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A Revisitation

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Buddhism and Capital Punishment: A Revisitation¹

Martin Kovan²

Abstract

The first Buddhist precept prohibits the intentional, even sanctioned, taking of life. However, capital punishment remains legal, and even increasingly applied, in some culturally Buddhist polities and beyond them. The classical Buddhist norm of unconditional compassion as a counterforce to such punishment thus appears insufficient to oppose it. This paper engages classical Buddhist and Western argument for and against capital punishment, locating a Buddhist refutation of deterrent and Kantian retributivist

¹ An earlier paper (in the *Journal of Buddhist Ethics*, Vol. 22, 2017) addressed this theme in terms of an alternative, and more narrowly focused, philosophical argument. The present paper, engaging a more broadly comparative ethical discussion, draws substantially on, but reconfigures, the earlier account. I am grateful to the then-editor of the *JBE*, Daniel Cozort, its reviewers, and to Jay Garfield for their invaluable comments on that paper, and to Karsten Struhl, for reviewing this one.

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grounds for it not only in Nāgārjunian appeals to compassion, but also the metaphysical and moral constitution of the agent of lethal crime, and thereby the object of its moral consequences.

1. Introduction

In the *Rāja-parikathā-ratnamālā*, the second century C.E. Mahāyāna philosopher Nāgārjuna advises king Udayi with regard to the death penalty:

Once you have analysed the angry
Murderers and recognised them well,
You should banish them without
Killing or tormenting them. (v. 337; cited in Harvey 2009,
54)

Nāgārjuna describes at some length (verses 330 to 336) how “punishment should be enforced with compassion” (v. 336); indeed, he advises to “[e]specially generate compassion/ For those murderers, whose sins are horrible” (v.332). Nāgārjuna presents a view that underlines the general ethic of *ahiṃsā*, which characterizes the inception and growth of Buddhism, and confirms the first precept in its prohibition of harmful acts. Echoing texts such as the *Ārya-bodhisattva-gocara*, Nāgārjuna’s view typifies the Mahāyāna extension of compassion (*karuṇā*) in the context of punishment to a degree that, to proponents of capital punishment, might be seen as unreasonably charitable and misjudged for the worst crimes.³

³ As Harvey describes (2009, 60-61), some South and East Asian Buddhist polities have historically seemed to agree, and in the twenty-first century capital punishment variously remains in the law of culturally Buddhist nations. Where that is the case, it is prosecuted both increasingly (China, Vietnam, Singapore) and decreasingly (Japan, Korea,

While an appeal to a superlative compassion is laudable in a Buddhist context (as for many outside it), it does not present obvious grounds for the exercise “[o]f compassion from those whose nature is great” (v. 332) beyond the cultivation of the bodhisattva norms informing Nāgārjuna’s Mahāyāna worldview. Moreover, if Buddhists themselves have often politically and judicially failed compassion in this case, then compassion alone is not always sufficiently compelling reason for abolition.

There is thus cause to engage reasons other than affective ones that might bolster Nāgārjuna’s advice to the king. In pursuing these I intend to offer philosophical ballast to his claim by assessing preventive arguments for capital punishment. In order to consolidate the Buddhist norm expressed by Nāgārjuna, for purposes again of clarifying the Buddhist position as a critique of the (neo-)Kantian one, the paper thus engages a critical dialogue between two contrasting intellectual traditions, with reference to one intentional form of lethality: lethal retributivism (hereafter LR).

Its justificatory claims centrally rely on the principle of just re-quit (or desert) for lethal crime, and the death penalty as the proportionate satisfaction of re-quit. Both claims feature in recent Western as well as Buddhist-ethical accounts (Bedau 2005; Fink 2012; Glover 1990; Harvey 2009, 2018; Loy 2000; Sitze 2009) of retributive (including lethal) punishment. After distinguishing between forms of preventive punishment—that is, as deterrent and obstructive—below, in section 2, I examine the claims by which lethal retribution proponents, on the other hand, defend its case, considering a neo-Kantian retributivist defence (Sorell, 1987) of capital punishment as justified punishment. In section 3, invoking

Thailand); the 14th Dalai Lama opposes it (Harvey 2018, 398). As with other classes of intentional killing, the tension between its normative status and commission evidences a basic moral ambiguity within Buddhism itself.

sources in the canon, their commentaries and recent secondary scholarship, I contextualise and criticize those claims on Buddhist grounds. That discussion converges in conclusion with a common concern for a Kantian emphasis on the moral-legal sovereignty of the just state as well as with the Buddhist qualification that, in Nāgārjuna's words, "unworthy sons are punished/ Out of a wish to make them worthy/ So punishment should be enforced with compassion" (v. 336, op. cit., cited in Harvey 2009, 54).

1.1. The legal sanction of state execution

Killing by sanction of the state (as punishment, war-combat or for other purposes) is not legally or ethically equivalent to criminal killing. The first honors and enforces state law, the second (unintentionally) disregards or (intentionally) repudiates it. The first aims to redress or deter crime and so uphold the good of justice while the second defies justice by wrongful misadventure. Yet both lethal acts fully intend, despite these differing conditions, to take life, yet one is punished for it where the other is not. This appears *prima facie* to present at least an axiological tension; how is it that one and the same act of the deprivation of the primary good of life is condemned in the one case, but sanctioned in the other? We need to disambiguate the sense in which the latter act may be considered justified and so permissible as it is clear that the former is not.

Firstly, only the legally-constituted government of a legal state can sanction capital punishment in the name of the citizens it governs. The state exercises power to prosecute capital punishment by means of a legal proxy (an appointed executioner) whose individual lethal actions are thereby legal acts of state justice. Secondly, the state legislature which passes statutory law recommending capital punishment for some crimes

must justify that legislation. There is no justice without reasons, and a legal state, as much as any judging body (a court of law, a jury, an ethicist), must bring them to bear in passing judgement on crime.

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.

These premises are central to the notion of capital punishment as a form of social *deterrence*. The first two also contribute to punishment as *retribution*, inasmuch as the latter takes itself to be an appropriate response to such a wrong, irrespective of its deterrent effect.⁴ In especially deterrent but also retributive cases, 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 a general preventive justification of punishment in a classically utilitarian sense:

⁴ 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, punishment for the “wrong” of witchcraft is still common in the Papuan highlands). However, it is unlikely that the intentional structure pertaining to and between these reasons, as detailed above, significantly varies.

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)

1.2. Punishment as prevention: “reformative” and “obstructive”

Preventive punishment thus presupposes the possibility that the agent, or other agents who may be aware of it, might perform similar 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 warranted punishment in the first place, and this gives rise to an important distinction between two concepts of prevention.

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. 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*, to simply stop an actual or potential agent from acting in any way at all.⁵

⁵ Its possible reformative sense *qua* deterrence, sustained with respect to observing potential agents, is discussed below.

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 is obstructed from falling.⁶ In obstructive prevention, the inculcation of the self-directedness of responsibility on the part of the offender which constitutes the social meaning of reformatory 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 nor punishment.

1.3. Prevention as deterrence

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

At best, however, empirical findings suggest an indirect and minimal contribution to psychological effects of deterrence, against which

⁶ 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.

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.⁷

Sorell, a neo-Kantian and non-utilitarian defender of capital punishment, concludes: “I do not see how utilitarian arguments in favour 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” (1987, 99).⁸ I am not concerned here to decisively refute the case for deterrence, understood as a means to influencing the behavior 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 (Bedau 706). 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* achieve its intended result, but it has been strongly suggested it might not, and in any case cannot guarantee that it will.⁹ It follows, second, that if the empirical claim regarding ends cannot be justified, then nor can the means be justified either.

⁷ 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.

⁸ For a still stronger general statement, cf. Honderich (ed.) *Companion* 120-121.

⁹ 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.

The claim for deterrence is then a weak moral wager, which intends to potentially deter (or even reform) its witness precisely by *not* intending to deter (or reform) its actual and certain object. A merely potential deterrence succeeds only at the absolute cost of that object—one demanding the highest grade of epistemic warrant, which by empirical reckoning it cannot secure. Moreover, it is 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* criminal 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 even the probability of deterrence of crime by potential agents, it can at best only claim the (obstructive) prevention of crime by its actual agents. The proponent could then suggest that the potential recidivism of perpetrators should be lethally prevented irrespective of deterrent effect, but that is already a different normative claim, suggesting that absolute obviation of repeat heinous crime serves an end in itself, whatever the cost.

If this justification does not still rely on deterrence, it approaches but is not yet explicitly that of lethal retribution. Here, absolute obviation of repeat crime emphasizes the putatively absolute undesirability of its repetition, rather than its punishment *per se*. But to morally if not intentionally separate these justificatory emphases appears arbitrary; what is the difference between a response to a crime that demands its lethal prevention, and one which demands its lethal punishment?

The moral significance of both is that they each hold a normative premise in common—some crimes are morally grave enough to require an equally grave response. Thus, the case for capital punishment is often justified on the grounds that the state holds the right to respond to 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.¹⁰

2. Lethal Punishment as Retribution: The Neo-Kantian Defence

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)

As noted at the outset of this paper, without justified reasons, neither the legislation that legalizes execution, nor its prosecution, is justified. It is just this grounding in justified reasons that is supposed to distinguish state-sanctioned capital punishment from illegal homicide. The claim that capital punishment is justified just because it is a legal act under statutory

¹⁰ 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.

law is not a justification for lethal retribution. State legislation is only the *means* of judicial authorization for the *reasons* underwriting Kantian lethal retributivism, where those reasons justify capital punishment. Note again that we are concerned here specifically with *lethal* retribution and what justifies it;¹¹ the right to *retributive punishment* is not at issue.¹² Two fundamental, descriptive features of lethal retributivism (hereafter LR) follow.

First, according to LR lethal punishment is an appropriate or just desert for certain crimes. But it is in fact only one option for appropriate punishment. So, 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 suggests the punishment for the crime is 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

¹¹ 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 punishment), its reasoning is more narrowly distinct from the broader sense of retribution given here.

¹² There are of course strong conceptual links between any justification of non-lethal and lethal retribution, but the discussion and refutation of the former, with reference to a Buddhist theory of punishment, would shift the focus of the present discussion. However, some of the argument following will apply to retributivism more broadly, as there specified, even while the target of its critique is the lethal dimension of LR and only secondarily retributivism *per se* (see Fink and Loy, and n.13, below).

and retribution unless the perpetrator is judicially put to death. (Reiss and Nisbet 156)¹³

LR also implies the 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 what 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 on 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. (Reiss and Nisbet 155)¹⁴

¹³ It is thus also by virtue of this self-understanding of retribution, that any crime not-equivalent to murder (or the wilful deprivation of life), and however grave, is not appropriate to lethal retributive, but rather only to non-lethal punishment. (Kant’s own uncertainty regarding the relevant identity-conditions of murder for retribution in its borderline cases, such as infanticide and lethal duels, tends to confirm the same; see Sorell 142). Hence, all non-lethal (such as religious, ideological or political) crimes to which capital punishment is sometimes applied are not relevant to this analysis of LR.

¹⁴ This statement also formulates the equivalent Kantian principle that in committing intended murder, the murderer forfeits the right to (his own) life. 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.

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* appears to apply in the case of murder, and it appears he has good reason to think so; many would not question that the heinous rape and murder of a minor, for instance, deserves capital punishment. But on inspection the PE¹⁵ requires modification (as we have already seen) once it is put to work, and can finally only be applied to a single, *sui generis* case.¹⁶

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 “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 only of rightness (of objectively just proportion), but of independent value. Whatever is required for

¹⁵ 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.

¹⁶ That Kant also envisages some non-lethal crime (such as sedition) as capital crime similarly undermines the consistency of any *prima facie* “parallel” proportionality.

a murder to adequately meet the identity-conditions for aggravatedness or seriousness now requires a new principle: the degree of the intention to inflict suffering, for instance.

It is on these jointly necessary but not individually sufficient bases that murder is properly proportional to lethal punishment: *intentional severity* qualifies proportionality. But if the justification of lethal retribution does not rely only on PE, there must be another reason that justifies capital punishment. Sorell offers the following justification:

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. But this does not explain *why* suffering should be exacted for suffering. Nor can the answer to that, and the case for LR, rest essentially on its qualification of *heinous* lethal crime. The identity-conditions for heinousness are vague and can only be stipulated (Bedau 710). They could apply to the death penalty itself (frequently botched and often torturous). What LR finally identifies as capitally culpable is the severity of the *intention* to illegally inflict the worst suffering. On that basis, it demands that the criminal expression of that intention be punished by the legal infliction of *not more than an equal* degree of suffering on its agent.

3. A Buddhist Contextualization of Lethal Retributivism

No Buddhist interlocutor can accept the principle of just requital: first, it contravenes an implicit principle of obviating dukkha or suffering (PD) informing the first precept; that is, no intentional act should intend to cause harm or suffering to another. Second, it entails the generation of malign moral effects consequent on the intention to act lethally. Such consequences entail a principle of kamma (PK) which recognizes that action engendering malign effects for its actor (in this case the agent of LR) should be avoided. We can first consider what it means on a Buddhist account, in dialogue with Western accounts of capital punishment, to intend to “return suffering for suffering.”

3.1. *Returning suffering for suffering: the contravention of PD*

3.1.1 SURFEIT AND CONSEQUENCES

If suffering is returned for suffering, as the principle of just requital requires, then it *prima facie* implies a doubling of the sum of human suffering. Glover writes that:

This view [Kant’s] of punishment, according to which it has a value independent of its contribution to reducing the crime rate, is open to the objection that acting on it leads to [. . .] *pointless suffering*. To impose suffering or deprivation on someone, or to take his life, is something that [. . .] needs very strong justification in terms of benefits, either to the person concerned or to other people. The retributivist has to say either that the claims of justice can make it right to harm someone where no one benefits, or else to cite the curiously ‘metaphysical’ benefits of justice being done. [. . .] there is already enough misery in the world [. . .]

.] adding to it requires a justification in terms of non-metaphysical benefits to people. (229; my italics)

We can leave the question of non-metaphysical benefit aside for the moment. But first, if *dukkha* is precisely what a Buddhist seeks to obviate, he must agree with Glover that a failure of putative benefits on the intentional doubling of suffering cannot be justified. But what might appear as gratuitous suffering is rather, for the proponent of LR, what ultimately serves the end of securing the respect for human life that has been abused in lethal crime, and further risks becoming more common failing its proper punishment. Indeed, the preservation of justice as a function of categorical moral duty itself confers value on human life.

Kant makes the point clear in the *Philosophy of Law*: “The Penal Law is a Categorical Imperative; [. . .] For if Justice and Righteousness perish, human life would no longer have any value . . . Whoever has committed murder must *die*” (cited in Glover 228). Moreover, overlooking a single just case of capital punishment is already one too many; Kant in the *Metaphysics of Morals* famously extends this desideratum to the hypothetical event of a civil society that in a state of consensual dissolution is required to execute beforehand “the last Murderer lying in the prison [. . .] in order that [. . .] blood-guiltiness may not remain upon the people; for otherwise they might all be regarded as participators in the murder as a public violation of justice” (cited in Glover 229).

Thus the proponent is able to object to the charge of gratuitous suffering on the ground of a ‘non-metaphysical benefit to people’ framed in terms of the social significance of justice. The moral loss incumbent on the failure of justice, and potential long-term erosion of civil law thereby, could globally outweigh in moral seriousness the comparatively uncommon local suffering of a life *deservedly* lost. (A parallel justification for the intentional loss of enemy life in war is not far away.) For a Kantian, as we

have just seen, the maintenance and sovereignty of codes of law and governance trump the grievance of a purely personal loss. This justification might seem to run into, but is importantly distinct from, the practical deterrent concern to prevent the commission of violent crimes, whereby the death penalty is a putatively important factor in controlling crime and criminals.¹⁷

Rather, the proponent of LR has the broader and more noble concern of the good at heart; he wants to preserve the right of justice for all by the sacrifice of the few willing to defy it, and as Kant asserts, secure the inviolability of *the value* of just human life, if not life itself. Compared to the perspective of private individuals concerned with mitigating personal suffering (who, as strangers to executed criminals, do not mourn them), the proponent has an arguable claim to a greater moral responsibility.

Canonical Buddhist sources, however, express the same concern for the maintenance of justice. There are numerous instances of warning against a failure or even laxity of punishment. At D III.67, the *Cakkavatisihanāda Sutta* criticizes the soft treatment of thieves; the early Mahayana *Ārya-satyaka-parivarta* similarly says that “[i]f a ruler is too compassionate, he will not chastise the wicked people of his kingdom which will lead to lawlessness and, as a result, the king will be unable to remove the harm done by robbers and thieves” (Harvey 2000, 347). Rather, “A righteous ruler ‘with compassion should root out wicked people just as a father disciplines a son’” (348). The *Suvarṇa-bhāsottama Sūtra* urges that the king

¹⁷ It should be noted in this context that in thus serving the protection of state subjects, LR also serves the end of state control, including by authoritarian or totalitarian power. This arguably informs why China consistently executes more people on average than all other countries combined. Enforcement of efficient crime-control does not ipso facto guarantee the promulgation of citizens’ freedoms and rights under protection of the state.

“must not knowingly without examination overlook a lawless act. No other destruction in his region is so terrible” (cited in Harvey 2009, 56).

The Buddhist is as concerned as the Kantian with a vigilant attention to justice, as with the value of life, but implicitly asks how a surfeit of suffering guarantees justice in a way that serious but non-lethal punishment cannot. That vigilant attention implicitly asks to what end justice itself is put, and for the Buddhist this is paradigmatically not toward a surfeit of suffering; in the afore-mentioned text, Nāgārjuna writes, “[o]nce you have analyzed the angry/ Murderers and recognised them well,/ You should banish them without/ Killing or tormenting them” (v. 337, cited in Harvey 2009, 54).

If the Buddhist rejects the notion of a *return* of suffering for suffering, this might not only be because a second quotient of suffering putatively equals and so unacceptably doubles the first. Another way of parsing the notion of surfeit it entails is to ask what it means to say that a unique event of suffering, suffered by one person, is qualitatively equivalent to another event suffered by another.

3.1.2. QUALITATIVE CONSIDERATIONS

Each event of suffering is unquestionably suffered by someone, but in differing conditions, and if none can occupy the others’ experience, then they are for that very reason not qualitatively commensurable. Rather, events and kinds of suffering are distinct between their unique sufferers. Is the kind of suffering of the murder victim even broadly like the kind of suffering of the condemned killer? Glover suggests the difference is one not merely of degree but of kind:

What seems peculiarly cruel and horrible about capital punishment is that the condemned man has the period of

waiting, knowing how and when he is to be killed. Many of us would rather die suddenly than linger for weeks and months knowing we were fatally ill, and the condemned man's position is several degrees worse than that of the person given a few months to live by doctors. He has the additional horror of knowing exactly when he will die, and of knowing that his death will be in a ritualised killing by other people, symbolising his ultimate rejection by the members of his community. The whole of his life may seem to have a different and horrible meaning when he sees it leading up to this end. (231-232)

In comparing events of suffering, Glover claims that LR entails a unique kind of moral pain qualitatively inequivalent to that which might characterise sudden or unexpected death by a criminal act (plausibly suggesting that many would prefer to suffer the latter over the former). If so, LR appears to stretch its warrant for a proportionate suffering between crime and punishment in a way that undermines its own equitable principle by intrinsic overdetermination. Or is this the proponent's intention, the substance of the punishment justly deserved for lethal crime, enshrined in the principle of just requital? If so, this raises another problem, which returns to Glover's point regarding the pointlessness of such suffering, above.

At this juncture we need to recall the Buddha's rejection at MN II.140 of *Ājīvika* "annihilationism": an a-kammic doctrine of causeless and meaningless suffering that denies a telos to the recognition and gradual surmounting of suffering states. An instrumental but fundamental meaning of suffering in Buddhism thus lies in prompting its extirpation in the moral-psychological program (Noble Eightfold Path) of the cultivation of insight and virtue, conducive to acts expressive and productive of *kusala* mental states. Hence, in general Buddhist terms, if a gratuitous suffering

is effectively intended by its constitutive conditions to be suffered for suffering's sake, it is ipso facto, as Glover suggested, pointless, or futile.

The suffering intended by LR as a finite but extreme punishment registers nothing more than itself, pending a merely just death. The condemned, kept in secure and isolated confinement, can merely suffer privately until the moment of forced demise (Loy 146), with no anticipatory incentive of the exercise of moral value, rendering his suffering empty even of that minimal meaning. If, however, on a charitable reading, LR in its extreme degree of suffering even minimally allows for the redeeming of the sufferer's criminal character (an effect LR explicitly counter-indicates), what opportunity does the condemned have to enact that moral redemption, in his person and relations with a social context, knowing only that he is imminently forced to die?

Even granting the kammic notion that moral reflection and remorse in this life might provide for a better rebirth in a subsequent one, and so provide for some redeeming of this-life suffering in the "dead time" of waiting for execution, still the reflection does not have to necessarily end in execution. Any substantial period of life-preserving punishment might provide the context for repentance, so LR as such is not justified thereby, and LR needs a justification that makes its form of punishment exclusively necessary.

The value that a redemptive meaning in extreme suffering might endow LR, but that its formal commitment to objective desert forecloses, is not conditional on LR. This renders the punishment of LR, but still worse the suffering that is its object, morally gratuitous at best. For a Buddhist, this amounts to a denial of the fundamental moral-causal telos of kamma inherent in intention and the possibly redemptive intersubjective acts (*kusala-kamma-patha*) engendered thereby. Offending against PK, it presents to the Buddhist not merely a moral-psychological vacuum or positive evil, but in broader terms an error of wrong view (*micchā-ditṭhi*) that

denies the very means of potential liberation from the nihilistic construal of moral causation it implies.

3.2. That suffering ought to be returned: the contravention of PK

There are two main issues that arise for a Buddhist account with regard to this denial. One of these pertains to the kammic “desert” of the criminal person of LR; the other pertains to its agent, whereby the incentive to lethally punish is also kammically determined, but in addition productive of further (negative) moral consequence for the intentional actor. In the first case, the denial of kammic causation puts the work of securing appropriate desert for lethal crime into the hands of the state and its proxies, rather than the “natural law” of moral consequence attending intentional acts. In the second, the moral-psychological conditions of anger or indignation that give rise to the putative necessity for just requital in LR generate not only further kammic consequence but also reproduce those conditions in its commission.

Where LR purports to close the circle of intentional lethal action by resolving retribution in a legally justified form, it also reiterates the moral-intentional grounds that on its view makes LR imperative: namely, that grievous suffering ought to be inflicted on the intentional inflictor of grievous suffering. By construing grievous suffering as gratuitous and resisting the intention to inflict it, the Buddhist seeks to break this economy of the exchange of suffering at its justificatory point of lethal requital.

3.2.1. ASSUMING THE MORAL WORK OF KAMMA

If someone has intentionally committed lethal harm, its negative kammic consequence is ineluctably incurred, irrespective of the justice or kind of

its proportionate punishment, including by death. On this view, the proponent of LR gratuitously determines and bestows the apparent moral consequence of murder, in effect doubling or over-determining its effect, and thereby incurs negative kammic consequence on his own action.¹⁸

The proponent has an obvious objection to this claim—surely legal consequence as a social effect of crime must be distinguished from the personal ethical consequence of ill-action. The latter secures the internal or private justice of the moral law, arguably pertaining to individual salvation alone, while the former secures the public social-cultural determinations of penal law, pertaining to all those who live under its jurisdiction (with their various private spiritual destinies). Is it really the case then that the proponent of LR gratuitously over-determines the moral or kammic law by taking criminal life, and is not its penal function to be sharply distinguished from the moral one?

A Buddhist might be tempted to think that the exercise of penal justice is itself only another form of kamma—in this case socially hypostatized and institutionalised as the law. Harvey notes that:

¹⁸ We can note here a possible quandary given a Buddhist claim for post-mortem kamma, which might theoretically hold that capital punishment serves the cause of moral reform of the rebirth of the ‘same’ consciousness. The most obvious problem with this claim is one of epistemic access, which (failing a Buddha’s omniscience) remains indeterminable. But there are two other, related, problems. First, it is unclear whether, given kamma 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 kammic imprints) in a subsequent ego-centered resentment and thirst for vengeance (and more intended violence). As an index of ignorance, kamma 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.

One could see execution as simply a karmic result of a past bad deed—but in principle this might even be the case if the person executed were actually innocent of the specific action for which he was being “punished”—so this does not help us with the question of the justice of capital punishment. (2009, 50)

In identifying a distinction between kammic result and judicial guilt, Harvey rightly suggests that the moral law of kamma and legal one of punishment do not serve the same social explanatory interests: the former universally explains and ineluctably functions in causal distinction from the local socio-historical reasons and reasoning that justify the latter. Hence, the casuistry of kamma can only provide putative explanation of the causes for and effects of the commission of punishment; it cannot contest penal law on its own terms.

The Buddhist objection to LR in this case thus proves unfounded but this does not exclude at least one kammic dimension, noted above. By intending to lethally punish, and especially where this has been identified as gratuitous and so unjustified, the Buddhist sustains the claim that the agent of LR does two misguided things: he actively engages the constitutive kamma of lethal intention that psychologically (if not judicially) determines he should resort to LR, and by actually enacting that intention generates constituting kamma as its inevitable effect.¹⁹

The Buddhist in this case might concede that the judicial sanction of LR again cannot be challenged in its own terms, but that the commission of LR cannot thereby neutralise its kammic effects—not a penal con-

¹⁹ Compare this to the constitutive-constituting function of the *saṃskāraskandha* which in constructively engaging its cognitive-affective volitions creates the conditions for the experience of the self and its suffering states.

comitant but a moral-psychological causal one. This conclusion from a basis in intentional (mental and physical) action is not compromised by the legal status of the death penalty, but causally transcends its sanction. This is especially the case where, as Harvey suggests, the fallible means of human justice is mistaken and a would-be criminal is wrongly executed for a misattributed crime. *Kamma* is supposed, in such cases, to deliver the infallible “verdict” of moral consequence attending intentional action especially where that action is unjustified but still legally sanctioned.

In the same way, the Buddhist might object that the judicial apparatus of legal sanction in the case of LR at a deeper register expresses a morally unskilful (*akusala*) motivation. To make that point, the Buddhist returns to a focus on the moral-psychological conditions of possibility for the will to just requital.

3.2.2. MORAL-PSYCHOLOGICAL PRECONDITIONS FOR JUST REQUITAL

What explains the putative necessity for LR? This question turns analytic focus from the justification of the punitive act *per se*, to what undergirds Kant’s inflexible conviction that “if Justice and Righteousness perish, then human life would have no more value in the world” such that “the murderer must die.” This is a statement concerning something about the moral-psychological constitution of the proponent of LR, rather than the criminal, or even his crime. As we have seen, Kant’s conviction appears to express the axiological if not judicial tension that the value of human life in general is necessarily secured by the sacrifice of human life in the particular criminal case.

In a discussion of reconciliation (*paṭisāraṇiya*) in the Buddhist ethics of punishment, Charles Fink suggestively highlights the role of resentment in the motivation to punish:

The [reconciliation] model assumes not only that it is appropriate for offenders to be remorseful for their crimes, but that it is appropriate for victims to resent offenders. Resentment is recognised as appropriate, first, because it is an expression of self-respect. (389)

The resentment of abuse is a plausible element of what might prompt the positively valenced indignation of the Kantian moral agent on behalf of the victim of lethal crime. That is, the proponent of LR psychologically assumes as indignation (for the other) the justified resentment (for oneself) of the victim that has been denied the victim in their death. Of course, indignation and resentment are species of anger, and the rectitude of a justified anger is frequently summoned to the cause of LR (Bedau 717). But Bedau sees an important distinction between them:

The feeling and expression of resentment—seeing oneself as an undeserving victim of another’s immoral conduct and objecting to it—is understandable. So is moral indignation—seeing another as an undeserving victim of someone’s immoral conduct and objecting to it. But both resentment and indignation are moral emotions—that is, they are regulated by moral considerations, in contrast to anger and revenge. These latter know no bounds; thus it might be said that they are always inappropriate, even if they are often excusable. (717)

Anger is, with hatred, unequivocally identified in Buddhist sources as one of the most morally destructive of emotions, and counter-indicated in the Buddhist program of aretaic mental-affective cultivation.²⁰ On Bedau’s and Buddhist and even his own terms, the proponent of LR needs to preserve the moral valence of justified indignation in order to avoid a charge

²⁰ See Cozort 1995.

of basely emotive revenge, something that the proponent denies as a justificatory motivation.

But even if the Buddhist charitably grants the proponent the best case of justified indignation and not anger on behalf of the killed victim, problems remain. A plausible reason for indignation on Fink's account lies with the psychologically harmful and immoral reduction of the dignity of the victim to an instrumental means for criminal purposes. He continues:

To be victimized by crime is to be treated as a thing rather than a person. Crime can and typically does inflict physical or emotional suffering upon the victim, but it is also a communicative act. It communicates to the victim that he or she is not a person but a thing to be used or abused. To resent the offender is to counter this communication with an affirmation of one's inherent worth as a person. (390)

The victim's right to autonomy and to life are each violated by the lethal crime, in virtue of their absolute subordination to the malign will of the lethal agent. The abuse of the crime therefore consists not only in the base physical heinousness of taking life, but crucially for the proponent the moral heinousness of the instrumentalization of the victim. The agent of LR thus seeks restitution for that moral abuse and, in order to avoid a like abuse of the moral worth of the criminal person, not the base instinct for revenge. Adam Sitze notes:

If a person is, as Kant will say, "a subject whose actions can be imputed to him" [. . .] then the death penalty is an apparatus for treating the criminal like a human: it imputes to the criminal a faculty for pure reason, a capacity for freedom and autonomy in the strict and purely human sense, and *therefore*, on this same basis—out of respect for the criminal personified as a human, out of respect for what

the pure reason “in” the criminal will have willed—it ends his life. (234)

Hence, the agent of crime, recognising the categorical moral duty of that punitive restitution of abuse, must will his own punishment thereby. But what, for the Kantian retributivist, allows a criminal-moral agent to simultaneously both value his own inherent worth as a person, as his status as a moral agent of the categorical imperative requires, and to will the sacrifice of his life as the ontological basis for that very worth?

3.3. *The Kantian division of the person*

Quoting Kant in *The Metaphysics of Morals*, Sitze notes the distinction he draws:

between the *homo noumenon* (the “moral personality” who is the locus of “pure reason within me” [. . .]) and the *homo phaenomenon* (the “sensuous being” who is the locus of my desire to preserve myself in my “animal being”) [. . .] When I consent to suffer the penalty of death at the hands of the sovereign [. . .] It is that “I” am the locus of two distinct beings, a *person* (the *homo noumenon*) and a *living being* (the *homo phaenomenon*) and that the *person* within me (which is to say, the nameless force of pure reason, which “desires” nothing other than universality and necessity itself) dictates a perfectly consistent set of penal laws to which I then subject my own living being. (233)

By subordinating his animal living being to his purely rational moral person, the condemned corroborates the moral law of duty and the civil law of appropriate punishment for lethal crime. But this subordination is in turn predicated upon another Kantian premise:

Kant considers the right of self-preservation to be a merely *conditional* duty—a duty, in other words, that is grounded not in the necessity of pure reason, but merely in inclination, in a desire to avoid pain and achieve happiness. As such, the duty of self-preservation possesses less dignity and necessity than does the unconditional duty of conformity to the categorical imperative. To the extent that we are governed by our desire for self-preservation, we are not “persons” (which is the name Kant gives in the *Groundwork* to “rational beings”), but merely “things” [. . .] In cases where our conditional duty of self-preservation comes into conflict with our unconditional duty of preserving the state [. . .], the latter thus easily prevails over the former. (232)

Hence, the neo-Kantian can logically justify the preservation of the inherent worth of the person in the criminal by virtue of the sacrifice of ‘animal life’ that is willingly submitted to the maximal punishment of its deprivation. This justification is predicated on the moral acumen and will of the criminal agent in general, and his valorisation of noumenal moral being over sensuous animal being, in particular.

Even if the first of these is granted, on a Buddhist account the metaphysical division of the sentient being between noumenal and phenomenal existence is incompatible with its own understanding of the person. If so, the Kantian distinction between conditional and unconditional duties with regard to oneself as a person, or to the state, is not for the Buddhist tenable as an account of moral obligation. First, Buddhist metaphysics of the person does not entail a moral agent as an entity ontologically distinct from the psychophysical properties (skandhas) of the living being (sarīra) upon which personhood is conceptually imputed. Moreover, the

moral-intentional function of *cetanā* is not an isolated ego or self that, being non-existent on the Buddhist account, can morally adjudicate over 'its' embodied existence. Such a self would amount to a claim for:

satkāyadr̥ṣṭi, according to which there exists an [. . .] absolute self that, while fully autonomous, is somehow related to or residing within the constituents of the mind and body. All Buddhist philosophers seek to eliminate *satkāyadr̥ṣṭi* and any beliefs, such as the notion of a whole, that are corollaries of it. Hence, this level of description is never accepted, even provisionally, by any South Asian Buddhist philosopher. It is mentioned only so as to refute it. (Dunne 57)

Rather than a noumenal Kantian moral agent, the mental-volitional bases for moral action (*kamma*) are engaged as *cetanā*, or the intention directing the action of the conventionally real person (*puggala*). The singular "noumenal personality" that for Kant reigns supreme over all other subordinate elements of volition (such as the conatus of the self-preserving sensuous being) is distributed in the Buddhist case across multiple properties that functionally cohere to endow personhood with moral agency, including its governing ethical conditions (*śīla*), affective tone (*vedanā*), quality of consciousness (*citta*), and moral valence on a range between *kuśala* and *akuśala* volitional intensities.

In the case of the moral exercise of justice, Loy makes explicit the psychological connection between intention as *kamma* and its mediation in and by the *saṃskāra*skandha:

Intention is also the most important factor in the operation of the law of *karma*, which [. . .] is created by volitional action. *Karma* is essential to the Buddhist understanding of

justice [. . .] One modern approach to *karma* is to understand it in terms of what Buddhism calls *saṅkhāras*, our “mental formations,” especially habitual tendencies. These are best understood not as tendencies we have, but as tendencies we *are*: instead of being “my” habits, their interaction is what constitutes my sense of “me.” But that does not mean that they are ineradicable: unwholesome *saṅkhāras* are to be differentiated from the liberatory possibilities that are available [. . .] if we follow the path of replacing them with more wholesome mental tendencies. (Loy 156-157; *saṅkhāras* = *saṃskāras*)

This Buddhist project can be highlighted in a psychologically more plausible best case of punishment than the ideal Kantian one: the criminal agent, by acknowledging his abuse of the inherent worth of his victim, recognizes his own moral humanity, and seeks to atone for wrongdoing as a moral and ‘merely living’ being. The proponent cannot easily object in this case that LR sustains the inherent worth of the person in virtue of its metaphysical benefit of absolute justice, when the condemned seeks as an autonomous person to preserve his life (especially in the case where he is potentially or actually innocent), and in order (in the case of guilt) to repent of his crime thereby.

If the proponent fails to honor this claim morally, this compromises the personhood—i.e., reason, freedom, autonomy—of the condemned, especially with regard to his moral agency, explicitly recognised by LR in its expectation of the criminal’s recognition of moral duty, and exploits his life to the end of a metaphysical benefit of absolute justice which many a moral witness, such as the Buddhist, might not recognise. Moreover, to preserve its moral integrity, LR must in its own terms explicitly avoid treating the condemned as an object rather than a person, by

communicating in its commission his inherent worth as a person.²¹ Is it plausible to hold that LR necessarily secures these required features in the very commission of LR?

3.4. *Lethal intention and the infliction of harm*

A Buddhist response undermines its plausibility by appeal to a claim regarding LR not as the exercise of justice per se but in terms of its constitutive intention (*cetanā*). Fink writes of retributive punishment more generally:

Punishment involves the infliction of harm—typically some form of suffering. This by itself is morally problematic, but what renders punishment especially problematic is that it involves the *intentional* infliction of harm. The retributivist, for example, believes that offenders should be punished simply because they deserve to suffer, as an end in itself [. . .] For a form of treatment to count as punishment, it must not only be harmful, it must be intended as harm; it is in this sense that punishment involves the intentional infliction of harm. (374)

LR intends an absolute punishment in the loss of life, and so intends a maximal infliction of harm and the suffering of it. 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 a normative force on action. Intended action is not merely something which its agent believes (for better or worse) ought to

²¹ Sitze notes Kant's agreement with Beccaria whereby "the rights of the person are inviolable (or, to be precise, that liberty ends and tyranny starts at that point when law begins to treat the man no longer as a person but now as a thing [. . .]) (234).

be done; Buddhist ethical evaluation attends to the affect or motivation of the “ought.” In weighing the moral valence of intention (*cetanā*) in both criminal and retributivist senses, it is possible to see these as different. A passionate murderer kills in desire or rage; a cold-blooded retributivist kills for the sake of an ideally affect-free conviction in upholding absolute justice, in particular of anger as revenge or the personal expression of the grievance of resentment.²²

On the other hand, we have seen a fundamental motivation for LR lies with the all-too-human outrage provoked by (aggravated first-degree) murder, genocide, war crimes, heinous abuses of innocence and similar cases. If such outrage drives the demand for exacting justice, it is moral outrage that decisively motivates the putatively necessary lethal fulfillment of justice in LR. However putatively high-minded, moral outrage is, for a Buddhist view, not justification enough. On that view, both these ostensibly non-affective and affective motives for action, lacking a positive valence, are variations on a spectrum of unwholesome intention (*akuśala-cetanā*). Despite an overt intention to preserve an apparent absolute justice (to what ultimate end is not clear) LR on a Buddhist account covertly fails a fundamentally non-harmful intention, and so undermines its self-understanding as the just recompense for wrongful harm.

The Buddhist account thus categorically views the intention to inflict a maximal harm and suffering as morally wrong, and so rejects the premise that execution is the sole appropriate response to lethal crime.²³

²² Sorell ironically betrays the same point by noting 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)

²³ The historical presence of capital punishment in some Buddhist societies is a cultural-anthropological issue logically distinct from the present discussion. Inasmuch as all

In virtue of this rejection of the intention to kill under any circumstance, a Buddhist might instead propose that the most severe punishment for the most severe intentional killing is life imprisonment without the possibility of parole (LWOP) (Bedau 706). (In practice LWOP would in this most severe Buddhist case of punishment be conceived as life imprisonment that allows for interpersonal relationships, productive work and reformative opportunities: that is, a life in prison that actively engages the means of personal rehabilitation.) Using this potential Buddhist claim as a plausible premise, we can consider the following:

1. Agents of lethal crime deserve to be punished.
2. Execution, justified by lethal retributivism (LR), is a possible punishment of lethal crime.
3. LWOP is another possible punishment of lethal crime.
4. Hence, execution is a contingent punitive response to lethal crime.
5. A Buddhist categorically rejects the intention to kill as punishment.
6. But LR serves to uniquely express a (metaphysical) benefit unavailable in non-lethal forms of punishment: lethal just requital as the expression of absolute justice.
7. If so, the lethal element of LR necessarily serves the expression of that (metaphysical) benefit.
8. If so, execution serves an end supplementary to punishment per se, which could (by 4) have been otherwise.
9. A Buddhist accepts LWOP as sufficient punishment of lethal crime.

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.

10. Hence, for the Buddhist, execution justified by LR is a gratuitous punishment for lethal crime.

4. Civilising Norms: Restorative Justice and Aretaic Cultivation

This Buddhist conclusion is in accord with the premises of what Bedau describes as “the best argument for abolition” (728). The first of these is that “Governments ought to use the least restrictive means—that is, the least severe, intrusive, violent methods of interference with personal liberty, privacy, and autonomy—sufficient to achieve compelling state interests” (ibid.). If reducing lethal criminal violence is a compelling state interest (Bedau’s premise 2), and LWOP is a less severe and restrictive penalty than penalty by death (his premise 4) and “sufficient to accomplish (2)” (his premise 5), then on both Bedau’s and the Buddhist’s grounds, “therefore, the death penalty—more restrictive, invasive, and severe than imprisonment—is unnecessary; it violates premise (1)” (ibid.).

Thus, both Bedau and the Buddhist argue primarily against LR as justifying a gratuitous punishment. But this argument is not exclusive of the moral value that LR in the first place rightfully recognized as having been abused in lethal crime: the inherent worth of the person. The agent of LR reasoned that the proportionate means to seek restitution for the abuse of the inherent worth of the victim, was to take the criminal’s life. But the Buddhist wants to ask, “Is another act of lethal aggression the best or only means to affirm the inherent worth of the person?” She might revise the motivation of the agent of LR, in addressing the criminal as such: “I could kill you as punishment. But instead I’ll affirm your inherent worth, the very thing you failed to honor in your victim by taking his life, and by doing so resist repeating your error.”

By affirming the inherent worth of the criminal (however compromised his moral integrity in virtue of his crime) in resisting his execution,

the Buddhist retroactively affirms, in the person of the criminal, the original worth that was abused in his victim—just as the agent of LR retroactively assumes the moral injury of that abuse of the person as victim. Otherwise, and irrespective of its justification, lethal aggression intentionally reiterates the original objectification of the victim as an object-person to be killed: a moral-psychological intention that in itself inevitably results in a predisposition to ill-motivated action (*akusala-kamma-patha*). Loy writes:

The state's violence reinforces the belief that violence works. When the state uses violence against those who do things that it does not permit, we should not be surprised when some of its citizens feel entitled to do the same. [. . .] The emphasis on nonviolence within so much of the Buddhist tradition is not because of some otherworldly preoccupations; it is based upon the psychological insight that violence breeds violence. This is a clear example, if anything is, of the maxim that our means cannot be divorced from our ends. [. . .] If the state is not exempt from this truth, we must find some way to incorporate it into our judicial systems. (153-154)

There is, moreover, a specifically Buddhist concern built into its preference for an ideally restorative rather than retributive justice (and so in practice might also qualify the worst case of LWOP to a punishment of life with the possibility of parole). I have argued elsewhere that the foundational value inherent to the person as a person lies in an implicit eligibility for the telic program of the Buddhist cultivation of compassion, wisdom, and ultimate awakening from ignorance.²⁴ As noted at the outset of this paper, unlike all other forms of reparative punishment which entail the deprivation of one or another good (of liberty, of society, of money, and

²⁴ Doctoral thesis (University of Melbourne, 2019).

so on), LR uniquely intends the absolute foreclosure of the possibility of those goods, and even the possibility of possibility, and ostensibly does so on behalf of its object person, in their name as a legal member of the state.

The absolute deprivation of life has central relevance to the Buddhist (especially Mahāyāna) project in its soteriological purpose. Its concern is with a universal liberation from suffering, for which as we have seen all sentient beings possess the intrinsic potential (Loy 49). It aims to achieve that end via interconnected atheistic, but aspirationally ambitious modes of rational, affective, intentional, and social life (the Noble Eightfold Path) that together cultivate its achievement. On this basis it becomes clear that, as Fink describes (387ff.), a Buddhist conception of punishment (*daṇḍa*) can only be predicated on a basis of restorative and not retributive justice.

The maintenance of any ethic that prioritizes deprivation of life can only be one that, in presuming to preserve the inherent worth of persons, actually problematizes that value and repudiates the intentional cultivation of virtue at its core. When Nāgārjuna speaks of “banishing angry murderers” we might in the 21st century take him to refer to excluding such agents from the very economy of grievous harm, for their own and others’ sakes alike.

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