The Ethics of Capital Punishment

A Philosophical Investigation of Evil and Its Consequences

Matthew H. Kramer



Contents

Preface		
	Introduction 1.1 The limits of the enquiry 1.2 A matter of justification 1.2.1 A first caveat 1.2.2 A second caveat 1.3 A pithy conspectus 1.3.1 Chapter 2: Deterrence-oriented theories 1.3.2 Chapter 3: Retributivism	
	 1.3.3 Chapter 4: The incapacitative rationale 1.3.4 Chapter 5: The denunciatory conception 1.3.5 Chapter 6: The purgative rationale 1.3.6 Chapter 7: Problems of administration 	11 12 12
2.	Deterrence through Capital Punishment 2.1 The deterrence-oriented rationale expounded	19
	2.2 Simplistic strictures 2.2.1 A misjudged recourse to Rawls 2.2.1.1 Donnelly's first line of reasoning: the matter of slavery	20 23 24 24
	2.2.1.2 Donnelly's second line of reasoning: an untenable asymmetry2.2.1.3 Donnelly's third line of reasoning: public order2.2.1.4 Some further reflections	25 26 27
	2.2.2 Using people as means	29
	2.3 Empirical doubts 2.3.1 The meagerness of the evidence 2.3.2 General misgivings 2.3.2.1 Prospects versus certainties 2.3.2.2 Beyond deliberation	30 31 33 34
	2.3.2.3 Brutalization 2.4 The moral untenability of the deterrence-oriented rationale	36 38
	2.4.1 The manner of use2.4.1.1 Blocking the analogy?2.4.1.2 Help from an unexpected quarter?	39 40 42
	2.4.2 No limits	44
	 2.4.2.1 The massacre of the innocents 2.4.2.1.1 Ineffective dissimulation? 2.4.2.1.2 A retributivistic side-constraint? 2.4.2.1.3 Justifiable executions of innocents? 	45 45 49 53
	2.4.2.2 Types of punishments	58

	2.4.2.2.1 Proportionality	59
	2.4.2.2.2 Utilitarianism	60
	2.4.2.2.3 Retributivism to the rescue?	65
	2.4.2.2.4 Sunstein and Vermeule on analogies	66
	2.5 A pithy conclusion	67
3.	Death and Retribution	69
	3.1 Some key themes	71
	3.1.1 Desert and moral responsibility	72
	3.1.2 Human equality	72
	3.1.3 Commensurateness, proportionality, and lex talionis	74
	3.1.3.1 Commensurateness	74
	3.1.3.2 Proportionality	74
	3.1.3.3 Lex talionis	77
	3.1.4 Punishment as communication	78
	3.2 Versions of retributivism	80
	3.2.1 Desert-focused retributivism	80
	3.2.1.1 Freedom as the unjust gain?	81
	3.2.1.2 The price of a licence	8 <u>5</u>
	3.2.1.2.1 A first query	85
	3.2.1.2.2 A second query	86
	3.2.1.2.3 A third query	88
	3.2.1.2.4 A fourth query	90
	3.2.1.3 Self-indulgence	92
	3.2.1.3.1 A manifestly unsustainable version of the thesis	92
	3.2.1.3.2 A tenable version of the thesis	93
	3.2.1.3.3 Some qualifications	96
	3.2.2 Vindicatory retributivism	97
	3.2.2.1 Retribution is not revenge	98
	3.2.2.2 The communicative dimension	99
	3.2.2.3 A first objection to the communicative dimension	
	of vindicatory retributivism	101
	3.2.2.4 A second objection to the communicative dimension of	
	vindicatory retributivism	102
	3.3 Does retributivism disallow capital punishment?	104
	3.3.1 Contrition precluded?	105
	3.3.1.1 A first rejoinder by Markel	107
	3.3.1.2 The time of the punishment	108
	3.3.1.3 Post-punitive opportunities for reform	109
	3.3.2 Human dignity revisited	110
	3.3.2.1 The exploitation of pain	112
	3.3.2.2 The death penalty and moral responsibility	113
	3.4 Can retributivism justify capital punishment?	115
	3.4.1 The views of retributivists	116
	3.4.2 On the limited determinacy of retributivism	119
	3.4.2.1 Commensurateness to the rescue?	119

	3.4.2.1.1 Going too far	120
	3.4.2.1.2 Against uniqueness	122
	3.4.2.2 Proportionality	124
	3.4.2.3 Lex talionis	128
	3.4.2.3.1 Reiman on retribution and equality	129
	3.4.2.3.2 Waldron on returning like for like	130
	3.5 A concluding rejection of scepticism	135
4.	Death as Incapacitation	137
	4.1 The general doctrine	137
	4.1.1 Punishment as incapacitation	138
	4.1.2 Incapacitation is not tantamount to deterrence	140
	4.1.2.1 Four differences	140
	4.1.2.2 A missed distinction: some closing remarks and examples	143
	4.1.3 Incapacitation is not tantamount to retribution or denunciation	145
	4.2 The fatal shortcomings of the incapacitative justification	147
	4.2.1 Moral responsibility swept aside	147
	4.2.2 More on moral responsibility	150
	4.2.3 The hurdle of the Minimal Invasion Principle	151
	4.3 Conclusion: irreparable damage	153
5.	Death as a Means of Denunciation	155
	5.1 The general denunciatory theory of punishment	155
	5.1.1 Denunciation versus deterrence	157
	5.1.2 Denunciation versus retribution	159
	5.2 The denunciatory theory as a rationale for capital punishment	161
	5.3 The unsustainability of the denunciatory theory	162
	5.3.1 Empirical murkiness	162
	5.3.2 When perceptions do not match reality	164
	5.3.2.1 Denunciation versus incapacitation	165 167
	5.3.2.2 A problem of principle	168
	5.3.3 Inverted proportionality and surreptitious crimes	168
	5.3.3.1 Reinforcement of moral outlooks	
	5.3.3.2 The defusing of vindictive impulses	170
	5.3.3.3 The consolidation of a community's identity	171 172
	5.3.4 No upper limit	
	5.3.5 The minimal invasion principle afresh	174 178
	5.4 Concluding reflections	176
6.	. The Purgative Rationale for Capital Punishment	179
	6.1 The execution of Achan	181
	6.1.1 The extraneous features	182
	6.1.1.1 Excessive severity and the massacre of the innocents	182
	6.1.1.2 Collective responsibility versus defilement	183
	6.1.1.3 Some further extraneous features	185
	6.1.2 The gist of the purgative rationale	186
	6.2 The nature of evil	187

6.2.1	The un	derlying states of mind	188
		Sadistic malice	189
	6.2.1.2	Heartlessness	191
		6.2.1.2.1 Heartlessness without evil	193
		6.2.1.2.2 Heartlessness with some qualms	194
		6.2.1.2.3 Heartlessness with seemingly good intentions	196
		6.2.1.2.4 Heartlessness, moral conflicts, and mitigation	197
	6.2.1.3	Extreme recklessness	199
		6.2.1.3.1 More realistic examples	200
		6.2.1.3.2 Recklessness without evil	201
		6.2.1.3.3 The qualitative/quantitative distinction again	202
6.2.2	The fa	ctor of harmfulness	203
	6.2.2.1	Connections between culpability and harm	204
		6.2.2.1.1 Failed attempts and unmaterialized risks	204
		6.2.2.1.2 Overdetermined harm	206
		6.2.2.1.3 Attenuated links	208
		6.2.2.1.4 Spectatorial pleasure	211
	6.2.2.2	Is severe harm necessary for evil?	212
		6.2.2.2.1 Concomitants of harm	215
		6.2.2.2.2 Tortured cats and bullied children	216
		6.2.2.2.3 Sadistic voyeurism again	218
		6.2.2.2.4 A face-saving reply	219
		6.2.2.2.5 An embarrassing secret	221
6.3 Defi	lement	and death	223
6.3.1	Nothi	ng supernatural	224
6.3.2	Paradi	gmatic cases	226
	6.3.2.1	Richard's Case	227
	6.3.2.2	Joseph's Case	227
6.3.3	Defile	ment and purgation	228
		A first query: humankind as a whole?	230
	6.3.3.2	A second query: capital punishment for mere contempt?	231
	6.3.3.3	A third query: whence the community's involvement?	232
	6.3.3.4	A fourth query: why death?	235
		A fifth query: a role for repentance?	237
	6.3.3.6	A sixth query: difficult backgrounds and extenuation	240
		6.3.3.6.1 General inflexibility	241
		6.3.3.6.2 Some exceptions	243
	6.3.3.7	A seventh query: mental maladies and shortcomings	244
		6.3.3.7.1 Mistakes about harmfulness versus mistakes about morality	244
		6.3.3.7.2 Mental retardation	245
		6.3.3.7.3 Mental illness	246
		6.3.3.7.4 Insanity after conviction	247
		An eighth query: failed attempts afresh	248
	6.3.3.9	A ninth query: jurisdictional complexities	249
	6.3.3.1	o A tenth query: vagueness and aggravating factors	252

	6.3.3.10.1 The concerns of the opponents of the purgative rationale	253
	6.3.3.10.2 Dealing with vagueness	254
	6.3.3.11 An eleventh query: permissibility as well as obligatoriness?	256
	6.3.3.11.1 When permissibility is missing	256
	6.3.3.11.2 When executions are permissible	257
	6.4 Conclusion: why only liberal democracies?	260
	6.4.1 An ancillary reason: procedural fairness	260
	6.4.2 The chief reason: purgation in a moral community	262
7.	The Death Penalty in Operation	267
	7.1 Mistakes and irrevocability	269
	7.1.1 A preliminary point: clarifying an ambiguity	270
	7.1.2 Intentional killings of innocents?	271
	7.1.2.1 A specious argument	271
	7.1.2.2 Intentional or not?	275
	7.1.2.2.1 The de dicto/de re distinction	276
	7.1.2.2.2 The distinction applied	277
	7.1.3 Sweeping too broadly	278
	7.1.3.1 Lempert's reasoning afresh	279
	7.1.3.2 Intentionality at the level of decision-making, once again	280
	7.1.3.3 Steiker and Steiker on the distinctive harms of	
	mistaken executions	281
	7.1.4 Irrevocability?	284
	7.1.4.1 Compensability	284
	7.1.4.2 Remedies during one's lifetime	286
	7.1.5 Capital punishment in the shadow of mistakes	290
	7.1.5.1 Confidence rather than certainty	292
	7.1.5.2 Exasperation as the price of legitimacy	295 297
	7.2 Arbitrariness	
	7.2.1 A markedly inadequate response	299 303
	7.2.2 Another unsatisfactory response	305
	7.2.3 Distortive exaggeration	305
	7.2.3.1 Processes of differentiation in practice	300
	7.2.3.1.1 Studies cited by Dolinko	308
	7.2.3.1.2 McCord on aggravating factors	308
	7.2.3.2 Differentiation in principle	311
	7.2.4 Residual arbitrariness	313
	7.3 Invidious discrimination	314
	7.3.1 Extrinsicality	31;
	7.3.2 A couple of complexities and the key rejoinder	317
	7.3.3 No severe punishments? A first look 7.3.4 No severe punishments? A second look	31
		319
	7.3.4.1 An opening reply to Cholbi	319
	7.3.4.2 A further reply to Cholbi	32
	7.3.4.3 A final reply to Cholbi	J

xii CONTENTS

7.3.4.3.1 Fair discrimination	320
7.3.4.3.2 A dubious principle	323
7.3.4.4 A brief summation	324
7.3.5 Substance dressed up afresh as procedure	324
7.4 A few words in conclusion	326
References	329
Index	341