

Journal of Buddhist Ethics

ISSN 1076-9005

<http://blogs.dickinson.edu/buddhistethics/>

Volume 24, 2017

Capital Punishment: a Buddhist Critique

Martin Kovan

University of Melbourne

Copyright Notice: Digital copies of this work may be made and distributed provided no change is made and no alteration is made to the content. Reproduction in any other format, with the exception of a single copy for private study, requires the written permission of the author. All enquiries to: cozort@dickinson.edu.

Capital Punishment: a Buddhist Critique

Martin Kovan¹

Abstract

Capital punishment is practiced in many nation-states, secular and religious alike. It is also historically a feature of some Buddhist polities, even though it defies the first Buddhist precept (*pāṇatipātā*) prohibiting lethal harm. This essay considers a neo-Kantian theorization of capital punishment (Sorell) and examines the reasons underwriting its claims (with their roots in Bentham and Mill) with respect to the prevention of and retribution for crime. The contextualization of this argument with Buddhist-metaphysical and epistemological concerns around the normativization of value, demonstrates that such a retributivist conception of capital punishment constitutively undermines its own rational and normative discourse. With this conclusion the paper upholds and justifies the first Buddhist precept prohibiting lethal action in the case of capital punishment.

¹ School of Historical and Philosophical Studies, University of Melbourne. Email: gangetics@gmail.com.

This essay opens a critical dialogue between two contrasting intellectual traditions regarding one form of the intentional taking of life. It also seeks to identify how some ethical problems, for Buddhist thought, integrally entail a consideration of their metaphysical and epistemic constitution, and demonstrates how capital punishment is such a case. In Part I, I consider a neo-Kantian retributivist defense of capital punishment as justified punishment, after distinguishing between punishment as prevention (which includes capital punishment as deterrence) and as retribution. In Part II, I criticize the defense of retributivism on Buddhist-metaphysical, epistemological and ethical grounds.²

Part I: Punishment as Prevention and as Retribution and Its Neo-Kantian Defense

I.A. Punishment as Prevention

Capital punishment is irreversible and so requires a degree and kind of justification not necessary for non-lethal punishment. The claim that capital punishment is justified as a means of prevention is defended on some or all of the following grounds (among possible others).

1. That a heinous wrong has been committed by the agent to be punished.
2. That this wrong should not be committed by this or any agent.
3. That capital punishment will prevent or discourage (in others) its recurrence.

² The author gratefully acknowledges Stephen Harris, Damien Keown, an anonymous

These premises are central to the notion of capital punishment as a form of social *deterrence*, but also in part to *retribution* inasmuch as the latter emphasizes the notion of a putatively appropriate punishment irrespective of its deterrent effect.³ The wrongdoer is punished not merely because of the commission of the relevant act, but because it is in the interests of society that neither that agent, nor any other, should repeat it. Bentham expresses both dimensions of punishment in a classically utilitarian sense, but one that has arguably universal reach:

General prevention ought to be the chief end of punishment as it is its real justification. If we could consider an offence which has been committed as an isolated fact, the like of which would never recur, punishment would be useless. It would only be adding one evil to another. (Honderich, citing Bentham, *Punishment* 51-52)

I.A.1. “REFORMATIVE” AND “OBSTRUCTIVE” PREVENTION

Preventive punishment thus presupposes the possibility that the agent, or other agents who may be aware of it, might perform punishable acts in the future. Deterrent punishment hence also presupposes that actors respond to acts of punishment. Capital punishment, however, removes the possibility of the recurrence of the wrongdoing which (following Bentham) warranted punishment in the first place, and this gives rise to an important distinction between two conceptions of prevention.

³ See Sorell (30 ff.) for summary discussion of the empirical claims that are frequently brought to bear in support of capital punishment as deterrence and retribution. Of course, the content of these reasons may vary between cultures, often very widely (for instance, homicide for the “wrong” of witchcraft is still common in the Papuan highlands). However, it is highly unlikely that the intentional structure pertaining to and between these reasons, as detailed above, significantly varies.

It is the first sense of preventive punishment, which I will call its *reformative* sense, wherein this very possibility makes punishment meaningful, as reforming the agent's own character and observing potential agents' alike. But that sense can only refer to *non-lethal* punishment, applicable to actual and potential agents. Absent that reformative meaning, capital punishment can be meaningfully preventive only in a second, purely instrumental sense: as terminally *obstructive*, it simply stops an actual or potential agent from acting in any way at all.⁴

That is still prevention, no doubt. But prevention as reformation and as obstruction are not intentionally equivalent: a person or committee is prevented from acting; a boulder or a building obstructed from falling.⁵ In obstructive prevention, the possibility of the inculcation of the self-directedness of responsibility which constitutes the social meaning of reformative punishment, is denied by a purely instrumental sense of preventive "punishment" as *destruction*: a denial of its punishment's putatively social and inculcative purpose.

The point here is *not* that prevention as obstruction lacks all justification: a terrorist gunman is lethally obstructed from shooting, in order to prevent further carnage. However, *if* the priority is to sustain the possibility of reform, then the gunman should be taken alive, and not killed. If that possibility is not at issue, as is only ambiguously the case with lethal prevention, then the counterfactual is irrelevant and the gunman accordingly killed without scruple: but this is neither reformation and still less punishment. Here we can merely note this descrip-

⁴ Its possible reformative sense qua deterrence, sustained with respect to observing potential agents, is discussed below.

⁵ Of course, in general usage "prevention" can apply to all these instances. But this distinction is to identify the contrasting forms of intentionality that remain opaque in that usage.

tive difference, because it proves to be salient to a further understanding of whether lethal punishment is justified when retributively intended.

I.A.2. PREVENTION AS DETERRENCE

Lethal punishment can, then, still be conceived as intended to *reform* behavior *only as deterrence*. In this case, the witness to capital punishment is expected to be deterred from committing acts similar to those punished. The claim that capital punishment is justified as deterrence can therefore only be justified empirically.

At best, however, empirical findings suggest an indirect and minimal contribution to psychological effects of deterrence, against which counter-examples always co-exist. Research and theoretical literature consistently tend to a uniformly negative appraisal of the causal efficacy of deterrence, and even conclude that there is no determinate means of securing or replicating efficacy in such a way as would render lethal punishment deterrent in every case.⁶

Sorell, a neo-Kantian and so non-utilitarian defender of capital punishment, concludes: “I do not see how utilitarian arguments in favor of the death penalty can be completely detached from a deterrence argument, and it seems to me that no one knows how to make such an argument conclusive.” (99)⁷ I am not concerned here to decisively refute the case for deterrence, understood as a means to the possible refor-

⁶ For two 2015 surveys see: <http://www.abc.net.au/news/2015-02-26/fact-check3a-does-the-death-penalty-deter3f/6116030>; <http://theconversation.com/theres-no-evidence-that-death-penalty-is-a-deterrent-against-crime-43227>. Cf. <https://www.nap.edu/catalog/13363/deterrence-and-the-death-penalty> (2012). Cf. also Donohue and Wolfers.

⁷ For a still stronger general statement, cf. Honderich (ed.) *Companion* 120–121.

mation of the witness to lethal punishment, inasmuch as the onus is on that case to make its claim indubitable. Its problem is that a consensus of empirical research concurs in the conclusion that it cannot be decisive in every or even any given case. This raises a deeper problem, which involves two related points. First, the intention of deterrence is necessarily projected into a future in which it *may* effect its intended result, but it has been strongly suggested it might not, and in any case cannot guarantee that it will.⁸ It follows, second, that if the empirical claim regarding ends cannot be justified, then nor can its means be justified either.

The claim for deterrence is then a weak moral wager, which intends to potentially deter (or reform) its witness precisely by *not* intending to deter (or reform) its actual object. A merely potential deterrence succeeds only at the absolute cost of its object: one demanding the highest grade of epistemic warrant, which by empirical reckoning it cannot secure. Moreover, it is counterfactually undeniable that the crime which putatively deserves capital punishment could be punished by non-lethal means, and thereby also sustain a potential for reform of *both* agent and witness, without paying the heavy price of both life and uncertainty incurred in the lethal case. In what, then, lies the advantage of lethal deterrence, on its own terms? With no rationally clear advantage, it enacts a moral and pragmatic gamble justified only by a punisher willing to risk its wholly uncertain dividends.

The moral onus then lies on the proponent of capital punishment as deterrence to demonstrate that taking the risk of its failure is *still* justified even at the cost of taking life. If doing so cannot guarantee the (re-formative) prevention of crime by potential agents, it can *at best* only claim the (obstructive) prevention of crime by its actual agents. The

⁸ Nor is infallibility per se a sufficient condition for permissibility; the point here is that the evidence does not support even a fallible claim for deterrence.

proponent could then try to claim that the potential recidivism of perpetrators should be lethally prevented irrespective of deterrent effect, but that is not what the proponent of reformative deterrence claims. Rather, to save the case for capital punishment, it is often justified on the grounds that the state holds the right to punish such crime as a matter of legal (or religious-legal) justice. Accordingly, we can turn to an examination of fundamental reasons often presented for capital punishment, as the just retribution for crime.⁹

I.B. *Lethal Punishment as Retribution*

The limit-case of punishment is retribution. Capital punishment as retribution is conceived as the fulfillment of justice:

The [retributivist] appeal to justice usually takes the following form: people deserve to suffer for wrongdoing. In the case of criminal wrongdoing the suffering takes the form of legal punishment; and justice requires that the most severe crimes, especially murder, be punished with the severest penalty—death. (Honderich *Companion* 120)

Note that we are concerned here specifically with *lethal* retribution and what justifies it.¹⁰ For this reason, the right to *retributive punishment per se*

⁹ These reasons can take varying form across cultures, but it could be argued that they philosophically translate into those examined below, or that where subsidiary (religious or secular-normative) reasons support them, or could be substituted by others, these do not in themselves modify the critique that I make of the arguably universal primary reasons. These subsidiaries are thematized in the argument of §I.B.2, and later in Part II.

¹⁰ Note also that while *lex talionis*, or the talion law of “an eye for an eye” is popularly understood as a form of retributive justice (central for instance to Kant’s theory of pun-

is not at issue.¹¹ Two fundamental, descriptive features of lethal retributivism (hereafter LR) are:

First, LR conceives lethal punishment as an appropriate or just desert for certain (usually lethal) crimes. By the very fact of being intended, desert could be decided among a variety of possible forms of action. Lethal retribution is in fact only one option for the appropriate punishment of lethal crime, and thus only contingently decided as appropriate. Second, a rational principle must determine *when* lethal punishment is appropriate. As Sorell (consciously echoing J.S. Mill before him) puts it “retributivist arguments . . . depend on the principle that the punishment should match or be proportional to the crime.” (106) Hence, for instance, in *The Metaphysics of Morals* Kant makes the punishment for the crime determinable under a “principle of equality” where

. . . no possible substitute can satisfy justice. For there is no *parallel* between death [in the course of crime] and even the most miserable life, so that there is no equality of crime and punishment unless the perpetrator is judicially put to death. (cited in Reiss and Nisbet 156)¹²

ishment) its reasoning is more narrowly distinct from the broader sense of retribution given here.

¹¹ §§I.A.1. and I.A.2. have already detailed the conditions necessary for any intentional course of action to be meaningfully conceived as punishment, and while lethal retribution is commonly understood as such, that discussion qualifies that understanding inasmuch as agents of acts are properly required to remain alive in order to be punished in the reformatory sense there argued.

¹² It is thus also by virtue of this self-understanding of retribution, that any crime not-equivalent to murder (or the willful deprivation of life), and however grave, is not appropriate to *lethal* retributive, but rather only to non-lethal preventative or deterrent punishment. Kant’s own uncertainty regarding the relevant identity-conditions of

LR also implicates a normative claim: that it is a social good to legally exact proportional retribution. Sorell notes, “Retributivism, by way of its Principle of Just Requit, says that it is *right* for suffering to be returned for suffering, that this is how things *ought* to be” (157). This fundamental claim underwrites the cogency of LR, but before returning to this point, we must consider which agents of lethal crime, in virtue of the determination of the Kantian principle of equality (hereafter the PE), are fit to be punished by death. Kant states the principle as follows:

But what kind and degree of punishment does public justice take as its principle and norm? None other than the principle of equality in the movement of the pointer of the scales of justice, the principle of not inclining to one side more than to the other. Thus any undeserved evil which you do to someone else . . . is an evil done to yourself . . . if you kill him, you kill yourself. (cited in Reiss and Nisbet 156)¹³

Sorell summarizes Kant: “According to the principle of equality the punishment should consist in a loss to the criminal equal to or in keeping with the loss to the victims; a relation other than equality would be arbitrary” (138). Hence for Kant, *lex talionis* applies in the (more, rather than less, straightforward) case of murder, and it appears he has good reason to think so: many would not question that the heinous rape and murder

murder for retribution in its borderline cases (such as infanticide and lethal duels) tends to confirm the same (see Sorell 142).

¹³ This statement also formulates the equivalent Kantian principle that in committing intended murder, the murderer forfeits the right to (his own) life. (This principle is thematized as a potential subsidiary value in the argument of §1.B.2, below.) All three principles (of Just Requit, of Equality or just proportionality between crime and punishment, and the forfeiture of life) can be understood as related aspects of the same general doctrine of right requital, and they are so taken in what follows.

of a minor, for instance, deserves capital punishment. But on inspection the PE,¹⁴ requires modification (as we have already seen) once it is put to work, and can finally only be applied, by its own lights, to a single, *sui generis* case.¹⁵

Hence, many modern retributivist commentators on Kant restrict lethal punishment to aggravated murder, in order to recognize different degrees of severity or intention, and thus culpability. Sorell writes:

If there is any crime which the death penalty fits uncontroversially, it is more likely to be what Mill calls aggravated murder than murder plain and simple. Kant's theory is not changed drastically if one restricts the murders that automatically receive the death penalty to first degree or perhaps aggravated first degree murders. (142)

The restriction to aggravated first-degree murder would thus for Sorell represent the very best case for LR, where "The reason behind this proposal is . . . different murders seem to display different degrees of seriousness" (151). If aggravated murder is the sole crime "uncontroversially" eligible for lethal punishment, then its *seriousness* is what makes it so: a judgment not of rightness (of objectively just proportion), but of independent *value* (only something *this serious* warrants the most serious punishment). Whatever is required for a murder to adequately meet the identity-conditions for aggravatedness or seriousness now requires a

¹⁴ Note that the determinative function of the PE in cases of proportional punishment *in general*, relevant to jurisprudential theory and practice, is *not* at issue here. As noted above, the distinction is an ethically salient one: we are concerned to identify what LR deems, via the reasoning of the PE, appropriate *lethal* punishment.

¹⁵ That Kant also envisages some non-lethal crime (such as sedition) as capital crime similarly undermines the consistency of any *prima facie* "parallel" proportionality.

new principle: the degree of the intentional infliction of suffering, for instance.

It is on this basis that murder now qualifies as properly proportional to lethal punishment: *intentional severity* and not lethal proportionality per se. This point importantly gives rise to a question regarding the intentionality of judgment as justified in this case.¹⁶ If the epistemic warrant for the determination of the conditions for lethal retribution does not lie with something inherent to the objects of the PE, or in a purely formal necessity, then it essentially lies with the interests of those epistemic agents positing such conditions in the first place. There must be *cause* for just requital, or for the forfeiture of life, or else there would be nothing to be requited, and no reason for forfeiture, and therefore those two principles would be empty of content. What, then, are those interests? Sorell provides a pithy account of what, for LR, they are:

Kant's principle of equality between crime and punishment . . . when it is taken together with certain assumptions about the value of life and the harm involved in murder . . . gives a reason for punishing murder with death. The assumptions are that life itself, whatever its quality, is a good, and that the harm in murder consists at least of the loss of this good to the victim. (139)

If "life itself" is a good, then the suffering caused by murder is wrong (i.e., is also a suffering *qua wrong*) because it deprives its victim of this good. As suffering ought to be returned for suffering, then the murderer should suffer equally. Both claims sustain normative value of a kind that together can justify, for LR, the intentional taking of life. They do not in themselves explain why suffering should be exacted for suffering. We do

¹⁶ If not of non-lethal cases which, again, and for reasons already suggested, entail distinctly differing intentionalities such as non-absolute and non-terminal fulfillments.

not in fact need to know *why* LR holds that claim (if it can be adequately answered), because LR already undermines its central premises, and so its own argument, as we will see below.

I.B.2. LETHAL RETRIBUTIVISM (LR) AND AXIOLOGICAL CONTRADICTION

In sum, the implicit justification for capital punishment is that murder is a crime because (1) any given society under whose laws it is a crime, regards it as a wrongdoing; (2) it is a wrongdoing because it intends to take life, and (3) the *intentional* taking of life is a wrongdoing because it willfully deprives its victim of life, where life, per se, is for its possessor a primary good. From these claims we can derive the following argument, in two parts:

Part I.

1. LR posits the value of the just lethal retribution of agents of lethal crime.
2. To do so, LR must recognize what determines lethal crime as wrongdoing.
3. LR recognizes lethal crime as wrongdoing because, for it and the legal state which sanctions it, the intentional taking of life is a wrong.
4. LR recognizes that the intentional taking of life is a wrong because, for it and the legal state that sanctions it, life is valued as a primary good for the living human beings subject to that legal state.

5. Hence, LR implicitly posits the primary value of life with regard to the living human beings subject to that legal state, which include agents of lethal crime.
6. Hence (by 1 to 5), if this value was not constitutively present in the value LR posits as the value of lethal retribution, lethal retribution as appropriate punishment of lethal crime would have no normative force, for it would lack any basis (and logical premise) in a recognized criminal wrongdoing.
7. Hence, implicitly positing the primary value of the good of life (of the legal subjects of a state) is what gives normative force to, and so ultimately justifies, the value LR posits (by 1) as the value of the just lethal retribution of agents of lethal crime.
8. However, because LR endorses lethal retribution of agents of lethal crime, it faces (by 5) a constitutive dilemma: if it values the lives of agents of lethal crime, then in exacting lethal retribution it contradicts (by 3 and 4) its own normative posit.
9. Hence, LR is logically required either *not* to value the lives of agents of lethal crime or, to value their lives but to bring alternate and more-privileged value(s) to bear as ultimately justificatory of the value of LR.
10. However, (by 5 to 7) it is only by positing the value of life that the normative force of LR as appropriate punishment of lethal crime is justified.

Part II.

11. Hence (by 9 and 10), LR is required to bring to bear an alternate and more privileged value-x, over the value of the primary good of life (by 7), as ultimately justificatory of the posited value of LR.

12. Whatever the content of value-x that is ultimately justificatory for LR, it must (by 1) serve the value posited by LR of the just lethal retribution of agents of lethal crime.
13. Serving legal justice, qua the lethal retribution of lethal crime, for LR thus constitutively entails serving (by 10 & 11) two distinct values: the value of lethal retribution (by 1 and 12) *and* the value of the primary good of life (by 7).
14. These two values entail contradictory intentions (and consequences): the intentional deprivation of life, and the intentional preservation of life, respectively.
15. Hence, LR cannot serve legal justice in terms of both values simultaneously because (by 14) they entail opposite and contradictory intentions (and consequences).
16. Hence, by bringing a value-x to bear as its ultimate justification (by 11), LR either ultimately (by 15) justifies lethal retribution by the value of lethal retribution, *or* LR ultimately (by 15) justifies lethal retribution by the value of the primary good of life.
17. If by means of value-x LR ultimately (by 16) justifies lethal retribution by the value of lethal retribution, then LR would express the tautology: 'the value of just lethal retribution ultimately justifies the value of just lethal retribution.'
18. LR does not express this tautology, but rather (by 7) posits that the primary value of the good of life (of the legal subjects of a state) ultimately justifies the value LR posits (by 1) as the value of the just lethal retribution of agents of lethal crime.
19. But by ultimately justifying the posited value of LR by means of an alternate and more-privileged value-x, over the value of the

primary good of life (by 11), LR does not ultimately justify lethal retribution by the value of the primary good of life either.

20. Hence, by not ultimately justifying lethal retribution by the value of the primary good of life, LR does not (by 7) posit the value of the just lethal retribution of agents of lethal crime.

LR cannot resolve its constitutive dichotomy without undermining the value that gives it normative sense. Moreover, given the foregoing analysis, any number of subsidiary retributivist values-*x* (such as the value of the murderer's forfeiture of the right to life, where life *has been intentionally taken*) fall prey to the same dichotomy, and imply a series of pragmatic contradictions that are not resolved by appeal to any ultimate, or transcendental, value (including religious forms of divine command), if they take the form shown here. In view of this impasse, a Buddhist-epistemic critique does not move "forward" into still more positive conceptual justification, but rather "back" into an analysis of the putative foundation of justification as value *per se*. To do so we turn now to a Buddhist-syncretistic consideration of how LR functions epistemically and otherwise in the conventional lifeworld.

Part II: A Buddhist Contextualization

II.A.1. PERSONS AND INTENTION (*CETANĀ*)

For most Buddhist schools the person, while ultimately illusory, is conventionally a real existent. Persons *are* persons inasmuch as they are individuals identified as instantiating the values and capacities, and performing the actions, that constitute the intersubjective and normative lifeworld of shared experience. There is no existing "person" as an ontological remainder, or substrate, beyond those psychophysical properties

upon which “person” is imputed (indeed, for the Madhyamaka, the properties are imputed as well).

Moreover, those properties qua values, capacities and actions, and the beliefs that guide them, are among the identity-conditions that conventionally determine one not merely as a person, but a specific kind of person: a mother, a teacher, a criminal, a President and so on. Those persons *are* those persons because they behave and function socially in those roles respectively. Similarly, persons as agents of lethal acts are so characterized by the kinds of acts they perform. They encode, in their persons, the reason(s) by which lethal action is for them given sense and, as action, thereby made rational. As more or less rational posits, persons thus *intend* those reasons, and the effects that are believed to ensue from acting upon them.

Here we can invoke the Buddhist psychology of the Sutta- and Abhidhamma Piṭakas (in large part carried over into the Mahāyāna schools) which informs Buddhist ethics in general. For it, *cetanā* denotes the intention informing physical and mental acts alike; this takes in reasons and affective motivations, elements of thinking and emotion that in part constitute the causes of intended action. The reasons that we have seen posited as those constitutive of LR, reasons that underwrite the “ought” of its action, are intended as constituting norms that express conventional moral truths (“it is *right* to return suffering for suffering”). By expressing values (“as *right*, *x* is a good”), and the norms that *socially* encode them, action thus engages moral truth as intersubjectively-constituted. However, the conditions of possibility for that expression (and possible revision) of moral truth are complex and need to be considered in more detail, insofar as we can mobilize their analysis in a Buddhist critique of LR.

II.A.2. THE BODY OF THE PERSON AND ITS ACTUALIZATION AS VALUE

First, moral truths refer to abstract *and* concrete objects: persons, acts, values. Such is the case with the first Buddhist precept prohibiting killing, which proscribes any acts depriving persons of life, by means of harming living bodies. The first precept thus entails: the agent of a norm (*pānātipātā*), the abstract value of that norm (non-violence or *ahiṃsā*), and the physical object (*sarīra*, the living or mortal body of the other) with regard to which both the agent and the abstract value are concretely and abstractly intended.

The agent-body and the body that is acted upon are the perceptible objects (*pratyakṣa*) of a dependent-arising (*pratītyasamutpāda*) linking the moral phenomenology of the agent-subject and the body of the other, with the various possible values sustained by them in a wider intersubjectively-constituted lifeworld (*saṃvṛtisatya*). Now, LR presents a case which proposes the value of retributive lethality, which directly contests the Buddhist value of universal non-harmful action.

The first Buddhist precept entails that it is persons qua *sentient bodies* that should not be killed. The living body (*sarīra*) is thus the material signifier, as a phenomenal appearance (*ābhāsa*), for the first precept in a wider economy of *dhammic* values that entail material and immaterial existence alike. But how is the relational existence of the body-and-of-value (opaque in the norm itself) to be properly characterized?

We want to know this because we have seen above that LR stipulates the normative privilege of lethal retribution as just punishment, as a *value* bearing necessary reference to the *body* of the person punished. That is, it pits the abstract value of LR (A) against the embodied value of the life (B) of the criminal person by *implicitly recognizing the latter value as instrumentally constitutive of its own*. It “uses” value (B) as the necessary

means for expressing the claim that it is a punitive good to deprive this living body *of the good* of its life (C).

These are three distinct and separable cognitive elements of LR. (A) would be vacant without the implicit recognition of (B), that for LR ipso facto gives depriving the living person of the value of (B) its normative force. However, LR recommends itself in an opaque sense inasmuch as it is not obvious why the mere stipulation of (A), by the appropriative means of (C), in itself authorizes its prioritization over (B). That is the dichotomy of LR we now seek to address, by means of Buddhist-ontological and epistemological analyses of that same tripartite structure.

To do so, we need to consider in more detail how for a Buddhist (Pramāṇavāda) view the living human body itself is intended as a perceptual-cognitive datum. That is, inasmuch as the perception of a physical object (*pratyakṣa*) also perceives the supporting condition (*alambanā-pratyaya*) for a perception of that object's value, the living human body is the site for the construction of values in the conventionally-constituted lifeworld, in terms of which a posit such as LR makes its case. We can start by considering the ontological conditions for such values, before discussing the epistemological, and thence normative, issues that arise from them, in this case.

II.B.1. ONTOLOGY AND THE METAPHYSICAL STATUS OF VALUE

Broadly speaking, for materialists, values are represented by living beings, in their acts and bodies, and have no existence independent of these. Idealists, on the other hand, see values as transcendental and independent of empirical matters, but they also see the empirical datum of the body itself as an expression of value (which can, qua value, take any number of forms, whether they be biological, religious, aesthetic, kines-

thetic). For them, it is not the case that the body is value-neutral as ontologically antecedent to these valuations; rather, the body is as it is because it represents or encodes the value that is simultaneously transcendental to it.¹⁷

There is then an ontological indistinction between the body-as-empirical matter, body-as-representing-transcendental value, and the implicit, nominal sense of “body” which, in being able to signify either of these, is itself neither purely physical nor non-physical. In this third sense the body is an ontological cipher that intentionally fulfills whatever is imputed of it, and this is because for the human mind the human body is pre-theoretically *always* the intentional object for one or another of these perceptions/conceptions (*saṃjñā*) that fulfils a (biological, religious, aesthetic etc.) purpose. Bodies are objects that embody, represent, enact and even deny values, by virtue of the intentionalities that give those bodies intersubjective meaning.

If body and value are (physicalistically or idealistically) ontologically homogeneous, what is it that appears to allow for their internal *separation* as representor and represented (i.e., as body-representing-value, and value-representing-body)? In what “ontological authority” (of either version of homogeneity) do either of these sustain the primary, or originary, value to sanction the separation (between primary and epiphenomenal reality) where each express such reality as the primary value, as being “more real” than its “illusory” other? Similarly, if body and value are ontologically distinct (as for a version of dualism) which, similarly, has founding value as the source of the distinction that decides,

¹⁷ Hence, the human body might demonstrate the basic value of life, or, for Buddhist soteriology, the means for attaining Buddhist enlightenment, both of which endow the body with those different values; of course, the catalogue might be extended.

where relevant, the ontological hierarchy between “matter” (and its value) and “value” (and its value) inasmuch as *both* remain objects of *value*? While highly abstruse, these questions bear on the case before us just because it instantiates an empirical example of the genuine problem they pose.

In positing the dominant value of lethal retributive justice, LR instantiates these questions by stipulating its own value (A) in terms that reply implicitly both on the (concrete-biological) value of the empirical body (B) *and* the (abstract-normative) value of lethal justice parasitic on value (B), which necessarily conflates both (C). That conflation seems to resolve any ambiguity in the ontological bases for its own dominant valuation, only by ignoring the fact of its constitutive reliance (as C) *on* the very ambiguity.

Until that reliance is admitted and its ambiguity exposed and resolved, then LR suffers a fundamental philosophical incoherence. As Eltschinger notes,

According to Dharmakīrti, human beings perceive real things in all their aspects . . . but they fail to identify them as such due to internal and external causes of error. To put it otherwise, they misidentify reality by superimposing aspects [*ākāras*] that are contrary to the real ones. (270)

II.B.2. BUDDHIST-EPISTEMOLOGICAL CONTEXTUALIZATION: ĀKĀRA AND THE PRAMĀṆAVĀDA

For the Buddhist-epistemological school of Dignāga and Dharmakīrti (otherwise known as the Pramāṇavāda) (A), (B), and (C) can be conceived as each a representation or form (*ākāra*) of value, all three mediated by

cognitive relations that imply a hierarchization of their objects or supporting conditions (*ālambana*). This school conceives concrete and abstract objects as mediated by mental representations, which are the medium by virtue of which the hierarchization of LR (for instance) is enabled: *this* form valorized over *that* one, by virtue of *this other* (sharing the second as a conjunct). How does the prioritization of the conflated value of LR function as an ontological and epistemic posit, and is coherently sustained as so valorized?

To pursue these questions, we can observe how “the nature, functioning and internal structure of consciousness and cognition” (Kellner 276) of the *Pramāṇavāda*, might pertain to the tripartite relations of LR as detailed above. One of Dignāga’s conceptions (in the *Pramāṇa-samuccaya* and *-vṛtti*) of the *ākāra* as “object-form” or cognitive representation of the “supporting condition” (in this case the physical datum of the body) is as the perceptual awareness of the object it “resembles.” For this account of perception, the cognition of the *ākāra* as a differentiated form (i.e., having qualities particular to it) is what allows for the cognition of objects per se (objects which would otherwise lack specificity if their *ākāra* were not so differentiated). Perception on this view, Garfield summarizes, “must be mediated by a representation (*ākāra/rnam pa [nampa]*) and . . . this representation is the intentional object (*artha/don [dön]*) of a perceptual state.” (134)

What cognition takes to be the *real* nature of the object, Dignāga says, is so by operation of “what we call an *intentional object* . . . An object produced by self-presenting awareness . . . understood as a percept” (*ibid.*). In other words, for Dignāga (as for Dharmakīrti) the *ākāra* functions as an intentional object that mediates the objective existence of a physical, or indeed any cognitive, datum. As such, the sense of *ākāra* as a representation makes it the only possible percept, however much its re-

sembled object is also (Dignāga stresses) taken as independently existent out in the world.

If, as Garfield states, a perceptual state is, by this account, always a perception *of a representation*, then the intentional object of any perceptual state is similarly a representation, a “perceived form” or *ākāra*. Garfield (twice) notes (158, 221) the complex semantic range of *ākāra* as denoting form or representation in Buddhist philosophy of mind, with reference to something pertaining to or qualifying an object: an image, an aspect and even phenomenal content by which the object is represented.

As noted above, in LR the person *qua* criminal is *perceived* as such. Inasmuch as that perception requires a particular cognizer, the form of value so perceived is cognitively superimposed (*adhyāropita*) on the cognized form (*ākāra*) of the object of the person. I may not perceive the criminal person *qua* the representation of value that the lethal retributivist does: to that degree I do not *conceive* the person in that sense, and so fail the same cognitive superimposition.

Irrespective of the metaphysical question of the external reality of the body of the person as a physical datum, there must then be a cognitive mediation in order to account for different evaluative perceptions of the *same* external object (here, the same living being). Inasmuch as the same physical datum is the locus (the supporting-condition, or *ālambana-pratyaya*) for these cognitive operations, we still need to ascertain just what warrants the cognitive evaluation of one particular representation of value, over another.

Is it plausible to conceive of the perception *of value* as the representation (*ākāra*) of any normative cognition, with regard to its supporting condition (*ālambana-pratyaya*) *qua* the body of the person? For example, accompanying the perception of “the redness of an apple,” which for this account is the perception of the form(s) (*ākāras*) representing both

redness and apple, is a perception of its normative status as non-aversive, as something of value to human perceivers. Indeed, the perception of all objects, explicit in Abhidharmic accounts of kinds of awareness (*citta*) and their mental factors (*caitta/cetasikas*) filling in the phenomenology of perceptual experience, entails this evaluative dimension.

The Abhidharmic point is that the attribution of value is a cognitive act *on the part of the perceiver*, rather than mediated from the side of the percept, which serves as its occasion rather than its cause. This very concern is what gives sense to the Abhidharma (and general Buddhist) project of the purification of self-interested constructions of objects as so valorized: human epistemic agents have it in their power to cognize the nature of such objects as ultimately devoid of any inherent quality of aversion or attraction.¹⁸

Kellner's discussion of *ākāra* (as "a mode of grasping") in its doxographical transmissions gives reason to conceive *ākāra* with reference to the normative aspect of the intentional object of perception. She writes

When Vasubandhu [in AKBh. 473,23-474,9] says that mental factors have an *ākāra* because they perform *ākaraṇa* [determinately differentiate] with respect to the *ālambana* in a particular way, this then comes to mean that they grasp (feel, etc.) an object-support in their own distinctive way (*prakāraśaḥ*). (285)

This differentiating function of *ākāra* is general, whereby "Such a "mode-*ākāra*" is commonly applied in specifications of mental factors through-

¹⁸ That soteric project, however, also requires a correct apprehension of the *conventional* reality of existents, and their properties, as in the present case. A failure to do so renders the transcendental project illusory, as well. (See also n. 21.)

out Buddhist compendia” (285) and evidenced in “the variation to be observed when it comes to the *ākāra* of mental states.” (286) Kellner gives a canonical example of their specifically normative aspect:

Vasubandhu . . . specifies the *ākāra* of the [four] immeasurables by distinguishing their content: “happy!” for sympathetic joy, and “suffering!” for compassion, “may living beings rejoice!” for sympathetic joy, and “*living beings*” for equanimity. Setting aside the discussions which these specifications then generate, for our purposes it is sufficient to note that these sources deal with differences between mental states and *ascribe these to different aspects of mental states—their functioning or their content*—which suggests that *ākāra* was not considered as specifically referring to any structural features which a mental state might be thought to have. (286, my italics)

Via Vasubandhu, Dignāga, and canonical discourse referring to their representationalist epistemology, the notion of *ākāra* includes the representation of intentional objects (here seen in Vasubandhu’s schematic examples) involving the identification of persons as the objects of *normative* intentional states. Kellner cites also the Chinese translation of the *Abhidharmamahāvibhāṣā*, where Xuanzang “specifies the four “immeasurables” (*apramāṇas*) in terms of their *ākāra*. Loving kindness (*maitrī*) has for its *ākāra* “‘giving joy,’ compassion ‘saving from suffering’ . . .” (286).

The minimum that can be adduced from these examples is that *ākāra* takes in normative terms. It is not an implausible move from these to the *ākāra* of the first precept (*pānātipātā*) as “refraining from killing.” While prototypically expressed in these cases, such terms theoretically extend to more elaborate intentional content. If this is so, we can consider in a Pramāṇavāda analysis those stipulated by LR as the cognitive

elements of mental factors that, in perceiving the living person as *deserving* of being killed, putatively warrant its privileged position in a relevant hierarchy of values.

II.C. LR as the cognition of the *ākāra* of value

We considered, above, the sense in which the proponent of LR, perceiving the living body as instantiating a common, and perhaps universal, value qua *the bearer of life*, and to that degree optimally valorized, also conceives depriving it of that life as serving a *greater* end. This is so or else neither the killing of the living body (as a datum of value and intrinsic meaning), nor its subordination to that greater end (as a datum of value and normative meaning), would signify either value or meaning. LR stipulates that its value of lethal retributive justice, as a legally-sanctioned social good, is of greater value than whatever other value still pertains to the living body (the life) of the agent of lethal crime. That is, it has to sustain at least some value of this living body, or else there is no sense in its deprivation; hence Sorell's "certain assumption" "that life itself, whatever its quality, is a good . . ." (139)

The conditions of possibility for LR are thus that it perceives the body of the person qua living as a good: the intentional object has that primary *ākāra*, without which the perception-conception (*saṃjñā*) of the person qua living body is intentionally incomplete (as phenomenal appearance or as independently-existent external object alike). Following Kellner (in a threefold categorization of textual conceptualizations of *ākāra*, 289), we can call this the "object-*ākāra*" of the living body.

This very perception, as an *ākāra*, is thus constitutive of the pre-conditions for LR, which superimposes a secondary, abstract, value-claim (regarding retributive justice) on the same body: that, as an agent of (highly specified) lethal crime, it is exclusively worthy of being killed in

punishment. We can call this (again following Kellner) the “mode-*ākāra*” in its aspectual sense.

The body of the person for LR thus ineliminably requires both cognitions, and not merely the second. Lacking the first *ākāra*, it cannot sustain the putative value of the second, and this *first* requirement, as we have seen, is something constitutively demanded by LR itself. It is not the case that the second supersedes or displaces the first; rather, they must co-exist as distinct *ākāra* in the perception of the body of the person qua criminal, for the claim of LR even to be possible.

The positing of the value of LR thus implicitly entails the questions: is the *value* (qua object-*ākāra*) of *the living body per se* (in being justly deprived of life) the grounding intentional object of the value of lethal retribution? Or is it the *value* (the social good of absolute justice, qua mode-*ākāra*) the body thus represents for it in its deprivation of life? As we have seen, the second requires the first, and it is the body as supporting-condition which perceptually mediates these two values as cognitive data.

If LR says: our abstract retributive value (mode-*ākāra*) is primary, and we will express it by using the appropriately eligible body (of the criminal qua object-*ākāra*) to absolutely demonstrate it, then the burden lies with LR to rationally explain how the value of the former is greater than that of the latter, inasmuch as both are constitutive of its very cognition as a rational posit. LR can only rationally do so by repudiating the constitutive value of its object-*ākāra*, which we have seen it cannot do.

If the very perception of the mode-*ākāra* is ontologically and axiologically dependent on the object-*ākāra*, then intentionally depriving a person of life by reason of LR entails an ambiguity between ontological object and abstract object, between the value of embodied value and the value of disembodied value. The value of embodied value (B) ontological-

ly relies (inherently) on the living body, but *qua* value transcends the body (which it nevertheless *is*). Similarly, the value of disembodied value ontologically relies (symbolically) (as C) on the body (that is its object) but *qua* value (A) transcends the body (which it thus *uses* for its symbolic purposes).

If we ask, as LR tacitly demands we do, whether the value of either can be established, *qua* value, independent of ontological dependence on the body, and thus achieve autonomy as a value transcendental to its conditions, then the only possible answer is that the value (A) (which simultaneously both *is* and *is not* the body which is its object) has no independent basis upon which to assume an ontological or epistemic priority as an absolute negation of (B). In this relation (A) is dispensable but (B), *necessarily*, is not.

Other possible subsidiaries of (B) might conceivably be values that could refer to, build on, or (for Buddhist-soteriological purposes) even supersede, but not *constitutively* contradict, that founding value: “According to Dharmakīrti and his successors, the contradictoriness between ignorance (*avidyā*) and knowledge (*vidyā*) lies in the fact that the two cognitions display contrary *ākāras* of the *ālambana*” (Eltschinger 259, n. 26).¹⁹ They might even include forms of *reformative*, but not lethal,

¹⁹ Note, the same *ālambana*, not different ones, which implies that the relevant epistemic tension is not between contested concrete and abstract values per se (an abolitionist (B) versus a retributivist (A)) but rather within the constitution of (in this case) (A) itself. Dharmakīrti’s claim registers whether values’ *internal* structure vis-à-vis their *ālambana* entails incoherence or not, whatever their ontological status. Hence, the moral (and modal) tension in evidence in lethal contestations between values, does not ipso facto manifest contradiction in the sense LR does. There are specific Buddhist-philosophical senses in which (virtually all) cases of lethality conventionally instantiate cognitive confusion (and virtually none which don’t; altruistic suicide in very rare cases is possibly one of these). More broadly, note for example the stark contrast drawn in (respectively, Śrāvākayāna and Mahāyāna) Buddhist axiology between *ārya*- and bodhi-

punishment, itself serving the enhancement of the primordial value which gives it sense: life as the immanent project of its own optimal self-understanding.²⁰ That value of life (and its possibility) expresses something reducible neither to the purely physical nor mental, but transcendent to both: its (potential) Buddha-nature.

Of course, the nullification of the universal primacy of (B) is theoretically conceivable: in which case we would simply not be the human creatures we patently are. We would be another kind of animal, one that would probably never have survived the infancy of its evolution. To that degree, then, the nullification of (B) is contingently untenable, but not that of (A), which fails any necessity. To sustain the contrary is to repudiate the (for Mādhyamikas, conventional) truth of (B) as a universal and

sattva-suicide, and a general prohibition of homicide. (Cf. n. 23, below.) Altruistic self-sacrifice, and retributive lethality, plausibly map onto these Buddhist tropes, respectively (as developed in Kovan, “Thresholds . . . Pt. II” *JBE*, 2014). This also appears to confirm that in a Buddhist context most kinds of act (and then, tokens of them) require a separate analysis.

²⁰ We can note here a possible objection from a claim for post-mortem karma, which might hold that capital punishment serves the cause of reform of the rebirth of the “same” consciousness. The most obvious problem with this (improbable) claim is one of epistemic access, which (failing a Buddha’s omniscience) remains indeterminable. But there are two other, related, problems. First, it is entirely unclear whether, given karma as constituting impersonal, *a*-subjective causal processes, the *subjective* comprehension of (current life) wrong-doing would be translated into a (next life) personal appropriation of such fault, and thence a necessary commitment to reform. Rather, second, any subjective apprehension (as “mine”) of being imminently executed for wrong-doing could more plausibly result (via *impersonal* karmic imprints) in a *subsequent* ego-centered resentment and thirst for vengeance (and more intended violence). As a medium of fundamental ignorance, karma is functionally understood as *habitual* willed action. It is difficult to see where grounds for even minimal insight (and so reform) lies in this conditioned series: such insight, for Buddhist soterics, is not a product of coercion, but of self-understanding. (None of which comment, however, implies a judgment on the existence or function of karma per se).

real condition that is (for those moderate realists who so interpret Dharmakīrti) substantially identical with the living being as a (for them, conventionally) real individual.²¹ It is to elevate as primary an unreal (because purely conceptual) construction of value (already parasitic on the reality or truth, *satya*, of the former value) which in any analysis cannot be found to be primary or real beyond its false imputation. (A) is a mental elaboration (*vikalpa*), which as an erroneous conceptual construction (*vitathavikalpavāsanā*), is ipso facto unreal.

The best LR is able to do in terms of justification is to stipulate its priority, not demonstrate it, defensible not by reason, but *only* by volition. For Buddhist epistemologists, such cognitive-affective activity necessarily manifests “the cognitive experience of *prthagjanas* [ordinary beings] who, due to ignorance and especially the false view of the self, superimpose contrary aspects [*ākāras*] . . . or, equivalently, fail to ascertain reality’s most genuine features.” (Eltschinger 259) The constitutive dichotomy identified above is occluded within a conventional norm of “appropriate” (e.g., “proportional”) action evident in the posited value of LR. But if LR exclusively serves *the value of lethal retribution*, what distinguishes it from lying on a spectrum of more or less rationalized revenge? That is: that *suffering should be returned for suffering*.

²¹ In the context of Dharmakīrtian perceptual ascertainment (*niścaya*) “no other means of valid cognition beyond perception is needed in order to cognize the object in a positive way (*vidhinā*). Of decisive importance is the fact that real things produce perceptual cognitions according to their truly existing nature (*vidyamānātmanā*)” (Eltschinger 252).

Conclusion

As noted at the outset, unlike all other forms of reparative punishment which entail the deprivation of one or another good (of liberty, of society, of money, and so on) LR *uniquely* entails the absolute foreclosure of the possibility of those goods, and even the possibility of possibility,²² and it does so on behalf of its object person, in their name as a legal member of the state.²³ The absoluteness of this deprivation has central relevance to the Mahāyāna project which, in its soteriological purpose supersedes the closure of absolute justice. Its concern is with a still more universal form of justice: that of universal *liberation from suffering*, to which sentient beings possess an intrinsic birthright.

It recognizes that the only way that project can sustain possibility (for it may fail to) is by its raising *that* principle of liberative justice to its guiding universal norm, because nothing less can authentically achieve it. It does so via interconnected atheistic, but aspirational, modes of rational, affective, intentional, and social life (the Eightfold Path) that to-

²² See n. 20, above.

²³ It is in this sense as “legal” homicide that, *qua* lethal act, LR is also categorically distinct from suicide, which would otherwise fall wholly under the argument advanced above. It is plausible that, while reflexive, much suicide perpetrates the same axiological contradiction evident in LR but, significantly unlike LR, its adjudication remains within the affective, rational and soteric self-understanding of the autonomous agent, axiologically ambiguous just because of the objective indetermination of its causes, and only resolvable in subjective terms. In retaining a *self*-determination by its subject-agent (rather than by the social-legal other) suicide potentially, for the Buddhist tradition, enters into a soteric dimension (cf. n. 19, above). Where the value of life is to sustain the possibility of its *summum bonum* (its awakening from ignorance) the *ārya*-being, in having achieved that, has superseded that value as well, such that suicide does not compromise it.

gether cultivate that achievement. The maintenance of an ethic that prioritizes the good of the just deprivation of life can only be one that (in contradicting itself) contradicts that cultivation at its core: an error not merely of putative reason, but of civilization.

Intention (*cetanā*) as the primary Buddhist criterion of ethical evaluation, also functions as meaning-giving by identifying that how the agent acts, and not merely why or what she does, confers on action a normative force. Not merely is intended action something which its agent believes (for better or worse) ought to be done; Buddhist ethical evaluation attends to the affect or motivation of the “ought.”

Hence, in weighing the moral valency of intention (*cetanā*) in both criminal and retributivist senses, it is possible to see these as unlike in kind, if not intensity. A passionate murderer kills in desire or rage; a cold-blooded one in a spirit of revenge or sociopathic indifference. Similarly, a cold-blooded retributivist, ultimately serving the exclusive value of LR, ostensibly kills indifferently, for the sake of a more or less abstract conviction of upholding absolute justice, and without any affective basis defining it as retribution: definitionally lacking any affect, it could accurately be described as sociopathic.²⁴ Or, the fundamental motivation for the valorization of LR lies in registering the all-too-human outrage provoked by (aggravated first-degree) murder, genocide, war crimes, heinous rights abuses and similar cases.

Unsurprisingly, such outrage would only confirm the very primacy of value my discussion has drawn attention to. It indeed serves the spirit of exacting justice, but then it is moral outrage that ultimately mo-

²⁴ Sorell ironically betrays his case with the claim that, “Surely the reason for making murder a crime is some reason for punishing murderers, and surely the reason for making murder a crime can be the evil of violent loss of life, *whether or not the violent loss of life is attended by feelings of grievance*” (158, my italics).

tivates retributivism, not its putatively necessary fulfillment of justice. However high-minded, outrage is, for a Buddhist view, not justification enough. For a Buddhist account, both these affective and ostensibly non-affective motives for action are variations on a spectrum of unwholesome intention (*akuśala-cetanā*).²⁵ Despite sustaining a putative absolute justice—to what end, ultimately?—LR fails a fundamentally *non*-harmful intention, and so again undermines its own self-understanding as the just recompense for wrongful harm.

Works Cited

Donohue, J. and Wolfers, J. “Estimating the Impact of the Death Penalty on Murder.” *American Law and Economics Review* (2009) 11 (2): 249-309

Eltschinger, V. “The Four Nobles’ Truths and Their 16 Aspects: On the Dogmatic and Soteriological Presuppositions of the Buddhist Epistemologists’ Views on *Niścaya*.” *Journal of Indian Philosophy* (2014) 42: 249-273.

Garfield, J. L. *Engaging Buddhism: Why it Matters to Philosophy*. Oxford University Press: Oxford & New York, 2015.

Honderich, T. *Punishment: the Supposed Justifications* (2nd ed.). Harmondsworth: Penguin, 1976.

_____. (ed.) *The Oxford Companion to Philosophy*. Oxford/ New York: Oxford University Press, 1995.

²⁵ Note that the historical presence of capital punishment in some Buddhist societies is a cultural-anthropological issue logically distinct from the present theoretical discussion. Inasmuch as all founding Buddhist texts and praxes (in the first precept and *pārājika* rules) explicitly proscribe intentional killing, that historical datum suggests that some Buddhist societies past and present have failed to maintain the primary moral tenets that were to have, ideally, made them Buddhist.

Kellner, B. "Changing the Frames of Buddhist Thought: The Concept of *Ākāra* in Abhidharma and in Buddhist Epistemological Analysis." *Journal of Indian Philosophy* (2014) 42: 275-295.

Reiss, H. (ed.) and Nisbet, H.B. (trans.). *Kant's Political Writings*, Cambridge: Cambridge University Press, 1970.

Sorell, T. *Moral Theory and Capital Punishment*. Oxford: Basil Blackwell/Open University, 1987.