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Rahiim Manji

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Cost-Benefit Analysis, the Death Penalty, and Rationales for Punishment

Rahim Manji

University of Tennessee

College Scholars Senior Project

Mentor: Professor Lois Presser

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### *Abstract*

The paper contends that the use of cost-benefit analysis (CBA) for or against capital punishment is problematic insofar as CBA (1) commodifies and thus reduces the value of human life and (2) cannot quantify all costs and benefits. The paramount theories of punishment, retribution and utilitarianism, which are used as rationales for capital punishment, do not justify the use of cost-benefit analysis as part of that rationale. Calling on the theory of restorative justice, the paper recommends a change in the linguistic register used to describe the value of human beings. In particular, abolitionists should emphasize that human beings have essential value.

### **INTRODUCTION**

Advocates of the death penalty use economics to justify the use of capital punishment. Scott Turow, an Illinois-based lawyer says it well when he comments that two arguments frequently used by death penalty advocates are that, “the death penalty is a deterrent to others and it is more cost effective than keeping an individual in jail for life” (Turow). Edward Elias takes the point further in writing the following, “Let’s imagine for a moment there was no death penalty. The only reasonable sentence would a life sentence. This would be costly to the tax payers, not only for the cost of housing and feeding the prisoner but because of the numerous appeals which wastes man hours and money. By treating criminals in this manner, we are encouraging behavior that will result in a prison sentence. If there is no threat of death to one who commits a murder, than that person is guaranteed to be provided with a decent living environment until their next parole hearing. They are definitely not getting the punishment they deserve” (<http://www.cwrl.utexas.edu/>). According to the argument, whether a person convicted

of a capital offense should live might be evaluated, in part, by weighing the costs of killing the person versus the costs of keeping the offender alive, usually as a prisoner for life. The calculus is known as cost-benefit analysis (hereafter referred to as CBA). Because cost-effectiveness has proven itself a persuasive argument with American citizens and policy makers alike, the technique has become a tool of both death penalty advocates and abolitionists.

For example, the Connecticut Network to Abolish the Death Penalty (CNADP) lists various reasons for opposing the DP. These include “The death penalty offers no constructive contribution to society’s efforts to defeat violent crime, and in fact diverts resources and energies from such efforts.” The CNADP website also states: “The costs of capital felony cases are significantly higher than the costs of non-capital felony cases. The national average for prosecuting a capital felony case is 38% higher than the cost of life in prison” (CNADP 2004). Similarly, a national organization, the National Coalition to Abolish the Death Penalty, states: “Capital punishment costs more than life without parole” (NCADP 2004).

The use of CBA by abolitionists is a development that this paper finds problematic. I will argue that abolitionists’ use of CBA yields an unwanted consequence: the *moral* force of the argument against the death penalty is diluted. By commodifying life, we speak of it as though its value *can* be calculated. For this paper, that is a contentious presumption – a moral error. The paper ultimately recommends responses to crime, such as restorative justice, that recognize the humanity of offenders.

Restorative justice is a social movement that seeks reconciliation of victims and offenders in community contexts. It is backed by a philosophy that views offenders (like

everyone else) as people with needs, and justice as the meeting of needs. Responses to crime, in this philosophy, should seek to repair the harms caused by crime and the harms that led the offender to offend, not to impose further harm. CBA is not justified by the restorative justice philosophy because it does not orient to human needs. But neither is it justified by the extant dominant arguments *for* the death penalty – retributive (or moral) and crime control (or utilitarian) rationales.

The paper proceeds as follows. First, I examine the aforementioned philosophical arguments, retribution and utilitarianism, that are used as rationales for capital punishment. Second, I describe how CBA attends to easily quantifiable costs of a policy while ignoring other, less calculable costs. The use of CBA to evaluate environmental conservation efforts and the death penalty are cases in point. Finally, I discuss restorative justice as offering an alternative discourse on crime and redress of crime.

## **THEORIES OF PUNISHMENT**

In the vast literature on philosophies of punishment, two overarching theories or rationales are identifiable: retribution and utilitarianism. Both have been used to lend support for capital punishment. A review of these theories demonstrates that they do not justify CBA, rather they seek to reaffirm the value of human life, which has been put into question by the offense. Thus, these philosophies preclude the use of CBA, which degrades the value of life.

## Retribution

Retributivists conceptualize crime as an act that produces pain for society (Kant, 105). Punishment must be imposed to rectify the injustice. “According to the retributivist theory, a crime leaves the moral fabric of the universe ‘out of balance’ and punishment is needed to correct this imbalance” (Fichtelberg, 33). Kant writes, “Punishment by the court can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society. It must always be inflicted upon him only *because he has committed a crime* (Kant, 15). In other words, punishment must be meted out in *honor* of the offender. Whether the death penalty signifies respect for human dignity – Kant’s position – or whether the death penalty is excessively abusive, retributivists agree that some form of punishment is a “needed form of human respect” (Kay, 70). Kay writes: “Retributivists, particularly of the Kantian sort, are particularly keen on treating humans with the full respect they deserve, which includes treating them as responsible moral agents, not as powerless victims” (ibid.). Similarly, Murphy quotes Kant in stating that a criminal’s punishment must be “entirely free of any maltreatment that would make an abomination of the humanity residing in the person suffering it” (Kant, 102 from Murphy, 107).

One also finds in summaries of the retributive rationale the assertion that punishment dignifies victims, whose worth is reaffirmed by punishment (Hampton, 128). As Hampton (1988) states, “to strike a blow for morality and thus for the idea that all human beings have great value, the victim must make sure that she fights in a way recognizes the wrongdoer’s very real value” (Hampton, 137).

Most retributivists believe that retribution is not a disguise for hatred and thus a rationale for vengeance (Murphy, 122). The point is important since a ‘lashing back’ dynamic is more animalistic (Hampton, 123) than retributivists are want to portray their position. Instead, retributivists desire retribution to punish in order to annul the message sent by the crime that the victim and offender have unequal worth as human beings (Hampton, 131). If retribution is merely revenge, then it does not reflect a *considered* defense of human value. Retribution is said to differ from revenge because it is something the state seeks in the name of justice and in planned fashion – not because it abates feelings of rage and so forth (Hampton, 136). Retributive theorists agree that punishment should be bounded by a rational mind that seeks only to repair the metaphysical imbalance created by the crime (ibid). In other words, retributivists do not cause harm (and never cause excessive harm) for its own sake. Rather, they seek to punish to reaffirm the value of the victim (Murphy, 123) and the offender (Morris, 74). They seek to do justice to communicate that human life is valuable. These claims lead the author to surmise that cost-benefit analysis, a tool that commodifies life, is irreparably disconnected from the retributive philosophy.

### **Utilitarianism**

The second major philosophy of punishment that is used to endorse the death penalty is utilitarianism. Utilitarianism accepts as the foundation of morals “utility” or the “greatest happiness principle,” which holds that actions are right insofar as they tend to promote happiness; actions are wrong insofar as they tend to promote unhappiness

(Mill, 7). By “happiness” those promoting utilitarianism generally mean pleasure and the absence of pain; by unhappiness, they mean pain and the privation of pleasure (ibid).

It is doubtful that the dictum supporting the pursuit of happiness can be used to endorse capital punishment if we assume, as Hausman and McPherson suggest in their book *Economic Analysis, Moral Philosophy, and Public Policy* (2006), that costs and benefits ultimately depend on the satisfaction of *individual* preferences. Let us examine, then, the foundation for examining the satisfaction of these preferences and how they are calculated in economic terms. Initially, economists talked about preference satisfaction as being either Pareto superior or Pareto inferior. The principle of Pareto efficiency is a principle that assumes that it is a morally good thing to satisfy someone’s preferences *if* those preferences do not harm another. For a situation to be a Pareto *optimum* (also called Pareto superior) it must make a segment of the population better off without making *anyone* worse off. However, a situation that is a Pareto optimum may not sit well with our social conscience. Consider the following example: if thousands of people are dying from lack of medical supplies while, in another part of the world, a hospital has storerooms full of unused band-aids, disinfectants, and the like, it would be inefficient in Pareto terminology to give supplies to the have-nots (because it would not make everyone richer). Because the hospital is *technically* worse off, we have entered a state of Pareto inefficiency. If Pareto superiority was the standard to be reached before cost-benefit analysis could prescribe the death penalty, there would be no death penalty. Death to even one person would mean a net loss for at least a segment of society.

The death penalty is not the only social policy that would fall to the wayside under the high standard of Pareto superiority. As such, most economists endorsed a new

standard, described in the Kaldor-Hicks hypothesis (Hausman & McPherson, 64). The Kaldor-Hicks hypothesis proposes that for an action to be optimal it must cause an increase in supply (or satisfaction) *on balance*. For example: say person A is eating five meals a day and person B is not eating at all. Now suppose that they both move to a new country where person A can eat only four meals a day, but person B can eat three meals a day. Were we to adhere to the Pareto principle, this would be an inefficient move because one of the persons is experiencing a decrease in supply upon the move; however, if we endorse the Kaldor-Hicks hypothesis, then, because person B is gaining more than person A is losing, the move is considered efficient (Hausman & McPherson, 144).

This latter reasoning, that of the Kaldor-Hicks hypothesis, inspires CBA, which reflects the view that for a social policy to be viable, the benefits to society must outweigh the costs. In criminology, such reasoning can be discerned in the form of general deterrence theory, which argues for the death penalty if anticipated costs, in the way of punishment, outweigh anticipated benefits of offending. That is the paramount utilitarian argument for punishment. The literature distinguishes between specific deterrence, in which case punishment experienced deters an individual's repeat offending, and general deterrence, in which case the prospect of punishment deters offending generally (Williams & Hawkins, 545). According to the Kaldor-Hicks hypothesis, cost-benefit analysis, and deterrence theorists, there must be evidence that the death penalty saves lives, at least on balance. However, the proposition that the death penalty deters future crime is inconsistent with current research.

Research on deterrence falls into two general categories, macro-level research testing how levels of punishment affect crime rates in aggregates (e.g., states, nations)

and micro-level research that tests how *perceptions* of punishment affect the expected future behavior of individuals (Kleck, et al, 624). One of the key issues in studying deterrent effects – even at the macro level – is not how swift, severe, and certain punishment *is*, but rather is how swift, severe, and certain the punishment *seems* (Paternoster, 58). As Kleck et al. make clear, such research is quite rare. Paternoster raises other methodological pitfalls and shortcomings, including the possibility that involvement in criminal behavior affects perceived certainty of punishment, rather than the reverse. The carefully designed, multivariate and longitudinal research necessary to discern deterrent effects has, for the most part, simply not been done. As Kleck et al. found in their research, “none of the five measures of punishment, whether measures of certainty, severity or swiftness of punishment, showed consistent indications of an effect of actual punishment levels or on levels of perceived punishment (Kleck et al., 647). Accordingly, the view that administering the death penalty more certainly, frequently or swiftly in order to deter crime is an unreliable method of communication for the criminal justice system.

Even deterrence theorists (those who support deterrence as rule) agree that the data are conflicted. In a recent article, economist Gary Becker concedes that data supporting deterrence are far from foolproof (Becker, 1). Even though a small number of studies has found a deterrent effect for the death penalty, a far larger set of studies have failed to find a deterrent effect (Katz, Levitt, & Shushtorovich, 318). Donahue and Wolfers (2006) state: “The view that the death penalty deters is still the product of belief, not evidence. [In fact] on balance, the evidence suggests that the death penalty may increase the murder rate” (Donahue and Wolfers, 6).

Even by the theory's "own" criteria, set by the Kaldor-Hicks hypothesis, the death penalty may do more harm than good. In CBA terms, it may be costly, on balance. Many social scientists point to data that show that highly publicized executions, rather than functioning as a deterrent, actually *increase* the number of homicides. The phenomenon is known as the brutalization effect (Cochran, Chamlin, and Smith, 110). Braithwaite states "Deterrence is shown to fail as a policy not so much because it is irrelevant (though it is for many [cases]) but because the gains from contexts where it works are canceled by losses from the contexts where it backfires" (Braithwaite, 102). In fact, recent studies, including one conducted after Oklahoma's reintroduction of the death penalty, found that a highly-publicized execution has no deterrent effect. Instead, a spike in stranger homicides, the type that criminologists most expect to evidence a deterrent effect (as opposed to homicides committed in the supposed heat of the moment), suggest that a brutalization effect likely took place (Cochran, Chamlin, and Smith, 127). In view of the potential for a brutalization effect of the death penalty, its "benefits" are in grave doubt.

### **Cost-Benefit Analysis: The Problem of Quantifying Costs**

Braithwaite's remarks illuminate my contention that CBA does not conceive of all of the costs associated with taking a life. In fact, those costs cannot be calculated because life transcends economic interpretation.

Thought to be a neutral, uniform technique with which to make decisions, CBA has come to be used widely for purposes of public policy (Aguilar and Semanchan, 340).

But CBA reaches an impasse in its inability to quantify all costs of an intervention. The case of environmental conservation provides an apt demonstration.

For years, policy-makers have used CBA to evaluate decisions pertaining to environmental conservation (Lumley, 102). The Australian government's use of CBA for such purposes demonstrates how CBA, as economic analysis, is irreparably disconnected from deep social concerns.

In the late 1980's and early 1990's, the Australian people were engaged in a debate about whether the government should be allowed to establish a precious metals mine at a site known as Coronation Hill in the Kakadu Conservation Zone. Though the hill itself was not considered to have high conservation value, it lay very close to South Alligator River and Kakadu National Park—both historic landmarks. To help settle the dispute, the government commissioned a cost-benefit analysis (CBA) to examine the various costs associated with preserving Coronation Hill. The results were problematic.

As the Australian locals found to their discontent, the analysis only included the *quantitative* costs and benefits of preservation. As a result, the environmental value of preserving the Hill—for which no monetary amount could be identified—was not included in the report (Lumley, 109). For many of the indigenous cultures, for whom the hill was a sacred burial ground and prayer site, the analysis discounted the Hill's worth. The worst part: there was *no way* to quantify its significance as a historic landmark or religious site. Encountering the protests from local community members, the government made a decision to allow a more comprehensive CBA system, thinking that it would allay the problems. The government was wrong. Instead of providing a workable solution, the new criteria angered mining companies who thought such a revised framework arbitrary:

they thought that the mining value of the land was far more than the environmental value. In all, CBA proved to be an extremely controversial methodology no matter its measures (Lumley, 106). As Hausman and McPherson (2006) state, “[cost-benefit analysis] compares willingness to pay rather than welfare gains or losses of different people” (Hausman & McPherson, 149). That is, cost-benefit analyses measures value by how much people are willing and able to pay to have or to save something which inevitably favors the rich. So, as we see in the case of Coronation Hill in Australia, costs that cannot be evaluated by the market—or are valuable only to the poor—are omitted in a CBA.

Similar to the environmental example in Australia, many who advocate for those on death row (including the convict’s family and friends) would contend that commodification discounts many realities. There are many such costs that do not fit, as line items, into CBA. A report from Tennessee, the home institution of the author, concedes that some costs associated with the death penalty cannot be calculated (Wilson, Doss, and Phillips, 40). Specifically, two kinds of costs are conspicuous in their absence.

First, the time spent by pro bono (i.e., volunteer) attorneys is noted in the report as something that cannot be “expensed.” The authors of the report write, “Neither attorneys nor judges in Tennessee track the time they spend on individual cases. The law does not require them to keep records” (Wilson, Doss, and Phillips, 46). Consequently, whereas the costs associated with first-degree murder cases in Tennessee are probably underestimated, pro bono assistance is not estimated at all. The resource of pro bono legal representation is not expensable – the services are free – *because* mostly poor

people get on death row and *because* there are people who see that circumstance as unjust, and are thus willing to donate their time to correcting the injustice. The fact that activist attorneys donate their time makes the death penalty appear cheaper. The injustice of the death penalty is not topical to the Tennessee report or to any other cost-benefit analysis – it is supposed to be an objective document – but it “lives” in the numbers.

Second, costs include emotional pain and suffering to jurors, the victim’s family and the condemned person’s family. Some grief counselors believe that years of appeals allow victims’ families to circumvent the grieving process while focusing their attention on rage and anger toward the murderer (Brownlee, McGraw, and Vest, 24-32). Stanley Allridge, a boy whose two older brothers were murdered, has this to say after witnessing the perpetrator’s executions, ““After the first execution, I knew my life had totally changed. I had witnessed something most 18 year olds can’t imagine. I didn’t plan on being an activist, but I feel like I’m obligated to talk about the death penalty and what happened in our family. I don’t think we need to be ashamed. We are marching and protesting and trying to put an end to the death penalty, and we shouldn’t be embarrassed to be part of that” (MVFHR, 2006). Remarkably, this pain and suffering is totally absent from the Tennessee CBA report. The ideology of the death penalty – to cause pain and suffering – is *built into* the report in that such pain is not even identified as a cost. Although the report is designed to be morally neutral, it cannot be because estimating what is gained or lost from various human experiences is always a value-laden exercise.

It is impossible to rank policy options without making significant value judgments (Boadway, 1). These value judgments are especially obvious in society’s decision to put a higher premium on some lives, evidenced by the indiscriminate application of the death

penalty. If taking all lives necessitated taking more lives, the never-ending cycle of capital punishment would require society to execute government officials who carried out executions. But, that is not how capital punishment is applied in society. We decide who should be put based on an idea we have that some people are not “worth” saving. Cost-benefit analysis supposes, if only provisionally, that values are relative and secondary to economic efficiency. If formal, maximizing rationality is “good,” regardless of its content, and if rationality exhausts itself in the efficient pursuit of any goal regardless of its origin and content, there is no principle – in the words of Weisskopf – “from which one could deduce the duty to examine the goal itself” (Weisskopf, 91). Society’s main concern would not be *what* was done; it would be *how* it was done. The criteria would render any well-executed atrocity excusable. Even such horrors as the Oklahoma City bombing could be evaluated only on procedural measures. A system that makes *moral* decisions on *economic* criteria is inherently flawed because it has no way of knowing whether the action itself, in this case the death penalty, is moral regardless of whether it is efficient.

## **REAFFIRMING THE INHERENT VALUE OF HUMAN LIFE:**

### **RESTORATIVE JUSTICE**

In the remainder of this paper I will introduce a different perspective on justice, known as restorative justice. The values of restorative justice implicitly weigh against conceptualizing justice in terms of efficiency.

Restorative justice is a philosophy of crime and punishment that in some ways shares conceptual ground with both retributivist theory and utilitarianism. Like the

retributivist, those subscribing to the restorative justice perspective believe that crime is harm. Like the retributivist, in the aftermath of the harm, the restorative justice advocate is concerned with reconciling the imbalance created by the crime. Bazemore, a restorative justice advocate, writes, “justice processes must promote repair or an attempt to heal the wound the crime caused” (Bazemore, 768). However, unlike retributivists, restorative justice advocates do not believe that the imposition of pain is the best path of repair. Advocates are typically opposed to intentionally adding harm to the world in the aftermath of crime (Zehr, 32).<sup>1</sup>

Restorative justice proponents suggest that its practices are effective forms of crime control. Thus, there is a utilitarian aspect to the restorative justice movement (Garvey, 1806). Braithwaite’s reintegrative shaming theory is a leading explanation for how restorative justice practices may reduce recidivism among those who participate. A look at these practices, Braithwaite’s theory, and other utilitarian theories associated with restorative justice, follow.

Many types of encounters can be considered restorative including: victim-offender mediation, family group conferencing, impact panels, and healing circles (Van Ness and Strong, 58-66). These practices have in common an attempt to convene a dialogue between parties involved in crime or other conflict. In a restorative justice encounter, victims and offenders and persons supportive of each party will come together, typically in a face-to-face encounter (Braithwaite, 47). Both victim(s) and offender(s) discuss how they felt as a result of the crime, and what they think to be the

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<sup>1</sup> Daly (1999) believes that restorative justice is compatible with retribution. For her, practices of restorative justice are themselves forms of punishment consistent with the retributive ideal. Daly writes, “Restorative justice practices embrace retributive justice assumptions of individual culpability *and* they also include a wider notion of community responsibility for those acts” (Daly, 3).

best recourse for healing the harms caused by the crime. Plans are made for ‘making things right’ (Zehr, 67). Social problems (harms) that were themselves conducive to the crime are also discussed in restorative justice conferences (Presser and Hamilton, 334).

One of the key ways restorative justice seeks to address the harms created by crime and restore both victims and offenders in the context of encounter is through reintegrative shaming (Braithwaite, 55). Braithwaite suggests that shaming may be stigmatizing and thus unlikely to reduce offending, or it may be reintegrative and thus likely to reduce offending (Makkai and Braithwaite, 362). Reintegrative shaming involves disapproval of the harm while maintaining a relationship of respect, and ceremonies to decertify deviance. As Braithwaite points out, reintegrative shaming is already operational in families. In this context, shaming is done within a continuum of love (Braithwaite, 56). Because punishment erects barriers between the victim and the offender, reintegrative shaming is in a better position to repair the harm created by crime and *thus help the offender continue along a socially acceptable trajectory* (Braithwaite, 73). With his theory of reintegrative shaming, Braithwaite has provided the preeminent explanation for why restorative justice might intervene in offending patterns.

Other explanations have been offered for why restorative justice may lead to crime reduction. Restorative justice practices may help offenders increase competencies needed to achieve stakes in conformity, such as to obtain and maintain a job (Bazemore 28). Or restorative justice dialogue might target criminogenic attitudes held by community members generally. These include attitudes that inform prejudice or discrimination (Presser and Hamilton, 335). As Bazemore and Dooley write, “restorative justice practitioners have given new life to the meaning of repair by focusing on the need

to restore, strengthen, or build *relationships* between offenders, communities, and crime victims. Moreover, because crime is both a cause and a result of weak relationships, strengthening relationships at the level of neighborhood and parochial groups is a first step in healing that may also have preventative and reintegrative implications (Bazemore and Dooley, 111).

In short, trying to restore the many things that resulted in and from the crime, restorative justice is a perspective that reaffirms the value of human life. It seeks to honor all of the people affected by crime in our society in a way that provides for enhanced community building (Van Ness and Strong, 37).

## **Conclusion**

None of the theories of punishment discussed in this paper, retribution, utilitarianism, or restorative justice, necessarily advocate evaluation of punishment in terms of the costs and benefits of a person's life. The retributive theory of punishment precludes use of the language of "cost," whereas CBA has proven problematic for the utilitarian theory.

Further, CBA prevents a holistic examination of punishments by narrowly focusing society's attention on *certain* costs and benefits, ignoring costs such as those incurred by the family of the person executed. The latter costs, if only because not easily calculable, are marginalized. CBA cannot value anything for which a market does not exist. Because there is no market for life, a society completely entrenched in the utilitarian ethic will find not find it valuable.

The narrow scope of CBA can have a number of adverse and unintended consequences. For example, CBA may be instrumental in compromising due process for defendants. For example, it might inform calls for speeding up executions and reducing the time between conviction and execution, currently under consideration in the U.S. Congress (BBC 2005). A quicker appeals process is no doubt a cheaper one, and it is an obvious result of claims that life in prison is cheaper than the death penalty.

CBA is not an easy instrument to abandon. Even this paper, critical as it is of analyzing costs and benefits where life is concerned, advances the *costs* and *benefits* of using cost-benefit analysis! CBA may be seen as a discourse – a frame for thinking and speaking. Each of us, individually, invokes cost-benefit analyses in everyday decision-making. We think about the costs and the benefits of one activity (e.g., eating ice cream, going for a walk, watching a movie, going to bed, calling a friend) versus those of another. For making hefty, even permanent decisions that affect others, such as punishment, I have argued for a new linguistic register - that of restorative justice. Restorative justice offers a way of speaking that seeks to empower victims and offenders to travel down the path of repair after a crime has been committed.

In short, those arguing either for or against the death penalty should discuss life in terms other than costs and benefits. To equate life with money is both morally and technically wrong. Using cost-benefit arguments as a means of achieving abolition, in particular, leaves perspectives that degrade human life both unchallenged and invisible.

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