

# The Ethics of Capital Punishment

*A Philosophical Investigation of Evil and  
Its Consequences*

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## Introduction

### 1.1. The limits of the enquiry

Although much of this book will be devoted to impugning all the standard rationales for capital punishment, the chief purpose of the volume is to advance an alternative justification for such punishment in a limited range of cases. By pursuing both a project of critical debunking and a project of partial vindication, this book adopts an approach quite different from that which has sometimes been attributed to proponents of the death penalty. Some theorists have asserted that 'citizens invariably signify their agreement with *all* the conventional rationales that point in the direction of their preferred position on the death penalty' (Kahan 1999, 445, emphasis in original). Whatever may be the veracity of such a bold assertion when it is applied solely to non-philosophers or non-academics, it is very wide of the mark in application to philosophical discussions of the death penalty and particularly in application to this book. On the one hand, my accounts of the standard rationales for capital punishment will seek to highlight the features of those rationales that have made them attractive to philosophers and ordinary citizens alike. On the other hand, however, the ultimate aim of each such account is to reveal that none of the standard rationales can genuinely justify the imposition of the death penalty. By showing that each of the currently prominent justifications is otiose even when elaborated sympathetically, my discussions of those justifications will indicate that the moral soundness of capital punishment must rest on some alternative basis—if such punishment is indeed ever morally sound.

Unlike the commonly proposed rationales for the death penalty, the purgative justification that will be championed in this book is not an offshoot or aspect of a general theory of punishment. Each of the commonly proposed rationales is associated with a wide-ranging theory that addresses all types of crimes rather than only the most rebarbative atrocities. Each such rationale for the death penalty thus consists in the application of a comprehensive account of punishment to the worst atrocities; the death sentences for such heinous misdeeds are perceived as lying at the extreme end of a spectrum of sanctions which in their sundry degrees of severity are respectively attached to various crimes in pursuit of the same underlying objective (deterrence or retribution or incapacitation or denunciation). By contrast, the rationale for capital

punishment that will be expounded herein is *sui generis*. It does not emerge as a ramification of a broader theory of punishment.

In two respects, then, this book's purgative rationale uniquely requires the imposition of the death penalty (in appropriate cases). In the first place, as the subsequent chapters will argue—and as has been remarked above—the purgative rationale is uniquely effective as a justification for capital punishment, since the competing justifications all fail. In the second place, the only type of punishment for which the purgative rationale ever calls is the death penalty. It does not prescribe any lesser punishments, and does not address any crimes less grave than those that are extravagantly heinous.

In that second respect, my approach to the death penalty runs counter to the following declaration by William Edmundson: 'Anyone who reflects on the practice of capital punishment has to work through two issues. The first is that of the justification of punishment in general, the second is that of the place of death within his or her overall theory of punishment' (Edmundson 2002, 40). Though Edmundson's comment accurately summarizes the ways in which the standard rationales for capital punishment have been propounded, it fails to capture the *sui generis* character of the purgative rationale. Within this volume, I do not endeavour to present an overarching theory of punishment from which certain conclusions about the death penalty follow as special implications. Instead, the aim is to arrive at certain conclusions about the death penalty through a free-standing justification. (To the extent that this book's purgative justification of capital punishment is embedded in a broader theory, the theory in question is an account of evil rather than of legal sanctions.)

Consequently, this book's contestation of the prevailing rationales for the death penalty will address them predominantly as just such rationales rather than as doctrines that prescribe punitive measures across the board. To be sure, a few of my objections to the commonly marshalled arguments for capital punishment will question whether the factors invoked by those arguments can ever truly justify any punishments. Furthermore, this book's expositions of those putative bases for the death penalty will of course take account of their locations in comprehensive theories of punishment. For the most part, however, my expositions and queries will concentrate on the distinctive difficulties surrounding the proposition that some criminals are properly punishable with death. We shall be pondering the diverse efforts by numerous philosophers to defend that proposition, and we shall only incidentally consider whether the shortcomings in any of those efforts extend beyond the context of executions. For example, when we contemplate the merits and weaknesses of the incapacitative rationale for the death penalty, we can largely leave aside the question whether a broad incapacitative approach to punishment would succeed in vindicating some lesser sanctions.

Because the justification of capital punishment advanced in this book is not a facet or ramification of a general theory of punishment, it presupposes that any satisfactory overall account of punishment will be pluralistic. That is, given that my purgative

rationale for the death penalty does not lend itself to being generalized to other sanctions, there is no single principle that serves as the justificatory foundation for all the punishments that might suitably be imposed by a morally worthy government. There is no single objective toward which all those punishments should be oriented. On this point, the present book is in agreement with some theorists who never mention the purgative rationale: ‘Ultimately, all accounts of punishment are partial accounts. No one theory explains the whole enterprise.’<sup>1</sup>

## I.2. A matter of justification

As is evident from what has been said already, the fundamental tenor of this book is justificatory. Both within the chapters that seek to discredit the most frequently proffered arguments in favour of capital punishment and within the chapter that expounds a purgative alternative to those arguments, the aim is to come up with solid grounds for the employment of the death penalty in response to especially horrific crimes. Now, if this justificatory project is to yield any practical consequences, the direction of the burden of proof has to be specified. For the operativeness of such consequences, it is not enough that the imposition of the death penalty in response to atrocious crimes is justified. In addition, we need to be warranted in believing that it is justified. When are we so warranted? Where does the burden of proof lie?

In line with most other philosophers and jurists who write about capital punishment, this book readily accepts that the burden of proof rests on the proponents of such punishment.<sup>2</sup> Thus, for example, if some people support the death penalty on the ground that it more effectively deters vile murders than does any other available type of punishment, their views should not carry any practical weight unless they adduce solid evidence of the deterrent effect to which they advert. They cannot rely simply on the absence of any clear-cut evidence that would disprove the occurrence of such an effect. Much the same is true, *mutatis mutandis*, of other rationales for capital punishment.

<sup>1</sup> Kennedy 2000, 850. For a similar view, see Hampton 1992, 1659 n 2, 1700–1. See also Shafer–Landau 1996, 296–7. In my insistence on the distinctiveness of the considerations that justify the imposition of the death penalty, this book’s approach to punishment is more strongly pluralistic than the sophisticated blending of retributivism and consequentialism advocated in Cahill 2010. The purgative rationale for capital punishment is neither retributivistic nor consequentialist.

<sup>2</sup> See, for example, Finkelstein 2002, 12, 16, 20; Goldberg 1974, 74 n 5; Hurka 1982, 659 n 14; Symposium 2003, 152 (remarks by William Erlbaum). A few theorists proceed differently. For instance, Hugo Adam Bedau writes that he will ‘ignore here the question of which side has the burden of argument and will proceed as if the abolitionist did’ (Bedau 1999, 49). Likewise, Ernest van den Haag—Bedau’s fiercest opponent—sometimes contended that ‘the irrevocability of the death[s] of homicide victims justifies capital punishment until deterrence is positively disproved’ (Book Review 1983, 1213). For a more sophisticated version of van den Haag’s view, see Davis 1996, 42–3, 50–1. For non-committal stances on the matter of the burden of proof, see Jones and Potter 1981, 158–9; Schwarzschild 2002, 10–11. For a somewhat equivocal stance, see Sorell 2002, 28, 33. See also Edmundson 2002, 41: ‘It will not do for either side to claim that his or her position is presumptively correct, and to cast upon the other side the burden of persuasion.’

Of course, not every such rationale joins the deterrence-focused theories in appealing centrally to empirical considerations. In particular, this book's purgative rationale for the death penalty depends on moral argumentation rather than on empirical investigations. (Naturally, any deterrence-focused theory also depends on moral argumentation; but the content of its moral argumentation commits it also to some major empirical claims that have to be substantiated.) Unless this book's lines of reasoning are strong enough to be plausible, its purgative rationale for capital punishment should not carry any practical weight. The sheer absence of any conclusive refutation of that rationale is hardly sufficient to discharge the burden of proof that confronts anyone who advocates the imposition of the death penalty.

Why does the relevant burden of proof lie on the supporters of capital punishment rather than on the opponents thereof? Under basic principles of liberal democracy, any significant use of governmental power and resources is illegitimate unless it has been credibly justified by reference to some worthy public purpose(s). Legal-governmental officials are not morally entitled—nor legally entitled, in any liberal democracy—to wield the mechanisms of government whimsically or selfishly. If their activation of those mechanisms is not undertaken on the basis of objectives that can properly be sought by a system of governance, then it violates the moral obligations that are incumbent upon them in their roles as public officials. Those obligations both constitute and express the morally subordinate status of any system of governance vis-à-vis the citizenry over whom it exercises authority.

Hence, the direction of the burden of proof in debates over capital punishment is a matter of fundamental liberal-democratic principles concerning the moral priority of individuals vis-à-vis governments. After all, the application of such punishment to anyone is a lethal exertion of governmental power. If executions were to go ahead without any credible argument that they are necessary for the achievement of an important public purpose, the respect due to citizens from those who govern them would be egregiously compromised. Liberal-democratic principles raise a presumption against virtually any use of governmental power. When a use of power involves the deliberate infliction of death, the presumption is strong indeed. Though the presumption is still rebuttable, the requisite rebuttal does not occur by default; it has to occur through moral argumentation, and the argumentation has to establish that capital punishment serves a major public end which cannot be satisfactorily served by any less severe penalty.<sup>3</sup>

<sup>3</sup> I am here subscribing to a moral principle that Bedau has styled as the 'Minimal Invasion Principle' (a fundamental precept as well in American constitutional law). According to that principle, any significant exertion of legal-governmental power must satisfy two conditions: it must be in furtherance of an important public purpose, and it must employ the least invasive or restrictive means that is sufficient to achieve that purpose. See Bedau 1999, 47; 2002, 4. Van den Haag was disconcertingly glib when he sought in effect to reconcile the death penalty and the Minimal Invasion Principle by discounting the invasiveness or restrictiveness of that penalty. He wrote that 'the [implementation of a] death sentence does not deprive one of a life one would otherwise keep. We all die even without a legally imposed sentence. . . . Whatever can be said against the death penalty, it cannot be said that it causes an otherwise

As will become clear in Chapter 6, the only tenable justification for capital punishment leads to the conclusion that such punishment is never legitimate except when imposed (in appropriate circumstances) by liberal-democratic governments. Hence, the liberal-democratic principles that determine the direction of the burden of proof in debates over capital punishment are dispositive. No applications of the death penalty are morally legitimate unless a satisfactory vindication of that penalty has emerged as the basis for those applications.

### 1.2.1. A first caveat

This section should close by averting two possible misunderstandings. First, although there is always initially a (rebuttable) presumption against the mobilizing of a government's coercive mechanisms, we should hardly infer that the absence of punitive measures on the part of a government is never itself in need of justification. On the contrary, a government's refusal or failure to intervene forcibly is sometimes morally indefensible. Joel Feinberg supplied an example of this phenomenon, when he reported that the penal code in the state of Texas had formerly permitted the slaying of a paramour by a cuckolded husband if the paramour and the adulterous wife were caught by the husband *in flagrante delicto*. As Feinberg wrote, 'a great injustice is done when such killings are left unpunished. . . . [I]n effect the law expresses the judgment of the "people of Texas," in whose name it speaks, that the vindictive satisfaction in the mind of a cuckolded husband is a thing of greater value than the very life of his wife's lover' (Feinberg 1970, 103). David Lyons has recently recollected an even more odious example. In the South of the United States during the closing decades of the nineteenth century and the first few decades of the twentieth century, prosecutors were extremely reluctant to pursue charges against the perpetrators of racist lynchings, and juries and judges were strongly disinclined to return guilty verdicts against the few who were prosecuted. As Lyons remarks: 'Lacking fear of prosecution, participants posed [for cameras] with impunity. Prosecutions were in fact rare and, thanks to jury nullification, convictions were rarer still' (Lyons 2008, 32).

As these examples and many other potential examples can attest, the withholding of punitive measures is quite often morally problematic. What is most important for our present purposes is that, whenever the absence of sanctions is objectionable, it is so because a general practice of levying sanctions is morally legitimate and vital. In other words, the moral dubiousness of the omission of punishments is always super-venient on a context in which the burden of proof for the legitimacy of punishments

avoidable death' (Van den Haag and Conrad 1983, 15, 16). If these quoted statements are to be evaluated as true, they have to be understood *de dicto*. That is, they have to be understood as focusing on an event-type—the event-type of death—with an indefinite temporal index. When so construed, the statements could just as well be uttered about murder, *mutatis mutandis*. Van den Haag himself eventually allowed that no conclusions about the moral status of the death penalty follow from the remarks just quoted: '[T]he death penalty is intended to hasten death. We as yet have to consider whether this can be justified as a punishment for any crime' (Van den Haag and Conrad 1983, 16).

has been met. That moral dubiousness ‘presupposes the regular [and legitimate] use of the criminal sanction as a background condition, as the “baseline” against which deviations are measured’ (Fletcher 1999, 62). Thus, far from there being any inconsistency between a presumption against a government’s exercise of its coercive powers and a presumption against a government’s failure or refusal to exercise its coercive powers, the satisfaction of the burden of proof imposed by the former presumption is a necessary condition for the existence of the latter presumption.

### 1.2.2. A second caveat

Although this book endeavours to vindicate the employment of the death penalty, it is certainly not seeking to justify every execution that has actually taken place in any country. For one thing, as has already been briefly noted, the use of the death penalty is morally legitimate only in countries that are governed by liberal-democratic regimes. Most executions in the present day (to say nothing of past centuries) have taken place in countries that are governed by regimes which lack the moral authority to put any prisoners to death. Furthermore, even in the liberal-democratic nations in which the death penalty is still employed—by far the most prominent of which is the United States, of course—the application of that penalty has been both overinclusive and underinclusive. Many convicts who should not be put to death are in fact executed, and some convicts who should be put to death are instead kept in prison for life (either because they are sentenced to lifelong imprisonment or because their death sentences are never given effect).

Two broad sets of considerations can separately or together militate against the appropriateness of any particular execution: procedural or administrative factors, and substantive factors. Shortcomings in the administration of capital punishment, which Chapter 7 will explore at length, can undermine the moral legitimacy of executions of criminals whose misdeeds are sufficiently heinous to be covered by this book’s purgative rationale. Indeed, if the procedural shortcomings are serious and frequent, they can vitiate the whole practice of capital punishment within the criminal-justice system involved. After all, an execution is not legitimate unless it is performed for the right reasons. When death sentences are imposed and carried out largely because of administrative aberrations, they are morally illegitimate even if the executed criminals are defilingly evil. In such cases, substance does not trump procedure; the moral permissibility of the outcomes is undone by the unscrupulous or haphazard ways in which they have been reached. Just as liberal-democratic principles determine the direction of the burden of proof in debates over the moral status of capital punishment, those principles—particularly relating to due process and equality of opportunity—constrain the manner in which any applications of such punishment can legitimately unfold.<sup>4</sup> When the administration

<sup>4</sup> For an exposition of the formal and procedural principles of liberal democracy, see Kramer 2007, 143–86.



of the death penalty is in compliance with those constraints, it is informed by the same moral values on which the substantive correctness of any infliction of that penalty depends.

At least as important as the procedural legitimacy of executions, of course, is their substantive appropriateness. As has already been indicated—and as will become clear in Chapter 6—the purgative rationale for capital punishment, which articulates the conditions for the substantive appropriateness of executions, is fairly restrictive. It would not serve to justify quite a few of the death sentences that are handed down in the United States.

Hence, although the orientation of this book is justificatory, I am not striving to vindicate the current practice of capital punishment in the United States or anywhere else. Quite the contrary. If the arguments in this book are sound, then the systems of capital punishment in various American states are in need of considerable modifications. Some notable features of those systems are salutary, to be sure, but numerous people sentenced to death therein are not defilingly evil and are thus not properly subject to execution under the purgative rationale that will be expounded in this book. Accordingly, my championing of that rationale is more a manifesto for change than a vindication of existing practices. It does not constitute an apology for the status quo.

Indeed, although support for the death penalty is more often found on the right than on the left of the political spectrum in the contemporary United States, the regnant political associations of that support are contingent and somewhat superficial. Even Dan Kahan, who dwells on those associations, acknowledges that '[t]here is no necessary *philosophical* link between the death penalty and these [right-of-center] positions [on issues such as abortion and civil liberties and gun control].'<sup>5</sup> He avouches that, if support for the death penalty does stem principally from the right of the American political spectrum, 'that's only because the death penalty bears [contingent] connotations that make it fit better with certain evaluative stances than others' (Kahan 1999, 441).

These concessions by Kahan are wise, since the connections between conservatism and the advocacy of capital punishment are tenuous. For one thing, conservatives' distrust of governmental power lends itself quite readily to some forceful arguments against the adoption or retention of the death penalty (Rowan 2004). Although Chapter 7 will ultimately reject those arguments, they are not to be dismissed lightly. Moreover, as will become apparent in Chapter 6, this book's purgative rationale for capital punishment appeals to considerations that are more frequently invoked on the left of the American political spectrum than on the right. Those considerations, pertaining to the ties of solidarity and mutual responsibility among human beings, cannot easily be ignored or disclaimed by people who regularly resort to them for

<sup>5</sup> Kahan 1999, 440, emphasis in original. Let it be noted that I myself favour left-of-centre positions on abortion, civil liberties, and gun control.

other purposes. Such people should be chary of trying to squeeze this book into any ideological pigeonholes.

### 1.3. A pithy conspectus

Each of the next four chapters will critically scrutinize one of the standard rationales for capital punishment. Chapter 2 deals with the deterrence-oriented justification; Chapter 3 examines two main types of retributivism, the vindictory variety and the desert-focused variety; Chapter 4 ponders the incapacitative rationale; and Chapter 5 probes the denunciatory theory. After those four chapters have rebutted the commonly invoked justifications for the death penalty, Chapter 6 presents a rationale—the purgative rationale—that stands as an alternative to those justifications. Chapter 7 then concludes the volume by considering whether the sundry problems that afflict the administration of capital punishment are inevitably so bad as to undo the moral legitimacy of every endeavour to institute such punishment.

Three of the standard justifications for capital punishment—the deterrence-oriented, incapacitative, and denunciatory rationales—are consequentialist. They favour the death penalty because of its presumed tendency to produce socially beneficial consequences (especially through the reduction of serious criminal activity). By contrast, retributivism in its primary form is deontological.<sup>6</sup> Retributivistic arguments in support of capital punishment contend that death is sometimes an appropriate sanction not because the imposition of it will tend to cause a diminution of criminal activity—though such a consequence may indeed ensue—but because the imposition of death is deserved or because it reasserts the moral dignity of those who have been harmed by serious crimes. My purgative rationale for capital punishment is likewise deontological rather than consequentialist, as I maintain that such punishment is appropriate when the application of it brings to an end the defilingly evil existence of someone who has committed particularly flagitious crimes.

#### 1.3.1. Chapter 2: Deterrence-oriented theories

All the consequentialist justifications for capital punishment, especially the deterrence-oriented and denunciatory rationales, depend on far-reaching and controversial empirical claims. Thus, as will be discussed in my next chapter,

<sup>6</sup> Of course, as will intermittently become apparent in subsequent chapters, retributivism can be combined with consequentialist theories in a number of ways. Moreover, as is argued in Berman 2010, some contemporary versions of retributivism are consequentialist. According to those latter versions of the doctrine, the realization of any retributivistically valuable states of affairs is an especially weighty goal that should be pursued along with other goals in a consequentialist fashion. For reasons that will become evident from my comments on consequentialism in Chapter 2 (and from a few of my comments on retributivism in Chapter 3), the elaboration of retributivism along consequentialist lines is highly problematic; it weakens rather than enhances the insights of retributivists. Thus, because I want to come to grips with retributivism in its strongest form, I will generally treat it as a deontological justification of punishment.

much of the disputation surrounding the deterrence-oriented rationale has centered on numerous empirical studies that have been subjected again and again to complicated statistical analyses. Still, as was remarked earlier, the empirical claims of deterrence-oriented theories are coupled with moral principles that ascribe ethical significance to those claims. Though the moral theses of the deterrence-oriented rationale for the death penalty are perhaps not as frequently assailed as are its empirical theses, they have been far from uncontentious. Chapter 2 will concentrate chiefly on those moral tenets. It will endeavour to show that, even if the empirical propositions advanced by deterrence-oriented theories were all true, those theories would not succeed in establishing that capital punishment is morally legitimate in principle.

In a nutshell, the deterrence-oriented justification of capital punishment holds that executions of murderers are significantly more effective than any other acceptable penalties in lowering the incidence of premeditated homicides by frightening people away from committing them. (Deterrence-oriented arguments in favour of the death penalty can also advert to crimes other than murder, of course. However, very few proponents of such arguments in the present day have called for the use of capital punishment in response to crimes that do not involve murders.) As one of the most renowned exponents of the deterrence-oriented justification proclaimed: '[B]y a dozen or score of punishments, thousands of crimes are prevented. With the sufferings of the guilty few, the security of the many is purchased. By the lopping of a peccant member, the body is saved from decay' (Austin 1995, 43). When theorists commend capital punishment on such grounds, they usually hail any reduction in the incidence of premeditated homicide not as an ultimate end but instead as a means to the ultimate end of maximizing a society's aggregate or average level of utility. In the eyes of deterrence-oriented theorists, then, executions are instrumentally valuable for the fear-inducing ways in which they contribute to the realization of the value that is of ultimate importance.

Chapter 2 will address the debates over the multitudinous relevant empirical studies only to a very limited degree,<sup>7</sup> because the controversies over the findings and statistical significance of those studies are largely matters for social scientists rather than for philosophers. Still, even someone outside the social sciences can recognize that there is a dearth of evidence in support of the deterrence-oriented position. At best, the data and the statistical analyses of the data are inconclusive. Given the quantity of ink and intellectual energy bestowed on the question of the deterrent efficacy of capital punishment, the conclusion that can most plausibly be drawn is that there are no statistically significant deterrent effects waiting to be discovered.

Still, as has been stated, most of Chapter 2 proceeds (strictly *arguendo*) as if the empirical claims of the deterrence-oriented theorists have been at least partly substantiated. Should those claims, if correct, impel us to conclude that the institution

<sup>7</sup> I will, however, discuss some general reasons for doubting that capital punishment deters serious crimes more effectively than do alternative sanctions such as lifelong imprisonment-without-parole.

of capital punishment is morally legitimate and obligatory? For several reasons, the answer to this question is negative. As will be argued, the deterrent efficacy of capital punishment is not sufficient to justify the infliction of such punishment, nor can it become sufficient by being supplemented with any of the considerations on which the other standard rationales for the death penalty have concentrated. This book's second chapter will explore the moral inadequacies of the deterrence-oriented rationale partly by reference to a recent exchange between Cass Sunstein and Adrian Vermeule on the one hand and Carol Steiker on the other (Sunstein and Vermeule 2005a; Steiker 2005; Sunstein and Vermeule 2005b). Though their exchange does not address all the queries that will be raised in my critique of deterrence-oriented theories, it is a stimulating point of departure for a number of those queries.

### 1.3.2. Chapter 3: Retributivism

Chapter 3 moves away from the consequentialism of the deterrence-oriented rationale, as it shifts the focus to the deontological conceptions of punishment and the death penalty propounded by retributivists. Retributivism has emerged in multifarious varieties, which are often blended in the writings of particular theorists. Every variety lays emphasis on human equality and on the moral responsibility of individual human agents. In some versions of retributivism, the centre of attention is the malefactor who has unjustly indulged himself at the expense of others and who therefore deserves to be brought low by being subjected to the detriments of punitive measures. In other versions, the centre of attention is the victim whose rights and dignity have been transgressed; the object of retributive punishment is to reaffirm the rightful standing of the victim, who can be understood solely as some discrete individual(s) or also as the public at large. In either the desert-focused form or the vindicatory form—each of which is frequently conjoined with the other—retributivism aims to reassert the equality of all human agents by ensuring that nobody can unfairly set himself above his fellows with impunity.

Whereas the deterrence-oriented supporters of capital punishment commend it from a viewpoint that is thoroughly prospective and instrumentalist, the retributivistic supporters of capital punishment commend it from a retrospective viewpoint that characterizes such punishment as intrinsically fitting. For these latter proponents, executions are valuable not because of the consequences to which they lead, but because of their commensurateness with the heinous crimes in response to which they are carried out. Executions in appropriate cases are deserved and are to be performed for that reason, irrespective of whether they yield any salutary results such as deterrence.

As has been suggested in this chapter's opening section, my critique of the tenets of retributivism will not seek to impugn those tenets as a general theory of punishment. Rather, the precise issue to be addressed is whether retributivists can succeed in justifying the use of the death penalty. Can they show that the use of that sanction is morally obligatory and legitimate in principle? Chapter 3 delivers a negative answer to this question, as it argues that the considerations underlying retributivism cannot

determinately call for executions in preference to certain other severe sanctions. In so arguing, the third chapter will align itself not only with many opponents of retributivism but also with quite a few retributivists (who oppose the institution of capital punishment). Though the chapter will not endorse all the objections raised by those retributivists against the use of the death penalty, it will join with them in maintaining that such a penalty is never morally required on the basis of retributivistic principles. The ends prescribed by those principles can be attained through lesser sanctions. Because retributivism cannot provide any grounds for the proposition that capital punishment is ever morally required, it cannot provide any grounds for the proposition that such punishment is ever morally permitted; after all, it cannot provide any grounds for the proposition that executions are the least severe means for the realization of a major public purpose.<sup>8</sup>

### 1.3.3. Chapter 4: The incapacitative rationale

According to the incapacitative rationale for the death penalty, the object of capital punishment is to eliminate extremely dangerous people in order to prevent them from wreaking havoc in the future. A justification along these lines is obviously consequentialist, as it upholds capital punishment for the sake of producing the socially beneficial consequence of enhanced public safety. It contends that the only way of protecting members of the public (including members of the public in prison) from the depredations of certain people is to terminate the existence of those people. Even if the executions of those thugs will not deter anyone else from indulging in criminal activity, the executed thugs themselves will no longer be around to prey on their fellow human beings. *Pro tanto*, the world will be a safer place; the numerous innocent lives spared will more than offset the relatively few lives extinguished.

Chapter 4 poses a host of objections to the incapacitative rationale for putting people to death. For one thing, the rationale on its own terms is unconcerned with moral responsibility. It deals with dangerously violent people as if those people were rabid animals rather than agents responsible for their misdeeds. Furthermore, the incapacitative justification for capital punishment does not even condition its applicability on the occurrence of misdeeds. If there is a solid basis for the claim that someone is strongly disposed to engage in murder and mayhem, then under the incapacitative rationale there is a solid basis for executing him regardless of whether he has yet committed any crimes.

Even more damaging is that the incapacitative justification cannot determinately call for executions in preference to alternative sanctions (such as lifelong imprisonment in solitary confinement) that would effectively deprive savage criminals of opportunities to harm others. Thus, notwithstanding that the incapacitative goal of safeguarding members of the public against the occurrence of lethal crimes is a

<sup>8</sup> Note that this argument does not rely at all on the principle that everything morally obligatory is morally permissible. I have repeatedly assailed that principle, most recently in Kramer 2009b.

worthy and important objective, the use of the death penalty for the realization of that goal is doubly illegitimate. It is illegitimate because it runs afoul of the problems broached in the preceding paragraph and also because it is not the least severe means for effectively promoting the desideratum that is being pursued.

### 1.3.4. Chapter 5: The denunciatory conception

Although the denunciatory conception of punishment is often mistaken for other conceptions, it comprises a distinctive array of consequentialist theses. Foremost among them is the idea that punishments give expression to a community's detestation of the misdeeds for which the punishments are levied. Denunciatory theorists hold that the expressive role of punishment is instrumentally valuable for two principal reasons. First, the manifestation of the community's attitude of revulsion toward serious crimes will help to solidify people's sentiments against the commission of those crimes. Like the deterrence-oriented rationale, then, the denunciatory theory maintains that a key function of punishment lies in the reduction of criminal activity. However, whereas the advocates of the deterrence-oriented approach contend that the reduction will occur through the evocation of fear in people, the advocates of the denunciatory rationale contend that the crime-diminishing effect of punishment will derive instead from the reinforcement and purification of people's moral sentiments.

A second valuable consequence of the expressive role of punishment consists in the defusing of people's vindictive impulses. By giving vent to people's feelings of hatred and resentment, punitive measures satisfy their instincts for revenge and thereby greatly lower the likelihood of their resorting to private acts of retaliation. When private vengeance and vendetta are thus obviated, the increase in public order and individual security is beneficial for everybody. As one of the most famous exponents of the denunciatory theory remarked with characteristic trenchancy:

[C]riminal law is in the nature of a persecution of the grosser forms of vice, and an emphatic assertion of the principle that the feeling of hatred and the desire of vengeance . . . are important elements of human nature which ought in such cases to be satisfied in a regular public and legal manner. . . . [C]riminal law operates . . . indirectly, but very powerfully, by giving distinct shape to the feeling of anger, and a distinct satisfaction to the desire of vengeance which crime excites in a healthy mind. [Stephen 1993, 98, 100]

Although retributivism is often associated by its critics with a lust for revenge,<sup>9</sup> the denunciatory conception of punishment is in fact the rationale that accords a central place to vindictive feelings. Of course, in so doing, the denunciatory conception is not crassly pandering to people's baser impulses. It portrays punishment as the opti-

<sup>9</sup> Such an association has also been posited by some proponents of retributivism. See, for example, Oldenquist 2004, 339–40.

mal means of channelling and allaying people's vengeful sentiments, rather than as a means of untrammelling those sentiments to roam freely.

Applied to the matter of capital punishment, the denunciatory rationale submits that the only apposite way of expressing a community's repugnance toward the most heinous crimes is to execute the perpetrators of those crimes. Only thus can the functions of criminal law be satisfactorily performed in reaction to such ghastly wrongdoing. Unless the vilest criminals are put to death for their iniquities, the extreme wickedness of their actions will have been glossed over and will consequently not have been made sufficiently apparent to the community at large. Likewise, the instincts for revenge felt by many individuals against those criminals will not have been sated and thereby defused. Accordingly, if the most repellent crimes in a community are not punished with death, the community's moral cohesion and its level of public security will suffer considerably.

Chapter 5's critique of the denunciatory rationale for capital punishment will take exception to that rationale partly because of its consequentialism. Like the deterrence-oriented approach, the denunciatory theory does not in itself provide any basis for confining the death penalty to malefactors who have actually committed crimes. If someone is very widely and firmly thought to be responsible for an atrocious murder, and if there is no significant prospect of the emergence of any exculpatory evidence that will persuade people to the contrary, then the denunciatory rationale countenances the execution of the suspect regardless of whether he has actually carried out any misdeed. Furthermore, even if the denunciatory theorists supplement their rationale with retributivism's emphasis on desert in order to overcome this first problem—that is, even if they treat retributivism as a side-constraint that limits the applicability of their own theory to people who are actually guilty—a number of other difficulties remain, as Chapter 5 will make clear.

For the proponents of the denunciatory rationale, the most vexing of those additional difficulties is that that rationale cannot provide any solid grounds for favouring executions over several alternative sanctions such as lifelong imprisonment-without-parole. The empirical studies adduced by supporters and detractors of the deterrence-oriented justification are focused solely on increases and decreases in rates of crime; those studies do not attempt to distinguish between decreases attributable to the dread of execution and decreases attributable to the reinforcement of morally upright sentiments. Consequently, the utter inconclusiveness of those studies (at best) is as damaging to the denunciatory rationale for capital punishment as to the deterrence-oriented rationale. No more than the empirical claims of the latter rationale are the empirical claims of the former rationale borne out by the available data. (Chapter 5 will present some general reasons for doubting that those empirical claims will ever be borne out.)

Moreover, even if the empirical evidence were largely in keeping with what the denunciatory theorists assert, their attempted justification of capital punishment

would fail to establish that such punishment is morally legitimate in principle. Again the problem faced by the denunciatory rationale is parallel to a problem faced by the deterrence-oriented rationale. For each theory, the problem arises from the fact that punishments much more severe than the ordinary death penalty—such as the infliction of savage torture followed by death through dismemberment—are highly likely to be even more efficacious as deterrents or as reinforcers of morally upright sentiments. In many possible worlds,<sup>10</sup> those much more severe sanctions will be utility-maximizing (not least because their formidableness will mean that they seldom have to be used). Nonetheless, they are morally illegitimate. Given as much, the efficacy of sanctions as deterrents or as reinforcers of morally worthy sentiments is not a sufficient condition for their legitimacy. Ergo, to know whether any sanction such as the death penalty is morally legitimate in principle or not, we have to draw upon some independent touchstone of moral legitimacy. That touchstone must come from somewhere beyond the denunciatory theory, yet—for reasons explored in Chapters 2–4—it cannot come from any of the other standard rationales for capital punishment.

### 1.3.5. Chapter 6: The purgative rationale

Having impeached the standard justifications for the death penalty, this book proceeds in Chapter 6 to expound an alternative justification. Although the purgative rationale goes almost entirely unmentioned in the contemporary philosophical literature on the death penalty, it is one of the most prominent of the several justifications for capital punishment that are propounded in the Bible. In the Book of Deuteronomy, the following pronouncement occurs at many of the junctures at which the Israelites are enjoined to put certain miscreants to death: ‘So you shall purge the evil from the midst of you’ (Deuteronomy 12:5, 17:7, 19:19, 22:21, 22:24, 24:7). Several other closely similar pronouncements likewise appear in Deuteronomy.

Now, one reason for the nearly complete disregard of the purgative rationale in modern philosophical discussions of capital punishment is undoubtedly the association of that rationale with the Bible. One of the most salutary contrasts between modern philosophy and much of medieval philosophy is that the Bible cannot any longer be cited respectably as a source of authoritative insight that supposedly resolves thorny philosophical disputes. Quite rightly, no capable philosopher in the contemporary world would accept that the Bible’s endorsement of the purgative rationale for the death penalty is somehow determinative of that penalty’s moral status. Far from being invariably correct, the moral beliefs expressed in the Scriptures are often primitive and repellent. Hence, the sheer presence of the purgative rationale in Deuteronomy is hardly sufficient to guarantee its moral correctness. On the contrary,

<sup>10</sup> When philosophers speak of possible worlds, they are referring to the countless alternative ways in which the whole array of entities and events can unfold; the actual world is possible, of course, but so are innumerable counterfactual worlds. Any one of those latter worlds is classifiable as nearby or proximate insofar as its similarities to the actual world are close.



the salience of that rationale in the Bible is enough to discredit it altogether in the eyes of many philosophers.

Indeed, as we shall see in Chapter 6, a famous passage from Immanuel Kant that fleetingly gestures toward the purgative justification for the death penalty has frequently been derided on the ground that it peddles some outlandish ideas from the Bible. Still, despite the ridicule heaped upon that passage, the purgative rationale to which it somewhat confusedly adverts is sound and is quite detachable from any religious origins. Removing the purgative rationale from its religious provenance is in fact the central task to be carried out by Chapter 6, for this book firmly aligns itself with most modern philosophers in eschewing any appeals to the Scriptures as authoritative oracles.<sup>11</sup> Moral justifications have to be grounded on unremittingly secular moral argumentation rather than on Scriptural incantations. My elaboration of the purgative rationale for capital punishment will indeed be unremittingly secular in both its orientation and its motivation.

What, then, is the purgative rationale? It maintains that some misdeeds are so monstrously evil as to render morally noxious the lives of the people who have committed them. The continued existence of the perpetrator of any such misdeed(s) will have defiled the moral character of the community in whose control he or she abides. Though the community may well not have been complicit in the occurrence of the misdeed(s)—since the misdeed(s) in question may have been thoroughly at odds with the prevailing mores rather than in furtherance thereof—it becomes and remains complicit in the continued existence of the person who is responsible, insofar as that culprit has been brought or should have been brought under the control of the community. By failing or refusing to execute such a person after fair legal proceedings, a community becomes and remains defiled. (As will be seen in Chapter 6, the defilement pertains to the relationship between a community and the rest of humankind. It arises because certain offences are so horrific that they count as crimes against humanity.)

Unlike the commonly invoked rationales for capital punishment, the purgative justification calls uniquely for the death penalty—not only in the sense that it deals exclusively with the most heinous offences, but also in the sense that the sole remedy which it ever prescribes is the termination of a defilingly evil person's life. As Chapter 6 will argue, for example, banishment is never a suitable alternative to death under the purgative rationale. Nonetheless, the superiority of the purgative rationale in the respect just mentioned will obviously be unavailing unless the key elements of that rationale are sustainable. Most of Chapter 6 is devoted to providing support for those elements.

In particular, the chapter—drawing to some degree on recent philosophical discussions of the topic—expounds a thoroughly secular account of evil. In a closely related vein, it elaborates a thoroughly secular account of defilement. (Whereas the

<sup>11</sup> Although I study the Bible closely for 60–90 minutes every day, and although I believe that fruitful ideas can be gleaned from it, I have been robustly atheistic since the age of eight.

property of evil has received considerable scrutiny from philosophers in recent years, the intimately connected phenomenon of defilement has received very little attention from them.) On the basis of my explications of those notions, Chapter 6 affirms that the application of the death penalty in appropriate cases is the least severe means—indeed, the only means—for the effectuation of a major public purpose. The application of that penalty in such cases partly constitutes the moral probity of a community as a locus of liberal-democratic values.

As has already been indicated, the reach of the purgative justification is too cabined to comprehend many of the executions that have taken place in the United States in recent decades. Similarly, as has likewise been indicated, the emphasis of the purgative justification on the ideal of moral probity will mean that the justification does not support any executions carried out by a regime that is itself morally illegitimate (such as the Communist government in contemporary China). No such regime can correctly claim to be acting in furtherance of the moral purity of the community over which it governs, since most of the regime's own operations are so starkly at variance with genuine moral values.

Still, despite the restrictive scope of the purgative rationale for capital punishment, it does indeed establish that some executions in the United States (and other liberal democracies) are both morally obligatory and morally legitimate in principle. Any of the vilest murderers, such as Charles Manson and Richard Ramirez and Theodore Bundy and Richard Speck and Dennis Rancie and Timothy McVeigh and Ian Brady and Khalid Sheikh Mohammed, would fall within the sway of the purgative rationale. The continued existence of any such person defiles the community in whose control he abides. Furthermore, as Chapter 6 will maintain, some actual or imaginable crimes other than murder can be sufficiently depraved and brutal to fall within the ambit of the purgative rationale. Hence, although this book's arguments are focused chiefly on matters of abstract moral principle, they yield a number of concrete practical implications.

### 1.3.6. Chapter 7: Problems of administration

Having debunked the standard justifications for capital punishment, and having then offered an alternative justification that surmounts the difficulties afflicting the previous rationales, this book concludes by investigating some problems that have figured prominently in the disputation over the death penalty in the United States for decades. Notwithstanding that the death penalty for some monstrous criminals is morally obligatory, any application of that penalty will be morally impermissible if shortcomings in the administration of capital cases are so grievous and widespread as to undermine the moral legitimacy of the institutions responsible for handling such cases. Critics of the death penalty in the United States have long dwelt on real or putative problems such as the following: the never fully eliminable possibility of mistaken convictions and executions of innocent people; racial biases in the

administration of capital punishment, especially with regard to the racial affiliations of the victims of the crimes for which the death sentences are imposed; the arbitrariness of the selection between capital defendants who are to undergo executions and capital defendants who are instead imprisoned for life; the costliness of the death penalty; the shoddiness of the legal representation provided to indigent defendants; the protractedness of the delays in the carrying out of death sentences; and the notoriety gained by executed defendants whose victims, by contrast, tend to be largely overlooked.

My closing chapter will explore most of these problems. Two chief points should be noted straightaway. First, even if these administrative shortcomings are independently or cumulatively sufficient to delegitimize the death penalty as it is currently practised in the United States, they are not destructive of the moral legitimacy of that penalty in principle unless they are somehow inevitable. Surmountable faults in the administration of capital punishment, however flagrant, do not affect the moral status of such punishment as a general type of sanction. In a society whose institutions of criminal justice are not tarnished by those faults to any significant degree, the moral obligatoriness of executions under the purgative rationale will be accompanied by the executions' moral permissibility. In a society whose institutions of criminal justice are so tarnished, the best course of action is to improve those institutions and thereby to bring about a state of affairs in which the implementation of appropriate death sentences is morally legitimate. (Among the reasons for deeming such a course of action to be best is that, if administrative defects are grave, the factors consequently militating in favour of a moratorium on capital punishment would typically also militate in favour of a moratorium on any severe punishments.)

Secondly, most questions concerning the extent of the various imperfections in the administration of capital punishment in the United States are for social scientists rather than for philosophers. To ascertain whether and how much the problems listed above are recurrent in the criminal-justice system of any particular country, scholars have to engage in empirical enquiries. Though Chapter 7 will make reference to some empirical studies, I do not pretend to have conducted any such studies myself. Thus, instead of marshalling any newly obtained empirical data, the chapter will ponder some general points that arise from the data that are already available. In so doing, the chapter will suggest that some allegations of administrative irregularities are exaggerated or tendentious, and that some other such allegations are based at least partly on dubious arguments. In those respects, Chapter 7 will join with some opponents of the death penalty who chafe at finding that the debates over the morality of capital punishment have become preoccupied with administrative deficiencies (Dolinko 1986; Note 2001; Steiker and Steiker 2005). Still, while raising a number of queries, the chapter will of course not deny that the systems of capital punishment in various American states are procedurally imperfect. Every punitive system is

procedurally imperfect. Whether the failings are so grave as to be sufficient in themselves to delegitimize the whole practice of capital punishment within any American jurisdiction is a more complicated matter. Answering that question for each jurisdiction is an endeavour that lies beyond the scope of this book, but there is no evident basis for presuming that the answer will be either uniformly positive or uniformly negative.

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