CONSEQUENTIALISM AND THE DEATH PENALTY: OPEN PEER COMMENTARY ON 'THE ETHICAL "ELEPHANT" IN THE DEATH PENALTY "ROOM"' BY MICHAEL KEANE

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Arguments in defense of the death penalty typically fall into one of two groups. Consequentialist arguments point out beneficial effects of capital punishment, normally focusing on deterrence, (Sunstein et al. 2005) while non-consequentialist arguments seek to justify execution independently of its effects, for example, by appealing to the concept of retribution.(van den Haag 1986) Arguments defending *physician involvement* in capital punishment can be divided along similar lines. A consequentialist might claim that physician involvement in capital punishment reduces the amount of suffering endured by prisoners, allowing them a more humane death.(Waisel 2007) A nonconsequentialist defense might, on the other hand, maintain that doctors should participate in capital punishment simply because a legitimate state requires them to do so.

Michael Keane's target article 'The ethical "elephant" in the death penalty "room"' should, we believe, be read as an attempt to present an interesting new consequentialist defense of physician involvement in capital punishment. Keane identifies one negative consequence of forestalling execution - the increased suffering of victims' families – and argues that this may outweigh the harms that would result from proceeding with execution.

Admittedly, Keane does not himself present his argument as consequentialist. He appeals to the principle of nonmaleficence, asking "As physicians don't

we 'do no *harm*'?" [emphasis in the original] This principle's origins are obscure, and its place in medical ethics is debated,(Gillon 1986)(Beauchamp et al. 1994) but nonmaleficence is traditionally interpreted in a *non*consequentialist way.

Nonmaleficence deviates from consequentialism in two important respects. First, it is sensitive to the distinction between acts and omissions. 'Above all, do no harm' is normally interpreted as, 'above all *cause* no harm', rather than the more consequentialist 'above all, allow no harm to exist'. Second, nonmaleficence – at least as it is used in medical ethics – is normally taken to generate a *prima facie* obligation not to cause harm *to specific people.*(Friedman 2008) Thus, a physician complies with the principle when she *causes* no harm to *her patient,* even if she thereby fails to prevent a greater harm from befalling some third party.

Keane eschews this traditional interpretation of nonmaleficence. He argues in favor of physician involvement in capital punishment by arguing that physician *non*-involvement would result in psychological harms to the families of crime (and in particular, murder) victims. Plainly, however, in abstaining from the death penalty, physicians would not breach the principle of nonmaleficence as traditionally understood.
Firstly, in abstaining from execution, the physician would not *cause* harm to the victim's family, he would merely allow it to persist. Secondly, the harm

would afflict third parties, rather than the patient under the doctor's care (the convicted prisoner).

Keane refers to a "risk benefit equation", and implies that potential harms to co-victims can be weighed against other benefits and harms associated with execution. The only formulation of the principle of nonmaleficence consistent with such an approach is, we think, a consequentialist one; we must attribute to Keane the view that physicians fall under a general requirement to minimize (or at least reduce) the total amount of harm that exists in the world. The thought is then that, by abstaining from capital punishment, physicians would breach this requirement since the resulting harm to victims' families would outweigh any harms that would be caused by their involvement in capital punishment

Keane's consequentialist calculus appears heavily skewed, focusing on the harms to co-victims if execution is prevented (for which he admits there is little evidence), while ignoring the harms that proceeding with execution imposes on prisoners' families, prison staff, and the prisoner. However, we wish to focus here on a more basic worry about Keane's approach. Though we are sympathetic to consequentialism in general, we believe that Keane's interpretation of the principle of nonmaleficence leaves his argument open to two serious objections.

First, it appears to rob his argument of any dialectical potency. The arguments against physician participation in execution are typically nonconsequentialist and deontological in basis. Thus it is argued that physician involvement in execution is inconsistent with the proper goals of medicine,(Varelius 2007) breaches the Hippocratic oath, and violates the principles of basic dignity and respect for the patient.(Clark 2006) It is also maintained that the principle of nonmaleficence (as conventionally understood) prohibits physician collaboration in capital punishment.(Farber et al. 2000; Clark 2006) Keane's argument seems misdirected, since the possibility of harms to other individuals does not change the duties of a physician to his patient, a point that Friedman also makes in his commentary.(Friedman 2008) Keane would need to provide a reason for rejecting or modifying the nonconsequentialist principles that bar physicians from harming or killing their patients.

Second, in arguing that the prevention of harm to third parties may justify imposing harms – even death – on patients, Keane risks justifying too much. Consider the case of a physician faced with a patient who is so hated by his family that his continued survival causes them great distress (call this the case *Hated Patient*). If Keane's consequentialist principle is correct, the physician might be justified in killing this patient in order to alleviate the harm that his continued survival is causing to his family. Indeed, the harms in play in this case seem very similar to those that Keane considers important in the case of capital punishment.

For another example, consider the *Transplant* scenario, a staple case from the ethics literature. In one version of *Transplant*, we are asked to imagine that a doctor could save five lives by killing one of his patients and distributing the patient's organs to five other people who are in need of organ transplants. It seems clear in both the *Hated Patient* and the *Transplant* cases that the physician ought not to kill her patient, yet Keane's argument seems to imply that (perhaps) she should.

Keane might respond by noting that he does not actually claim that the harms suffered by victims' families justify execution. He merely claims that these harms must be taken into account in the ethical discourse. Thus, in *Hated Patient* and *Transplant*, Keane need not advocate the killing of the patient, he must simply claim that the benefits to the family (in *Hated Patient*) and to the potential organ recipients (in *Transplant*) ought to be taken into account. But even this seems very implausible. In considering whether the physician in *Transplant* ought to kill his patient, should we even take the needs of potential organ recipients into account? Most would reject such an idea. Instead, it seems that there are certain actions that doctors should never undertake, even if they may in specific instances lead to the best overall consequences.

Admittedly, there are some special cases in which doctors may kill. For example, as Keane notes, it is often held to be permissible for physicians to kill fetuses if that will prevent harm to the mother. However there are

significant disanalogies between abortion and capital punishment. In abortion, the party harmed by the physician is a fetus rather than an adult person, and the person protected is the physician's patient, rather than a third party.

The question of whether physician participation in the death penalty is justified is often entwined with the question of whether the death penalty is itself justified. If our criticisms above are sound, Keane's argument fails to justify physician participation in execution. The harms that Keane identifies might, if substantiated, form one element in a consequentialist defense of the death penalty itself. However there are also strong consequence-based reasons to oppose capital punishment. While debate over capital punishment sometimes appears intractable, it does not follow, as Keane' appears to suggest that it is merely a matter of personal choice whether individuals support or oppose it. If that were the case, there would be no point in ethical discourse or analysis at all.

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