

Kramer's Purgative Rationale for Capital Punishment – A Critique

by John Danaher*

forthcoming in *Criminal Law and Philosophy*

Abstract

Matthew Kramer has recently defended a novel justification for the death penalty, something he calls the purgative rationale. According to this rationale, the death penalty can be justifiably implemented if it is necessary in order to purge defilingly evil offenders from a moral community. Kramer claims that this rationale overcomes the problems associated with traditional rationales for the death penalty. Although Kramer is to be commended for carving out a novel niche in a well-worn dialectical space, I argue that his rationale falls somewhat short of the mark. By his own lights, a successful justification of the death penalty must show that death is the minimally invasive, most humane means to some legitimate moral end. But even if we grant that his rationale picks out a legitimate moral end, there are at least three alternatives to death, either ignored or not fully considered by Kramer, which would seem to satisfy that end in a less invasive, more humane manner.

Keywords: Death Penalty; Capital Punishment; Purgative Rationale; Matthew Kramer

* PhD (UCC), Lecturer in Law, Keele University

1. Introduction

The death penalty is the ultimate punishment. To kill another human being is *prima facie* wrong,¹ so if the state is going to implement a system of capital punishment, it needs to ensure that it is morally justified in so doing. Whether this is the case has been the subject of a protracted and heated ethical debate.² Proponents of the death penalty argue that it plays a necessary role in securing justice, deterring criminality, and denouncing wrongdoing; while opponents of the death penalty argue that a state-sanctioned machinery of death is deeply unjust, cruel and unusual, and undermined by ineluctable failures in legal procedures.³

In light of this dialectical state of affairs, Matthew Kramer's recent book *The Ethics of Capital Punishment*⁴ is to be welcomed. With his characteristic thoughtfulness and sophistication, Kramer carefully dissects the traditional rationales for the death penalty and exposes their shortcomings. Those who were previously enamoured with such rationales, or who have themselves sought to critique them, will learn much from Kramer's analysis.

But Kramer is not a death penalty opponent. His critical dissection is intended to clear the way for a new rationale for the death penalty, something Kramer calls the *purgative rationale*. According to this, the death penalty can be justifiably implemented whenever it is necessary in order to purge defilingly evil offenders from moral communities.

This article argues that the purgative rationale, like the rationales Kramer himself criticises, falls short of the mark. By the terms set by in his own critique of the traditional rationales, Kramer holds that the death penalty can only be justified if it is

¹ Note I use the term "prima facie" in an epistemic sense here, not a moral one. In other words, I am claiming that, at a first glance or initial level of inspection, to kill another human being is wrong. Further scrutiny may reveal this to be mistaken. This clarification is necessary since I am engaging with the work of Matthew Kramer, who has written extensively about the different uses of the term "prima facie" in ethical discourse and the tendency for this to confuse. See Kramer "Michael Moore on Torture, Morality and the Law" (2012) 25 *Ratio Juris* 472-495

² See, for an overview, Bedau and Cassell (eds) *Debating the Death Penalty* (Oxford: OUP, 2005) and Reiman, J. and Pojman, L. *The Death Penalty: For and Against* (Oxford: Rowman and Littlefield, 1997)

³ See, for example, Stephen Nathanson *An Eye for an Eye?* (2nd Edn, Oxford: Rowman and Littlefield, 2001)

⁴ Kramer, M. *The Ethics of Capital Punishment: A Philosophical Investigation of Evil and Its Consequences* (Oxford: OUP, 2011), hereinafter *Ethics of Capital Punishment*.

the least invasive, and most humane means to some morally legitimate end. But it is doubtful whether the purgative rationale satisfies those demands. Even if we grant that the rationale singles out a morally legitimate end – and we shall need to be careful in identifying what that end is – the death penalty is unlikely to be the least invasive, most humane means for achieving it. Indeed, it seems that there are at least three other ways in which to purge evil from a community that are morally superior to death.

The article proceeds in four main stages. First, I briefly consider Kramer's critiques of two traditional rationales for the death penalty — the retributive rationale and the deterrence rationale. Understanding his criticisms is crucial because they effectively set up a test that any successful rationale for the death penalty must pass. Second, I try to reconstruct Kramer's argument in favour of the purgative rationale. This turns out to be far from easy. Kramer is nothing if not painstaking in his conceptual articulation of the rationale, but for all that he fails to specify the crucial premises of his argument in favour of the purgative duty. The most plausible version of the argument, and the one that Kramer accepts,⁵ holds that the purgative duty is derived from a more general duty to restore moral order to a community (the *restorative* argument). There might, however, be an alternative version of the argument, rejected by Kramer,⁶ which sees the duty to purge as, in some sense, ethically basic (the *purgative* argument). Third, I argue that the *restorative* argument fails to uniquely specify the death penalty in the manner required by Kramer's test. Hence, his case for the purgative rationale fails. Fourth, I consider the merits of this *purgative* argument, which although it has some obvious shortcomings raises several interesting questions about the justification of the death penalty, and also adds some further plausibility to the overarching critique of Kramer's defence of the purgative rationale.

⁵ Kramer acted as a reviewer for this paper and made clear to me in his review which version of the argument he endorsed and felt could be reconciled with his writings. I will occasionally refer to comments made in his review elsewhere in this article. I do so by referring to "Kramer, Personal Correspondence".

⁶ *Ibid* and *The Ethics of Capital Punishment*, p. 114 which rejects the notion that capital punishment occupies the foundational level of morality.

2. What is Kramer's Test for a successful rationale?

One of the cornerstones of Kramer's book is the sustained critique to which he subjects traditional rationales for the death penalty. The upshot of this sustained critique is a test, which I here call "Kramer's Test". By his own lights, any successful rationale for the death penalty must pass this test so it is crucial that we understand its elements. Reviewing the problems facing two popular rationales for the death penalty allows us to do so.⁷

The two rationales considered here are the *deterrence rationale* and the *retributive rationale*. Proponents of the deterrence rationale hold that punishments are justified if they can deter criminality⁸ or, more narrowly, particular forms of criminality (such as murder). On this rationale, one form of punishment (P1) is more justified than another (P2), if P1 produces a greater *marginal* deterrent effect than P2. For death penalty advocates, the claim is that death produces a greater deterrent effect than alternative forms of punishment (such as life in prison without possibility of parole), and because this in turn serves some more general consequentialist aim, it is justified.⁹ Proponents of the retributive rationale hold that punishments are justified if they give the offender what they deserve; that is: if they *fit* the crime. Most retributivists hold that punishments are not only justified in the weak sense of being a necessary evil, but that punishments are themselves intrinsically good¹⁰ because they give people their due. The fittingness-relationship to which retributivists appeal can vary. Some hold that punishments must be *proportionate*, *i.e.* of roughly equal weight in the punishment scale as the crime was in the wrongdoing scale. Some hold that punishments must be *commensurate*, *i.e.* of roughly quantitative equivalence to the wrongdoing. And some hold that punishments

⁷ In total, Kramer critiques four rationales for the death penalty: (i) the deterrence rationale; (ii) the retributive rationale; (iii) the incapacitative rationale; and (iv) the denunciatory rationale. Although I only review the first two here, the critiques of the other two follow similar lines.

⁸ For general discussions, see Boonin *The Problem of Punishment* (Cambridge University Press, 2008), chapter 2, Zimmerman, M. *The Immorality of Punishment* (London: Broadview Press, 2011), chapter 2. Although both Boonin and Zimmerman are both very critical of deterrence theories, they give good outlines of them.

⁹ Kramer's basic discussion of this rationale can be found on pgs 20-23. For a defence of this position see Sunstein, C. and Vermeule, A. "Is Capital Punishment Morally Required? Acts, Omissions and Life-Life Tradeoffs" (2005) 58 *Stanford Law Review* 703. Of course, proponents of the deterrence rationale need to adduce evidence which proves the presence of the claimed marginal deterrent effect. See Donohue, J. and Wolfers, J. "Uses and Abuses of Empirical Evidence in the Death Penalty Debate" (2005) 58 *Stanford Law Review* 791 for a discussion of this.

¹⁰ See, generally, Moore "Justifying Retributivism" (1993) 27 *Israel Law Review* 16, and *Placing Blame* (Oxford: Clarendon Press, 1997).

must *qualitatively match* the wrongdoing (the *lex talionis* or eye-for-an-eye principle).¹¹ Whatever the particularities of their views, if a retributivist is to support the death penalty, it will be on the grounds that death is the fitting punishment for at least some forms of criminality.¹²

The first problem that Kramer sees for both rationales is that they fail to satisfy the demands of the Minimal Invasion Principle (MIP). According to this principle, a policy or practice — particularly, though not necessarily, a policy or practice implemented by the state — is justified if and only if it is the minimally invasive means to securing some morally legitimate end. The kinds of proportionality tests that are commonly employed in legal contexts are redolent of the MIP. Whether the MIP is itself justified does not concern me here. I shall simply assume that it is. What is of concern are the reasons for thinking that both the deterrence and retributive rationales fail to satisfy the demands of this principle.

What are these reasons? Both rationales specify a (supposedly) morally legitimate end for punishment,¹³ deterrence in the one case and just deserts in the other. The problem, as Kramer sees it, is that there is no reason to think that death is the minimally invasive means for securing those ends. If one wants to achieve a significant deterrent effect, then there are arguably other forms of punishment that will do just that without going so far as the death penalty. For example, the particular end that retributivists wish to achieve — whether they are fans of proportionality, commensurateness or qualitative matching — is fuzzy. It is not immediately obvious that death is proportionate or commensurate or qualitatively similar to whichever kind of wrong is specified by the retributive rationale (*e.g.* murder). Indeed, there are reasons, which I shall not rehearse

¹¹ See Corlett, J. A. *Responsibility and Punishment* (4th Edn, Dordrecht: Springer, 2012) for an extreme endorsement of this. See also Waldron, J. “Lex Talionis” (1992) 34 *Arizona Law Review* 25, on the *lex talionis*.

¹² *Ethics of Capital Punishment*, Chapter 3 for his discussion and critique of retributive justifications of the death penalty.

¹³ It is not my desire to cast doubt on the legitimacy of the ends in this particular article. The bracketed “supposedly” was inserted merely in deference to the fact that there are those who think punishment cannot be morally justified. For two recent defences of this thesis see Boonin and Zimmerman (n 8).

here, for thinking that other forms of punishment might satisfy the fittingness-relationship.¹⁴

So much for the first problem. The second problem challenges both rationales from almost the exact opposite direction. As Kramer sees it, there are certain kinds of punitive practice — *e.g.* “prolonged torture, boiling in oil, executing the close relatives of convicts, burning at the stake”¹⁵ — that can never be justifiably implemented. This is because these forms of punishment are inhumane, failing to respect human dignity.¹⁶ For Kramer, dignity is constituted by three (endowed) properties of humans: (i) the capacity to feel intense pain; (ii) the capacity to have positive experiences and (iii) the status of being a rational agent that can set and pursue sophisticated goals.¹⁷ The problem with the kinds of punishments just listed is that they do not respect these properties. In particular they demonstrate a callous exploitation of the capacity to feel intense pain.¹⁸ Because of this they cannot be justified. We shall call the principle that endorses this conclusion the Humane Treatment Principle (HTP).

Both the deterrence and retributive rationales run afoul of the HTP. Kramer argues, persuasively in my opinion, that if one adopts a deterrence-based justification of punishment, there is no principled upper limit on the kinds of punishment one can endorse. If it can be empirically proven that boiling people in oil has a greater marginal deterrent effect than administering the lethal injection, then so be it. Similarly, if one is a retributivist, particularly a retributivist who endorses the qualitative matching version of the fittingness-relationship, then one can arguably endorse inhumane forms of punishment. For instance, if an offender carries out a sadistic torture, rape and murder of his/her victims, then the matching principle arguably justifies the torture, rape and (eventual) murder of the offender. Now, few retributivists will actually endorse this,¹⁹ but Kramer’s point is that any constraint they place on the justifying power of their

¹⁴ *Ethics of Capital Punishment*, chapter 3, sections 3.3 and 3.4 for this critique. These sections are quite long (approximately 30 pgs), so a representative example of his criticisms (relating specifically to qualitative matching) can be found on pp. 130-135.

¹⁵ *Ethics of Capital Punishment*, p. 127.

¹⁶ He repeats this at several points. The most general discussion can be found in *Ethics of Capital Punishment* s. 2.4.2.2.2 and later in 3.2.2

¹⁷ *Ethics of Capital Punishment* p. 61 (and clarified further on p. 62).

¹⁸ Kramer seems particular hung-up about punishments which exploit the capacity to feel intense pain, see *Ethics of Capital Punishment* p. 62 and, later, pp. 112-113 with the capacity to feel pain.

¹⁹ Corlett (n. 11) is the one who, in recent memory, has endorsed something like this.

theory must come from outside the core principles of that theory. In other words, retributivism *by itself* fails to comport with the HTP. Something additional is needed.

In sum, the failure of the deterrence and retributive rationales boils down to a failure to *uniquely specify death as the appropriate punishment*. And the failure of unique specification links back to the failure of both rationales to comport with the MIP and the HTP. This gives us Kramer's Test, a test that any successful rationale for the death penalty must pass.

Kramer's Test: A principle or rationale for the death penalty is successful if and only if it specifies some morally acceptable/desirable end for which death is:

- (a) the least invasive means for securing that end (*i.e.* the rationale is compatible with the Minimum Invasion Principle); and
- (b) the most²⁰ humane means for securing that end (*i.e.* the rationale is compatible with the Humane Treatment Principle).

Kramer thinks that his preferred rationale can pass this test, but I disagree. To see why, I first need to outline the argument he offers in its favour.

3. What is Kramer's argument for the purgative rationale?

This section reconstructs Kramer's purgative argument for the death penalty. The reconstruction is necessary if a serious analysis and evaluation of the purgative rationale is to take place. But the reconstructive task is not an easy one. Although Kramer dedicates over eighty pages of his book to the articulation of the purgative rationale, few of those pages actually *defend* the rationale itself.²¹ Furthermore, the few pages that do defend the rationale do not do so in a formal manner. At no juncture does Kramer stop to identify the key empirical and normative premises of his argument.

²⁰ I have added this to my specification of the test, even though the preceding discussion did not couch the HTP in terms of degrees of humaneness. The reasons for this will become clear in section 4, below.

²¹ Most attention is dedicated to outlining a secular concept of evil and specifying what the rationale does not entail. *Ethics of Capital Punishment* pp. 188-223 and the majority of 230-262.

What follows is my attempt to identify those premises and reconstruct the argument. I base this on several key portions of Kramer's text²² as well as some reading between the lines. I start my reconstruction by looking at two paradigmatic instances of defiling evil that Kramer uses to motivate the rationale. I follow this by presenting two versions of the argument. The first version argues that the duty to purge offenders from a community is derived from a more general duty to restore moral order to that community. This is probably the most plausible version of the argument, and the one that Kramer says he endorses.²³ Nevertheless, in the interests of completeness, and since Kramer himself does not directly address the possibility,²⁴ I also identify a second version of the argument which holds that the purgative duty is, in some sense, ethically basic. I critique both versions of the argument in sections 4 and 5.

The gist of the purgative rationale is straightforward enough: the death penalty is (strongly) justified²⁵ whenever death is needed in order to purge defilingly evil offenders from a moral community. The language that Kramer employs here is somewhat unfortunate. For starters, the concept of evil has significant religious connotations, which is likely to put off many secular moral philosophers. Furthermore, the word "defilement" has connotations of moral disgust and hygiene, both of which have insalubrious histories. But Kramer is quite clear that, at least in his usage, the notion of "defiling evil" is intended to have neither connotation. On the religious

²² *Ethics of Capital Punishment*: (i) pp. 181-187, in which Kramer presents the "gist" of the purgative rationale by reference to biblical example of the execution of Achan; (ii) pp. 226-230, in which Kramer re-states the gist of the rationale, now shorn of its religious connotations; and (iii) pp. 232-237, in which Kramer explains why the community is the focus of the purgative rationale and why only death will do as a punishment. Other aspects of Kramer's discussion of defilement and purgation (section 6.3 of chapter 6) are relevant too, but those three seemed key to me.

²³ Kramer, Personal Correspondence

²⁴ Kramer makes it clear that he rejects the notion that capital punishment occupies the foundational level of morality (*Ethics of Capital Punishment*, p. 114). Kramer makes this assertion while criticizing Dan Markel's view that the inconsistency between capital punishment and human dignity, rejected by some retributivists, is a self-evident and foundational fact of morality. When I eventually critique the notion that the purgative duty is ethically basic, I make a somewhat similar move to Markel by suggesting that it is implausible to think this is so because such a duty is strongly inconsistent with another ethically basic fact: that killing is *prima facie* wrong. However, my arguments are based on the links between moral epistemology and moral ontology, and allow for the possibility of overturning or overriding such facts. Indeed, the restorative version of the purgative rationale may do exactly that, which is something to bear in mind when assessing its merits.

²⁵ By strongly justified, Kramer means that the death penalty is (at least sometimes) both obligatory *and* permissible. The distinction between strong and weak justification has been a long-standing feature of Kramer's work. See *Ethics of Capital Punishment*, pp. 256-260. Kramer holds that something is weakly justified when it is obligatory but impermissible, and strongly justified when it is both obligatory and permissible. Kramer's conceptualisation of weak justification may seem slightly perverse to some because they accept, what he calls, the "Permissibility Theorem" of deontic logic. According to this theorem, if something is obligatory then it is necessarily permissible. In other words, it is not possible for something to be both obligatory and impermissible. But Kramer rejects the Permissibility Theorem. See Kramer, M. *Where Law and Morality Meet* (Oxford: OUP, 2004) at pgs. 282-283.

question, Kramer dedicates considerable energies to the articulation of a fully secular account of evil, and on the disgust issue he writes that his wording is intended to capture the “extreme [moral] gravity” of certain actions, not the “emotional reactions which those actions tend to provoke”.²⁶

To underscore this, Kramer presents two paradigmatic instances of “defilingly evil” conduct, the gravity of which even secular and rational moral philosophers should recognise. The two are called *Richard’s Case* and *Joseph’s Case*. The first is based closely on the real life case of Richard Ramirez, a serial killer who went on killing spree in the mid-1980s in California. The second is inspired by a combination of the real-life cases of Josef Fritzl and Josef Mengele. Richard’s case tells the story of a man who engages in a series of grisly murders over a period of several months. He frequently binds his victims (who are all women), then rapes, tortures and mutilates them. He derives intense sadistic pleasure from the rape, torture and murder, and he occasionally consumes portions of the remains of his victims. Josef’s case involves a man who does not perpetrate any murders but instead kidnaps young girls, and imprisons them in a network of rooms beneath his house. Once there, he binds them to a wall, amputates their hands and legs (without using anaesthesia) and carries out a series of pseudoscientific experiments on their bodies. He also occasionally visits them for sessions of rape and torture.

These are, no doubt, morally abhorrent actions. They are also empirically plausible and this is something Kramer is keen to emphasise. His goal is to show that the death penalty is justified in plausible real world cases, not just in some hypothetical case constructed by a philosopher. One can appreciate why: in attempting to articulate a new rationale for the death penalty, it would be a hollow victory indeed if the rationale turned out only to apply in some unrealistic, hypothetical world.²⁷ So the need for empirical plausibility is something we need to bear in mind both in appreciating and assessing his argument.

²⁶ *Ethics of Capital Punishment* p. 225 on this point.

²⁷ *Ethics of Capital Punishment*, p. 226. This seems to be why Kramer dedicates so much attention to the procedural problems associated with the death penalty in chapter 7 of his book.

More important than their empirical plausibility, however, is the role that these two motivating cases play in the defence of the purgative rationale. As Kramer sees it, the communities in which Richard and Joseph live are being morally corrupted by their continued existence.²⁸ As a result those communities would be justified — strongly so — in killing both offenders.

There are some gaps in the reasoning here. Some quotations from Kramer might help us to fill in the gaps. Initially commenting on the reaction to the cases of Richard and Joseph, Kramer has this to say:

“...each of them has perpetrated grotesque iniquities that besmirch the moral standing of the community in which each of them respectively abides. Though there is not any collective responsibility for the original iniquities themselves (in the absence of any facts that would implicate people who were acting as public officials), there is collective responsibility for the continued existence of each of the perpetrators. Because there is collective responsibility of the latter kind, and because the continued existence of Richard or Joseph defiles any community which bears that responsibility, such a community is under a moral obligation to resort to capital punishment.”²⁹

Three important points emerge from this quotation. First, there is some further detail about the nature of defiling evil. We are told, at least in this instance, it consists in the besmirchment of the moral standing of the community. Second, we are introduced to the notion of a collective responsibility/duty for the continued existence of the offenders, *i.e.* we are told that the community as a whole has moral control and authority over the

²⁸ They are not morally corrupted by Richard and Joseph’s *acts*, unless public officials are somehow implicated in them, *e.g.* by negligently performing law enforcement duties. This focus on the continued existence of the morally depraved offenders, as opposed to their acts, is an important feature of Kramer’s rationale, and provides an obvious counterpoint to retributive rationales, which focus more directly on the wrongdoer’s actions. The focus does raise the question: are acts of wrongdoing needed at all on Kramer’s account? He says that they are, that merely expressing or having an attitude of moral contempt is not enough. (*Ethics of Capital Punishment*, pp. 231-232) His defence of that view is sketchy, seemingly arguing (p. 232) that, for example, Richard’s moral depravity would not be possible without, and could not be detached from, his evil acts. A critic of Kramer might be able to challenge this by identifying an empirically plausible possible person who has an equivalent level of moral depravity but with no concomitant actions. This would throw open some interesting avenues of debate. But I tend to think that the link between the kind of extreme moral depravity singled out by Kramer’s rationale and morally evil actions is modally robust, and so I leave the development of such a critique to others.

²⁹ *Ethics of Capital Punishment*, pp. 228-229

lives of the offenders. And third, there is the suggestion that the duty is such that capital punishment is required to discharge it. Still, the quotation leaves much unsaid. In particular, we are left wondering: what is the precise nature of the moral besmirchment involved in these cases? And how do we get from that moral besmirchment, via a collective responsibility, to the conclusion that death is strongly justified?

The following quote provides some further clarification:

“When iniquities are on the scale of those perpetrated by Richard or Joseph, they bespeak not only utter contempt for particular individuals and for the moral order of the community in which the iniquities occur, but also utter contempt for basic human capacities and thus for humankind as a whole. Contempt of the latter sort...is what a secular rendering of the purgative rationale should recognize as depravity. Such depravity, embodied by Richard or Joseph, poses an affront to humankind so long as either of them remains alive. That depravity therefore taints the relationship between Richard’s community or Joseph’s community and the rest of humanity. Removing the taint in each case requires terminating the existence of Richard or Joseph.”³⁰

This clarifies the nature of the moral besmirchment involved in defilingly evil acts. As Kramer points out, such acts do not just harm particular individuals, and damage the stability and security of the relevant community — though they certainly do both of those things — they also damage the relationship between the community and humanity. It is the more general type of damage that is particularly troublesome. In this instance, “humanity” is understood in an abstract sense. It is not that the relationship between the community and particular human persons has been corrupted by Richard and Joseph, rather it is the fact that the relationship between the community and the morally salient properties of persons as whole (the three properties of dignity highlighted earlier) has been corrupted. The suggestion then is that the community has a

³⁰ *Ethics of Capital Punishment*, p. 230.

duty to remove this corrupting taint and that this can only be achieved by terminating the existence of Richard and Joseph.³¹

This provides us with the background we need to formulate Kramer's argument for the purgative rationale. As I said earlier, I will consider two possible formulations of the argument. Although both will have premises talking about moral besmirchment (or corruption), community responsibilities and empirical plausibility, they will differ specifically in how they understand those community responsibilities. The first version of the argument — which I shall call the Restorative Argument — assumes that the duty to purge derives from a more general community-level duty to restore or repair damage to its moral standing. The second argument — which I shall call the Purgative Argument — assumes that the duty to purge is basic, *i.e.* not derived from any more general community duties. Kramer endorses the first version of the argument, and so addressing its premises is the major focus in the remainder of the article. Nevertheless, the second version of the argument is worthy of consideration too insofar as it highlights an alternative way in which to justify the purgative rationale that is not explored by Kramer.

Here then is restorative version of the argument:

Restorative Argument

(1) If the moral order and standing of a community C (relative to humankind) has been corrupted or defiled, then C has a duty to do what is necessary to restore or repair their moral order and standing (the *Restoration Principle*).

(2) In certain empirically plausible cases (such as Richard's and Joseph's) a person (S) can corrupt or defile the moral order and standing of the community in which they abide.

³¹ I should note in passing that some of the foundational metaphysical claims here — *e.g.* that there really is a defensible notion of moral besmirchment or that the tainting relation is a real one — strike me as implausible, but I am going to concede these claims to Kramer. My critique will focus on the internal coherence of his rationale, not on the plausibility of its foundations.

(3) Therefore, in those empirically plausible cases, C has a duty to do whatever is necessary to restore or repair their moral order and standing.

(4) In these empirically plausible cases, the only thing that will restore the moral standing of C is the death of S (the *Exclusivity Claim*).

(5) Therefore, in empirically plausible cases, C has a duty to kill S in order to restore their moral order and standing.

The two key premises of this argument are premise (1), which states the motivating moral principle, and premise (4), which claims that death is the exclusive means for satisfying the purgative duty. The latter, in effect, is claiming that the purgative rationale satisfies Kramer's Test.

The second version of the argument is structurally similar, but changes the motivating moral principle such that the duty to purge is basic. It is not clear that this version of the argument needs an exclusivity claim since, as we shall discuss below, "purge" can probably be understood as being semantically equivalent to "kill" or "terminate" if we are viewing the duty to purge as ethically basic. So, for the time being at any rate, this version of the argument will drop the exclusivity claim. As follows:

Purgative Argument

(1*) If the moral order and standing of a community C (relative to humanity) is corrupted or defiled by the existence of particular persons, then C has a duty to purge those persons from C (the *Purgative Principle*).

(2) In certain empirically plausible cases (such as Richard's and Joseph's) a person (S) can corrupt or defile the moral order and standing of the community in which they abide.

(3*) Therefore, in those empirically plausible cases, C has a duty to purge S from C.

Both versions of the argument are valid, so what needs to be assessed is the truth/plausibility of their premises. This will be undertaken in the remaining sections of the article, starting with the restorative version of the argument in section 4.

Before that, however, two limitations of the arguments should be highlighted. First, as emphasised by Kramer, the number of cases in which death is warranted under the purgative rationale is slight. Only where the wrongdoing of the offenders rises to the level envisaged in Richard's or Joseph's case will death be justifiable, and even then some caution must be expressed. The moral concepts that are employed here are, admittedly and unavoidably, vague.³² Although there are paradigmatic cases, there may be many borderline cases where we are not sure whether the wrongdoing is sufficiently "flagitious" to fall within the category of defiling evil. In those cases, given the nature of the death penalty, Kramer feels we should resolve our uncertainty in favour of life, not death.³³

Second, again as emphasised by Kramer, the obligation to kill may, in certain cases, be overridden³⁴ by other obligations and considerations. In particular, Kramer suggests that if the system imposing the death penalty is riddled with serious procedural flaws, it would probably be obligatory not to carry out the death penalty, even if it is justified in the particular case.³⁵

4. Does Kramer's rationale pass Kramer's Test?

This section of the article evaluates premise (4) of the Restorative Argument, which states:

³² See the discussion of vagueness in *The Ethics of Capital Punishment* pp. 252-256; see also Kramer, M. "When is there not one right answer?" (2008) 53 *American Journal of Jurisprudence* 49.

³³ *Ethics of Capital Punishment*, p. 254

³⁴ Though he would probably prefer the term "overtopped", see *Where Law and Morality Meet* (n 24) and "Moore on Torture, Morality and the Law" (n 1)

³⁵ *Ethics of Capital Punishment*, pp. 256-264 and Chapter 7 on this point.

(4) In these empirically plausible cases, the only thing that will restore/repair the moral standing of C is the death of S (the *Exclusivity Claim*).

This premise is what is used to derive the duty to terminate from the duty to restore/repair. It puts forth an exclusivity claim, proposing that the only way to satisfy the restorative/reparative duty in the case of offenders who have committed acts of defiling evil — *i.e.* offenders like Richard and Joseph — is to kill them. This is to be defended by reference to Kramer’s test. To satisfy this test three conditions must be met. First, there must be some morally legitimate end or goal in mind. Second, death must, in the particular case, be the minimally invasive means of achieving that end (that is, death must be compatible with the MIP). And third, death must, in the particular case, be the most humane means of achieving that end (that is, the death must be compatible with the HTP). Humane treatment, in turn, requires that respect be shown for the three elements of human dignity mentioned earlier: (i) the capacity to feel intense pain; (ii) the capacity to have positive experiences and (iii) the status of being a rational agent that can set and pursue sophisticated goals.³⁶

For present purposes we can assume that the restorative/reparative end is morally commendable. The question then becomes whether the death penalty satisfies the other requirements of Kramer’s test. Is death the minimally invasive means to achieving restoration (in the case of defilingly evil offenders)? And is death the most humane means of achieving the end of restoration? To answer those questions satisfactorily, one would have to exhaustively enumerate alternative punishments (or treatments) that plausibly *seem* to satisfy the demands of restoration and explain why each of them fails.

Kramer only considers two such alternatives: banishment and life imprisonment without possibility of parole (in different kinds of conditions). In a moment, I will argue that these two alternatives do not exhaust the possibilities. Before that, however, I want to briefly explore why Kramer rejects these two alternatives. Doing so assists in our understanding of the nature and application of Kramer’s Test.

³⁶ *Ethics of Capital Punishment* pp. 61-62.

Let us first consider the possibility of banishment. Superficially, this might seem to satisfy the reparative duty. In the case of banishment, the person who is morally corrupting the community is removed from that community, and hence the community is restored to a state of moral harmony.³⁷ Kramer concedes that this seems to have been viewed as an acceptable form of purgation in ancient communities (he specifically mentions the example in Sophocles's *Oedipus Rex*), but he nevertheless rejects it:

*“Under my own secular rendering of the purgative rationale, however, banishment cannot ever aptly serve as a substitute for the death penalty. Banishment can result in a vast physical distance between a defilingly evil offender and his community, but it does not result in any comparable normative distance...it is an officially chosen route for perpetuating an affront to humanity. When a defilingly evil offender is exiled rather than executed, the blight on the relationship between his community and the rest of humanity persists.”*³⁸

We have here two important notions. First, that in order to discharge the duty, the community has to create sufficient “normative distance” between itself and the corrupting influence. Second, that this distance cannot be created by allowing the corrupting influence to persist in another geographical location. It can only be satisfied by removing or quashing that influence, neither of which can be achieved by simply creating spatial distance between the community and the source of corruption. The fact that the community allows the corrupting influence to persist means that its moral relationship with humanity is still impaired.³⁹ Indeed, in the modern world, it would at best simply foist the corrupting influence on to another community in a geographically distinct location.

Now let us consider the possibility of life imprisonment rather than execution. Here, Kramer points to the moral problems associated with the allocation of considerable resources to the continued existence of the corrupting influence. According

³⁷ I say this somewhat facetiously: of course the community may be morally corrupted by other persons or other factors. But at least one source of corruption has been removed.

³⁸ *Ethics of Capital Punishment*, p 234-235

³⁹ Kramer notes (*Ethics of Capital Punishment*, p. 235) that banishment to a place that would result quickly in death might be acceptable, but only because it is to implement the death penalty by another means. However, it would probably run afoul of the humane treatment principle.

to Kramer, if a community puts someone like Richard or Joseph in prison, even in solitary confinement for the life, they will:

“...be expending a particularly large quantity of resources on the continuation of his existence. In so doing, [the community] will be expending a particularly large quantity of resources on the persistence of a state of affairs that sullies its relationship with the rest of humanity. Hence, the imposition of a severe sanction that falls short of the death penalty is not a means whereby a community can remove the blight that lies on its relationship with the rest of humankind.”⁴⁰

Again, the message seems clear. To quarantine a corrupting influence is not to repair or restore moral order to the community. It is simply to contain it and allow it to persist. It can never suffice to discharge the duty. Thus, Kramer submits, the death penalty is the minimally invasive means of securing the morally desirable end of restoration/reparation since neither of these two viable alternatives actually satisfies the restorative duty.

But is it also the most humane means? It all depends on how it is implemented. As noted above, Kramer would object to death if carried out following torture, or by boiling in oil, or burning at the stake. Such methods would exploit the human capacity to feel intense pain and thus disrespect human dignity. But less pain-exploitative means, like lethal injection, would not. Thus, death could be imposed without violating the HTP. Furthermore, unlike the deterrence and retributive rationales, the purgative rationale can place principled upper limits on the inhumanity of the punishment it endorses. This is because the moral end of restoration or repair is not better served by inhumane methods of execution.

One can be somewhat sceptical about this reasoning. The humanity of the punishment, for Kramer, flows from its respect for human dignity, and dignity is a three-pronged property. Even if killing a person need not exploit their capacity to feel

⁴⁰ *Ethics of Capital Punishment*, p. 234. Additional comments are made on pp. 236-237, addressing the shortcomings of life in prison in extremely grim circumstances relative to the purgative aim.

pain, it seems likely that it would impair their capacity to have positive (future)⁴¹ experiences and interfere with their autonomy.⁴² Kramer gestures at a retributive response to this point,⁴³ contending that punishment would respect autonomy because it would affirm moral responsibility for actions.⁴⁴ This seems misguided to me. Even if punishment did affirm moral responsibility in such cases, and even if it was justified, one cannot deny that it compromises the capacity to have positive future experiences or that it interferes with autonomous decision-making. This is for good reason too. Given the way in which punishment is typically defined — as the state-sanctioned, intentional infliction of *harm* on another person⁴⁵ — it seems like it would have to impact on at least one of the three prongs of human dignity that are mentioned by Kramer. Otherwise it would not truly be punitive.

This raises an interesting point. If punishment necessarily impacts on at least one of the three prongs of human dignity, then the death penalty cannot be declared humane (or, rather, more humane than all the alternatives) simply because it avoids intense pain. A much more rounded, all things considered, judgment of humaneness must be entertained, one which addresses the trade offs with the other two prongs.

This brings me to the main critique Kramer’s purgative rationale. By only considering two viable alternatives to the death penalty, and by having an overly-narrow conception of what counts as humane or not, Kramer has ignored other measures that a community could take that would discharge the reparative duty, while at the same time being less severe and inhumane than death. If this is correct, then Kramer’s purgative rationale fails to pass the test that he himself sets for it.

⁴¹ Here I echo Marquis “Future Like our’s Argument”, which holds that death is wrong because it deprives someone of the capacity to have positive future experiences like us.

⁴² Waldron in his attempt to identify the wrong-making property of murder that needs to be replicated by retributive punishment refers to the total violation of autonomy. Kramer discusses this (*Ethics of Capital Punishment* p. 134) and critiques it. It is telling that he thinks punishments short of death could replicate that wrong-making property.

⁴³ *Ethics of Capital Punishment*, p. 114. See also p. 58, n. 21 where Kramer implies that inhumaneness is not a linear function of punitive severity. That may well be, but Kramer also admits that there is some tracking between the two. If this is right, the more rounded, all things considered, assessment that I call for in the text is still called for.

⁴⁴ Kramer has suggested to me (Personal Correspondence) that his argument is not that everything designed to impinge on those three elements contravenes dignity. On the contrary, he holds that rights concomitant with dignity (such as the right not to be imprisoned and not to be killed) can be forfeited through serious wrongdoing. I am not sure exactly what the distinction between “impinge” and “contravene” is taken to be, but in any event nothing I say here denies Kramer’s claim. I accept that one can legitimately violate aspects of dignity and/or forfeit concomitant rights, when certain moral ends are at stake. All I am saying is that if there is a method of achieving those ends that is *less* violative of those aspects of dignity, it is to be preferred.

⁴⁵ See Boonin (n 8), chapter 1, and Zimmerman (n 8) chapter 1 on this type of definition.

To demonstrate this claim, I will enumerate three possible types of punishment. Some of them may seem a little gruesome at first glance, but bear with me until I actually defend their propriety under the requirements of Kramer's test. Also, keep in mind that I am not actually endorsing these alternatives, I am merely suggesting that they are compatible with the requirements set down by Kramer. The broader implications of that compatibility is something I return to in the conclusion.

Here are three alternative types of punishment :

Lobotomy:⁴⁶ Whenever a person commits a defilingly evil act they are forced to undergo a form of brain surgery that either reduces them to a catatonic state or induces a delusional mental illness of some kind (akin to schizophrenia or mania).

Memory Erasure: Whenever a person commits a defilingly evil act they are forced to undergo a memory erasure procedure (either surgical or pharmacological). The erasure can be more or less severe, depending on the case, but could include elimination of the explicit (semantic/declarative) memories of events and the implicit (emotional/procedural) memories of events. It could also include elimination of the capacity to form new memories.

Personality Replacement: Whenever a person commits a defilingly evil act they are forced to undergo memory erasure *and* behavioural and personal modification. In other words, their pre-existing personality is wiped and they start anew with a fresh set of dispositions and desires.

As I say, they may seem a little gruesome (particularly lobotomy) and far-fetched at first glance. But I submit that they are not and that they are indeed viable alternatives to the death penalty. To establish this claim I will look at four interrelated objections one might have to these three examples. First, I will consider whether they satisfy the

⁴⁶ By "lobotomy" I do not necessarily intend to denote the procedure that was popular in the middle part of the 20th Century (and pioneered by Egas Moniz and Walter Freeman). Rather, I refer to any type of psychosurgery that will have the impairing effects referred to in the text.

demands of the restorative/reparative duty. Second, I will evaluate their humaneness. Third, I will address the possibility that they amount to “death in all but name”. And fourth, and finally, I will rebut the suggestion that, interesting though they may be, these possibilities are not genuine alternatives to Kramer’s proposal because they are not empirically plausible.

To the first question then: Do these alternatives actually satisfy the demands of the restorative duty? To answer that we need to recall how Kramer understands those demands. In his dismissal of life imprisonment without possibility of parole and banishment, Kramer makes clear that the duty is not satisfied until the corrupting influence is actually extirpated; that is, until the community creates sufficient normative distance between itself and the corrupter. This precludes allowing the corrupting influence to continue to exist, sometimes at great expense to the community, in a separate or specially contained spatial location. The three options outlined avoid this problem.

To see why, we need to burrow a little deeper into Kramer’s account of defiling evil and moral corruption. There is a curious diachronic aspect to this account. Although Richard and Joseph commit their acts of defiling evil at a particular historical moment (or moments), their lives are dominated by those acts in such a way that their continued existence is a corrupting taint on the community. Kramer suggests that this is due to the “ferocity” of their “repudiation of mankind” which persists in their attitudes and dispositions.⁴⁷ It is those attitudes and dispositions that must be extirpated in order to restore moral order. Banishment and life imprisonment won’t do because they allow the attitudes and dispositions to persist.

But this means that the alternatives I have listed really would solve the problem of moral corruption. In all three cases, the attitudes, dispositions, beliefs and inclinations are not being allowed to persist. They are, in different ways, being eradicated or modified. In the case of Lobotomy they are eradicated through a harsh procedure that disrupts the cognitive and affective capacities underlying the corruption. In the case of

⁴⁷ *Ethics of Capital Punishment* pp. 237-240 discuss the possibility of repentance.

Memory Erasure, they are eradicated through the elimination of the cognitive and affective beliefs underlying the moral corruption. And in the case of Personality Replacement, they are both eradicated and replaced. In no instance is the corruption allowed to persist; in all cases it is destroyed. Kramer seems to concede this point (though obviously not in a direct reply to the objection I am mounting) when he discusses the case of mentally ill offenders. He accepts that the purgative rationale could not be operative in the case of such offenders, even when the mental illness arose after the acts of defiling evil had been committed.⁴⁸ He comments:

“In the circumstances envisaged here, where Richard or Joseph has become thoroughly insane, he has permanently or temporarily ceased to exist as the person who carried out extravagantly evil atrocities. Thus, the implementation of his death sentence should permanently or temporarily be set aside.”

This seems like a major concession. If a sufficiently disruptive mental illness negates the need for purgation, then why not a sufficiently disruptive intervention into the cognitive processes of the offender, such as the interventions envisaged by my three alternative punishments? On this first point then, the three alternatives seem to succeed: they are effective means to the desired end.

But of course that simply raises the second issue. Are the alternatives humane? At first glance they seem clearly inhumane. I, for one, would feel extremely queasy about inducing a severe mental impairment in anyone, no matter how morally corrupt they might be. But then again I would feel similar about ending that person’s life. The relevant question here is not whether the suggested alternatives are humane, or whether I feel queasy about them, but whether they are *less* inhumane than death. Since every punishment is somewhat inhumane (in that it necessarily impinges on some aspect of their dignity), it is the contrastive judgment that is all-important.

⁴⁸ *Ethics of Capital Punishment*, pp. 244-248, in particular 247-248 which discuss insanity after conviction. Kramer seems committed here to the view that in order for execution to be justified, the offender must remain mentally whole right up until the moment of execution.

This is where we must return to Kramer's three-pronged account of human dignity. According to him, the death penalty is humane because it need not be implemented in a gratuitously painful manner and because it is compatible with moral responsibility. This is despite the fact that it impairs two other aspects of human dignity: the capacity to have future positive experiences, and the capacity for autonomous decision-making. But each of the three alternatives I have sketched is compatible with more of the prongs of human dignity than is death. For starters, none of the alternatives exploits the capacity to feel intense pain. The cognitive impairments could be induced via surgery under anaesthetic or pharmacological interventions. Second, each of the procedures preserves some of the capacity to have positive experiences. A person who simply has a personality replacement will be free to live a normal life thereafter; a person with memory impairments can still enjoy the pleasures of the moment (although, depending on the severity of the impairment, they may not be able to plan too far into the future);⁴⁹ and a person with an induced mental illness may, depending again on its severity, be able to have some positive experiences (as opposed to none in the case of the person who is killed). Finally, although Lobotomy may lead to permanent impairment of the capacity for autonomous decision-making, this would still rank it ahead of the death penalty (compatible with two prongs rather than just one) and the other two alternatives may be compatible with a greater sense of autonomy.

So each of the alternatives is indeed more humane than the death penalty. If this is right, and if we are to follow the constraints set down by Kramer's test, then the death penalty is not morally justified under the Restorative Argument. It is not the minimally invasive, most humane means to the end of restoration/reparation; alternatives are available that achieve the desired end in a more humane manner.

Maybe this is too hasty a conclusion. It could be argued that the alternatives I have sketched amount to death "in all but name" and so they are only justified to the extent that they are qualitatively identical to the penalty that Kramer prefers. To say this one would need to adopt a very particular conception of what it means to die. Certainly, under current medical conceptions of death (brain death), none of my proposals would

⁴⁹ One thinks here of the situation experienced by Henry Molaison, the famous patient H.M. who lacked the ability to form new long-term memories.

be qualitatively equivalent to those envisaged by Kramer. Nor would they amount to death if one views killing as the cessation of embodied consciousness,⁵⁰ since each proposes that embodied consciousness continues. Indeed, it is that continuation that renders the alternatives more humane than the death penalty.

The argument might work if one adopted a Lockean conception of personhood and coupled it with the view that death occurs when the Lockean person ceases to exist. Under the Lockean conception, a person is a set of continuing and overlapping psychological states.⁵¹ So the person ceases to exist when that continuity is disrupted. It could thus be argued that the alternatives I have sketched warrant a Lockean death of the person since they envisage a break in psychological continuity. But even this argument seems suspicious. Although some rupture or impairment of psychological continuity is envisaged by each of my proposed alternatives, it is not necessarily total. Personality Replacement comes closest to complete disruption, but Lobotomy and Memory Erasure do not go so far. Each of them merely envisages the elimination of the traits that were morally corrupting, other more benign traits could continue in existence. Thus, the alternatives I sketch are not qualitatively equivalent to even a Lockean conception of death.

Finally, one of the restrictions that Kramer placed on his argument was that it had to be applicable in empirically plausible cases of defiling evil. But surely empirical plausibility cuts both ways. Not only do the offences to which the rationale is applicable have to be empirically plausible but so too do the punishments. The death penalty is obviously empirically plausible, but what about the alternatives that I have listed? Are they too fanciful — too hypothetical — to be deemed genuine alternatives to the death penalty?

I do not think so. Surgical and pharmacological techniques for inducing severe mental impairment (such as those envisaged by Lobotomy and, indeed, Memory Erasure) already exist. Their existence has largely been established through accident —

⁵⁰ McMahan, J. *The Ethics of Killing* (Oxford: OUP, 2003).

⁵¹ Tooley, Shoemaker "Personal Identity and Ethics" (2012) *Stanford Encyclopedia of Philosophy*, available at <http://plato.stanford.edu/entries/identity-ethics>, accessed 31/5/13

surgeons with good intentions not fully realising the implications of what they were doing — but they exist nevertheless. Admittedly, these techniques are probably a little crude and unselective at the moment, but neuroscientists are refining and improving their techniques with notable rapidity, and the creation of interventions for memory erasure and memory dampening is a major research programme at the moment.⁵² The only alternative that truly seems implausible is Personality Replacement. As far as I am aware, there are no controlled, well-understood techniques for inducing complete, *discontinuous*, personality change of that sort. But my argument does not stand and fall on this one alternative.⁵³

It seems then that Kramer's argument fails because there are viable alternatives to death, that meet the requirements he set out, and that he has not fully considered.⁵⁴

5. Might there be a basic duty to purge?

As emphasised already, the Restorative Argument is the one that seems to be endorsed by Kramer and so if it fails, then Kramer's rationale would appear to fail as well. Nevertheless, in the interests of completeness, the merits of the Purgative Argument are worthy of our attention too. Granting them this attention highlights some interesting constraints on any plausible rendering of an ethically basic duty to purge, and adds some further background and justification for thinking that the Restorative Argument is the only plausible way in which to defend the purgative rationale. Consequently, in addition to considering an alternative case for the purgative rationale we also derive some additional support for the overarching claim that this rationale fails.

⁵² A good overview article, looking at this research programme, and its possible implications for the law is O. Carter Snead "Memory and Punishment" (2011) 64 *Vanderbilt Law Review* 1195

⁵³ I would concede, however, that since Personality Replacement is probably the most humane of the alternatives I sketched, and since it builds upon the interventions envisaged by Memory Erasure, it may be worth looking into.

⁵⁴ Kramer does briefly consider the possibility of induced insanity, *Ethics of Capital Punishment*, p. 247, n. 37. The extent of his comments are: "The reasons for a negative answer to this question [*i.e.* the question as to whether induced insanity would be acceptable] are largely similar to the reasons for the illegitimacy of any punitive practice of torturing or mutilating monstrous prisoners. I expound those reasons at length in my forthcoming book on torture." One awaits that book with interest.

We start by looking once more at the motivating principle in the Purgative Argument:

(1*) If the moral order and standing of a community C (relative to humanity) is corrupted or defiled by the existence of particular persons, then C has a duty to purge those persons from C (the *Purgative Principle*).

The use of the word “purge” here is problematic. The term admits of several possible interpretations. I shall consider two. One, in which “purge” is read as being semantically equivalent to “kill” or “terminate, and so the duty to purge is simply the duty to kill; and another, in which “purge” is read as being equivalent to “totally remove” or “remove all trace of”. The argument shall be that the first interpretation is implausible because it clashes with other ethically *certain* truths, and the second is implausible because serious consideration of what it might mean to totally remove all trace of something leads, in a more roundabout way, to a similar conclusion. This, in turn, explains why a derivative rendering of the duty to purge has more promise and so guides our interpretation of the Restorative Argument.

Start with the obvious question: how could we come to know that a duty or fact is ethically basic? There would seem to be two common routes to such knowledge. The first would be to look directly at the content of the proposed duty and see whether it seems self-evident or necessarily true in and of itself. For instance, duties or facts such as “do good, not evil” or “it is forbidden to torture an innocent child for fun” have these qualities of self-evidence or immanent necessity. This might be because they represent conceptual truths about the domain of morality, or be because no possible world could exist in which they fail to be true. Either way the facts require no deeper *moral* grounding and so appear to be basic.⁵⁵ The problem with the duty to purge is that it does not seem to have these qualities. Its truth is neither self-evident nor immanently necessary. That leads to the second possible route to knowledge of ethically basic truths. This route focuses on the evaluation of and reaction to particular thought experiments.

⁵⁵ I use the term “moral grounding” as opposed to just ‘grounding’ in recognition of the fact some people think that necessary or self-evident truths of this sort may be grounded in other, non-moral facts. I think this view is probably mistaken, but it is there nonetheless.

If some action seems obviously or evidently required in a particular case, then that might do the trick of justifying the allegedly basic duty. In this instance that would require close evaluation of something like Richard or Joseph's case, and working out whether we intuitively and robustly think that death is required in each case. The problem with this, however, assuming such reactions are present is that it would render any claim that the duty to purge is ethically basic open to the charge of, if not quite question-begging, dubious self-justification. If the duty to purge is semantically equivalent to the duty to kill, then it seems like the argument boils down to the claim that the duty to kill an offender in particular cases justifies the killing of the offender in particular cases.

Now, as I say, this isn't question-begging. It is not impossible for a duty or obligation to be justified on the basis of a single thought experiment (call this a "one-shot" justification because it justifies something on the basis of one general type of scenario, which may be illustrated in a number of different ways). For example, Michael Moore has argued that the duty to punish culpable wrongdoing can be justified in precisely this manner.⁵⁶ But it seems like we should at least be cautious about this possibility, particularly when it comes to state-sanctioned killing of another person. Killing is *prima facie* wrong and its wrongness is a foundational, some have argued epistemically certain, basis for many of our other moral strictures.⁵⁷ Pleasants, for instance, argues that injunctions against killing have the quality of basic morality certainty and thereby occupy a foundational role in all our moral practices.⁵⁸ So for a duty to kill to be deemed strongly justified solely on the merits of an intuitively appealing thought experiment (or two) should be a cause for some concern. At the very least, more analysis and explanation of why the duty is correct, and why the *prima facie* injunction against killing does not apply, would seem to be in order.

⁵⁶ Moore "Justifying Retributivism" (n. 10)

⁵⁷ McMahan, J. *The Ethics of Killing* (Oxford: OUP, 2003). Of course, certain Epicureans disagree and argue that death is not as bad as we might first think (for example, see Smuts, A. "Less Bad but not Good: In Defence of Epicureanism about Death" (2012) 93 *Pacific Philosophical Quarterly* 97. However, even defenders of the Epicurean position are at pains to point out that their theory does not have the counterintuitive implication that killing is, in general, morally acceptable. See Hershenov, D. "A More Palatable Epicureanism" (2007) 44 *American Philosophical Quarterly* 171 for more on this important point.

⁵⁸ Pleasants, N. "Wittgenstein and Basic Moral Certainty" (2009) 37 *Philosophia* 669-679; and "Wittgenstein, ethics and basic moral certainty" (2008) 51 *Inquiry* 241-267

Perhaps the best bet for such a one-shot justification of an ethical duty to kill would be to argue that the duty is of a threshold nature.⁵⁹ That is to say, that the duty is one that only “kicks in” once a value (or range of values) has crossed a certain parameter (or range of parameters). Thus, one could argue that the duty to purge, though not present at lower levels of wrongdoing, and so not present in analogous but subtly different thought experiments, kicks in once the wrongdoing crosses the (admittedly fuzzy) threshold into defiling evil. This might provide some ground for believing in the existence of an ethically basic duty to kill, without causing us to be suspicious of the fact that the duty is justified in a one-shot manner.

But I suspect the appeal to threshold obligations is unavailable, for reasons I have set forth more fully elsewhere.⁶⁰ To state those reasons succinctly, I think it implausible to believe that thresholds can actually convert something that is not already ethically acceptable into something that is, unless the crossing of the threshold brings another stronger or equivalently strong moral principle or consideration into play. To be more precise, I think it only plausible that the crossing of a threshold converts what was previously an imperfect duty (one that could be satisfied in a number of different ways) into a perfect duty (one that is satisfied in one way); or what was previously ethically permissible (or supererogatory) into something that is obligatory; or that the crossing of the threshold brings into play an equal or stronger moral principle that overrides what previously seemed ethically impermissible. The problem with the alleged duty to terminate someone’s existence is that killing is not subject to a preexisting permission or imperfect obligation. Quite the contrary in fact – the stricture against killing seems to be a basic moral certainty. So to suggest that a sufficiently serious case of wrongdoing - such as Richard’s or Josef’s case - can convert something that is *prima facie* wrong into something that is *prima facie* right, looks to be implausible.

Self-defence cases provide an obvious counterblast to this argument. In self-defence cases, a sufficiently serious threat to one’s life (*i.e.* a threat that crosses a threshold of seriousness) transforms what would have previously been impermissible

⁵⁹ I take the suggestion from Gwiazda, J. “Worship and threshold obligations” (2011) 47 *Religious Studies* 521, who uses it to argue in favour of a duty to worship a supreme being.

⁶⁰ Danaher, J. “Stumbling on the Threshold: A Reply to Gwiazda on Threshold Obligations” (2012) 48 *Religious Studies* 469

into something that is permissible. But that is only because the permission to kill in such a case is derivable from another ethical fact that is of equal or greater certainty than the stricture against killing, namely: the right to self-preservation or the fact of moral equality between lives. In other words, in such cases the permission to kill is not an ethically basic fact at all; rather, it is a derived fact. One could argue for the purgative duty in a similar manner – indeed, that is exactly what the Restorative Argument does – but that raises different considerations and concerns.

This problem with an ethically basic duty to purge might resolve itself if we change the interpretation of “purge” from “kill/terminate” to “totally remove” or “remove all trace of”. In such a case, the clash between the stricture against killing and the alleged duty to purge would not be immediately apparent, and so it is at least possible for the tension to dissolve. Nevertheless, I submit that any consideration of what it means to totally remove all trace of something from a society would lead us quickly back to the same concerns. To see this, begin with an example in which the purgative duty is alleged to exist but in which it does not seem to immediately countenance death. This might happen if there is a duty to purge corrupting ideas and prejudices from a community, such as Nazism, racism, sexism. One assumes that this could be done without necessarily having to kill the people who believe in these ideas. Thus, one could have a duty to purge that is not automatically equivalent to the duty to kill.

This sounds superficially plausible, but the devil is in the detail. Assuming there was a duty to purge corrupting ideas, how exactly would this be discharged? Ideas are presumably informational structures that are stored in various media, but primarily and most importantly in the human brain. The informational structures are abstract and require instantiation in some medium before they can have an effect in the real world. It seems likely then that purging ideas would require the destruction of the media in which the informational structures are stored.⁶¹ This could justify the destruction of books, CDs, and websites supporting those ideas; outlawing activities that propagated those

⁶¹ The ideas might be thought to continue their existence eternally in some abstract Platonic realm, but since such free-floating existence could not affect the real world without some physical medium in which it can be stored and propagated, I assume that the ideas are purged once all physical media in which they are stored have been destroyed.

ideas (as in hate speech laws); but also destruction of the brains that stored those ideas.⁶² Now, certainly the final possibility is unlikely to be accepted, but if one actually wished to remove corrupting ideas completely, extreme measures of that sort would probably need to be taken. Information is exceptionally hard to contain once it starts to propagate. Indeed, those who were charged with enforcing the duty would presumably pick up the corrupting ideas along the way (if only so as to be able recognise when those ideas were present in some information storage device). To truly purge would require destruction of all information storage devices, including human brains, on a massive scale. Thus, we once again end up with a hypothetical scenario in which death is directly encompassed by the duty to purge: purgation seems to bring with it the need for death.

Two conclusions about the duty to purge emerge from this hypothetical. First, it is difficult to separate it out from a duty to kill since, even in the distinct case of totally removing corrupting ideas, it seems like death would be mandated by the duty. Second, if in order to purge one must carry out mass extinction on the scale suggested in the previous section, then it seems like something must be wrong with the underlying duty. There seems to be a reduction to the absurd going on here, a repugnant conclusion that moral philosophers would wish to avoid.

But perhaps a defender of the duty could argue that the duty is still sound despite its repugnant implications. Perhaps they could argue that countervailing duties and considerations rein-in the purgative duty's more extreme consequences. For example, the duty to respect freedom of conscience and expression might be thought to override the duty to purge bad ideas. Hence mass extinction, of the sort I just envisaged, would not be justifiable, all things considered.

This suggestion just exacerbates the problem. If the duty to purge is too severe, and if compliance with it leads ineluctably to clashes with other countervailing duties, how plausible is it to think of it as a basic duty? The best answer to this question, I

⁶² The kind of destruction involved here may also be analogous to the memory wiping examples discussed in section 4, but that then leads into the problems with the exclusivity claim discussed in that section. Furthermore, one might wonder whether banishment of persons could "totally remove" them from a community, but we already saw how this was rejected by Kramer in section 4.

submit, is to accept that there is no basic duty to purge. Instead, the duty to purge derives from other more general, and more plausible duties, such as the duty to repair or restore the moral order of a community after it has been damaged. Such a duty could countenance many different policies, but it also wouldn't shut the door to the occasional need for purgation. This sounds right to me, but, of course, it just leads us back to the problems discussed in the previous section.

6. Conclusion

In formulating the purgative rationale, Kramer has attempted something that is worthy of intellectual respect: he has tried to carve out a novel niche in an otherwise stale and well-worn dialectical space. But that, of course, is not enough. Death is a serious business, and if the state is going to sanction the punitive killing of any one person, it better have a good reason for doing so, not just a novel one.

Even if one accepts his motivating principle, the rationale must pass the test that he himself sets for it. The problem is that it does not. The purgative rationale does not uniquely and justifiably select death as the only effective means to a morally desirable end (that of moral restoration or repair). There are alternative means to that end that are less invasive and more humane than death. Consequently, Kramer's rationale fails.

That, in a nutshell, is the argument I have presented in this article. But what are its broader implications? If one accepts the motivating moral principle — *i.e.* that communities owe a duty of restoration in the aftermath of moral corruption — then one could view my alternative set of punishments as genuine and morally compelling possibilities. Ones that the community should invest serious time and effort into developing. My instinct, however, is to balk at this suggestion, since the alternatives I have sketched seem gruesome and heavy-handed. They warrant the deliberate infliction of mental impairment or disruption, which seems wrong, and their implementation would require the setting-up of an institutional framework for the performance of such acts. Arguably, such an institutional framework would have a corrupting effect on society. But maybe I should not respect my instincts in this regard. Punishment is a

nasty business, perhaps nastier than we realise,⁶³ but if there is a duty to restore moral order then maybe we should not retreat from it simply because it has unpalatable consequences. Certainly, the framework envisaged by my alternatives is no less disquieting than the framework envisaged by proponents of capital punishment: death is also *prima facie* wrong and requires the setting-up of an arguably equally corrupting institutional framework.

Alternatively, one could endorse the instinctual rejection of the three alternatives. Perhaps the instincts are not the problem but the motivating principles are? If the duty of moral restoration, coupled with Kramer's test, can warrant the implementation of such gruesome punishments, then so much the worse for those concepts. In other words, maybe my argument is simply a *reductio* of the principles motivating Kramer's rationale. But this is not an entirely welcome conclusion either. The notion that a community has a duty to restore or repair moral order does not seem absurd, and nor do the two moral principles at the heart of Kramer's test (the MIP and HTP). It seems then that we are left with a choice between two possibilities, neither of which is particularly pleasant, each of which is somewhat plausible. It was ever thus.⁶⁴

⁶³ Gross, H. *Crime and Punishment: a concise moral critique* (Oxford: OUP, 2012)

⁶⁴ I would like to thank Matthew Kramer and Tsachi Keren-Paz for their helpful comments on earlier drafts of this paper. I would also like to thank attendees at a seminar in Keele University for their engaging questions and perceptive critiques of the original draft of this paper.