

## The Irrevocability of Capital Punishment and Active Voluntary Euthanasia<sup>1</sup>

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**ABSTRACT** *One argument often made against capital punishment is that it would involve the risk of killing innocent people and that such a mistake cannot be corrected in ways that other punishments can. I call this the ‘Irrevocability Argument’. In this article, I argue that the Irrevocability Argument is symmetrical with respect to capital punishment and active voluntary euthanasia. If the Irrevocability Argument works against capital punishment, then it also works against active voluntary euthanasia and vice versa. The main upshot of this is that it means at least some of the moral positions that people hold to treat them differently are untenable. Those who rely on the Irrevocability Argument as an argument against capital punishment are also committed to it as an argument against active voluntary euthanasia.*

### Introduction

One argument often made against capital punishment is that it would involve the risk of killing innocent people and that such a mistake cannot be corrected in ways that other punishments can (hereafter referred to as the Irrevocability Argument).<sup>2</sup> The basic thought is that the irrevocable nature of capital punishment and the chance that fallible creatures like us will punish the innocent shows we ought not use capital punishment.

Whilst there has been discussion of how this Irrevocability Argument fares against capital punishment, its implications for other acts have largely been left unexplored. Some have tried to argue that capital punishment and euthanasia are similar with regard to what motivates moral objections against them and that both are seen by some as exceptions to the ‘right to life’.<sup>3</sup> But beyond this, there has been little discussion of how capital punishment and euthanasia might be related. In this article I argue that capital punishment and euthanasia are strongly related with respect to the Irrevocability Argument. Specifically, I argue that the Irrevocability Argument against capital punishment also works against active voluntary euthanasia (hereafter AVE).<sup>4</sup> The essence of the Irrevocability Argument is the thought that the irrevocable nature of capital punishment and the chance of using it when we lack moral justification for using it (i.e. when the executed person is innocent) shows we ought not use capital punishment. I argue that these considerations apply equally in the case of AVE.

The main upshot of my argument is that it shows the Irrevocability Argument is symmetrical with respect to capital punishment and AVE. It is a valid argument against both. The symmetry entails that those who think the Irrevocability Argument shows we ought not use capital punishment are then also committed to it showing we ought not use AVE. Conversely, if they deny the argument works against AVE, then

they are also committed to denying it works against capital punishment. This is significant because there are currently a number of countries (e.g. Belgium, Canada, Colombia, Luxembourg, and the Netherlands) where capital punishment is abolished and AVE is legally permitted or is under debate. The symmetry of the Irrevocability Argument shows that at least *some* of the moral positions in the political discourse of those countries is untenable. By this I only mean that the moral position of thinking the Irrevocability Argument only works against capital punishment or AVE is inconsistent. One has to concede, as I'll show in this article, that it works against both or works against neither.

With all that in mind, the article proceeds as follows. In Section 2, I reconstruct what I take the clearest and most general version of the Irrevocability Argument against capital punishment to be. In Section 3, I show how the argument works against AVE in the same way it works against capital punishment. In Section 4, I consider a likely objection concerning the moral agents involved in capital punishment and AVE and provide a response that shows the symmetry stands

### The Irrevocability Argument against Capital Punishment

The Irrevocability Argument against capital punishment hinges on the idea that capital punishment is morally significant because it cannot be revoked once it is carried out. Unlike other punishments, the act involved in capital punishment – killing a person – cannot in some significant way be undone when morality requires we ought to revoke the punishment. This argument has so far been spelled out in various ways by both its proponents and detractors. Each makes use of slightly different theories of punishment and conceptions of the good.<sup>5</sup> But the goal of this article is not to defend or object to the argument. Rather the goal is to show how the argument is symmetrical with respect to capital punishment and AVE. What interests us then are the general features of the Irrevocability Argument that make it a valid argument against capital punishment. To that end, I take the clearest and most general version of the Irrevocability Argument against capital punishment to be something like the following:

P1: Capital punishment is an irrevocable act.

P2: If fallible creatures like us use capital punishment, then there is a subjective chance of doing something morally wrong.

P3: Capital punishment involves, for fallible creatures like us, a subjective chance of irrevocably doing something morally wrong. (MP: P1, P2)

P4: If acting in a certain way involves a subjective chance of irrevocably doing something morally wrong, we ought not act in that way. (*Correcting Wrongs Principle*)

C: We ought not use capital punishment.

Before explaining how the argument is valid, let me clarify what type of argument it is. The Irrevocability Argument is a *procedural* argument against capital punishment.<sup>6</sup> It is

a procedural argument because its focus is the *procedure* of carrying out capital punishment. As such, it only involves considerations about the procedure of carrying out capital punishment. It does not appeal to any considerations about the moral status of capital punishment or what it takes to morally justify capital punishment as a punishment. Importantly, the procedural nature of the argument then has nothing to do with the distinction between procedural and substantive justice. The argument readily employs substantive moral considerations. But these considerations are only about the procedure of carrying out capital punishment as opposed to its justification *qua* punishment. The argument is consistent with capital punishment being the rightful punishment for some crime. The argument only targets whether it is ever rightful for creatures like us to carry out such punishment.

With those two points in mind, in what follows I clarify the ideas that underlie the premises of the argument. These are, the idea of 'irrevocability', the idea of 'a subjective chance of doing something morally wrong', and the *Correcting Wrongs Principle*. Clarifying those ideas will show how the argument is valid. I do not defend any of these premises as true or develop any case for why they should be taken as true. Showing the argument is valid will suffice to show that, for those that think all the premises are true and that the argument is sound, the argument will symmetrically speak against capital punishment and AVE. For those that think the argument is unsound, showing it is valid will suffice to show it fails as an argument against both capital punishment and AVE.

The first idea to clarify is the idea of 'irrevocability' in Premise 1. Irrevocability here is not about the actual 'revocation' of some punishment or act. Given creatures like us cannot reverse time or travel to the past, revocation of a punishment as if it had never been carried out is impossible for any act. Irrevocability in that sense would be trivial. As a result, irrevocability is cashed out through the idea of compensation.<sup>7</sup> Specifically, the idea that for some act to be irrevocable is for it to be impossible to compensate the individual directly affected by the act. This captures the significance of capital punishment in contrast to acts that leave the victim in some position to be possibly made better off than they were due to the act. As Kramer says:

Although someone wrongly imprisoned cannot receive back the years during which he has been immured, he can be compensated to some degree for the loss of those years. By contrast, someone wrongly executed is not only unable to receive back the life that has been taken from him, but is also beyond any possibility of compensation.<sup>8</sup>

Capital punishment is straightforwardly irrevocable because it involves killing a person which means they no longer exist to be compensated.

Of course, there is some controversy about whether irrevocability ought to be understood as involving the strict *impossibility* of compensation. For instance, some theorists have argued that acting irrevocably does not involve the impossibility of compensation because it is possible to compensate a person by furthering their interests posthumously by paying their family or their estate in some way.<sup>9</sup> This thought has prompted attempts to tweak the notion of irrevocability so that it involves the *impossibility* of compensating a person during their *lifetime*. This has, in turn, raised worries of whether irrevocability understood in this way would condemn acts we do not want to condemn like life imprisonment without parole.<sup>10</sup> In response, others have proposed

irrevocability ought to be understood in relation to the moment the act begins.<sup>11</sup> I leave all these issues aside here for advocates of the Irrevocability Argument to deal with.<sup>12</sup> This is because they are largely irrelevant to whether the Irrevocability Argument is symmetrical with respect to capital punishment and AVE. What is relevant is that the idea of irrevocability could plausibly apply to capital punishment. For that, cashing it out as the impossibility of compensation suffices. If it turns out that there is no idea of irrevocability that can capture capital punishment, then so much the worse for the Irrevocability Argument. If there is, then so much the better.

The second idea to clarify is the idea of 'a subjective chance of doing something morally wrong' used in Premise 2. The thought here is that human beings are fallible creatures. This means that they go about their lives under conditions of uncertainty.<sup>13</sup> With the Irrevocability Argument, the particular condition of uncertainty that concerns us is the uncertainty about whether the facts that justify some act (e.g. capital punishment) hold. Two clarifications about this way of characterising human beings as fallible creatures are in order.

Firstly, the uncertainty that characterises human beings as fallible creatures is not the uncertainty over whether capital punishment is the correct punishment to use for some crime. This would be a type of first-order uncertainty over whether some set of facts morally justify capital punishment or not (e.g. uncertainty over whether brutality of some crime, the accused's attitudes, or the nature of the victim should morally justify capital punishment).<sup>14</sup> As I have said, the sort of uncertainty that characterises human beings as fallible creatures in the Irrevocability Argument is the uncertainty over whether the facts relevant for determining whether a crime has been committed and therefore whether some punishment is justified actually hold. This is a sort of higher-order uncertainty.

The second clarification is that the notion of uncertainty is not metaphysical in some way. It is not itself an objective fact about the world. Rather it is purely about the subjective epistemic situation that humans face when determining whether criminal punishment is morally justified. Premise 2 then merely describes the epistemic situation that results from the procedure human beings use – typically a criminal trial – to determine whether punishment is morally justified. The procedure uses rules of inference and evidence that maximise the probability of a correct outcome, namely a judgement consistent with the totality of facts. But we acknowledge it is impossible to design these rules to guarantee the correct outcome.<sup>15</sup> As Lenta and Farland point out:

Consider these factors: mistakes made by law enforcement officials, mistaken eyewitness testimony, perjury by witnesses for the prosecution, suppression of evidence, conflicts of interest when convicts are granted reduced sentences for testifying against others, fair treatment of suspects who are mentally handicapped, use of intimidation to force an admission, etc. The permissibility of the death penalty cannot be decided purely in the abstract. The limitations of the institution that applies the punishment have to be taken into account.<sup>16</sup>

Given those factors, there is no guarantee that criminal punishment is always morally justified because it is not based on having guaranteed access to the totality of the facts. Rather, a reasonable weighing of the best available evidence for the totality of facts gives us conclusive reason to determine someone's guilty or innocence. Although it

aims to, and does sometimes, determine guilt and innocence purely based on facts, it cannot guarantee it. This means legal punishment is based on establishing the facts that make someone liable for punishment according to the best available evidence. Since the best available evidence is not the totality of facts, relative to that evidence we have to accept that we always have the subjective chance that the person to be punished is innocent. That subjective chance is what characterises us as fallible creatures. And since punishing the innocent is a moral wrong, we have to accept that when carrying out capital punishment, we always have the subjective chance of doing something morally wrong. With that clarified Premise 3 follows by substitution and modus ponens. It follows that capital punishment involves for fallible creatures like us a subjective chance of *irrevocably* doing something morally wrong.

The final idea that needs clarifying is the one underlying the *Correcting Wrongs Principle* in Premise 4. The basic idea is that the subjective chance of irrevocably doing something morally wrong by acting in a certain way grounds a conclusive reason against acting in that way. Since what we have conclusive moral reason to do is what we morally ought to do, we ought not act in ways that have a subjective chance of resulting in an irrevocable moral wrong. This basic idea is derived via two steps that theorists make, often implicitly, in the literature.

The first step involves claiming that the subjective chance of irrevocably doing something morally wrong by acting in a certain way grounds a *pro tanto* reason against acting in that way. The thought is that there is a standing *pro tanto* reason to correct one's moral wrongdoing which, no matter how one cashes out the good, is a corollary of the standing *pro tanto* reason to promote the good.<sup>17</sup> This is because correcting one's moral wrongdoing simply is to make things better given one has made things worse. But, irrevocable acts make correcting moral wrongdoing impossible, therefore when there is a subjective chance that acting in a certain way results in an irrevocable moral wrong, we have *pro tanto* reason against acting in that way.

Of course, establishing a *pro tanto* reason against acting in irrevocable ways does not derive the *Correcting Wrongs Principle* yet. After all, depending on one's conception of the good, there are cases where irrevocable acts do promote the good. For instance, when capital punishment is actually morally justified, using it against people who committed certain crimes could indeed promote the good.<sup>18</sup> Therefore, deriving the *Correcting Wrongs Principle* requires a second step which shows how the *pro tanto* reason becomes a conclusive reason. This step can involve one of two strategies. One strategy involves claiming that all other considerations about revocable and irrevocable acts are equal.<sup>19</sup> As a result the *pro tanto* reason, by default, becomes a conclusive reason against acting in ways that carry a subjective chance of an irrevocable moral wrongdoing. Again, although my aim in this article is not to defend the truth of any of the premises of the Irrevocability Argument, one can imagine plausible defences of this strategy. One might defend the idea of holding all other considerations about revocable and irrevocable acts equal on the basis that such considerations are simply too difficult to weigh up or so equally balanced that none of them seem clearly conclusive. For instance, in the case of capital punishment, the brutality and severity of some crimes and the way new forensic methods exonerate otherwise guilty individuals, may make it simply too difficult to be certain that capital punishment will promote the good. In short, such considerations may be too difficult to deliberate and leave us with too many situations of paralysis. Another way one might defend the idea of holding all other considerations equal is on the basis that we live

in societies with deep moral diversity where social life is marked by people holding irreconcilable conceptions of the good. As such, any attempt to weigh up whether irrevocable acts like capital punishment do actually promote the good will result in intractable moral disagreements that undermine the ability to make arguments about what laws a society should have. Therefore, one ought to hold such considerations equal and focus purely on the reason that all can agree on, namely that we have standing reason to correct our moral wrongdoing.<sup>20</sup>

The other strategy for deriving the *Correcting Wrongs Principle* involves claiming that in fact there is a general asymmetry in value between revocable and irrevocable acts.<sup>21</sup> The idea is that it is better for fallible creatures to act in ways that are revocable with the chance of not promoting the good, than for fallible creatures to act in ways that are irrevocable with the chance of promoting the good. As a result, promoting the good – understood as making things evaluatively better – actually requires that, when there is a choice between irrevocable and revocable ways of acting, we err on the side of caution and act in ways that are revocable. Yost has offered the most comprehensive review and defence of this strategy.<sup>22</sup> Yost appeals to a difference in the invasiveness of revocable acts of punishment compared to irrevocable ones and the principle that valid legal authorities ought always choose the less invasive method achieving some legitimate political or legal aim over a more invasive one. Yost takes the principle to be constitutive of retributive punishment and liberal political morality. Again, my aim in this article is not to defend this asymmetry. I only aim to show how it could work to derive the *Correcting Wrongs Principle* and the validity of the Irrevocability Argument. If no such asymmetry can actually be defended, then so much the worse for the soundness of the Irrevocability Argument.

With the *Correcting Wrongs Principle* so understood, it then follows by *modus ponens* from Premise 3 and 4 that we ought not use capital punishment. Given the way the three ideas that underlie the argument's premises have been clarified, the conclusion follows from the premises and so the Irrevocability Argument is a valid argument that speaks against capital punishment.

### **The Irrevocability Argument against AVE**

Now, I submit, the Irrevocability Argument is also a valid argument against active voluntary euthanasia (AVE). This is because the three ideas that I argued make it a valid argument against capital punishment also make it a valid argument against AVE. If we replace 'capital punishment' with 'active voluntary euthanasia', the Irrevocability Argument against AVE reads as follows:

P1: Active voluntary euthanasia is an irrevocable act.

P2: If fallible creatures like us use active voluntary euthanasia, then there is a subjective chance of doing something morally wrong.

P3: Using active voluntary euthanasia involves, for fallible creatures like us, a subjective chance of irrevocably doing something morally wrong. (MP: P1, P2)

P4: If acting in a certain way involves a subjective chance of irrevocably doing something morally wrong, we ought not act in that way. (*Correcting Wrongs Principle*)

C: We ought not use active voluntary euthanasia.

In Premise 1, the idea of 'irrevocability' as the impossibility of compensating the individual directly affected by the act, with the caveats about crafting a more precise theory of irrevocability notwithstanding, applies to AVE in the same way as capital punishment. AVE, just like capital punishment, involves killing a person, who would not be killed otherwise. As such, just like capital punishment, AVE involves an act which the person cannot be compensated for. To that end, it is irrevocable.

In Premise 2, the idea of 'a subjective chance of doing something morally wrong' also applies to AVE. This might seem odd since the moral wrong that concerned us with capital punishment was punishing the innocent and AVE is not a punishment. It does not involve trying to harm those who make themselves liable to that harm by committing crimes. But this overlooks the core elements of the idea that applied to capital punishment. Firstly, the idea involved the absence of moral justification for capital punishment. As such, the 'subjective chance of doing something morally wrong' was about the chance that capital punishment would be carried out by fallible creatures when there was no moral justification for carrying it out, whatever the moral justification for capital punishment actually is. Secondly, this absence stemmed from the institutions used to establish the moral justification. These are the institutions that establish the moral justification of punishing according to the best available evidence and on the totality of facts. Both of these core elements apply to AVE in the same way they did to capital punishment.

Just like capital punishment, the uncertainty that characterises human beings as fallible creatures is not the first-order uncertainty over whether some set of facts morally justify AVE or not (e.g. uncertainty over whether valid consent as opposed to the mere appearance of consent is what morally justifies AVE). Rather, the uncertainty that characterises human beings as fallible creatures is the uncertainty over whether the facts relevant for determining whether AVE is morally justified actually hold (e.g. uncertainty over whether a person has given morally valid consent to being killed).<sup>23</sup> It is this higher-order uncertainty that is relevant and still applies in the case of AVE.

In addition, just like capital punishment, the notion of uncertainty in Premise 2 is not metaphysical in some way or an objective fact about the world. Rather it is purely about the subjective epistemic situation that humans face when determining whether AVE is morally justified. As such, Premise 2 merely describes the epistemic situation that results from the procedure human beings use – typically a review process by multiple independent doctors and public authorities – to determine whether a person has validly consented to being killed and therefore whether AVE is morally justified.<sup>24</sup> The procedure uses rules of inference and evidence that maximise the probability of a correct outcome, namely a determination consistent with the totality of facts. But, we must acknowledge it is impossible to design these rules to guarantee the correct outcome. For instance, at its core, such a procedure would have to determine whether a person desires to die for morally valid reasons and not because they suffer from some mental illness which makes them unable to weigh the value of their life, or suffer 'elder

abuse' which causes them to devalue the value of their life so as not be a burden on their family and community. The nonnegligible difficulties in safeguarding against these factors, especially when they involve systemic issues like poverty and low social status, are well documented in debates on the legalisation of AVE.<sup>25</sup> This is because, as in the case of capital punishment, such a procedure does not guarantee access to the totality of the facts but only a reasonable weighing of the best available evidence for the totality of facts. This means that there is always a subjective chance that we do not have the moral justification for carrying out AVE and therefore of doing something morally wrong. With that, Premise 3 follows from Premises 1 and 2 by substitution and *modus ponens*. It follows that AVE involves for fallible creatures like us, a subjective chance of irrevocably doing something morally wrong.

Finally, the *Correcting Wrongs Principle* in Premise 4 also applies equally in the case of AVE. This is because the basic idea the principle hinges on, and the way that idea is derived is fundamentally neutral with respect to capital punishment and AVE. The basic idea that the subjective chance of irrevocably doing something morally wrong by acting in a certain way grounds a conclusive reason against acting in that way, is neutral with respect to capital punishment and AVE. Wrongful AVE would be an irrevocable moral wrong in the same way that wrongful capital punishment would be an irrevocable moral wrong. As such, if the principle were true, it would apply equally to AVE and capital punishment.

This symmetry with the *Correcting Wrongs Principle* between capital punishment and AVE is a result of the two steps I outlined in the previous section to derive the principle also being neutral with respect to capital punishment and the AVE. With the first step – claiming the subjective chance of irrevocably doing something morally wrong by acting in a certain way grounds a *pro tanto* reason against acting in that way – the central claim is about moral wrongs in general. As such, the standing *pro tanto* reason to correct one's moral wrongdoing, which as a corollary of the standing *pro tanto* reason to promote the good no matter how one cashes out the good, applies in the case of AVE just as it did with capital punishment. Both acts are irrevocable acts that make it impossible to correct one's moral wrongdoing and therefore make things better given one has made things worse. Therefore, insofar as there is a *pro tanto* reason to correct one's moral wrongdoing, the subjective chance to do something in a way that makes it impossible to correct moral wrongdoing grounds a *pro tanto* reason against acting in that way.

The symmetry continues with the second step as well. With the second step, both of the strategies that could be used show how the *pro tanto* reason becomes a conclusive reason can also be applied equally in the case of AVE and capital punishment. The first strategy – claiming that all other considerations about revocable and irrevocable acts are equal – is concerned with revocable and irrevocable acts in general. As such, it can be defended in the case of AVE in the same way I outlined it could be defended in the case of capital punishment. For instance, one could argue that in the case of AVE considerations about new advancements in medical research, the structural conditions of poverty, familial relations, the pain of some mental and physical illnesses make it simply too difficult to be certain that AVE will promote the good. One might also argue that the conditions of deep moral diversity also apply in the case of AVE. As such, any attempt to weigh up whether irrevocable acts like AVE do actually promote the good will result in intractable moral disagreements that undermine the



ability to make arguments about what laws a society should have. In both instances, the first strategy for defending the idea that the *pro tanto* reason becomes a conclusive reason because all other considerations are equal can be applied in the case of AVE just as it could in the case of capital punishment.

With the second strategy – claiming that in fact there is a general asymmetry in value between revocable and irrevocable acts – the central claim is again merely concerned with revocable and irrevocable acts in general. As such, in much the same way that Yost defends the claim by appealing to an asymmetry between the invasiveness of capital punishment and other punishments to achieve some political or legal aim, opponents of AVE can also appeal to a similar asymmetry. They could argue that there is a similar asymmetry with respect to the invasiveness of AVE compared to other methods to achieve the moral or political aim of reducing people's suffering. Opponents may argue that putting much more funding and research into palliative care is far less invasive than AVE. Again, my aim in this article is not to defend this asymmetry or nay such moves. I only aim to show that it could work symmetrical with respect to AVE and capital punishment.

With the three ideas clarified as applying to AVE, it then follows by *modus ponens* from Premise 3 and 4 that we ought not use AVE. The Irrevocability Argument is then symmetrical with respect to capital punishment and AVE. The considerations that featured in the argument against capital punishment feature equally and in the same way against AVE. If the argument is sound in one case, it must equally be sound in the other. If it is unsound against AVE, it is also unsound against capital punishment.

This symmetry is no small matter. Many countries currently have laws that do not treat capital punishment and AVE symmetrically.<sup>26</sup> For instance, in Belgium, Canada, Colombia, Luxembourg, and the Netherlands, and the state of Victoria in Australia, capital punishment has been abolished and AVE legalised. Conversely, fifty-five countries permit capital punishment but do not permit AVE. This means it is likely that at least some of the positions taken by advocates or opponents of capital punishment and AVE in the moral and political discourses of those countries are untenable. If the main argument for why capital punishment should be illegal is the Irrevocability Argument, then we would equally be committed to AVE being illegal. Conversely, if the Irrevocability Argument is unsound and it cannot show why AVE should be illegal, then it also cannot show why capital punishment should be illegal.

But there is also another kind of symmetry at play here. This is the symmetry of what motivates the Irrevocability Argument. For instance, nothing I have said suggests that all the moral considerations relevant to AVE and capital punishment are the same. We might well think when we weigh up all our considerations alongside the consideration of irrevocability, we will have conclusive reason in favour of either capital punishment and AVE but not both. But if we are motivated to make the Irrevocability Argument against one of them, we are committed to its relevance against the other as well. Otherwise we need an explanation, irrespective of one's favoured conception of the good, a theory of punishment or political morality, of why the moral consideration of irrevocability is irrelevant to either capital punishment or AVE. Such an explanation looks unlikely given both capital punishment and AVE are materially the same. In whatever way the Irrevocability Argument is relevant or irrelevant to capital punishment, it will be relevant or irrelevant in the same way to AVE.

None of this will be a problem for those who already think that all we should pay attention to are nonirrevocability-related considerations in favour of or against capital punishment and AVE. It will only be a problem for a certain type of moral position. It will be a problem for those who think the Irrevocability Argument works only against either capital punishment or AVE. Those who hold such a position are committed to conceding it works against both or that it works against neither.

### **Institutional Asymmetry**

One objection to the symmetry argument I have made so far might be that there is in fact an asymmetry between the *kind* of reasons in play in capital punishment and AVE because there is an asymmetry in the kind of moral agent involved. The thought is that a judicial institution is involved with using capital punishment whilst no such institution is involved in AVE. Therefore, what counts as a reason for an institution is different to what counts as a reason for an individual. That means that the Irrevocability Argument does not work against AVE in the same way it might work against capital punishment. Claiming it does is to conflate the reasons involved in political morality and those involved in interpersonal morality.

There are, I submit, two problems with this objection. The first is that it is simply false that no institution is involved with respect to AVE. AVE is in most societies connected to some judicial or bureaucratic institution that regulates and controls who may be euthanased. The institution will also typically control how the act of euthanasia takes place and who performs it. So it is not true that AVE is unlike capital punishment in being unconnected to or not sanctioned by an institution. It would also seem that if AVE were legal, the institution that oversees it would not be completely indifferent to its use. It would have to bring it to the attention of those likely to see AVE as an option and is even likely to try and seek ways in which to satisfy an individual's desire to die. It is, I think, reasonable to expect such an institution to be somewhat proactive in its activities just like the legal system is in trying and sentencing those who have been charged with crimes. Given all that, there is no reason why we should think the kind of conclusive reason in the Irrevocability Argument that speaks against capital punishment and AVE is not the same.

The second problem with the objection is that the Irrevocability Argument strictly speaking applies to the individual agent that intends to actually carry out capital punishment or AVE. This means one could accept that it is possible to carry out AVE or capital punishment unconnected to any social institution with a functioning practice of private restrained uses of it. But the Irrevocability Argument would still apply symmetrically to the individual, whoever they may be, that carries out AVE or capital punishment. This means it might well be true that the Irrevocability Argument provides no reason for *institutions* to refrain from making laws that permit capital punishment or AVE. But, the Irrevocability Argument would still apply to the *particular individuals* who would be the executioners or euthanasers within those institutions. After all, some specific individual must carry out the punishment or euthanasing. In such a case, even if there is no reason to oppose *laws* that permit capital punishment and AVE, the laws would be useless because it would be morally impermissible for any individual to take part in the practice of capital punishment or AVE.

## Conclusion

There has been little discussion of how a procedural argument like the Irrevocability Argument works against acts other than capital punishment. I have argued that it is a valid argument against both capital punishment and AVE, and as such, those convinced it is sound against one are committed to its soundness against the other, whilst those who think it is unsound against one are also committed to its unsoundness against the other. I suggested this is significant given the asymmetry in how capital punishment and AVE are currently treated throughout the world. I have also argued that it would be wrong to think that capital punishment and AVE are asymmetrical because of the institutional involvement in carrying out capital punishment. I argued that most ways of understanding AVE involve it having institutional regulation and how it is carried out will be directed and sanctioned by a society's basic political institutions. Moreover, I argued the irrevocability, strictly speaking, would still apply symmetrical to the individual carrying out capital punishment and euthanasia in any given case.

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## NOTES

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- 2 See Matt Stichter 'The structure of death penalty arguments', *Res Publica* 20, 2 (2014): 129–43, Patrick Lenta and Douglas Farland 'Desert, justice and capital punishment', *Criminal Law and Philosophy* 2, 3 (2008): 273–90. for a general discussion of the argument from irrevocability and its relation to other arguments. See Matthew Kramer *The Ethics of Capital Punishment: A Philosophical Investigation of Evil and Its Consequences* (Oxford University Press, 2011), Dawinder S. Sidhu 'Death as punishment: An analysis of eight arguments against capital punishment', *West Virginia Law Review* 111, 1 (2009): 453–95, Louis P. Pojman 'Why the death penalty is morally permissible' in H. A. Bedau and P. G. Cassell (eds.) *Debating the death penalty: Should America have capital punishment? The experts on both sides make their best case* (Oxford University Press, 2004). and Michael Davis 'Is the death penalty irrevocable?', *Social Theory and Practice* 10, 2 (1984): 143–56. for objections against the argument, and Benjamin S. Yost, *Against Capital Punishment* (Oxford University Press, 2019); Benjamin S. Yost, 'The irrevocability of capital punishment', *Journal of Social Philosophy* 42, 3 (2011): 321–340. for a defence of it.
- 3 See John Keown *euthanasia, Ethics and Public Policy: An Argument Against Legalisation* (Cambridge University Press, 2002), pp. 280. for discussion of the similarity in motivations against Voluntary euthanasia and Capital Punishment. See Danuta Mendelson and Mirko Bagaric 'Assisted suicide through the prism of the right to life', *International Journal of Law and Psychiatry* 36, 5–6 (2013): 413. for a discussion of Capital Punishment and euthanasia both being exceptions to the 'right to life'. See Brian L. Mishara and David N. Weisstub 'Premises and evidence in the rhetoric of assisted suicide and euthanasia', *International Journal of Law and Psychiatry* 36, 5–6 (2013): 434. for discussion of the issue of euthanasia involving the balance of the irrevocability of euthanasia and the freedom to choose how one dies.
- 4 The qualification of 'active voluntary' euthanasia is important here. It refers to killing a person who has expressed a desire to die as opposed to allowing a person to die depending on whether they have expressed a desire to die or not. See Brad Hooker 'Rule-utilitarianism and euthanasia' in H. LaFollette (ed.) *Ethics in practice: An anthology* (Blackwell Publishers, 2002), pp. 25–26. for a good outline of these

- distinctions. Some also use the term 'physician-assisted suicide' to refer to cases of euthanasia. In this case, it should be made clear that this article is only concerned with *active* physician-assisted suicide and not any form of physician assistance that is passive or merely the withholding of care. See Keown op. cit. xi. for this distinction. These qualifications are not meant to commit the argument to any fundamental distinction between doing and allowing. Rather, they are meant to focus the article on a more modest argumentative goal by respecting the widely held intuition that punishment of any kind involves doing harm, as opposed to allowing harm. If the argument can be generalised beyond that intuition, so much the merrier.
- 5 See David Dolinko 'Foreword: How to criticize the death penalty', *Journal of Criminal Law & Criminology* 77 (1986): 546–601, Thom Brooks, 'Retributivist arguments against capital punishment', *Journal of Social Philosophy* 35, 2 (2004): 188–97; Thom Brooks, 'Retribution and capital punishment' in M. D. White (ed.) *Retributivism: Essays on theory and practice* (Oxford University Press, 2011); Thom Brooks, *Punishment* (Routledge, 2012), and Yost, *Against Capital Punishment* op. cit. Ch. 4; Yost, 'The Irrevocability of Capital Punishment' op. cit. for examples of those who use a retributivist framework, Davis op. cit. for what seems a corrective justice reading depending on the value of the status quo, Cass R. Sunstein and Adrian Vermeule 'Is capital punishment morally required? Acts, omissions, and life-life tradeoffs', *Stanford Law Review* 58, 3 (2010): 703–50. for a consequentialist reading, and Kramer op. cit. Ch. 7. for a largely neutral reading.
  - 6 See Stichter op. cit., pp. 134–140. for a full discussion of the different structures of different arguments made against capital punishment.
  - 7 See Yost, *Against Capital Punishment* op. cit., pp. 162–165; Yost, 'The Irrevocability of Capital Punishment' op. cit., pp. 333–336, Masaki Ichinose 'The death penalty debate: Four problems and new philosophical perspectives', *Journal of Practical Ethics* 5, 1 (2017): 53–80, at p. 63, Stichter op. cit., p. 138, Brooks, *Punishment* op. cit., pp. 161–162, Lenta and Farland op. cit., pp. 283–284, Pojman op. cit., pp. 68–69, Dolinko op. cit. fn. 186, Davis op. cit., p. 145.
  - 8 Kramer op. cit., p. 284.
  - 9 See especially Davis op. cit., pp. 145–153. on this.
  - 10 See Kramer op. cit., pp. 284–290. for an overview of the debate on to this point.
  - 11 See Ichinose op. cit., pp. 56–57. for an argument against capital punishment on the grounds that it is impossible to justify the punishment to the punished. The underlying thought is that the moment the punishment is applied is also the moment the punished ceases to exist and so cannot have the punishment justified to them.
  - 12 For what it's worth, I am sceptical that posthumous interests can help here without causing problems for the justification of punishment as a whole. If furthering posthumous interests count as compensation, it seems capital punishment would be impermissible for those who have no posthumous interests or that have posthumous interests that it would be morally impermissible for the state to further. In such cases, it seems the permissibility of capital punishment would no longer depend on its aptness as a response to wrongdoing but on whether a convicted person has posthumous interests. This seems to get the very point of punishment wrong.
  - 13 See Yost *Against Capital Punishment* op. cit., pp. 209–211, Stichter op. cit., pp. 140–141, Brooks, *Punishment* op. cit., p. 161; Brooks, 'Retribution and Capital Punishment' op. cit., pp. 236–239, Kramer op. cit., pp. 292–295, Sunstein and Vermeule op. cit., pp. 728–729, Sidhu op. cit., pp. 20–21, Pojman op. cit., p. 67, Dolinko op. cit., p. 586. Davis op. cit., p. 144.
  - 14 See Yost *Against Capital Punishment* op. cit., pp. 209–211. on higher-order uncertainty – the sort that matters here – and first-order uncertainty.
  - 15 See John Rawls *A Theory of Justice: Revised Edition* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1999), pp. 74–75 on 'imperfect procedural justice' for a deeper explanation of this idea. However more than the impossibility of being able to design rules to guarantee the correct outcome, some have argued that certain rules of evidence and rules of procedure are inherently bad at increasing the probability of reaching the correct outcome. See Larry Laudan *Truth, Error, and Criminal Law* (Cambridge University Press, 2006): Ch. 5–8. on this. Thank you to Reviewer 1 for pointing this out to me.
  - 16 Lenta and Farland op. cit., pp. 140–141.
  - 17 See Davis op. cit., p. 144. on the premise that 'Fallible beings should not, all else equal, use a penalty not permitting correction of error if there is an alternative penalty permitting correction of error', and Yost *Against Capital Punishment* op. cit., pp. 160–165. on the "fix your mistake principle". Although Davis offers no explicit defence of the idea, Yost argues that it can be defended on liberal political morality

- grounds with respect to the good of removing unjust burdens, on the grounds of legal legitimacy with respect to the good of a legal authority as opposed to brute coercion, and finally on retributivist grounds with respect to the good of punishing people according to precisely what they morally deserve.
- 18 See Yost *Against Capital Punishment* op. cit., pp. 167–169. on the retributivist challenge, and Sunstein and Vermeule op. cit., pp. 729–732. and Pojman op. cit., p. 68. on a consequentialist version of the same challenge.
- 19 See Davis op. cit., p. 144. on 'premise 7' as someone who presents the Irrevocability Argument using this strategy.
- 20 One might think of this as a distinctly *public reason* approach to Capital Punishment. See John Rawls *Political Liberalism: Expanded Edition* (New York: Columbia University Press, 2005): Ch. 6.
- 21 See Yost *Against Capital Punishment* op. cit., pp. 170–177. on 'expanded asymmetry' which construes the asymmetry in terms of the value of underpunishing outweighing the value of overpunishing failing to correct the wrong of overpunishing.
- 22 Yost *Against Capital Punishment* op. cit., pp. 193–219.
- 23 The focus on morally valid consent here is important. It captures the whole gamut of factors that we might think goes into someone consenting in a way that actually morally justifies AVE. For instance, concerns about whether people own their lives or have the autonomy to make mistakes would all be subsumed into whatever the correct account of morally valid consent turns out to be.
- 24 See Keown op. cit., pp. 84–86. on the nature of the procedure in the Netherlands as an example.
- 25 For a detailed overview of these issues, see Keown op. cit., pp. 73–74, 86–88, 149, 160, 175, 179–180, John Finnis 'A philosophical case against euthanasia' in J. Keown (ed.) *euthanasia examined: Ethical, clinical and legal perspectives* (Cambridge University Press, 1995), pp. 33, Harris 'The philosophical case against the philosophical case against euthanasia' in J. Keown (ed.) *euthanasia examined: Ethical, clinical and legal perspectives* (Cambridge University Press, 1995), pp. 42–43, Robert G. Twycross 'Where there is hope, there is life: A view from the hospice' in J. Keown (ed.) *euthanasia examined: Ethical, clinical and legal perspectives* (Cambridge University Press, 1995), pp. 146–149, and the 'Elder Abuse – A National Legal Response' summary report by the Australian Law Reform Commission *Elder Abuse – a National Legal Response: Summary Report* (Australian Government, 2017).
- 26 See and compare <https://www.mydeath-mydecision.org.uk/info/assisted-dying-in-other-countries/> and <https://deathpenaltyinfo.org/policy-issues/international/abolitionist-and-retentionist-countries>