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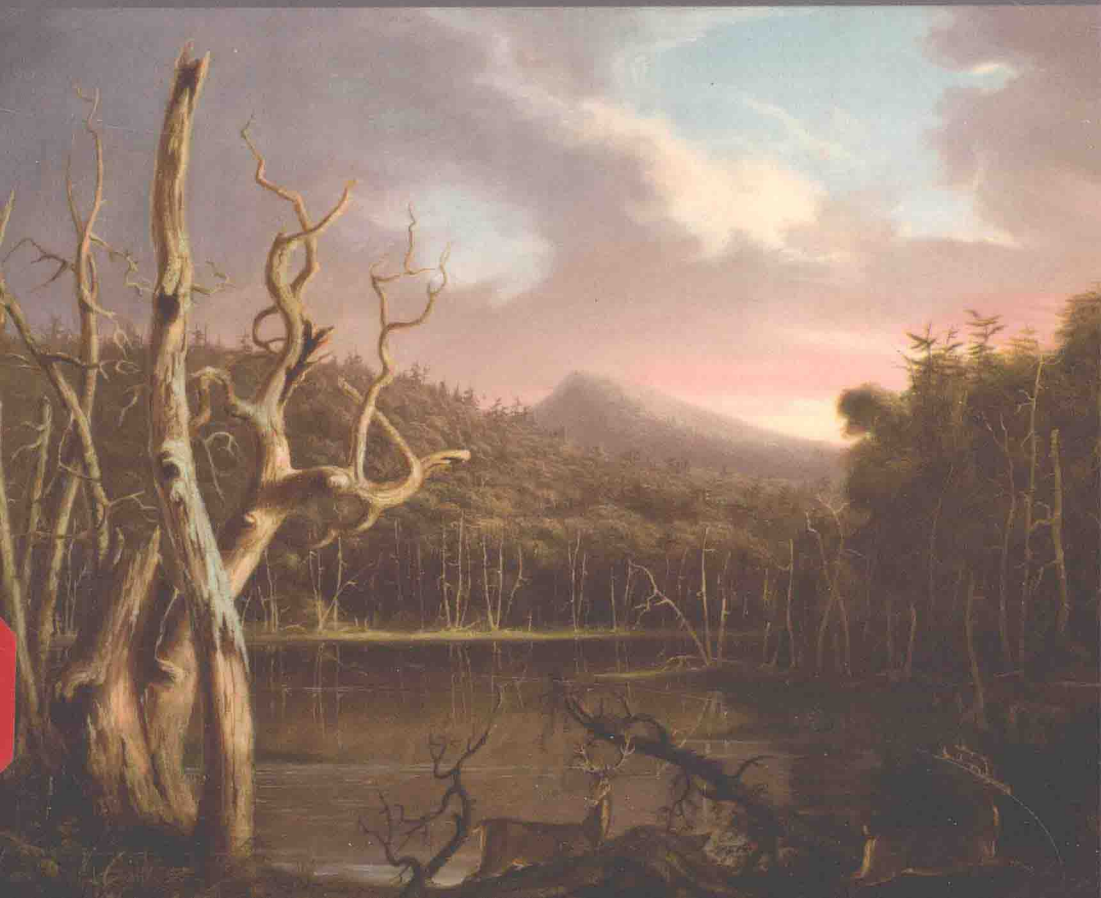
The Ethics of Capital Punishment

A Philosophical Investigation of Evil and Its Consequences

MATTHEW H. KRAMER



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Preface

When I was eight years old, I learned about the Holocaust and the subsequent trials at Nuremberg. During the months that followed my discovery of those events, my ruminations led me to develop inchoately one of the ideas at the core of the pivotal sixth chapter in this book. I remember thinking that it would have been morally grotesque if the trials of some of the major Nazi leaders had ended with sentences that would involve the devotion of resources to sustaining the lives of those leaders. That line of thought—reinforced by my recognition that, in slightly different circumstances, Hitler and Goebbels and Mengele and Heydrich would have been among those who were placed on trial—ultimately evolved into the purgative rationale for capital punishment.

I am a philosopher, and this book is a work of philosophy. However, because I want the book to be accessible to readers who are unfamiliar with philosophical technicalities, I have usually sought to elucidate any specialized philosophical phrases when they first appear. My explanations are mostly in the form of terse footnotes, but at a few junctures I have provided longer expositions.

This is not a book on American constitutional law or on the law of punishment in any other jurisdiction. Though I occasionally refer to some features of American law and to some aspects of the role of capital punishment in American life, the philosophical orientation of this volume leads me generally to prescind from the specificities of any particular jurisdiction. Whereas some of my conclusions about capital punishment are in accordance with the current law in the United States, many of them are not, and I only intermittently touch upon the points of convergence and divergence. As this book presents a philosophical investigation of the death penalty, it does not undertake any sustained efforts to track the correspondence (or lack of correspondence) between the results of that investigation and the details of any existent legal doctrines. My aim is primarily prescriptive; this volume seeks to recount, at a very high level of abstraction, what the law concerning capital punishment in any liberal-democratic jurisdiction should be.

I owe thanks to many people—nearly all of whom are opposed to capital punishment—for their generous help in my writing of this book. Alex Flach at the Oxford University Press has been an excellent editor, in keeping with his adept handling of some of my previous books. The anonymous readers whom he recruited were likewise superb, with perceptive comments that have salutarily prompted many modifications. I am very grateful to them. I am grateful as well to Natasha Flemming, Matthew Humphrys, and the rest of the production team at the OUP.

Norman Geras several years ago asked me to write a short account of my views on capital punishment for his blog. Though I now regard that account as extremely rough and facile, it murkily prefigured the structure of this book. I wish to express warm

thanks to Norm for his invitation, which he extended despite his own opposition to the death penalty.

Eve Garrard and Steve de Wijze provided some invaluable feedback on Chapter 6, and Eve in particular has engaged in some remarkably helpful correspondence concerning the nature of evil. I am extremely grateful to both of them for prodding me to sharpen my thinking about evil. Especially fruitful was my encounter with Eve and Steve at a conference in Manchester (England) in November 2009. Also present at that conference were some other people to whom I am very grateful for their thought-provoking comments: Ian Carter, Norm Geras (again), Eric Mack, Jonathan Quong, Hillel Steiner, Zofia Stemplowska, and Peter Vallentyne.

Of great value as well have been conversations with several of the philosophers who have visited Cambridge during the past few years: Thom Brooks, Alan Brudner, Robert Gibbs, Claire Grant, and Russ Shafer-Landau. (I am also grateful to Thom for supplying me with an offprint of his important article on capital punishment.) I have likewise benefited considerably from conversations with several Cantabrigians: Mark Hanin, Jules Holroyd, Antje du-Bois Pedain, Andrew Simester, and Andrew von Hirsch. Some email exchanges with my twin brother Mark Kramer have also been helpful.

Finally, I should make special mention of Dan Markel, whom I have never met. In the late autumn of 2010, he undertook the entirely supererogatory labour of reading every chapter and making extensive comments thereon. I have profited hugely from his suggestions and queries, and have responded to most of them (though of course I have not embraced his opposition to capital punishment). With his investment of so much time and intellectual effort in a project that runs partly contrary to his own sophisticated position on the death penalty, he has been a model of scholarly generosity and integrity.

Matthew H. Kramer

Cambridge, England

January 2011

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Introduction

1.1. The limits of the enquiry

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

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

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

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

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

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

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

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

1.2. A matter of justification

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

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

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

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

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

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

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

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

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

1.2.1. A first caveat

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

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

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