGHT AND WRONG* 10 (1978); Michael S. Moore, *Torture and the Balance of Evils*, 23 *Isr. L. Rev.* 280, 328 (1989); Thomas Nagel, *Personal Rights and Public Space*, *supra* n--- at 85; Thomas Nagel, *War and Massacre*, *supra* n--- at 54. For further arguments in favor of a "catastrophic exception" to deontological rules, see Kai Nielsen, *Against Moral Conservatism*, 82 *ETHICS* 219 (1972); Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 *PHIL. AND PUB. AFF.* 160 (1973); CHARLES BLACK, *THE OCCASIONS OF JUSTICE: ESSAYS MOSTLY ON LAW* 89-102 (1963). Michael Walzer, *Just and Unjust Wars* 253-254 (1977)(finding an exception for "supreme emergencies").

manifestation of a “threshold deontology” moral structure; as Michael Moore puts it, the idea is that “a very high threshold of bad consequences . . . must be threatened before something as awful as torturing an innocent person can be justified.”⁵³

Can capital punishment be justified by the catastrophic exception?

Sunstein and Vermeule argue that its threshold has been reached, if the deterrent studies are correct and the state could prevent 18 murders for each execution it inflicted.⁵⁴ But this can’t be convincing if we keep in mind that the exception constitutes an exigent morality for extraordinary

⁵³ Moore, *Torture*, *supra* n. ---, at 330.

⁵⁴ See Sunstein and Vermeule, *supra* n. 1, at 727 and 709. At 709, the authors argue that “[d]eontological accounts typically recognize a consequentialist override to baseline prohibitions. If each execution saves an average of eighteen lives, then it is plausible to think that the override is triggered, in turn triggering an obligation to adopt capital punishment.”

There is another way the catastrophic exception might be used to support capital punishment which the authors do not advance, and that is to deploy it against deontological constraints generally. On its face, the ticking bomb intuition offers reason to doubt that deontological prohibitions on torture or killing are absolute, but does not suggest that there should be no such deontological constraints at all. But because the catastrophic exception justifies killing someone for the collective benefit in some circumstances, one could argue that this fundamentally undermines the claim that an individual’s life must be treated as inviolable rather than fungible. If so, doesn’t this suggest that refusing to choose the lesser evil even in non-emergency conditions is a moral mistake?

The question has theoretical merit, but given the badly self-incriminating answers offered by absolutist versions of both consequentialism and deontology, I believe the threshold deontology theory is unavoidable, or at least the most attractive option. Absolutist consequentialism may justify slavery, if the costs and benefits work out that way; absolutist deontology leads to Kant’s famous view that one is obligated not to lie, even when it means divulging the whereabouts of someone to an enemy bent on killing him. Only a threshold theory instantiates the common intuition that at some catastrophic point grave harm should count, but in a way that does not destroy the respect for an individual’s intrinsic value that rights provide. It is both coherent and closest to the truth, I believe, to hold that an individual’s inviolability with regard to her life, body, and mind is of very great, but not infinite, moral weight. (There must also be distinctions drawn based on the interest involved, with the right to life being near-absolute and the right to religious expression much less so, for example.) Both deontological constraints and the catastrophic exception are part of a common-sense morality that is extremely resistant to displacement by theoretical constructs, and might be said to be a combination that is in “reflective equilibrium,” in Rawls’ model.

circumstances, and its rationale cannot apply to justify the kind of tradeoff possibilities that exist every day and everywhere in ordinary civic life.

Without that limit, there are no more deontological moral constraints at all, because there are always statistically impressive tradeoffs available – not least the transplant example, where there really are long waiting lists of transplant candidates who will not obtain their transplants in time. The reason why people can strongly believe in both deontological constraints and a catastrophic exception is because, so long as the latter is confined to extraordinary circumstances, it does not threaten the essential conception of a person's inviolability and self-ownership. By contrast, expanding the exception to cover the infinitude of significant life-saving tradeoffs available, as Sunstein and Vermeule would do by including deterrent value within its scope, make it a permanent rather than emergency approach to governance, radically changing what the law takes a human being to be and leading to the kind of slippery slope examples I recited earlier.

Apart from the routine nature of the trade-off the authors want to bring within the exception, we should also question whether the deterrent studies cited show consequences dire enough to satisfy the threshold level required. Rather than provide a separate argument on that issue, I shall consider whether these deterrent studies establish a case for capital punishment even on ordinary consequentialist criteria. The next section

argues they do not, and if that is correct, *a fortiori* they do not reach the much higher threshold required by the catastrophe exception.

D. Consequentialism?

My concern in this essay has been whether, as the authors argue, recent deterrent studies should persuade deontological opponents of capital punishment to change their view. I conclude with some observations about how consequentialists should respond to these studies. Although Sunstein and Vermeule acknowledge that a full consequentialist analysis would require a more elaborate assessment, they are ready to assert that if the studies are accurate, there should be a strong consequentialist presumption in favor of capital punishment.⁵⁵ “On consequentialist grounds,” they argue, “the death penalty seems morally obligatory if it is the only or most effective means of preventing significant numbers of murders.”⁵⁶ They argue further that this conclusion would stand even if one might reasonably doubt the reliability of the deterrent findings, provided there remained a significant *possibility* that they were correct.⁵⁷ I believe instead that these studies are insufficient to

⁵⁵ Sunstein & Vermeule, *supra* n. 1, at 717.

⁵⁶ Sunstein & Vermeule, *supra* n. 1, at 706-707. See also *id.* at 717 (“If it is stipulated that substantial deterrence exists...consequentialists [will or should conclude] that capital punishment is morally obligatory [because it] minimizes killings overall”).

⁵⁷ Sunstein & Vermeule, *supra* n. 1, at 715 (emphasis added). Sunstein and Vermeule say the following: “[L]et us suppose, plausibly, that the evidence of deterrence remains inconclusive. Even so, it would not follow that the death penalty as such fails to deter.... For capital punishment, critics often seem to assume that evidence on deterrent effects should be ignored if reasonable questions can be raised about the evidence’s reliability. But as a general rule, this is implausible. In most contexts, the existence of legitimate questions is hardly an adequate reason to ignore evidence of severe harm.... [A] degree

support the institution of capital punishment -- not because the findings are unreliable (though they may well be⁵⁸), but because that policy conclusion cannot plausibly be derived from so narrow an investigation.

On any reasonable consequentialist view, the necessary inquiry is hardly so simple a question as whether killings today will produce sufficiently fewer killings tomorrow compared to life imprisonment. Before resorting to state killings, one would want to consider and assess the full impact of adopting capital punishment on a deterrent rationale, and not just its effect on short-term murder rates. As illustrations, consider whether the following risks are any less important to the consequentialist calculation than the “significant possibility” executions deter:

◇ Will the capital punishment regime attain a life of its own, unresponsive to changes in “what the facts show?” Will the deterrent value of executions be the same 20 years from now? Having instituted capital punishment, will the state be willing to regularly reassess its utility?

◇ What societal impact will regular resort to executions have beyond changing the projected short-term murder rate? For example, will

of reasonable doubt need not be taken as sufficient to doom a form of punishment if there is a significant possibility that it will save large numbers of lives. *Id.*

⁵⁸ For a critique of the deterrence studies relied upon by the authors, see John Donahue and Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 Stan. L. R. 791 (December 2005). For other articles casting doubt on the reliability of deterrent research generally, see, e.g., Richard Berk, *New Claims about Executions and General Deterrence: Deja Vu All Over Again?* __ Journal of Empirical Studies (forthcoming), available at <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1059&context=uclastat>; Robert Weisberg, *Death Penalty Meets Social Science: Deterrence and Jury Behavior Under New Scrutiny*, --- ANNUAL REVIEW OF LAW AND SOCIAL SCIENCES --- (forthcoming).

executions divert attention, money and effort away from ameliorating criminogenic societal conditions? Over the long term, will the normative message of executions be that violent retaliation is the natural response to ill-treatment? Will the so-called “brutalization effect” of capital punishment appear under certain conditions?⁵⁹

◇ What are the potential effects of a governmental policy-making principle that rules no means out of bounds and always to be judged by its results? Are empirical predictions reliable enough to justify implementing intuitively abhorrent state policies? If a lesser evil, fact-contingent norm takes root culturally, will it save more lives than the rule-based morality it replaced?

◇ Will the state be tempted to abuse the lesser evil rationale? Will abhorrent policies be too easy to sanitize with skewed blue ribbon commissions or bureaucratic experts? How should one quantify the risk that the state will itself become malignant and use the power to execute its citizens in bad faith?

Any of these risks would seem relevant to the consequential calculation -- *unless* the best state of affairs is defined as the one in which killings are reduced to the minimum, regardless of any and all additional results that would obtain. This is a possible consequentialist criteria, but not a plausible one. What then is the metric of utility the authors have in

⁵⁹ On the brutalization scenario, see W. Bowers and G. Pierce, *Deterrence, Brutalization or Nonsense: A Critique of Isaac Ehrlich's Research on Capital Punishment* 35 (Center for Applied Social Research, Northeastern University, 1975); Joanna M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment's Differing Impacts Among States*, 104 MICH. L. REV. 203 (2005).

mind? Historically, different consequentialisms have variously aimed to maximize preference satisfaction, satisfaction of interests, pleasure, and some ideal set of goods. As we have seen, rights-utilitarians seek to maximize compliance with rights and duties. Do the authors believe that the status of inviolability, or at least the sense of security it engenders, are irrelevant to the goodness of a state of affairs in a consequentialist analysis?⁶⁰ One can't come to any conclusion about capital punishment's utility without answering the question, Useful for what?

If the authors limit the outcomes they are willing to recognize, so do they limit the alternatives to capital punishment they are willing to consider. For earlier consequentialists, capital punishment could not be justified without fully exploring the alternatives to it.⁶¹ By contrast, Sunstein and Vermeule exclude numerous possibilities from consideration because, they say, capital punishment would likely still have a crime-reducing effect even after these other measures were in place.⁶² But that

⁶⁰ See, e.g., John C. Harsanyi, *Morality and the Theory of Rational Behavior*, in AMARTYA SEN & BERNARD WILLIAMS, EDS., *UTILITARIANISM AND BEYOND* 39, 59-60 (1982)(advocating on rule-utilitarian grounds “social institutions which establish a network of moral rights and of moral obligations” that are not to be violated despite the immediate social utility of doing so). See also Kamm, *supra* n. ---, at 389.

⁶¹ For example, John Stuart Mill argued that capital punishment could not be justified unless “it were certain that no other punishment or means of prevention would have the effect of protecting the innocent against atrocious crimes.” Francis E. Mineka, ed., *The Collected Works of John Stuart Mill*, (Univ. of Toronto Press, 1963), Vol. 13, p. 474.

⁶² Sunstein & Vermeule, *supra* n. 1, at 733 (stating that “a key assumption of the strict scrutiny view is that the alternative policies are substitutes for capital punishment. Yet they would likely turn out to be complements instead”). They also justify limiting the policy alternatives to “the feasible set,” because even if there are crime-reducing policies that might eliminate the life-saving benefits of capital punishment, they are not ones Americans are likely to embrace, and “[n]o sensible principle of policymaking bars regulators from adopting a clearly desirable practice, unless and until they show that all other potential projects are inferior.” *Id.*

might or might not be true, depending on whether a regime of capital punishment would undermine alternative crime-reduction policies economically, or politically, or culturally, or in numerous other ways. It is also unclear why lives are the object of tradeoffs while other goods are not. Consider deterrent value itself: If the state can deter X number of murders by executing one person, it should be able to deter the same number by sufficiently increasing the neighborhood police presence. One of many choices that the authors arbitrarily exclude from their calculation is this tradeoff between spending more tax dollars and executing citizens; and one of the many uncertainties surrounding the consequentialism they have in mind is whether it provides any reason to prefer one to the other.

CONCLUSION

The preceding arguments have endeavored to show that, however valid the lesser evil approach may be in other domains, it fails when invoked to justify state violations of the right to life and other fundamental human rights. To Sunstein and Vermeule, choosing the lesser evil -- choosing to execute some in order to minimize killings overall -- must seem like a simple application of instrumental rationality to the end of justice. My counterclaim, among several I have offered here, is that treating human life as a fungible resource in this way is *itself* a form of injustice that necessarily goes uncounted in their minimize-injustice calculation. Deontologists should not be persuaded by the Sunstein-

Vermeule approach, because at its core, deontological morality springs from a very different view of the moral status of a human being.

The most fundamental human rights axiom is that every individual possesses a moral status of inviolability and self-ownership that all must respect. Both governments and individuals may transgress the legal right to life that reflects this moral status, and often have. But when a government does so pursuant to a life-life tradeoff policy, it does so wholesale, removing the legal recognition of this status from every citizen at once. The state is indeed a unique kind of moral agent, as Sunstein and Vermeule say, but that counts *against* their lesser evil argument for the death penalty and other human rights violations.

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