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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.

This essay opens a critical dialogue between two contrasting intellectual traditions regarding one form of the intentional taking of life. It also seeks

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to identify how some ethical problems, in a Buddhist context, integrally entail a consideration of their metaphysical and epistemic constitution, and demonstrates how capital punishment is such a case. In §1.2, 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. From §2, I criticize the defense of retributivism on Buddhist-metaphysical, epistemological, and ethical grounds.²

§1. Punishment as Prevention and as Retribution, and its Neo-Kantian Defense

§1.1. Punishment as prevention

Only the legally-constituted government of a legal state can sanction capital punishment, in the name of the citizens it governs. The state exercises its 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. However, the state legislature that passes statutory law, recommending capital punishment for some crimes, must itself 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 judgment on crime. Capital punishment is irreversible and so requires a degree and kind of justification not necessary for non-lethal pun-

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ishment. 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*, 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)

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.

§1.1.1. “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.

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.

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.

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

§1.1.2. 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

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.

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 reformation 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.

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

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.

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 (reformatory) prevention of crime by potential agents, it can *at best* only claim the (obstructive) prevention of crime by its actual agents. The 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 reformatory 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

§1.2. 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)

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 §1.2.1., and later in §2.

As noted at the outset, without justified (and thence justifying) 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 law” is not a necessary and sufficient reason 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.¹⁰ For this reason, the right to *retributive punishment per se* 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. Hence, state executions are *intentional lethal acts* performed by individual persons as legal agents for the state (states as such cannot perform them), justified by reasons.

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

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

¹¹ §§1.1. & 1.1.1 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 reformative sense there argued.

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 retribution unless the perpetrator is judicially put to death. (Reiss and Nisbet 156)¹²

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 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

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 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.

do to someone else . . . is an evil done to yourself . . . if you kill him, you kill yourself. (Reiss and Nisbet 155)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* appears to apply 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 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

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 §1.3, 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.

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.

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 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 required, 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:

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.

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.

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. They could as much, or more so, retroactively apply to the usually protracted anticipation, and frequently botched or torturous performance, of the death penalty itself. (It is at least for the former reason that Camus claimed that the suffering of capital punishment could prove well out of proportion to the original crime.)

What LR is really identifying in its moral condemnation of the severity of intention, is the *will* to inflict the worst suffering. Can, and should, individual sufferings be compared? With a view to Kantian proportionality LR demands that they are and that the suffering of heinous murder should be equal to the suffering of, necessarily, a heinous punishment. If this is what LR intends, as it explicitly does and logically must, then what it intends is a tautology: that 'grievous suffering warrants grievous suffering.' This is of course its principle of Just Requit, which in itself is a normative posit, not a justification.

We do not in fact need to know *why* LR holds that claim (if it can be adequately answered), because what that claim relies on are the normative reasons and values that for LR together justify it. But, as we will see in what follows, they express a contradiction. LR reduces to a tautology justified by a contradiction. We have just observed the former. What follows will consider in depth the latter, as justificatory of LR.

§1.3. 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 LR, 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 LR, 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.

§2. A Buddhist Contextualization

We have seen how LR stipulates that only some agents of lethal crime can be conceived as persons deserving lethal retribution. But others conceive of those same persons as persons who should *not* be killed. A Buddhist theorist should hence need to be able to justify which conception-perception (*saṃjñā*) of persons is morally correct, and why. In providing that justification, we should hope to understand how, for a Buddhist understanding of persons, the relation between values and the living body that is their object concretely functions in those respective conceptions-perceptions of persons. This should then allow us to determine which view is justified, from a Buddhist perspective.

In this enquiry, we in fact come to see how Buddhist-normative positions can be derived from analyses of the metaphysics of persons and acts. For the Buddhist view, there is a difference between the way persons actu-

ally exist, and how they are perceived to exist, and both are relevant to moral assessment. Normative judgments are grounded in ontology. It is in this broad sense that Garfield and Edelglass claim that for a Buddhist view “such cognitive states as ontological confusion are regarded as moral, and not simply as epistemic failings.” (7)

This raises a further question about values: are they inherent in natural objects or are they merely imputed? If values were in all cases only contingently assigned by agents, then all objects could theoretically be perceived in the first instance as ontologically value-neutral, and only subsequent to an original neutrality be available for those assignments.

Value is, at least in some cases, pretheoretically a feature of their ontology: they literally cannot be apprehended by those perceivers otherwise. Some objects (like rocks or tables) might be perceived value-neutrally, but even in these cases indifference remains a form of value (expressing axiological neutrality). There are many natural (but also non-natural) kinds, including humans (especially babies and children, but not only those), which embody for different perceptual-normative agents value(s) inseparable from their apprehension as the *objects* they are. For most if not all human cultures, a neonate, to take an obvious example, is intrinsically valuable *as a neonate*. Most human agents take other humans to be intrinsically valuable. It is not merely the event of its birth, but the ongoing fact of *its living embodiment*, which makes that value from then on a concrete feature of shared experience.

Certain (if not all) objects, among them natural kinds, are thus *perceived* as objects of more or less value, in perceptual-normative acts. Perceptual-normative acts are by their very nature responsive to those objects as valued objects: *we enjoy* the value of a beautiful landscape, *preserve* the value of natural biodiversity, and *nurture* and *protect* the value of neonates. Hence, such perceptual acts, *as the acts they are*, are also not value-neutral.

This means that values do not exist ontologically independent of the objects they qualify. In Buddhist terms, objects and values are dependently-originated concrete and abstract relata that require each other in order to exist as the intentional entities they are for those perceivers: you can't have the one without the other. To understand how values, as such, *justify* normative acts for those perceivers, we need to consider values' relations with the persons they qualify. To do so we can turn to a Buddhist-syncretistic analysis of how LR (as such a valuation of persons) functions in the conventional lifeworld.

§2.1. *Persons and Intention (cetanā): norms, value-claims, and the internal structure of LR*

The first Buddhist precept proscribes any acts depriving sentient of life. The first precept thus connects three distinct entities: the agent of its norm (*pānātipātā*), the value relevant to assessing the act (non-violence or *ahiṃsā*), and the physical object (*sarīra*, the living or mortal body of the other) of the act. The agent and the object must occupy the same world of values and objects if action is to be morally assessed. LR proposes that retributive killing is not merely permissible but mandatory: we saw (in §1.2) how LR ultimately stipulates the *sui generis* cases (of aggravated first-degree murder) to which the value of lethal retribution pertains. This is *prima facie* inconsistent with the Buddhist proscription of harmful action.

To advocate lethal retribution, is to assert that legally-punitively taking life is a good: "it is *right* for suffering to be returned for suffering, that this is how things *ought* to be." LR thus stipulates cases that deserve lethal retribution, in virtue of their moral status. For convenience, we can call this value 'A,' which value is inconsistent with the Buddhist norm that does not countenance any circumstance, including punitive ones, which

entails non-accidentally taking the life of a living being, because it abrogates the good of life itself ('B').

I have argued that A actually entails B: Sorell (after Kant) claims that a reason motivating LR is that "Life itself, whatever its quality, is a good." Hence, they claim that "the harm in murder consists at least of the loss of this good." Hence, the (non-accidental) loss of this good is a harmful wrong. Hence, value B logically expresses the claim that if the non-accidental loss of the good of life (whatever its quality) is a wrong, then life should not be (non-accidentally) taken. Buddhism agrees with this, which subserves its first precept.

Now, a punitive good can only be conceived as punitive insofar as it justly deprives its object of another good (or else it is not just punishment but only malevolent aggression). A thus punitively-normatively entails B, because without B, A's value *of the loss of the good* of B would leave A without normative force.¹⁷

A thus *implicitly recognizes* B. Hence, LR *cannot* disavow B, at any point, or it also disavows itself *as* A. Hence, the dichotomy already described between LR and the Buddhist precept is not limited to that relation alone. More importantly for Buddhist-analytic purposes, it is internally entailed *in A itself*. A can't *be* A, unless it implicitly recognizes B. The focus for a Buddhist analysis thus crucially turns to A's epistemic status, not merely its normative status vis-à-vis Buddhist value-claims.

How does the intentional positing of value A function simultaneously as an (implicit) affirmation *and* (explicit) sublation of value B? It is one

¹⁷ The Kantian posit of 'the forfeiture of life' (where the criminal homicide ipso facto relinquishes a right to life), does not change this. The normative force of forfeiture itself relies on the posit in which the right to life is something that can only be meaningfully forfeited *as a good*, just because it is conceived as something of value.

thing to sublimate one discrete cognitive or normative datum in a following one. But LR presents us with a case of the synchronic sublation of one value (B) in its explicit contradiction (A), in the same cognitive act:

- 1) *Within A*, value B normatively posits that as the non-accidental loss of life is a wrong (because life itself, whatever its quality, is a good) then life *should not be* (non-accidentally) taken. Then
- 2) *again within A*, a second value A normatively posits that because lethal retribution is a good, then life *should be* (non-accidentally) taken.

Because A necessarily recognizes B, the contradiction, *within A*, is thus: life should not be (non-accidentally) taken *and* life should be (non-accidentally) taken. How does this work in Buddhist terms?

The Buddhist answer is that it doesn't, or only at the cost of a fundamental misunderstanding of the truth of how things exist, and of how veridical perception discloses that truth to the perceiver. We can first ask what in fact is perceived, before ascertaining how that perception can be known to be true. One pervasive Buddhist understanding of perception

asserts ... the recognition that perception apprehends its object through the mediation of a mark left by the object on consciousness ... Consciousness does not apprehend external objects [*viṣaya*] directly but only through the mediation of aspects. An aspect [*ākāra*] is a reflection or mark of the object in consciousness ... The aspect is the form of the object stamped on cognition that allows us to differentiate among our experiences. (Dreyfus, 335-36)¹⁸

¹⁸ Dreyfus notes that while this Sautrāntika view is typically incompatible with direct realism, some traditions (such as the Tibetan Gelug) which profess the latter also hold the doc-

The perception of an external object requires the existence of a supporting condition (*alambanā-pratyaya*) for its mental representation or aspect (*ākāra*). Similarly, any perception of the *value* of that object requires the perception of its supporting-condition. But we have seen above that LR and Buddhism perceive the same object (living body) differently. In that case, how does inconsistent value-building get going, and can one kind of construction, as LR demands in A, simultaneously *affirm and sublate-by-contradiction* a crucial part of its foundation and still stand up? Note that LR, in A, does *not* affirm one value and then better it with an entirely different one. Rather, as I have argued above, A simultaneously requires the affirmation *and* the contradiction of B, to be A. That is the basic axiological, epistemic and ontological dichotomy we now seek to address.

We can start by taking our cue from Dharmakīrti, who draws a distinction between real and illusory percepts, and holds that error can be extirpated by not mistaking one for the other, and by not superimposing perceptual forms or aspects of objects on those which contradict them. The following discussion will show how LR commits this intentional fallacy, and so for this Buddhist view renders its cognitive foundations incoherent. 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)

trine that cognition ‘bears the mark’ of its object on consciousness, only directly and not via the mediation of the *ākāra*.

§2.2. Modes of perception: *ākāra* and the *Pramāṇavāda*

To try to resolve the dichotomy described, we need to examine how “the nature, functioning and internal structure of consciousness and cognition” (Kellner 276) of the Buddhist-epistemological school of Dignāga and Dharmakīrti (otherwise known as the *Pramāṇavāda*), might pertain to the internal relations of LR as detailed above. We have noted that the *Pramāṇavāda* conceives the perception of concrete and abstract objects as mediated by mental representations (*ākāras*). For this account of perception, the cognition of the *ākāra* as having differentiated qualities particular to it is what allows for the cognition of distinct objects per se (objects which would otherwise lack determination if their *ākāra* were not so differentiated).

One of Dignāga’s conceptions (in the *Pramāṇa-samuccaya* and *-vṛtti*) of the *ākāra* as the “object-form” or mental representation of the *alambanā-pratyaya* (or “supporting condition,” in this case the physical body) is as the perceptual awareness of the object it is said to resemble. On this view perception, 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 existence of a physical, or any cognitive, datum, however much its resembled object is also (Dignāga stresses) taken as independently existent in the world.

If 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.

The perception of a criminal as worthy of capital punishment is cognitively superimposed (*adhyāropita*) on the cognized form (*ākāra*) of the object of the person. Different moral assessments must reflect different perceptions of the person in question. In what could those different perceptions consist? Inasmuch as the same physical datum is the locus (the supporting-condition) for these cognitive operations (and note that this includes the cognition of A per se, and not merely A opposed to B) 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 an independent normative property? For example, accompanying the phenomenal 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. As suggested above, the human perception of most if not all objects entails this axiological dimension.

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 throughout

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 loving kindness, “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 [exclusive] structural features which a mental state might be thought to have. (286, my italics)

So, for the (Sautrāntika) representationalists Vasubandhu, Dignāga and Dharmakīrti, the notion of *ākāra* includes the representation 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). This shows that in this tradition *ākāra* has a normative dimension. If this is so, we can consider in a Pramāṇavāda analysis those stipulated by LR as the cognitive elements of mental factors which, in perceiving the living person as *deserving* of being killed, warrant its privileged normative status within a relevant hierarchy of values.

§2.3. *Ākāras and LR as the cognition of value*

Valid perceptual cognition is the foundation for Pramāṇavāda (and all Buddhist) epistemology, as it serves as the indubitable basis for valid inference. This is because for this anti-realist school only impermanent particulars are real, but these are by their nature straightforwardly both perceivable and veridical to human epistemic agents. In the *Drop of Reasoning* Dharmakīrti states

Its [perceptions's] object is only the specifically characterized. The specifically-characterized is the [kind of object] whose nearness or remoteness creates a difference in the cognition. That alone ultimately exists because it has causal efficiency, the defining property of things. Other [phenomena] are generally characterized, they are objects of inference. (in Dreyfus, 352)

What makes any subsequent perception and conception of articulated objects true, on the basis of these particulars, is however complex.¹⁹ This is because inference entails universals, which given the anti-realist commitments of the Pramāṇavāda mean they are conceptual constructs without any real existence. Hence, Dharmakīrti must ground certain and unmistaken knowledge in some real perceptual, and thence conceptual, cognition

¹⁹ We can leave aside here Dharmakīrti's claim for *svasaṃvedana*, or the reflexive nature of consciousness (or awareness). This posits the 'self-cognition of mental states—the subjective aspect (*grāhakākāra*) cognizing the objective aspect (*grāhyākāra*) of cognitions—as the inherent *knowing* of them. Where apperception is thus always implied in perception, and the subjective aspect of cognitions is just the simultaneous awareness of the external objective aspect of objects, then apperception is always valid. But cognitions or the *perceptions* of objects as such might not be valid, and we are only concerned here with *their* epistemic status. Dharmakīrti holds that cognitive validity is not internal or intrinsic to cognitions, but rather dependent on a conventional external state of affairs or practice that they represent.

other than universals. This grounding must then guarantee the epistemic status of the *ākāras* that mediate the perception of these percepts as determinate objects, and true judgments about them. Dreyfus writes that

Perception is explained in terms of the immediate objects, the aspects [*ākāras*] which do not themselves provide knowledge ... a sensing of bare particulars, is valid only inasmuch as it is able to induce appropriate forms of conceptualization that provide cognitive content to our experiences. Thus, the direct objects of perception are not foundational ... but they do provide an indubitable starting-point. (343)

Ākāras as perceptual objects are not themselves self-validating, because perception in itself is not cognitive, but they do instantiate a direct acquaintance with our own mental states. It is the conceptualization of the percept that for Dharmakīrti then allows the *ākāra* to function as a genuine intentional object representing an external object. At that point the *ākāra*, of which there will be more than one pertaining to that object, is its more or less veridical representation. Indeed, non-contradicting relations between these, and their object, are what constitute a non-mistaken (*abhrānta*) apprehension of the real:

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)

We can apply these considerations to the discussion of LR's dichotomous value of A. We considered there the sense in which the proponent of LR (in value A) implicitly perceives the living person as instantiating a value B, and explicitly conceives depriving the same person of life as serving a *great-*

er end A. This is so or else neither the killing of the living body (as a concrete datum of intrinsic value), nor its subordination to that greater end (as an abstract datum of greater value), would signify value at all.

The conditions of possibility for value A are thus that it perceives the living body of the person as intrinsic value (B). Its intentional object (on the basis of the perception of the *ākāra* of the living body of the person) is thus that *ākāra* of value, without which the perception-conception (*saṃjñā*) of the supporting-condition (the living person) is intentionally incomplete. Following Kellner (in a threefold categorization of textual conceptualizations of *ākāra*, 289), we can call this the ineliminable “object-*ākāra*” of the living body. This functions in just the same sense that the perception of the ripe apple includes the perception (in an *ākāra* of value): ‘non-aversive.’ In the context of Dharmakīrtian perceptual ascertainment (*niścaya*) Eltschinger notes that

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*). (252)

As constitutive of the preconditions for A, and inasmuch as a living person as an aggregate of real particulars is in fact being perceived, then for Dharmakīrti the object-*ākāra* of B must be a true perception of the object-person. Now, whether this object-*ākāra* of value can be said to initially represent a nonconceptual or conceptual cognition is unclear: as a somatic-affective datum ((immediately) non-aversive object) it is nonconceptual, and so the registration of value a still unarticulated but nevertheless non-mistaken (*abhrānta*) perception of the reality of the object. In any case, the normative conceptualization of value B is, like the ‘non-aversiveness of ripe apple,’ inseparable from the percept-concept of ‘living being’: it is what gives that

perceptual-conceptual datum its semantic function in a lifeworld of other living beings (including the perceiver herself). Even if the object-*ākāra* of value begins as an unarticulated percept, it can't remain that because its representing something of value makes it the *kind* of thing also deserving of attention, a cognition which takes in general or universal, properly conceptual, terms. It is “only when it [the perceptual aspect] is interpreted by a conception does the aspect become a full-fledged intentional object standing for an external object” (Dreyfus 337).

But A also perceives a secondary value-claim A vis-à-vis the same supporting-condition: that life is here worthy of being taken. We can call this (again following Kellner) the “mode-*ākāra*” in its aspectual sense. As an abstract object posited of the percept-concept of the object-*ākāra*, A is a re-conceptualization of the primary conceptual datum of B: a cognitive superimposition on it, that sublates the earlier representation of value into its opposite.

The body of the person as the intentional object of A thus ineliminably requires both cognitions of value, both *ākāras*. Lacking the first *ākāra*, it cannot sustain the putative value of the second. It is not the case that the second supersedes or displaces the first; rather, they must be co-intended as distinct *ākāra* in the perception of A vis-à-vis the body of the person, for LR even to be possible. The intending of value A thus implicitly entails the question: can value A coherently sustain both *ākāras*? If two cognitions of *ākāras* of the same *ālambana* contradict each other, then for Dharmakīrti they cannot manifest true knowledge of the object of which the *ālambana* is a supporting-condition.²⁰

²⁰ Note, the same *ālambana*, not different ones, which again implies that the relevant epistemic tension is not merely between contested concrete (thence, abolitionist) value B versus an abstract (thence, retributivist) value A—but rather within the constitution of (in this case) A itself. Dharmakīrti's claim registers whether values' *internal* structure vis-à-vis their

If LR's value A claims that the normative conceptual posit of the second mode-*ākāra* is primary, then the burden lies with LR to explain how the value of the mode-*ākāra* is greater than that of the object-*ākāra*, inasmuch as both are constitutive of its very cognition as a rational posit. LR can only directly do so by repudiating the constitutive value of its object-*ākāra*, which we have seen it cannot, and does not, do.

If the very perception of the mode-*ākāra* is ontologically and axiologically dependent on the object-*ākāra*, then value A entails an ambiguity between particular object and abstract object, between the intrinsic value of embodied value (of life) and the value of disembodied value (its deprivation). The value of embodied value B relies (inherently) on the living body, but *qua* value transcends the body (which it nevertheless also *is*). Similarly, the value of disembodied value A relies (*qua* 'justice', symbolically) on the body (that is its object) but *qua* value A transcends the body (which it thus *uses* for its symbolic-judicial purposes).

If we ask, as LR tacitly demands we do, whether the value of either B or A *ākāras* can be established, *qua value*, independent of ontological dependence on the body, and thus achieve autonomy as a value transcendental to its supporting-condition, then the only answer is that value A as the mode-*ākāra* (which simultaneously both (*qua* B) *is* and (*qua* A) *is not* the

ālambana entails incoherence or not. Hence, the moral (and modal) tension evident in lethal contestations between values (e.g., political protest-suicide), 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, Śrāvakayāna and Mahāyāna) Buddhist axiology between *ārya*- and bodhisattva-suicide, and a general prohibition of homicide. (Cf. n. 22, 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 tends to confirm that in a Buddhist context most kinds of act (and then, tokens of them) require a separate analysis.

body which is its intentional-object) has no independent basis upon which to assume an ontological or epistemic priority as an absolute negation of B. In this relation with the same supporting-condition, A (qua mode-*ākāra*) is dispensable but B (qua object-*ākāra*), *necessarily*, is not.

LR can try to claim, against all empirical evidence, that the object-*ākāra* of intrinsic value is not intrinsic, and that the Buddhist opponent must still justify why it is. In response, the Buddhist has three linked arguments: empirical, metaphysical, and soteriological.

First, the opponent might concede that the nullification of the universal primacy of B as the object-*ākāra* of the living person 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.

Second, to sustain the contrary is to repudiate the (for Mādhyamikas, *conventional*) truth of B as a universal and 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. 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.

Other possible subsidiaries of value 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. They might even include forms of *reformative*, but not lethal, punishment, itself serving

the enhancement of the primordial value which gives it sense: life as the immanent project of its own optimal self-understanding.²¹

Third, 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. 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 A. But if LR exclusively serves *the value of lethal retribution*,

²¹ We can note here a possible quandary given a claim for post-mortem karma, which might theoretically hold that capital punishment *serves* the cause of 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 entirely unclear whether, given karma as constituting impersonal, *a*-subjective causal processes, the *subjective* comprehension of (current life) wrongdoing 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 translife karma per se).

what distinguishes it from lying on a spectrum of more or less rationalized revenge? That is: that *suffering should be returned for suffering*.

§3. 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, and it does so on behalf of its object person, in their name as a legal member of the state.²² 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,

²² It is in this sense of legal homicide that, as a lethal act, capital punishment is also distinct from suicide, which would otherwise be vulnerable to the argument advanced above. It is plausible that, while reflexive, most suicide perpetrates the same axiological contradiction evident in LR. But, significantly unlike LR, its moral evaluation concerns the phenomenology of the affective, rational and soteric self-understanding of the autonomous agent, ambiguous because of the objective indetermination of its causes. 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. 20, above). Where the value of life is to sustain the possibility of its awakening from ignorance, the *ārya*-being (in having achieved that) has superseded that value as well, such that suicide does not compromise it.

affective, intentional, and social life (the Eightfold Path) that together 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.²³ On another hand, 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

²³ 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).

exacting justice, but then it is moral outrage that ultimately motivates 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*).²⁴ 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.

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²⁴ 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.

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