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The Death Penalty Debate: A Critical Examination of the Moral Justifications for Capital Punishment

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THE DEATH PENALTY DEBATE:
A CRITICAL EXAMINATION OF THE MORAL JUSTIFICATIONS FOR
CAPITAL PUNISHMENT

by

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A thesis submitted in partial fulfillment of the requirements
for the Honors in the Major Program in Philosophy
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at the University of Central Florida
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ABSTRACT

Capital punishment is a forceful moral issue that is frequently overlooked. This is possibly due to the reverence many have toward the rule of law or a passive acceptance of the status quo. In this thesis I will begin with a discussion of context to the topic of the death penalty in order to address potential biases. Then I examine not only the ethical merit of the death penalty but the foundational justifications for a system of criminal justice to show that the special relationship between the state and its citizens does not lend itself to or allow for the instantiation of the death penalty.

I look first to several theories of punishment selecting the most viable theory in order to make the most plausible case in favor of the death penalty. From there I establish that there is some intuitive merit to the notion that the vicious deserve unhappiness and see how far that intuition might extend. In this section I examine the merits and demerits of Kantian retributivism in order to address the many intricate ethical and political issues involved in the death penalty debate. I've chosen the Kantian ethical framework because of the nuance with which many of the problems of retribution are solved. Kant insets the enlightenment principles into his moral framework and provides reasoned explanations for there insistence, as such his work provides a background from which I will work through details and resolve contradictions.

I will then make an argument for the moral personhood of the state and sketch the special relationship it has to its citizens. Finally I will offer a system that incorporates the ideas developed in the previous sections and gives a practical answer to the death penalty debate. It is my ultimate argument that there is no absolute ban on the death penalty, possibly even some intuitive merit to the scheme, but ultimately many moral limitations

on its implementation.

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INTRODUCTION

For most people the death penalty debate is distant and theoretical. One of the arguments against even engaging this discussion is that such theoretical debate is useless because no one truly knows what their intuitions would be in such a confusing and painful situation. When I was fifteen a family friend was convicted of a triple homicide and I still can't say I have clear intuitions about the situation. On the one hand I see a monster that shot a six-year-old girl at point blank range and on the other I see the father of a disabled son who attended the family Christmas Eve party each year. His mother, who declined to testify in court, explained to me that while she would always love him she truly believed her son deserved to die. The sentiments of the victim's family ranged from pleas to end the violence to a stated desire to be the one to take Justin's life. August 2009 Justin Heyne was sentenced to be executed by lethal injection in 2015.¹

It is easy for most people to imagine murderers, especially those whose crime is considered heinous, as truly evil people deserving of death but the chances are that they are people who are capable of good and bad. At trial, the defense brought up the fact that Justin had an I.Q. of 88 and a cocktail of mental disorders and brain damage. They also brought up the fact that Justin was good to his disabled son and at the sentencing trial family and teachers told anecdotes of Justin giving his coat to a homeless man and defending weaker kids at school. The prosecutor demonstrated that Ivory, the 6-year-old girl, was tugging on Justin's shorts and was shot after her parents were incapacitated

¹ JUSTIN CURTIS HEYNE vs. STATE OF FLORIDA.

(thus diminishing any chance the murder was an accident in self-defense.) Probably the most sickening part of the trial was when the prosecution explained that the coroner found that Ivory had been slapped before her death so hard that the blood vessels in face burst.

This is not necessarily to say that that a crime of this nature begets its own punishment nor is it to say that no one, by right of his or her humanity, is deserving of death. The point I'm trying to make is that if one is going to participate in this discussion as an impartial observer, they cannot simply write off the humanity of the criminal. They must ignore surface inclinations to dismiss a person altogether as a monster and at the very least fully consider the humanity of the criminal and what making the decision to end a persons life truly means.

CONTEXT OF THE DEATH PENALTY DEBATE

In Plato's *Apology* Socrates describes why he feels he must follow the ruling of the jury and take his own life. Since then philosophers have examined the morality and policy of the death penalty, though more frequently than not it was used as an example to elucidate a larger picture of justice rather than a set piece in its own right.² Even though the death penalty was frequently implemented for petty theft until well into the 1700's, most of the scholarly writing focused on the execution of murderers and usually revolved around retributive or utilitarian considerations. Many philosophers insisted on the implementation of capital punishment, from Hobbes and Montesquieu to Kant and Mill, which seems in direct contrast to the idea of human dignity. The concept that humanity has some inherent value is one of the least controversial premises in post-enlightenment philosophy.

Though it is possible to judge an argument solely on its merit and not its context, it is possible that entrenched tradition associated with the death penalty may have skewed the intuitions of a great many thinkers and may still continue to do so. When an institution permeates a society it is difficult to test its negation. The death penalty is often defended as a necessity of justice and yet it is a relic of some of the most unjust periods in human history. It is much easier to fabricate a defense of a millennia old tradition than to confront the brutality of one's own inclinations.

“Throughout the greater part of human history punishment was not imposed because one held the wrongdoer responsible for his deed, thus not on the

² Bedau “*Bentham's Utilitarian Critique of the Death Penalty*” pg 1036, (1983)

presupposition that only the guilty one should be punished: rather, as parents still punish their children, from anger at some harm or injury, vented on the one who caused it—but this anger is held in check and modified by the idea that every injury has its equivalent and can actually be paid back, even if only through the pain of the culprit. And whence did this primeval, deeply rooted, perhaps by now ineradicable idea draw its power—this idea of an equivalence between injury and pain? ... in the contractual relationship between creditor and debtor, which is as old as the idea of "legal subjects" and in turn points back to the fundamental forms of buying, selling, barter, trade, and traffic.”³

Obviously Nietzsche had his own ideas about how to do philosophy, but there is something commonsensical about this line of reasoning. It seems reasonable, knowing what we do about the development of the human species, that indeed the strongest of a group was able to lash out at whomever he or she pleased and that practice evolved alongside societies and now manifests in the idea of retributive justice. But whether or not this is an accurate anthropological picture of the development of punishment throughout the ages, it provides an argument in favor of analyzing the debate under a new framework.

With the enlightenment principles (such as freedom, equality, rights, justice, and the value of human life) in mind, the standard for successfully arguing in favor of capital punishment is very high because taking a human life violates every one of the previous

³ Nietzsche “*On the Genealogy of Morals*” pg 471,(1969)

principles. In order to advocate the death penalty one must develop a theory of justice that establishes a value to be gained by executions that outweighs the significant costs. The chief ways of achieving this have been to point either to the guilt of the offender or the benefit to society. If we point to the guilt of the offender we must justify why only the death penalty is appropriate and necessary. If we point to the benefit to society we must justify why the benefit to society supersedes the grave consequences to the individual. Further, in order to justify the death penalty we must rule out any other considerations that may be overriding, such as an alternative theory of justice or otherwise unconsidered societal side effects.

JUSTIFICATIONS

As is the case with any form of argumentation if one does not accept the foundational principle upon which the argument is premised all further discussion is moot. In the death penalty debate the foundational principle is a theory of justice and in particular a theory of punishment. There are many theories and variations on those theories and it would be impossible to attempt to address them all in one body of work. I will give a brief explanation of Restitution (or Restorative Justice) and Deterrence and discuss the reasons they are not currently viable justifications for the death penalty. Ultimately I will focus on Retribution because I believe it presents a schema in which one can reasonably determine whether a person deserves death. Because Kant's ethical theory proceeds from the notion of human dignity I will frame the argument going forward on that system in order to give a reasonable perspective in favor of practical retribution.

Because Kant's theory of punishment relies heavily on his political theory and because punishment in general is linked to the state I will discuss the state's role as a moral actor. With emphasis on the enlightenment principles of human dignity, objective morality, and the value of life I will elaborate on Kant's metaphysics of justice as well as some elements of his moral theory as a whole in order to come to a conclusion about the death penalty. Finally I will discuss a type of punishment theory that involves retributive judgments of severity (in the form of a hierarchy of punishments), deterrent motivations, and limitations on who can be punished (namely those who have committed a crime).

Though his arguments lead to a retributive view of punishment, Immanuel Kant provides an interesting blend of elements when framing the execution of his ideal

criminal justice system. While the severity and amount of punishment are determined by purely retributive consideration, Kant allows for deterrent considerations in determining the manner of punishment. It may very well be the case that no single theory will provide a satisfactory answer to the death penalty debate and instead elements from each of the theories will be necessary to formulate an answer that adheres to the notion of human dignity. Kant achieves this goal to a large degree but there are still instances of contradiction in his work. In no uncertain terms Kant's moral theory supports capital punishment and the rule of law but I will discuss how this is one of the areas of disjunction in his work.

RESTITUTION

Restitution is a relatively recent theory and is based on rights such that, if A burns down B's house then A has violated B's right to his or her property and B is faced with the loss of a house and the inconveniences that follow. Thus A has taken from B and created a deficit. In the context of Restitution, a right can be described as a security in one's person or property that he or she has free and unencumbered use of, provided that use is not itself violating another person's rights. A violation results in an unjust distribution of entitlement leading to a right in the victim to remedy the imbalance up to the maximum reparation, which would be equivalent to the damage caused by the crime. This imbalance can be understood as a debt incurred by the offender to the victim.

By violating the right of the victim the perpetrator has opened him/herself up to be similarly treated. The mechanism for this is the caveat introduced in the initial explanation of rights, namely that one only has uninterrupted rights in so far as he or she does not use that right to harm others. Restitution takes this to mean that because the offender created the deficit they have the responsibility to repay it. Reparations may take the form of money or services paid to the victim of a crime by the perpetrator of the crime in order to remedy a rights violation. In this theory justice consists of the offender making right their wrong but in what way could execution reasonably be considered righting a wrong?

In the example of the death penalty, there is no benefit to the victim other than the fruition of vengeance, which is an ill-fitting aim of justice. For instance if there is no

physical or material harm to a victim merely insult or humiliation, that victim would be entitled to demand the perpetrator suffer insult in return. While we may agree that the good deserve happiness and the evil unhappiness, the force of this claim is lost when the sentence is determined by the whim of the victim. Restitution has admittedly takes the psychological affect of the victims into account. More over since, according to Restitution, the motives of the perpetrator needn't be examined the punishment be for an unintended insult would be as great as that of an intended insult if it were felt as deeply by the victim (for lack of a better word). If vengeance were to be taken seriously in restitution the results would certainly not reflect our intuitions about justice.

Further if we were to imagine a response to this problem that was suitably satisfying there is still the troubling issue of the vast degree of variation that is possible in a system of Restitution. Because the system of Restitution is primarily focused on the victim, the victim ultimately gets to decide the fate of the criminal, from full pardon up unto the full weight of the damages of their crime. Restitution is an easy calculation in the realm of violations to rights of property but it becomes more complicated when it is applied to violations of rights to personal security. Property can easily be measured by quantitative means and thus repaid in kind by a transfer of monies but bodily damage is a qualitative offense and thus is not so easily translated. While the victim is not the sole consideration in sentencing they play a substantial role.

For instance the extent to which the crime emotionally affects the victim is accounted for, even if the affect is purely the result of disposition. If the victim is inclined toward anger a transgression against him will affect them more powerfully than if it were

directed toward a victim who was more disposed to composure and thus the former would result in greater damages. Further in terms of a violations of the rights of a person a victim may choose not to receive any compensation at all due to the legitimate desire not to further their pain by involving themselves with the source of their distress. The result of considering the preference of the victim is a wide range of possible punishments for the same or similar crimes.

This leads to concerns about the practical application of a restorative theory of justice. Restorative justice requires a system to arbitrate disputes in a way that will result in a large variation of consequences. When such variation can sway from no consequences to execution based heavily and admittedly on a person's disposition, the system is likely to be viewed as arbitrary by the very people it is charged with mediating. In the current judicial system, which may in fact be effected by a group of people's disposition, this sort of influence is expressly avoided where possible. If an occasion arises where the public conception of a particular judgment is that it is being levied due solely or in large part to a disposition instead of properly processed law or judgments about the just response to the situation then the public has a grounds to dispute the decision or practice.

For instance, this is not necessarily the case in restitution but it is certainly vulnerable to this concern, the recent data uncovering the skewed sentencing practices toward certain races and racial composition of crimes. Where African Americans were sentenced to death at a much higher rate than their stake in the population and African American crimes against Caucasians were punished much more severely than the reverse.

In the current system this was outraged to the point of repealing the entire practice of the death penalty for a number of years, but victims were more strongly affected by one race due to prejudices that would be a legitimate concern in restorative justice.⁴

When trust in an official system is undercut there is a risk for informal systems to rise in popularity. These systems may seem more legitimate to the population than the current system while resulting in horrible consequences. For instance the use of religious council in Afghanistan, rising in popularity due to mistrust of a corrupted system, have led to the marriages of infants to grown men to settle monetary debt among other things.⁵ Ambiguity in punishment is likely to lead to an unstable system and thus in order to maintain a system of justice that will be respected and therefore have the ability to supply any restoration what so ever there needs to be a standard that is generally agreed upon.

If we have a system that only passingly considers the preferences of the victim but hold strong to one consistent principle then A) we must decide what that principle must be and B) a system with a central principle other than the restoration of the victim's damages is a system other than restitution. Also, if we include in this system an exemption for vengeance sought by the victim the system begins to look like Retribution rather than Restitution. Retribution also has to contend with criticisms regarding ambiguity in application but it is better equipped to address such claims due to its static underlying principle.

⁴ The Death Penalty Information Center “*Racial Disparities in Federal Death Penalty Prosecutions*” (1994)

⁵ United Nations Development Program “*Informal Justice Systems*” (2012)

DETERRENCE

The deterrence theory of punishment is at the same time easily accessible and utterly nebulous. It is generally the *prima facie* justification for punishment, possibly because it mirrors our intuitions about self-defense: if someone is attacking you it is necessary that you make them stop. In the same way if someone is attacking the community it is imperative that the authority of that community makes them stop.

This theory begins to become problematic when it extends this line of reasoning to the deterrence of a crime before it is committed, specifically before it is known to be a threat. In this case the deterrence theory of punishment devolves into a blanket statement amounting to “punishment is justified if it deters future crime.” This devolves because it is entirely unspecific: How much punishment is justified? What crimes justify what measures of deterrence? What constitutes a punishment? To what degree should a society aim to deter (i.e. wholly, maximally, maximally with the constraints of rights, etc.)?

To this end the deterrence theory of punishment must be paired with a set of societal values or a moral theory. While the idea that we should prevent pain and hardship where possible is relatively uncontroversial, the various ways of specifically formulating that general claim into a plan of action is wrought with complications that at least require careful consideration.

Utilitarianism is the most frequently cited moral theory that applies a deterrent justification of punishment. One of the biggest criticisms of the utilitarian moral theory is that it neglects the individual and ignores the concept of human dignity. This criticism is the result of a calculus central to Utilitarian moral theory that can be summarized as “the

greatest happiness for the greatest number.” Under this calculation, who benefits from the action – and at whose expense that benefit is derived - is not important and thus a great deal of injustice and brutality can be justified by the pleasure of the perpetrator.

Still, the deterrence theory of punishment is not inextricably linked to Utilitarianism and a critique of one is not necessarily a critique of the other. Deterrence could be framed around a theory of rights, namely that one has a right to their own body and property so far as they do not use that right to violate the rights of others. This formulation of right would establish both a need for protection and a means to justify violating this protection to pursue punishment (because under this conception one only has a right in so far as they are not using that right to violate the rights of others). Because this theory will ultimately not be the topic of discussion I will not develop an in depth theory and will instead move forward with the minimum theory of rights needed to discuss rights based deterrence as a possible theory.

Thus, under utilitarian theory the idea of deterring future crime in order to effectively protect the rights of all may be used as a justification for punishment. Here the concept of retribution isn't necessary because the focus is not righting a wrong but preventing future wrongs. It could conceivably be the case that public announcements of laws and well known follow through is the best way to convince someone on the brink of committing a crime not to go through with the action. ⁶We may even add the caveat that the violation one commits is the limit to which one can be punished. Ignoring for the moment the possibility of mistaken convictions, which is truly an issue with punishment

⁶ classical school of punishment

no matter what it's justification, there is one issue left standing with the concept of deterrence, namely does punishment *actually* deter future crime? This may seem like an obvious point, or maybe begging of the question 'why propose a theory of deterrence if punishment doesn't deter crime?' But accurate data on such a sensitive and large-scale question is hard to acquire. For example there is no naturally occurring control group and it is morally impermissible to arbitrarily assign the death penalty to some and not to others. Further measuring the actually rather than reported rate of deterrence in a population would involve tracking a statistically significant number of people in two areas, one randomly assigned the death penalty and the other the control, before these citizens ever committed a crime.

There is much philosophical rousing into the nature of man, for instance John Stuart Mill⁷ states that due to the unique nature of man the punishment of death is both more merciful than a life sentence and the most feared of all punishments making it a perfect utilitarian punishment because it minimizes the suffering of the victim while maximizing the deterrence effect netting the most over all happiness.

Hugo Adam Bedau⁸, a Harvard professor of philosophy, on the other hand argues that due to the unique nature of man the idea of deterrence, specifically in the case of the

⁷ John Stuart Mill "Speech in favor of Capital Punishment" (2015)

⁸ In "The Case Against the Death Penalty" Bedau states "Persons who commit murder and other crimes of personal violence either premeditate them or they do not. If the crime is premeditated, the criminal ordinarily concentrates on escaping detection, arrest, and conviction. The threat of even the severest punishment will not deter those who expect to escape detection and arrest. If the crime is not premeditated, then it is impossible to imagine how the threat of any punishment could deter it. Most capital crimes are committed during moments of great emotional stress or under the influence of drugs or alcohol, when logical thinking has been suspended. Impulsive or expressive violence is inflicted by persons heedless of the consequences to themselves as well as to others."

death penalty, is logically unsound. He argues that a crime is either premeditated or not, if it is premeditated then the focus of the criminal is not to be caught at all and if the crime is not premeditated there is no consideration to the consequences no matter what they may be.

While these are interesting and in some way appealing to common sense, the modern advancements in such technology have shown just how difficult decisive statistics on the matter can be to produce. Experts are torn on the matter and data has revealed everything from a marked reduction in homicide to a marked increase in homicides as a result of the death penalty. I will cite sources here⁹ to note the controversy but the evidence is clear that there is no decided fact of the matter among the experts. As such the matter remains unresolved. In the lack of conclusive evidence on the matter leaves a deterrence justification for the death penalty a possibility for which little can be said until further developments can be made.

Until such a development there is reason to err on the side of abolition. Several authors, such as Jeffery Reinman¹⁰ and Hugo Adam Bedau¹¹, have proposed an expansion on Caesar Baccaria's idea that the death penalty rather than saving lives actually degrades the societal respect for human life and thus increases the rate of violence. This seems to fall in league with the ponderings of the earlier mentioned philosopher, but if there is a chance not only that executing criminals results in no gain to society but that the abolition of the death penalty could save lives then the moral

⁹ Donohue "*Uses and Abuses of Empirical Evidence in the Death Penalty Debate*" pg 791 (2015)

¹⁰ Reiman "*Justice, Civilization, and the Death Penalty: Answering van den Haag*" pg 120-28 (1985)

¹¹ Bedau "*The Case Against the Death Penalty*" (2015)

community has a greater responsibility to side in favor of caution than to rely on one of many common sense proposals being offered.

RETRIBUTION

Having provided an explanation for and ultimately a dismissal of the other major theories of punishment I will focus on retribution for the rest of this thesis. Retribution is less susceptible to the criticisms of the other punishment theories because it is based on an idea that is intuitively sound: the virtuous deserve to be happy and the vicious deserve to be unhappy. It is difficult to see how that could be argued against in terms of ideal justice, but retribution implies a sort of proportionality in practice. The stipulation that punishment be proportionate to the crime causes one major point of confusion namely the question: what does proportionality entail? I will discuss the groundwork for retribution generally and move toward a specific formulation.

In both academic circles and popular consensus Retribution is becoming a more common moral justification for capital punishment. Intuitions are swaying from the severity of a numerical calculus to the more malleable abstracts of desert and responsibility. Many outside the philosophical community may not know they are using this sort of justification and in fact when named it is not an uncommon occurrence that retribution is mistaken for retaliation. While the two share some key components, namely their reciprocity, they are markedly different in emphasis. Retaliation is the act of harming someone because they have harmed you. Retribution is a punishment levied against someone because they have done something wrong. The emphasis of Retaliation is to return some hardship while the emphasis of retribution is to right a wrong.

With this in mind there are still several important ambiguities surrounding Retribution. First we must establish that a given punishment is in fact the correct

response to a given crime. Many theories accomplish this by simply applying a rule of equilibrium, for every crime there must be a punishment of equal effect. But there are other schools of thought that focus more heavily on the aspects of Retribution that limit the severity of a possible punishment rather than demand the equality of action and reaction.

Even if we can establish what constitutes just deserts and the existence of a necessity to impose responsibility on moral agents, what is the mechanism that demands a certain group of agents carries out the punishment? If that theory of just deserts falls in line with a moral equilibrium the body charged with balancing the equation (because if this is the case it is equally important to reward good acts as it is to punish bad acts) would necessarily be a universal karmic force. Unfortunately such power is yet unknown to humanity and we must settle for a criminal justice system.

While most justice systems throughout the world are developed with the express purpose of minimizing the convictions of innocent people and the escape of guilty people, such events continue to take place at an alarming rate. I am hesitant to throw the baby out with the bath water but when one seeks to have perfect equilibrium such mistakes seem incredibly damaging to the whole system. If the retributive system is designed to balance the scales of justice wrongful convictions exacerbate the problems instead of championing the cause

While it is true that the imperfections of humanity will have an effect on all justifications of punishment it is uniquely a problem for Retribution. In the utilitarian system such seeming mistakes can be justified by the overall satisfaction society received

from the idea that they have a working justice system. In Restitution the goal of the system is not to right wrongs but to compensate victims. Therefore in a system of Restitution wrongful convictions, while tragic, do not totally undermine the goal of the system as a whole as they do in the case of a Retributive system.

One problem with the requirement for equality is that it would necessitate reciprocity for good behavior as well and whatever force drives one body to punish would propel, if not the same group, another body to reward. But this is not worked into many formulations of retribution and certainly not in the systems currently seen. A possible counter argument for this point may be that controlling people's bad behaviors keeps others safe so there is impetus for outsiders to involve themselves. First this reasoning could just as easily apply to good behavior such as saving others from peril, helping others with potentially hazardous tasks, or even in a more material sense giving financial advice. Second this type of reasoning should not matter in a purely Retributive system because controlling behavior is not the aim of Retribution.

Since there are a number of ways to frame a retributive system I will start with the Kantian perspective and proceed from there. Kant is a viable candidate because he begins with several of the most universally appreciated concepts (some of which he was first to articulate) such as: equality among all people, negative rights, and the dignity of man. From these concepts Kant formulates a theory of retribution designed to respect the dignity of man on both counts, that of the victim and that of the culprit. It is both because of its recent popularity and the abstract principles that underlie retributive theory that I will move forward with it as the preferred theory of justice.

KANTIAN RETRIBUTIVISM

Kant's moral theory is in many ways reflective of his time. This may come as no surprise to those who are familiar with his method but Kant did not seek to alter traditions only to explain them in a coherent and intuitive way. This is the same methodology that led to his Copernican revolution in Philosophy of Mind. The result in Kant's moral theory is that, while the rationale behind it all may be innovative, what is morally permissible is ultimately in line with the Euro-Christian culture of his time. As culture has adapted, it is now the rationale that stands and is so widely appreciated. Thus there is a strange rift between the foundational principles that Kant sets forth (equality to all, duty not only to oneself but to other, the value of human life) and the severe nature of his theory of punishment.

Kant was novel in his idea that rationality could motivate one to action and it is in this idea that Kant formulates moral personhood. For Kant freedom is more than a lack of obstacles but the power of causal self-determination. Thus when he says "moral personality is nothing more than the freedom of a rational being under moral laws"¹² he means that moral personality, or the character of a specific agent's duties and relationships, is the ability to act in complete independence of any causes other than one's own reason. To be free therefore is to be morally responsible. A Person, with a moral personality, is thus "subject to no laws other than those that he gives himself (either alone or at least with others at the same time)." ¹³

¹² Ladd "The Metaphysical Elements of Justice" pg17, (1999)

¹³ Ibid.

Persons thus cannot be mere *things* because they possess the capacity to create their own ends. What has no true equivalent cannot have a price, because a moral agent has their own ends they must be considered an end in themselves and so there is no true equivalent. Thus human life is beyond all worth.¹⁴

Yet Kant also claims “if one has committed murder, he must die.”¹⁵ So how does Kant’s theory of punishment unfold to this conclusion? Kant’s theory of the justification is engaging because it attempts not only compatibility with the idea of human dignity but in fact proceeds directly from that premise. This is not to say that Kant’s formulation is entirely successful or even that it aims to be compatible with every variation on the concept of human dignity.

The basic tenant of retributive theory is the offender, in committing a crime, deserves a punishment. Kant is one of the best-known retributive proponents of the death penalty. His argument is roughly formulated as: in intentionally causing the death of an innocent person (i.e. not the execution of a murderer) the murderer has rendered himself deserving of death.¹⁶ An important thing to note here is that Kant draws a very clear line; someone may only be punished because they willed a punishable act. A person’s innate moral personality protects them from being used as a means to an end, whether that end is to his benefit or the benefit of society.

This means any supplementary justification of punishment, such as reforming the criminal or deterring future crime and thus minimizing the harm to society, may only be

¹⁴ Groundwork mm 53

¹⁵ Ladd “*Metaphysical Elements of Justice*” Pg139

¹⁶ Ladd “E on the right to punish and grant clemency” 6:333

an added benefit. Such justifications are not sufficient to authorize the violation of one's dignity but may be considered by the state after the guilty of the culprit has been determined. For Kant, justice ceases to be justice when it can be bought at any price whatsoever. That is to say that the full sentencing force must rely entirely on the principle of retribution that one is only punished because they are guilty and thus the punishment must be reflective of the crime.

Kant, like a great many philosophers, has a separate moral and political theory. The state plays a particularly important role in Kant's argument because according to him without a state one cannot have true freedom and thus one cannot have moral personality. Kant writes that in a state of nature there can be no justice because there is no law and thus it is a moral offense to break a law even if the law would otherwise carry no moral weight.

One important point that arises from Kant's legal theory is the characteristic of equality in justice. As Kant put it "justice is measured in the position of the needle on the scale of justice." This is true of any crime and is best demonstrated by Kant's description of theft, "when you steal from someone, you steal from yourself."¹⁷ In stealing from a member of the political community you deprive all the members of that community the security of their possessions, and so you deprive yourself any possible security in your own possessions. Kant's formulation of the state provides interesting insight into how this may follow. If we take for granted that in the absence of enforced law one can have no freedom it follows that a violation of the law would infringe on the freedom of the

¹⁷ Ladd pg138

community under the law. Because you have no security in your possessions “you have nothing and can acquire nothing” so the state must provide for you. But, Kant argues, they will not do so free of charge and this is where the state’s discretion to send a person to jail or debtor’s prison stems from.

Kant argues that sending someone to jail for the crime of theft may in fact be reflective of and equal to the crime. This is because he does not prescribe equality in act but in effect, the effect of the punishment must be equal to the crime. In number of instances simply retaliating in kind does not capture the full force of the crime. For instance if I am a professional piano player and you break my wrist I may no longer be able to make a living, so if your wrist is broken in return and it causes only discomfort the effect of the crime is not reflected. The suggestion here is that we use the effect of the original crime to balance the scale of justice, will the full and accurate force of the crime committed, rather than simply returning the action. In some ways this falls into the same trap deterrence theory finds itself in: some of the empirical evidence necessary for this ideal to be practically implemented is too difficult to attain or simply impossible to predict. This means that it is possible that Kant miscalculated the difference in effect of the death penalty and life in prison.

Further Kant points out that since this caveat dismisses the need for exact retaliation the state may, as it sees fit, alter the punishment to meet the needs of the state so long as it falls within the boundaries just established. Kant writes after guilt has been established the state should “punish in such a way that security be obtained.” This means that, for instance, the arrest and sentencing records can be publicized after each criminal

has gotten their due process in order to dissuade future criminal with the threat of a similar fate. Alternatively if one commits a particularly heinous or dreadful crime their punishment may be made public to deter future crime or ease public anxiety about the crimes. The argument made is that either way the morally correct action is to punish a criminal in a way reflective of their crime, if the state can use that punishment to their benefit then no harm done.

But if the proper punishment is not set in stone in the moment after the crime is committed then why is Kant so strict on murder necessitating capital punishment. In the first part of the metaphysical elements of justice Kant writes of the death penalty

“Even if a civil society resolved to dissolve itself with the consent of all its members- as might be supposed in the case of a people inhabiting an island resolving to separate and scatter themselves throughout the whole world- the last murderer lying in the prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realize the desert of his deeds, and 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.”¹⁸

Why does Kant have such harsh words for those who seek to find a justification for the abolition of the death penalty? Kant’s reasoning is that death shares no similarities with life (no matter how awful that life may be) hence there is no likeness between murder and any punishment other than death. Due to the fundamental difference between the two, life can never be equal to death, even in the more diluted sense previously

¹⁸ Ladd pg140

mentioned, and thus can never satisfy justice. For Kant failing to implement justice is a grave issue because when we let justice go “there is no longer any value in human beings’ living on earth.”

Yet Kant argues that while killing an innocent man is a mistake, letting a guilty man go free is a greater affront to justice. In Kant’s view failing to punish a guilty person has more moral gravity than executing an innocent person because when we fail to punish those who commit a crime we let justice go and, according to Kant, when we let justice go “there is no longer any value in human beings’ living on earth.”¹⁹

Isn’t a state fabricated injustice just as weighty, if not more, than the failure to execute an innocent man? One may argue that this is true of all punishment, and that if we are to follow this logic to its natural end there would be no justification for any punishment because a system of justice is just as likely to make a mistake in imprisonment as they are to mistakenly execute someone. The important thing to remember in regard to this point is the irrevocability of death. If a state imprisons someone for life and 20 years into the sentence it is discovered by way of DNA evidence the convict is not guilty then the convict can be released, his honor restored, and reparations from the state can begin to be made. If a man is executed and later found to be innocent there is no chance for reparations. While monetary reparations cannot fully repay lost time and freedom, there is a point at which the harm can be stopped and an attempt to recover losses can be made.

¹⁹ Ladd pg37

Further in the case of a wrongful conviction that is not overturned there is a second injustice: the lack of conviction of the true criminal. In this case justice is not satisfied and it is violated at the same time. Practically speaking the presence of a living prisoner advocating their innocence at the least provides some emphasis for further inquiry into the crime. In such a case there is some chance that the wrong may be righted and the guilty convicted. One may argue that a system of criminal justice can be more or less accurate but barring an omniscient entity there will always be some mistakes.

This critique poses the question, if the goal is to right moral wrong and the state of things is such that humanity is incapable of doing this perfectly and thus the very system designed to correct injustice is perpetuating injustice then are we left with unjust death? Kant wrote that to avoid murder was a perfect duty. In his opposition to utilitarianism Kant states that to take one innocent life to save others is not morally right action. The morality of an action depends on the action itself and not the consequences. According to Kant's the idea that we must treat humanity as an end in itself is inconsistent with murder, even the murder of oneself. In the groundwork for the metaphysics of moral Kant states "I cannot, therefore, dispose in any way of a man in my own person so as to mutilate him, to damage or kill him."

We must ask ourselves if the goal of moral certitude in acute accuracy of retaliation is worth even one innocent life. How great must the divide be between life and death that a life of imprisonment is in no way approaching equivalence to death? John Stuart Mill believed the death penalty should be implemented not because it was more

severe but because it was most merciful. In his address to parliament²⁰ Mill argues that the human brain tricks itself into the fear of death because it is unknown, while in fact a life of imprisonment is far worse. It is true that life and death are dissimilar but so is thievery and imprisonment. It is difficult to argue against the intrinsic value of the virtuous deserving happiness and the vicious deserving unhappiness but if the question is “should there be a system that returns most crimes but if in so doing it causes further irreparable injustice?” then an imperfectly balanced punishment, in the form of life sentences, seems the morally permissible answer.

²⁰ Mill “Speech in Favor of Capital Punishment”

THE STATE

The question of the state and the role of the punisher introduce a new element into the debate. There is a duty not to harm others in respecting them as an end in themselves and not as merely a means. Since, as such, it is morally impermissible to kill, in what way does the guilt of the culprit alter that duty?

Surely we cannot say that harming another person is punishment if the agent responsible for the harm is unaware of the guilt of their victim. This implies a distinction between the mere guilt of the recipient of punishment and the moral certitude of the punisher. For instance, we can imagine a situation where a serial killer executes a pedophile unaware of the pedophilic nature of his victim. In such a case the guilt of the victim does not alter the serial killer's duty not to harm others and would not be considered a punishment for the pedophile's crimes. Though some may consider the result of the circumstances (i.e. the death of the pedophile) just, the serial killer is still morally blameworthy for their actions.

When an established criminal justice system pursues punishment there is no such ignorance of the fact, the state acts on a set of procedures designed to determine the guilt of the recipient of punishment. It can be argued that in many cases a vigilante may be just as aware, possibly more if they directly witnessed the crime, of the guilt of the culprit. Yet there is some distinction between an organized and recognized state and a layperson carrying out a punishment.

Assume the legal punishment for a heinous murder/s was the death penalty. Assume there was a vigilante who was compelled and able to execute criminals in a manner similar to the state excluding a public trial. For the time being we are going to

ignore the possibility of wrongful conviction and assume, while there would be no trial in fact, had there been a trial the result would have been the same. Even if we isolate the guilt of the victim as a constant there is a distinction in moral culpability between the state and a vigilante.

In the same way that a passerby on the street would be judged harshly for stepping in to punish a schoolyard bully, the fact that a vigilante is taking matters into their own hands distinguishes them from an established criminal justice system. Because the vigilante is an unrelated peer there is something unsettling about them taking matters into their own hands. Thus the instinct would be to assign guilt to a vigilante for such action, though, it such instinct is generally weaker in this example than the next.

Now let's assume instead the legal punishment for the same crime was twenty years in prison. Again we will assume that there was no trial in fact but had there been one it would have produced the same result. We are to assume the vigilante could replicate the treatment a convict would receive in prison down to the food, amount of social interaction (maybe the vigilante has a large estate where they house many criminals), and recreational time they receive.

Surely it seems far more morally impermissible for a vigilante to take this sort of punishment into their hands. While in the case of the state we are less likely to question this form of punishment for a heinous crime and are more likely to deem this a merciful or far (if not totally negligent), in the case of a vigilante the common intuition would be to deem this cruel and unusual. The fact that our intuitions lead us naturally to a distinction between a non-related member of the public assigning punishment, even when

guilt is clearly established, and a recognized criminal justice system leads us to believe that it is not merely the fact of the guilt of the victim nor the knowledge of the guilt of the victim but some other consideration that justifies one executing the punishment of another person.

This brings to light an interesting issue: in what way does the position and moral personality of the punisher affect the justice of the punishment? Is the state exempt from moral judgments, more culpable due to the greater degree of responsible, or something else entirely? According to Kant the state is the legislative power and is thus above moral judgment. Kant was a staunch legal positivist and that comes into conflict with his metaphysically bases moral theory and many of the problematic elements discussed above stem from Kant's political theory.

Kant's formulation of civil duties involves a perfect duty to obey the laws of the state, even though he acknowledged that the state might create unjust or morally blameworthy laws. This is founded in the underlying principle of freedom because without the state all rights are in peril and so no rights can be secure. This is one of Kant's areas of contradiction, for instance he derives an absolute prohibition on revolution and in the same breath celebrates the French revolution²¹. The conflict between the foundational elements of ethics and Kant's political model is never resolved or directly addressed in the metaphysics of morals.

In order to address this contraction we will use Kant's requirements for moral agency to prove the state qualifies for moral personhood and then discuss the

²¹ Ladd pg120

implications of this. Kant develops three qualifications for moral personhood²²: unconstrained ability to choose one's own actions, subject to moral imputation, and rationality. These are more or less common requirements for moral personhood. Often the first requirement is described as freedom but that has connotations to the free will debate and Kant means something else entirely by freedom. The first requirement for moral personhood simply refers to the idea that the agent is not coerced, for instance, by a gun to the head or pair of handcuffs. There is no external force that is controlling their actions. To be very clear this external force does not have to be cognizant, for instance if I make a promise to deliver a letter and in route I fall into a hole covered over by debris, even if no one laid the trap, I am now restrained from fulfilling my promise and my ability to change that state of affairs is nil. Normal restraints, such as the anatomical inability to fly and monetary limitations, are not included as coercive forces because there is no external force inflicting the state of affairs.

The second requirement refers to the ability to assign responsibility to an agent. Can we say that the agent is the proximate cause for an event? For instance can we say that, if a cat walks along a table and kicks over a glass, the cat is cited as the reason the glass shatters? We surely wouldn't assign that event to the person who placed the glass on the table or the laws of physics that allowed the glass to fall and shatter. This requirement paired with the first requirement still does not amount to moral personhood because it is too broad a category. While discounting inanimate objects and agents under

²² Ladd pg88

coercion, these two requirements allow for the inclusion of nonhuman animals, very young children, and mentally handicapped humans.

The final requirement sufficiently narrows that field. Rationality in this sense is not meant to refer to the economic picture of a rational maximizer or an even a particularly intelligent individual. Rationality in this sense refers to two things: that the agent has some understanding of the likely consequences of their actions and that the agent has some idea of their place in their action. Rationality in the former sense refers to a range of ability from a goldfish, which likely doesn't understand the concept of cause and effect at all, to a mentally ill person who suffers from delusions and sincerely believes the likely consequences of their actions to be things that are extraordinarily unlikely to be the case.

An example of the latter can be pointed to in the recent trial of Eddie Ray Routh. His defense was that when the murder occurred he was in the grips of a post-traumatic flash back. The appeal in this defense is to the notion that he was unclear about where he was and what his place was in the situation. Routh claims to believe that Chris Kyle and Chad Littlefield were combatants trying to assassinate him and thus he acted in self-defense. In this case Routh claimed not to understand his place in the physical circumstance he found himself in²³. Many cognitive scientists would argue non-human animal have no sense of self and thus cannot know their place in their circumstances. Further it is clear mentally handicapped people and very small children do not understand the role they play in the circumstance around them.

²³ CNN "*Accused Killer of American Sniper*"

A state, whether it is composed of a single leader or a cooperative union of all citizens, meets these criteria. While a state in general and a criminal justice system in particular may be constrained by budgetary boundaries and procedural obstacles, the laws that a given state makes and the way in which it enforces them could fail to be the case – that is to say they could be otherwise. Further it is clear that the state is the proximate cause for the criminal justice system: they enact the laws that dictate crime, they investigate reported crimes, and they execute the punishment of criminals once convicted. Finally the state is made up of non-handicapped adult individuals and thus fulfills the requirement of rationality. It is clear that though the state is made up of individual persons, the moral personality of the group changes when they enter the group. This is not a totally foreign concept, for instance the moral personality of an agent changes when they become a parent due to the introduction of new responsibility, similarly with friendship or romance.

So in what way is a state different than a vigilante or a group of vigilantes? If the state and the individual both fulfill the requirements of moral personhood then the state is not, as Kant wrote, morally exempt. How, then, is the distinction in intuitions explainable? One answer is that, through its various processes and procedures, a formal state has a unique ability to efficiently determine guilt or innocence. The argument states that through the uniform instantiation of an investigation, a trial, and a sentence the state earns its authority and distinguishes itself from a layperson.

In distinguishing between the guilt of the criminal and the position and moral personality of the punisher I introduced an example where the vigilante is a first hand

witness to the crime. In that case the guilt of the victim would be surer to the vigilante than to a state after a trial. Unless one wishes to argue that the mere fact of a trial changes our intuitions about the propriety of a punishment then we can point only to the disparity between the likely guilt or innocence of the recipient of a punishment. For example we can imagine a punisher whose character would guarantee a just punishment with no possibility for wrongful convictions. We will use the philosophical character of God as classically constructed (all knowing, all powerful, all good, all present) for simplicity sake but the character in question is not attached to any other connotation of God (first mover, the father, the protector, etc.). Here we are simply to imagine an entity that could not fail to punish justly. If we were to then judge the merit of that character against that of a vigilante we can see how the mere fact that there is no possibility for mistake makes a compelling case for the exclusive authority of the former character to sentence punishment. It is clear to see though, that the state does not possess a perfect character.

*“Since 1973, over 130 people have been released from death rows throughout the country due to evidence of their wrongful convictions. In 2003 alone, 10 wrongfully convicted defendants were released from death row.”*²⁴

It is surely a moral question whether some innocent people may be harmed in order to punish the guilty, but facts show that even systems designed to minimize this effect have a sizable failure rate. Thus it comes down to a rate of accuracy, it is not a question of the moral permissibility of wrongful convictions and instead a question of

²⁴ Amnesty international *“Death Penalty and Innocence”*

how many wrongful convictions are morally permissible. Therefore the first answer to the moral distinction between a criminal justice system and a vigilante is a practical rather than a moral distinction.

Another possible answer is that the state has a unique responsibility to protect its citizens and thus a vested interest in seeing criminals stopped. This is a fine argument for a deterrent theorist but how does it work for a deontologist or the retributivist? Here we can turn back to Kantian deontology, which argues that the state is an intrinsic component of our moral duties. The same point that earlier lead to inconsistency fits nicely under this schema. Because in a state of nature no person would be secure enough in their own lives to make unencumbered choices everyone would fail to meet the first requirement of moral personhood.

The example of coercion given earlier was an agent threatening another with lethal force, a gun to the head. This example works because most people are motivated to preserve their own lives. In a state of nature there is no stability and no one can be secure in their lives or their possessions. Thus the character of a state, namely its role as stabilizing force, defines a special relationship that manifests a moral obligation to protect its citizens and further a monopoly on that responsibility. So while a state may only punish proportionally and for reasons of guilt, the state may punish in a manner that best protects its citizens.

This leaves us with a basic sketch of the moral personality of the state. A state has moral personhood but it is not equal to that of an individual. The moral personhood of the state is not the amalgamation of the duties of the individuals of the state but a separate

entity. While their merger alters the individuals who join the union, their duties are thus shifted to encompass the duties they hold in their position; the state itself has a moral relationship that is absent in each one of the individual members. The secretary of agriculture does not have a responsibility to protect the rights of each and every citizen and the Dutch translator at the American embassy does not have a responsibility to assume the criminally accused are innocent until proven guilty. This moral character is colored but the duty to maintain stability and protect the citizens and so must go into every policy and procedure available to the state.

With moral personality comes moral responsibility and moral judgment but the question of how to judge a state is a complicated one. Because the state is singular in its moral character it has a monopoly on force and distinct from any punishable set of agents so the familiar punitive measures do not apply. This conflict can be resolved by the articulation of an idea that has been present throughout this paper, which is a distinction between ideal and actual justice.

Ideal justice is the realm of moral judgments. Many actions can be judged morally impermissible that are not and should not be crimes such as adultery or lying. It is only those actions that invoke a special relationship that are punished. A schoolyard bully may in fact be acting in a way that is morally impermissible yet is not susceptible to punishment until a teacher or parent is involved. Further a child is susceptible to punishment for actions we may even consider morally neutral due to their relationship with their parent, namely the parents responsibility to guide the development of the child.

There are instances where punishment may be deserved but without a vehicle of

the proper authority to carry this out. Moral judgment is separate, though not entirely unrelated to, the practice of punishment so it is not inconsistent to say that we can make moral judgments about the state without necessitating forceful punishment. Instead the punitive measures will be just the judgment themselves and motivating change in the system such that if it is determined a state's action is morally impermissible the citizens use political means (such as lobbying or voting) or nonpolitical means (such as civil disobedience or rebellion) to change or reform the state in such a way that it ceases the morally impermissible action.

Nowhere in this formulation of the state's moral personality can we point to a mechanism to create a duty in the state to kill all murders. So while we may be able to establish a justification for the judgment that all murders deserve to die it is not clear that it is the duty of the state to execute them. Further the moral personhood of the state resolves the contradiction between the ideal notions of justice and the in practice limitations of any group of people that results in wrongful convictions. This formulation of the state leaves room for moral judgment and so we can conclude that wrongful convictions are morally impermissible without overturning the whole concept of justice. Instead that judgment leads to a constant effort to reform the criminal justice system and stay vigilante to avoid and minimize wrongful convictions. Still we have to flesh out what a state functioning on this schema would look like, so we must resolve what effect the requirement for proportionality in retribution would have on the actions of a state.

HIERARCHY OF PUNISHMENT

The force of retribution is the appeal of a characterization of justice as balance, that the virtuous deserve happiness and the vicious deserve unhappiness. In Kant's example the needle of justice moves in one direction when undeserved evil is done and in the opposite direction when that evil is rectified. This seems to ignore and exclude when morally praiseworthy action is done. If retribution were truly aimed toward striking a balance it would be equally morally obligatory to reward morally praiseworthy action.

The problem at hand refers back to the distinction between ideal and actual justice, while we could point to the justice of a universal karmic force no individual or group of individuals has that responsibility. Further a systematic lack of reward for morally praiseworthy action does not threaten the possibility of morality and thus does not necessitate an entity like a state. The moral personality of the state, as that of the protector, gives rise to not only the responsibility to punish but also the authority to intervene in the lives of individuals whose actions do not directly affect the state. Kant can be seen as referring to the responsibility of the state to protect its citizens while restricted by the categorical imperative such that punishment can only be carried out onto those who have committed crimes and a punishment can be no greater than the crime. But there is still some ambiguity in how those requirements are met. Inherent in retribution is the question of what embodies proportionality: Is balance struck when a crime is returned in action, an eye for an eye? Or when the effect of a crime is met in kind? Or rather is it balanced when the highest crime met with the highest punishment?

If equality in punishment is meant to denote equality in action then to a large degree our intuitions about justice are ignored. It is worth pointing out here that Kant did not advocate a system of *lex talionis* and in large part such a system is considered to be retaliation rather than retribution. There could be large variations in the effect of a punishment, for instance theft. If a man has almost no personal wealth and embezzles a million dollars the man could have all of his worldly possessions striped from him and be indentured to pay off the rest of the money owed, as opposed to a man with a great deal of personal wealth who embezzles a similar amount of money just for the thrill where there is no harm done when that money is recovered. Alternatively we can think of a less quantifiable example such as a professional piano player who breaks someone's hand in a fight. A piano player whose hands are broken is not only physically punished but also robbed of their means of earning a living. Thus the same action they perpetrated, exacted upon them causes greater harm. This clearly does not strike the balance we are looking to find in so far as the degree to which one is vicious does not match the unhappiness they suffer.

This leads to the second possibility, that balance is struck when the effect of the crime is matched by the punishment. This is the system Kant advocated, the one that lead him to believe that the crime of murder must and can only be punished by death. So how might one go about punishing to the same effect as the crime? Kant argues that we use a system whereby the severity of crime and punishment is measured in what the average person would deem it to be relative to other crimes and punishments. For instance the average person would deem loss of a limb to be more severe than lashes and prison more

severe than a fine. So if we have a crime that we would see unfit to repeat, such as rape, or that we are unable to repeat in kind, such as pedophilia, then we simply assign a punishment most would agree is roughly equal to the crime in effect. If there is this sort of trade and barter system, how then does Kant get to the inescapability of sentencing murders to death?

Kant says that categorically death is distinct from life and no form of life, no matter how wretched, could match death in effect. Yet it is not clear that “most people” would consider this the case and it is an example of a whole class of issues on which the public opinion varies. Euthanasia is an instance where many people would choose death over life. There is also a broad swinging variation in what people feel is equivalent to rape. Further the moral personality of the state is founded on the protection of its citizens and thus has restrictions of its own; we can imagine this is where the bar on cruel and unusual punishment stems from. The reason we would consider rape unfit to punish rape is due to the moral personality of the state and the facts of the execution of punishment. In order to execute that punishment there must be someone assigned to rape rapists and that person would be desensitized to a horrid and degrading act.

Kant, in his dealings with our duties to animals, argues that there are actions that are not in themselves immoral and yet lead to the degradation of one’s humane qualities.²⁵ He argues that these actions should still be avoided because they can lead people to cruelty toward humans. While Kant never directly applies this argument to punishment it fits nicely in the schema developed here upon his moral theory. Even

²⁵ Heath “Lectures in Ethics” Pg 212-213 (1997)

though we can establish the justice in seeing that murderers are executed and even though we have developed an entity with the authority to do so, there is still reason to avoid the death penalty. In most western nations there is a ban on corporal punishment not only as abominable to the person suffering the punishment but as a practice that tends to degrade the humanity of the punisher. Yet states that have come to this consensus about bodily harm seem to discount the nature of an execution. Surely the methods have become more humane over time but then end result is an irreversible severe bodily harm.²⁶

Further assigning death to every murderer also does not match the viciousness of the criminal to the level suffering they incur. If our gravest punishment is death and we sentence all murderers to death there will certainly be disproportionality in sentencing due to the broad definition of “murderer.” Surely we would assign more blame to a person who killed 4 people in cold blood than someone who killed their stepfather after years of abuse, and yet according to Kant they are to receive the same punishment. Kant uses the case of the Scottish rebellion to address this concern²⁷: He states that a man of honor is deserving of less punishment, but as a man of honor they would prefer death to convict labor so is less severely punished by death. Similarly the man “scoundrel” would prefer convict labor and is therefore more severely punished by death. This logic may hold for this example but it is not clear that every person who commits a lesser crime is an “honorable man” and every person who commits a higher crime is a “scoundrel.”

²⁶ Many have made this claim such as Stephen pinker and Jeffery murphy, that the less violence we encounter the more it offends us when we do and thus the less likely we are to stand for it.

²⁷ Ladd pg140

This does not address the distinction between those who kill out of emotion and those who kill in cold blood. A person who kills their long time abuser may very well prefer a life sentence and indeed many offenders strike plea agreements in order to insure life in prison over the death penalty. Moreover, even if we are to assume this logic follow in cases of a single murder or several murders, surely there is a distinction between a serial killer who murders less than ten people and a warlord responsible for genocide or the death of thousands or hundreds of thousands.

Punishing according to proportionality in measure avoids both of these concerns. Proportionality in measure can be thought of as a hierarchy of punishment where the greatest punishment a state can implement is assigned to the worst crimes that can be committed and adjusted for each crime, for example, a judicial system that had the death penalty for those who are most repugnant, life in prison for those who commit heinous murder, 25 year for man slaughter and so on. This system implements the intuitive ranking of punishment and a matching of the level of viciousness to the level of punishment avoiding the temptation to punish a crime in a manner equal to itself and instead punishing in a manner proportionate to other crimes. Only those who have committed wrong action can be punished and they should be punished in the way that does not pardon the crime entirely yet is no more severe than the crime itself. The exact punishment should be tapered to practical circumstances, namely the sentences of relative crimes and the level of societal condemnation associated to those crimes.

Further a proportionate system would be more clearly able to express societal condemnation of a crime, setting moral norms and conveying them to the population as

more than arbitrary rules. Earlier I established ground for the state to punish in a manner that would create stability and clearly establishing a link between punishment and societal condemnation lends to this goal. Even for a moral realist it is possible to see how a set of societal norms (with room for adaptation as we approach a better understanding of moral truth) can be positive, even necessary to create a stable foundation from which we can progress. When society uses the worst possible punishment for common criminal it decreases the expressive effect and increases that societies tolerance for death. With this in mind we can establish a hierarchy of punishment, one in which the death penalty is reserved for only those crimes that are absolutely abhorrent to the common consciences i.e. genocide, mass torture and mass extra judicial killing. In reserving the most severe possible punishment for those who commit such crimes, a society can more appropriately express the condemnation it wishes to establish.

CONCLUSION

The question of the death penalty is more than a question of who is deserving of the death, but rather a multifaceted question with political and moral implications for the victims or families of the victims, the punishers, and the culprit. There is an intuitive notion of justice in the idea that the good deserve happiness and the evil deserve unhappiness and while retributive notions of who deserves punishment may be difficult to fault, there is a distinction between who deserves punishment and who can rightly be punished. There must be more than desert on the part of the culprit in order to punish because there is a second moral element, that of the punisher.

In this thesis the punisher in question is the state. In Kant's formulation the state is above the reach of mere imputation yet sustains all of the characteristics of moral personhood. While the nature of the state is distinct from any other agent, a state as an entity possesses personhood. The duties of the state are colored by the necessity of its existence to provide the security under which morality can thrive; therefore the state must pursue justice but this picture of the moral personality of the state leaves open the question of justice.

While adhering to the notion of the good deserving good and the bad deserving bad we are not forced to assume that desert is equal in any particular regard. Surely desert would be meaningless if it were applied so loosely as to be arbitrary, but the general notion stated above does not exclude the possibility of proportionality rather than equality. The law of *lex talionis* prescribes equal proportions of harm retaliated in the same manner as the original crime. Kant prescribes equal proportions of harm levied against a culprit in

a manner that best suites the state. I assert that the intuitive notion conveyed in the earlier statement of justice can be maintained without necessitating equal proportions. Through a system of a hierarchy of punishment a proportion is maintained, though not an equal proportion, that preserved the intuitive notion of justice while conforming to the limitations place by the moral character of the state as a punisher. This system would not eliminate the death penalty altogether but limit is use to extreme cases of heinous criminals. This would have the dual function of satisfying the demands of justice while more clearly conveying societal outrage.

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