

quences than a choice of death for Smith. I think, however, that there is an important similarity between the two cases. In each case there may be a temptation to abandon consequentialist methods of reasoning on the grounds that what one is able to bring about, or able to be certain to bring about, is somehow dwarfed by the scale of what else is beyond one's control, or beyond one's epistemic reach. In each case, the cure is to focus on what is within one's control. Whether one person lives or dies is always morally significant, indeed it is this very significance which is at the root of our horror at the sort of massacres described by Williams. If one can decide whether Smith lives or dies, and there is no more reason to believe that life for Smith will have consequences for others which are worse than the consequences of death for Smith, the choice is just as clear in the seven million and one person case as in the two person case.

My example, of course, does not exactly model our epistemic situation with regard to the future. We do not operate only with subjective probabilities of one and of one half. A more complicated example could be devised as a variation on the situation I describe. My point would remain. It is rational for a consequentialist to accept that a choice with foreseeable good consequences may, for all she knows, have unforeseeable bad consequences which massively outweigh the good consequences, and yet to make the choice purely on the basis of foreseeable consequences.¹

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¹This paper has benefited from discussions with Jonathan Bennett, Joel Kidder, Steven Lee and Rick Wiley.

UTILITARIANISM AND THE 'PUNISHMENT' OF THE INNOCENT: THE GENERAL PROBLEM

By SAUL SMILANSKY

OPONENTS of utilitarianism have traditionally claimed that utilitarians might recommend the 'punishment' of innocent people (people who have not done anything wrong). And utilitar-

ians have worked hard to deny this claim, both sides rightly perceiving the importance of this issue. For if utilitarianism does imply that innocent people ought sometimes to be 'punished', this is *prima facie* a most damaging feature of the utilitarian position.¹ The debate has been however conducted in a somewhat unreal atmosphere: anti-utilitarians have by and large come up with extreme and peripheral examples, which are often unlikely or even bizarre. And utilitarians have naturally seized on this, claiming that the problem of the 'punishment' of the innocent is not a *real* problem for utilitarians (the classical exchange is [4], [5], [6], vs. [9]; see also [10], p. 13f). Both sides have seemed to share the opinion that in daily life (at least in the West) utilitarianism will not entail much (if any) serious transgression of the intuitively very strong moral ban on the 'punishment' of the innocent. I will argue that this basic notion is mistaken: in the creation and daily application of the criminal law we are constantly facing a general situation in which utilitarians would be obliged to promote the 'punishment' of the innocent.

The discussion between utilitarians and their opponents has typically proceeded as follows. The utilitarian is called to consider a case such as one where if a Sheriff were to frame an innocent person this would be beneficial, preventing a riot by a lynching mob. The utilitarian argues that (say) the Utilitarian Sheriff would not have the necessary knowledge about the probable course of events that would allow him to take such a decision, or that the act of injustice would become known and harm public trust, and the like. The anti-utilitarian then modifies his example to overcome the specific point made by the utilitarian, laying himself even more open to the claim that the problem is only manufactured and unreal. In day to day life, the utilitarian will tend to say, we want there to be well brought up Sheriffs (or judges or doctors etc., as the case may be) who are intuitively disinclined to be unjust. If we think critically as utilitarians, on the other hand, then perhaps in some fanciful cases acts of injustice would be right—but that after all says nothing about real life (see [1], p. 132f).

The claim that the anti-utilitarians only appear to have a case if fanciful examples are being employed is common in utilitarian writing. Hare for example speaks about the 'vulgar objec-

¹For the purpose of this paper the exact definition of utilitarianism and distinctions between forms of utilitarianism are not important. My arguments apply just as much to rule utilitarianism as to act utilitarianism. I discuss utilitarianism and not consequentialism because utilitarianism has been the main target of the 'punishment' of the innocent argument, and in order to focus the issue. The problem considered here would present a difficulty for most interesting forms of consequentialism, although there could of course be a consequentialist position in which the injustice involved would be considered bad as such, irrespective of other consequences.

tions...based on bizarre examples', with which 'A utilitarian theory of punishment can deal quite easily' ([2], p. 214). His typical claim against the anti-utilitarian objecting to utilitarianism because of the 'punishment' of the innocent issue is that 'The objection is usually based on highly artificial examples, for the good reason that no real ones are forthcoming which support the objector's case' ([3], p. 248). Similarly, J. J. C. Smart claims that '...a utilitarian might argue that it is empirically unlikely that some such situation as McCloskey envisages will ever occur...' ([8], p. 70).

Some anti-utilitarians have responded by saying that even if the utilitarian were right about 'real life', the fact that in principle utilitarianism might lead to abhorrent conclusions should in itself lead us to abandon it (e.g. [4], [5] pp. 254-55, [10] p. 181). And such a move is also naturally interpreted as reinforcing the utilitarian claim that in practice we have nothing to fear from the spread of utilitarian views.

I think that both types of anti-utilitarian moves—the presentation of detailed examples and the claim that the 'principle of the matter' is in itself important—are partially successful. It is complicit to think that utilitarians (critically deliberating as utilitarians) would not be lead in real situations to the conclusion that they ought to act in a way that would commonly be seen as gravely unjust. There is also a deep problem in any position which claims that there is no difference between (say) those 'blamed' or 'punished' properly (in common terms) and the framed innocent (or the 'punished' insane)—except that in the first case the general practical effects of 'blame' or 'punishment' are considered to be probably, on the whole, preferable. Some of the more realistic particular examples of the anti-utilitarians do create serious problems for the utilitarians, and even if we were to be tempted to agree that in practical terms the utilitarian outlook would not have harmful effects, this would still not make utilitarianism an acceptable theoretical position. However, the issue that I want to consider creates a difficulty for utilitarianism which transcends that made by the two sorts of issues just mentioned. The anti-utilitarian has a much stronger *general* case, which is very real and of central importance.

Take the current Western procedures for the apprehension of suspects, their prosecution and trial. And consider the suggestion that, perhaps even *primarily in order to save the innocent lives of victims of crime*, we should simply reduce the safeguards for conviction under normal trial procedures (so that fewer guilty criminals will get away). Procedures would remain much as they are today: no one ought to be framed, and a person's option of clearing his name by means of the common excuses (e.g. non-intentionality, ignorance or compulsion) would still exist. It would only be that matters such as the currently strong requirements as to the type of evidence needed for conviction, the degree of certainty which

juries are instructed to take into account in their deliberations, the constraints on the types of evidence admissible in court, and the like, would be somewhat and gradually relaxed. Such a change is likely to have some effect on the number of cases that the prosecution will present to the courts and perhaps on policing as well. Why is such a suggestion a problem for utilitarianism? The reason is that with such a relaxation of procedures the following situation is likely to ensue:

1. Significantly fewer criminals would escape conviction, and (assuming the utility of punishment) this would benefit the vast majority of people: directly and indirectly it would reduce crime, the fear of crime, insurance premiums, policing and security costs, etc.
2. There would not be a significant increase in the arbitrary power of people in positions of authority.
3. General respect for the law and the judicial system need not diminish (even if the details of the procedures would be realized): as the judicial system will be significantly more effective, possibly just the reverse.
4. Most innocent people would still not be at any sort of probable risk of being 'punished'.
5. Most people's chances of being wrongly 'punished' might be negligible, compared to their chance of being severely hurt by a criminal who got away because of the previous stringent procedures.
6. More innocent people, however, are very likely to be 'punished'.

In other words, changing in the above ways the conditions under which it is decided whether people are to be punished would be positive in terms of a utilitarian 'cost analysis'. Only in terms of justice, where there is something inherently wrong in the 'punishment' of any innocent person, is such a transformation a bad thing. And so only a non-utilitarian (or not-only-utilitarian) position could guard us from such injustice. Such a position would insist that we are not simply to count numbers of lives likely to be saved or the balance of serious harm, under the various possible social conditions and procedures (even adding the particular suffering of those being innocently 'punished' and other such relevant utilitarian considerations). It would say that, as 'punishing' the innocent is in itself wrong; doing a great deal to avoid it is a matter of great importance—which must not be overridden almost irrespective of consequences.

The utilitarian is likely to have a number of replies. Firstly, she might doubt whether we can have such probable knowledge of the actual effects of the 'relaxation of standards'. This is a dangerous argument for utilitarians however, for utilitarianism in general

depends on the strong possibility of having such knowledge of probable utilities, and excluding this in the case at hand would seem to be *ad hoc*. And it does seem reasonable to think that we can have the general sense of assurance about likely consequences which my case assumes. Perhaps it would be going too far to say that we can formulate a statistical law of 'increasing and diminishing utility', whereby relaxing standards at the price of risking more and more 'punishment' of innocent people would contribute a greater beneficial return (reducing crime), until we would reach a stage where the standards for conviction would be so lax as to cause 'too many' innocents to be 'punished' (i.e. an unacceptable number in utilitarian terms—a number that would create fear, lack of confidence in the judicial system, and the like). But even if we cannot formulate such 'laws', surely we have some working notion of the risks involved in various alternatives—after all, our current standards are widely perceived as practically protecting innocent people from being 'punished'.

Similarly, the utilitarian cannot get much mileage from the fact that the innocent people—those who are likely to be 'punished' if standards of criminal conviction are relaxed—are unknown, unlike in the case of framing an identifiable person. If the 'punishment' of innocent people is morally abhorrent than promoting it is so as well, and the anonymity involved seems not to matter.

A third possible utilitarian argument can be that in effect we are already involved in utilitarian calculations today, and are presumably willing to risk the 'punishment' of innocent people (or we would not have a punishing system at all). If this argument is simply a claim that even today we consider the likely outcome of various alternatives when determining policy, or even that there is a strong utilitarian rationale behind the institution of punishment in itself, then this point is harmless. However, it would be unconvincing to say that we currently have no strong non-utilitarian concern for preventing the 'punishment' of the innocent. Just consider the strength of the case that the prosecution has to make, and the strong provisions built into current trial (and appeal) procedures in order to help the accused respond to the prosecution's case (provisions made use of by many of the guilty in order to escape conviction). There is perhaps always a risk of injustice, but doing as much as we do to prevent it would seem to protect us from any description of quasi-utilitarianism.

A fourth and still different type of utilitarian response might be to embrace my argument and say that such balancing of risks is just what we should do: if (as I have claimed) it would be beneficial in utilitarian terms to relax current procedures in the above ways, then this is what ought to be done. Such a utilitarian reply would however be conceding my argument. For I am not directly arguing here for continuing to 'lose out' in terms of utility for the sake of justice: my claim is simply that the utilitarian claim, that in

real life we have no need to choose between justice and utility, is unconvincing.

To conclude. The issue of the 'punishment' of the innocent is a very serious problem for utilitarianism. Both utilitarians and their opponents have perhaps not gone about considering this issue in the best way. Many anti-utilitarians have focussed on specific and often artificial examples. And utilitarians have tended not to tackle the crucial difficulty, seizing on the tactical mistakes of their opponents, instead of attempting to make a case for the consideration of utility when it contradicts justice (as it often does). For if we consider not specific detailed examples (or the radical transformation of social institutions)² but the utilitarian attractions of a limited relaxation of the rigorous criteria for the conviction of people on trial, within the current judicial framework—the conflict between considerations of utility and of justice is clear. There are strong utilitarian reasons for gradual and limited modifications such as would be very likely to result in grave injustice.³

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²My way of formulating the problem also overcomes another sort of utilitarian argument. In a well known article Rawls dismisses the issue of 'punishing' the innocent because it would involve setting up an alternative social mechanism (or 'institution') for carrying out such policy, and this mechanism itself would lack utility overall ([7], p. 111D). But my point depends only on our familiar judicial process.

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