

This article has been published online by Springer in *Criminal Law and Philosophy*.
The final publication is available at Springer via
<http://dx.doi.org/10.1007/s11572-013-9261-6>

Does Communicative Retributivism Necessarily Negate Capital Punishment?

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Introduction

One of the most powerful contemporary conceptions of retributivism takes the communicative aspect of punishment seriously. In this article, I will follow Antony Duff, arguably the most prominent champion of this approach, in calling this conception “communicative retributivism”. In summary, communicative retributivism shares with other conceptions of retributivism the idea that criminal punishment is justified as a deserved response to the wrongdoer for past wrongdoings. Moreover, it is communicative, because the retributive response is taken not as something imposed on the offender, but rather as a message of censure to be addressed to the offender. A question then arises: If punishment functions mainly as a communicative act, why is the verbal denunciation expressed through the trial verdict not sufficient for the communicative purpose? Why is the hard treatment that punishment involves needed?

For some, hard treatment is solely a prudential supplement that helps to deter further crimes.¹ For Duff and others, hard treatment is an integral part of the censure that aims primarily to address the offender’s moral sense. For the purpose of this article, I deal only with the latter approach. Given that this approach takes punishment as communicative of censure, it follows that internal to the act of censure is an aim that the intended receiver gets the message, which hopefully leads to repentance, reform and reconciliation.² The emphasis given to moral reform does not make communicative retributivism a consequentialist theory. Even if the offender rejects the

¹ See von Hirsch (1998).

² See Duff (2001, pp. 107-112).

message and refuses to reform, the point of communicating censure remains undisturbed.

What would a communicative retributivist say about capital punishment? Most contemporary communicative retributivists are abolitionists, including most notably Antony Duff and Dan Markel.³ It is not difficult to see why. Even though repentance, reform and reconciliation are not strictly speaking the *telos*, the ends to which communicative retribution is used as means, communication to the offender nevertheless points to the hope of repentance and reform that helps to make sense of the communication. Execution eliminates the hope of further reform.

While I find myself in substantial agreement with the central tenets of communicative retributivism, I think there may be a place for capital punishment within the theoretical vision of communicative retributivism. I will argue that capital punishment, when reserved for radically evil offenders for the most heinous crimes, is justifiable within a communicative retributivist theory. Capital punishment has fallen below the horizon of communicative retributivists, mainly because of their failure to develop a crucial dimension of penal communication. Duff regards punishment as a two-way communication: the political community communicates censure to the offender, and the offender could take the hard treatment as secular penance through which he communicates his apology to society.⁴ By contrast, I argue that the interactive communication does not commence with punishment as censure. Censure should be deemed a counter-message commensurate to that sent initially by the offender through his criminal offense. The severity of hard treatment should depend upon what message is sent by the offense to the political community in the first place.

Capital punishment should be imposed only for murder. But not all murderers are equally culpable, and hence do not equally warrant capital punishment as a counter-message. Some are motivated by hateful impulses; some are nurtured by

³ See Duff (2001, pp. 152-155) and Markel (2005, pp. 457-476).

⁴ See Duff (2001, pp. 106-115).

longtime resentment toward perceived oppressors; still others are driven by evil and sadistic desires. The censure should be commensurate to the offensive message. To be commensurate to the most extravagantly evil offense, which communicates the message of flat denigration of the worth and meaning of life, as in the case of murders for sadistic pleasure, capital punishment is plausibly regarded as the counter-message.

Next, I contend that capital punishment does not violate human dignity insofar as it is applied only to radically evil murderers. The idea that punishment should communicate moral values to the offender as a moral agent is premised on the idea of human dignity. Arguing in the vein of communicative retributivism,⁵ Dan Markel forcefully argues that capital punishment is in flat contradiction with human dignity.⁶ As is well-known, this proposition is contested by retributivists such as Louis P. Pojman,⁷ Walter Berns,⁸ Ernest van den Haag,⁹ and all the way back to G.W.F Hegel and Immanuel Kant. However, the debate grows increasingly unfruitful without a clarification of what human dignity actually means in the context of capital punishment. I will advance a metaphorical framework to accomplish two objectives. First, I will explain in what sense capital punishment and torture both could be disruptive of human dignity, yet in two distinct ways. Second, I will argue that the distinction makes a significant difference and hence justifies capital punishment when applied to extravagantly evil murderers.

My argument is not meant to be a wholesale argument for retention. I defend capital punishment only in the context of communicative retributivism. My argument certainly lends support to cautious retentionism, by which I mean that only exceptionally evil murderers deserve the death penalty and that considerations of mercy and pardon must be built into the inner logic of the institution. However, my argument does not contradict abolitionism, as insurmountable problems of

⁵ “Confrontational conception of retributivism” is how he dubbed his version of the communicative approach to retributive justice. See Markel (2011, p.49)

⁶ See Markel (2005, pp. 464-7).

⁷ See Pojman and Reiman (1998, pp. 60-63).

⁸ See Berns (1991, pp. 162-3).

⁹ See van den Haag (1986, p. 1669).

administration, such as racial bias or an intolerably high risk of mistaken convictions, may override the moral legitimacy of this institution. Whether these administrative difficulties overwhelm the legitimacy of capital punishment is a question I do not address.

Communicative retributivism and proportionate sentencing

Common to almost all conceptions of modern retributivism is the emphasis on proportionate sentencing. However, contemporary theorists disagree whether retributivism itself is capable of generating minimally workable guidelines beyond the crude idea that “the most severe crimes should be met with the most severe punishments; and less severe crimes should be met with less severe punishments.” This disagreement reaches into the camp of communicative retributivism. For example, Markel maintains that retributivism is primarily a theory of justification, not of sentencing, and that what is more important is who decides through what procedures, rather than what the decision actually is.¹⁰ Duff, by contrast, is less skeptical. He sees the principle of proportionality as requiring “substantive fit” between crime and punishment.¹¹ But what does the idea of “substantive fit” mean?

As is well known, the retributive idea of proportional sentencing encompasses two distinct concepts. In Matthew Kramer’s terms, they include “proportionality” and “commensurateness”.¹² “Proportionality” requires that the ordinal rankings of the seriousness of crime and the severity of punishment come up separately. Then the two are made to correspond to one another, with the most serious crime fitting the most severe sentence. Respective rankings conceptually take precedence before the match. This idea says nothing about what should be included in the list of rankings in the first place. On the other hand, “commensurateness” involves the relationship between certain types of crime and types of punishment. Conceptually, the match between the

¹⁰ See Markel (2011, pp. 62-64).

¹¹ See Duff (2001, p. 142).

¹² See Kramer (2011, p.74-77). There are conceptual alternatives. For example, Duff uses “relative proportionality” and “absolute proportionality”. See Duff (2001, p. 133)

punishment and the crime comes before their respective rankings. The severity of the punishment is supposed to reflect the gravity of the crime, not through the indirect match of their rankings, but through the direct match between certain features of the punishment and the crime.

Commensurateness, however, is a vague concept. In a pluralistic society, it is increasingly difficult for the idea of commensurateness to be explicated without connections to richer values than simple retributive justice. Duff's idea of substantive fit attempts to provide such connections. The punishment must communicate the reprimanding messages intended by the community, and then reversely convey apologetic messages by the offender as a secular penance. Disproportionately harsh or lenient punishments would distort these messages.¹³ We can further substantiate the idea through three aspects of censure.

First, the punishment brings the offender face to face with his moral responsibility. Being responsible for a wrong does not simply mean that one recognizes what he did in the form of an abstract assertion. Instead, being responsible requires a willingness to re-conceive the nature of the criminal act in light of the moral values held by the community. Moreover, it requires the offender to realize the full impact of his action on the victim, and to repair the loss of those affected to restore the values flouted. This purpose would not be achieved if the punishment did not measure up to the crime.¹⁴ Second, punishment is a way of asserting human equality between the victim and the offender. Crimes communicate a message of dominance of the offender over the victim. Punishments respond to this message by a counter-message. There must be a substantive fit between crime and punishment to signify the community's recognition of the harm and its pledge of solidarity with the victim. Punishments fail to meet this objective if its severity falls short of the gravity of the crime.¹⁵ Third,

¹³ See Duff (2001, p. 143).

¹⁴ As Duff puts it, the punishment is meant to "bring offenders to face up to the character and the significance of what they have done, and serve as apologetic reparation for the crime." See Duff (2001, p. 142).

¹⁵ As Jeffrey Reiman points out, it would "trivialize the harms those crimes caused and be no longer compatible with sincerely believing that the offender deserves to have done to him what he has done to his victim and no longer capable of impressing upon the criminal his equality with his victim." See

punishment gives weight to the core values held collectively by the community. It is a means by which a community gives effect to the values that should be taken seriously.¹⁶ Failure in substantive fit entails a failure to give sufficient effect to these values, signifying a lack of commitment to their importance. Such a failure is serious. When a community fails to achieve a substantive fit between crime and punishment, the failure indicates the community's trivialization of the values violated.

Capital punishment and the internal tension in communicative retributivism

Based on the idea of substantive fit, it is now time to explore the status of capital punishment in communicative retributivism. I take the central tenets of communicative retributivism to encompass three propositions.

P1: Punishment must be communicative.

P2: Punishment (hard treatment) has to substantively fit the gravity of the crime.

P3: Punishment aspires to achieve the offender's repentance, reform and reconciliation (with the society and/or the victim).

For judicial policy makers and implementers, P1 and P2 are "perfect duties". Their violation renders the punishment illegitimate. P1 forbids policy makers from imposing torture or other inhumane hard treatment as acceptable forms of punishment, because they distort human rationality and are not communicative. P2 expresses the ideal of proportionate sentencing. It should be pursued at two levels. Judicial policy makers must specify proper ranges of sentences for particular types of crimes and offer proper guidelines to promote consistency across individual cases. Judges must consider the properties of particular crimes, and choose from the permitted range a specific sentence that substantively fits the particular offense. Note that neither P1 nor P2 necessarily precludes the death penalty. Insofar as the death penalty is deemed

Reiman (1985, p. 128).

¹⁶ See Nozick (1981, pp. 74-79).

essentially different from torture (see discussion below), the execution of extreme evildoers could well be consistent with these duties.

P1 aims to ensure that the offender receives the message and be persuaded by it, causing repentance and reform. However, reform is not the sole aim of the communicative enterprise. Even if the desirable state of affairs does not occur, i.e., the offender refuses to reform, the act of censure does not lose its point. P3 requires that judicial policy makers design punishments to facilitate, or at least not to hinder, the offender's reform. Thus P1 and P3 are inherently connected. Note that P2 and P3 also have inherent connections. P2 is meant to help the offender face up to the character and significance of what he has done. The requirement of substantive fit therefore helps to make reform genuine, both by showing the severity of the crime to the offender, and by offering him a way of penance that suffices to serve the ritual function of apology.

Does capital punishment violate P3? Communicative retributivists have denied that communicative retributivism is teleological: repentance and reform is not the goal to which punishment is a means. Nevertheless, communicative retributivists firmly reserve a place for repentance and reform as desirable states of affairs they hope punishment would achieve. Insofar as capital punishment excludes the possibility of repentance and reform, contemporary communicative retributivists find it difficult to accept capital punishment as legitimate. Matthew Kramer has recently made important critiques of the claim that capital punishment precludes repentance.¹⁷ Kramer aims primarily at Markel, who has made the most powerful case against capital punishment on grounds of communicative retributivism. My discussion will examine their important exchange.

Essentially, Kramer alleges that capital punishment does not preclude repentance or contrition, because the offender has time to repent before the execution takes place. This simple allegation, however, conceals complexities. First, the length of time is an

¹⁷ See Kramer (2011, pp. 104-110).

issue. Kramer's claim would be weakened if the length of time between the announcement of sentence and the execution is short. Reform takes time; swift execution would leave little opportunity for a rebellious mind to undergo meaningful introspection. If the waiting period is long, however, Markel's case is weakened. A lengthy period of waiting before execution leaves the death row inmate ample time for repentance. In the United States, of course, the waiting period on death row is quite long, averaging approximately eleven years. The fact seems to weigh in Kramer's favor.

Second, Markel aptly responds to the reality of the long waiting period on death row in the United States by arguing that a social institution can only convey meanings that are intended by the very design of the institution.¹⁸ What happens incidentally cannot be conveyed as potent messages. The long wait on death row is a product of protracted judicial procedures. To the extent that it is not intended as a period for death row inmates to repent, the lapsed time cannot be used to justify capital punishment by claiming to allow contrition. In response to Markel's argument, Kramer argues that it is a contingent matter whether the time elapsed before execution is meant for contrition. It is not an essential part of the institution of the death penalty. We can well imagine an institution of capital punishment with a deliberate design of waiting periods of substantial length for the convicts to undergo self reform.¹⁹

Third, Markel argues that "Once the Court committed itself to a retributive theory that situates punishment as a communicative enterprise requiring the defendant's rational understanding that his punishment is a response to his criminality, it also committed itself to a view that the punishment must leave some opportunity during and after the punitive encounter for the defendant to internalize why he is being punished so that he may do something with that rational understanding."²⁰ Obviously, the imposition of capital punishment precludes the possibility of a new life. Kramer responds that Markel's requirement is too broad. It precludes not only the death penalty, but also life

¹⁸ See Markel (2009, pp. 1196-7).

¹⁹ See Kramer (2011, p. 107).

²⁰ See Markel (2009, p. 1211-2).

imprisonment without parole. The fact that the requirement is too broad shows that it is an ad-hoc stipulation rather than a principled corollary of the principle of communicativeness. He argues, “After all, nobody can credibly maintain that someone who spends several decades in a term of lifelong imprisonment has been deprived of opportunities for rumination on the wrongness of the crimes that he has committed.”²¹ One might suggest that “allowing life after punishment” is an important aim which delegitimizes both the death penalty and life imprisonment without parole. But Kramer’s point is that while penal communicativeness does require that punishment facilitate repentance, it does not necessarily require allowing “life after punishment.” The basis for “allowing life after punishment” is not inherent in penal communicativeness, and has to be defended on different grounds.

I believe Kramer has made a convincing case against Markel’s claim that capital punishment contravenes the aims of repentance and reform. I agree with Kramer that capital punishment allows for contrition before it is imposed. However, it should be noted that Kramer’s critiques are insufficient to place capital punishment on a par with lesser forms of sentences. Indeed, capital punishment is qualitatively different. This is not because it does not allow contrition, but because it sends a message that is in serious tension with the purpose of the waiting period that precedes it.

Suppose capital punishment is instituted along with a substantial preceding period which is not a by-product of protracted appeals but is deliberately designed to facilitate contrition. Such an institution would leave room for the concern of communicative retributivists for repentance and reform. Repentance and reform, however, seemingly point to some kind of future possibility. After all, what is the point of contrition if what ensues is the negation of the life being reformed? Still, a life to be lived after contrition is not the only way to realize that future possibility. Much depends on the particular meanings a given culture accords to life and death. Even in secular terms, it is not impossible to imagine societies which regard death as creating values in the life being ended. For example, some argue that the analogy

²¹ See Kramer (2011, p. 109).

between the death penalty and the deep-rooted Japanese idea of *Harakiri*, the ritual suicide by which one takes full responsibility in fulfillment of his role in society, helps to explain why capital punishment is retained with consistently high popular support in Japan.²²

I do not intend to explore all of the possible forms of substantiating the “future possibility”. I merely point out that P3 does not inevitably require life after punishment. Nonetheless, I concede that capital punishment is in serious tension with P3. No religious or cultural traditions can deny that death is a serious deprivation of what life can offer, whatever else death might mean. Is it possible to justify such serious deprivation? The tension between capital punishment and P3 might well arise within the multiple tenets of the communicative enterprise itself. It may even result from a tension between P2 and P3. When these two central tenets of communicative retributivism come into conflict, it is not inevitable that the requirement of substantive fit should yield to efforts to facilitate contrition. The reverse is an option that cannot be ruled out without further argument. The critical question then is: in what sense might the demand of substantive fit actually *require* capital punishment?

A new look at the communicative aspect of punishment

In the Epilogue of her classic *Eichmann in Jerusalem*, Hannah Arendt made a declaration on behalf of the judges who addressed Adolf Eichmann, “And just as you supported and carried out a policy of not wanting to share the earth with the Jewish people and the people of a number of other nations—as though you and your superiors had any right to determine who should and who should not inhabit the world—we find that no one, that is, no member of the human race, can be expected to want to share the earth with you. This is the reason, and the only reason, you must hang.”²³ Arendt wrote this forceful statement precisely because the moral grounds for the trial and execution of Eichmann were subject to heated controversies. Why was it

²² See Asuka (2011). For doubts about such cultural explanations, see Lane (2005).

²³ See Arendt (1992, p. 279).

justifiable to execute someone who claimed he was simply obeying orders, had no inclinations to kill anyone, and never even hated Jews? Arendt recognized that the execution went against the prevalent philosophy of punishment of the day, which was anything but retributivism. “We refuse, and consider as barbaric, the propositions ‘that a great crime offends nature, so that the very earth cries out for vengeance; that evil violates a natural harmony which only retribution can restore; that a wronged collectivity owes a duty to the moral order to punish the criminal.’”²⁴ Nonetheless, she continued, “And yet I think it is undeniable that it was precisely on the ground of these long-forgotten propositions that Eichmann was brought to justice to begin with, and that they were, in fact, the supreme justification for the death penalty.”²⁵

Along with many, I harbor a strong moral belief that capital punishment is a proper response to horrendous evil. I take Arendt’s vicarious declaration to be a proper statement of such moral judgment. It is true that Arendt did not set out to articulate a theory of punishment. Her main purpose was to analyze and interpret the extraordinary event of Eichmann’s trial. Nevertheless, this statement is so rich with implications for the philosophy of punishment that I take it as the point of departure for my analysis. I will interpret her statement in the vein of communicative retributivism, despite my understanding that it could be interpreted to support other views. It is noteworthy that her vicarious declaration on the judge’s behalf was meant to address Eichmann himself. It was a statement deliberately meant to be communicated to the offender about the fundamental norms of morality his crimes transgressed. It was certainly replete with communicative purposes.

The first important implication of Arendt’s statement is that punishment is actually not the initial message in the communicative exchange. The initial message is sent by the wrongdoing. Punishment is actually a counter-message. This aspect of communication is underestimated by contemporary communicative retributivists.

²⁴ See Arendt (1992, p. 277).

²⁵ See Arendt (1992, p. 277).

Jeffrie Murphy quite aptly captures the communicative dimension of criminal offenses:

One reason we so deeply resent moral injuries done to us is not simply that they hurt us in some tangible or sensible way; it is because such injuries are also *messages*--symbolic communications. They are ways a wrongdoer has of saying to us, "I count but you do not," "I can use you for my purposes," or "I am here up high and you are there down below."²⁶

Jean Hampton likewise observes:

When someone wrongs another, she does not regard her victim as the sort of person who is valuable enough to require better treatment. Whereas nature cannot treat us in accord with our moral value, we believe other human beings are able and required to do so. Hence, when they do not, we are insulted in the sense that we believe they have ignored the high standing that value gives us.²⁷

It is quite true that many inexcusable intentional wrongs communicate insulting and degrading messages to their victims. To the extent that a liberal political community recognizes a shared humanity among all of its members and hence assumes an obligation to care for them, the insulting messages sent to the victims can be deemed as directed at the community at large. Crimes insult the victims as well as the community as a whole. The messages communicated by heinous crimes are serious violations of core social values and the collective conscience of a political community. The tangible harms caused by the crime may or may not be remediable. Punishment can never repair what is irreparable, such as lives lost or ruined. This is why the morality of punishment is subject to so much debate---how can evil doubled make a good? Nevertheless, what cannot be disputed is that the defiant and degrading messages conveyed by crime need to be addressed and countered. Thus Hannah

²⁶ See Murphy and Hampton (1990, p. 25).

²⁷ See Murphy and Hampton (1990, p. 44).

Arendt explained why Eichmann had to face the gallows. Paraphrasing Arendt's statement, the degrading message communicated by Eichmann and his fellow Nazis is: "We do not want to share the earth with the Jewish people and the people of a number of other nations. We have superior right to determine who should and who should not inhabit the world." The execution counters the message by saying to Eichmann: "No one, that is, no member of the human race, can be expected to want to share the earth with you. This is the reason, and the only reason, you must hang."

Most theorists who take notice of the communicative aspect of criminal offenses treat the messages expressed by crimes in an indiscriminate manner. Most often they are simply described as wrong, seriously wrong, insulting, or degrading crimes that deserve censure. Even Jeffrie Murphy and Jean Hampton who identified the general message sent by criminal offenses did not explore further what different messages could be conveyed by different types of crimes. Likewise, when discussing the death penalty, many penal theorists treat murders indiscriminately, as if all murderers deserve capital punishment.²⁸ This is perhaps because some version of *lex talionis* was taken as the operative principle of proportionate sentencing. Since the scale of justice can only be balanced between life and life, in principle murderers all deserve death. However, in many modern jurisdictions, murders are classified into differing degrees. This familiar phenomenon is crucial for my purposes.²⁹ I contend that not all murders, taking into account the details of individual crimes, convey equally degrading or wrongful messages. Hence not all murders equally warrant the death penalty as a counter-message. Only those murderous crimes which demonstrate extravagant evil, and are thus devoid of any human element, deserve death as a retributive counter-message.

What is a crime so devoid of any human element? I have claimed Eichmann deserved to be executed. That is not only because of the sheer immensity of the harm he caused,

²⁸ See Primoratz (1989, pp. 158-167), Pojman and Reiman (1998, pp. 27-33) and Berns (1991, pp. 162-3).

²⁹ Hugo Bedau uses this point in his arguments for abolition, when he criticizes Kant's retributive idea on death penalty for being too abstract to explain murderers whose state of mind does not necessarily warrant execution. See Bedau (1987, pp.16-18)

but also because of the strong message sent by his crime. Can comparably degrading messages be sent by crimes of a much smaller scale, by some murderers not operating within a state apparatus? Perhaps so. Hannah Arendt's highly controversial report of the Eichmann trial happens to reveal how banal, unthinking ordinary people could do monstrous things. Such depravity of humanity is also sadly revealed in psychological experiments such as Philip Zimbardo's Stanford experiments.³⁰ If such heartlessness can be deemed as typical evil, then how do we describe those sadistic psychopathic or sociopathic serial murderers who are not under authoritative orders, or surrounded by an oppressive social environment? No overwhelming social pressure is present to even make any sense of the depravity shown by such sadistic serial killers as Ted Bundy³¹ or David Parker Ray.³² The evil is self-grown, though perhaps not without some remote causes. Do not these psychopathic killers epitomize sheer evil on a par with Hitler and Eichmann despite the disparity in scale?

Human drama is not a theater only of virtues. It is a theater of human sins as well. A lot of crimes display nothing more than the weaknesses, vulnerability and crookedness that inhere in humanity. For example, a lot of crimes are committed out of passion. Where revenge goes out of control and is carried out in the form of crimes against the objects of hatred and no others, we may still find the commission of these crimes relatively understandable. Where social surroundings create a culture of killing, as in the culture of the mafia, we can perhaps still remotely relate to those who are thrust into such cultures and are trained to do horrible things. Admittedly, all of these murders convey degrading messages. But they are not really outside the realm of human drama.

I take seriously Norman Mailer's famous quote "Capital punishment is to the rest of the law as surrealism is to realism. It destroys the logic of the profession."³³ I agree that capital punishment is surreal. But it is surreal to the rest of the law, only because

³⁰ See Zimbardo (2008).

³¹ For a description of Bundy's crimes, see http://en.wikipedia.org/wiki/Ted_Bundy (last visited May 14, 2013)

³² See Stone (2009, pp. 217-21).

³³ Mailer (1981, p.6). Also quoted in Weisberg (2011, p.42)

extravagantly evil crimes are surreal to the rest of human sins. Such extreme crimes convey messages that contravene what humanity stands for. To counter such messages, the only proper counter message is death. It says to the offender: “What you did is completely out of bounds of what humanity stands for, even if humanity stands for both virtues and sins, even if humanity struggles between angels and demons. What you did only shows that you have stomped on the gift of life, with which all humanity shares a bond. You have completely degraded what is given to you, life as a human being. Now, for what you did, you no longer deserve to retain it.”

The message sent by capital punishment to extravagantly evil murderers is not only required by P2, the duty of substantive fit. It actually has a deep relation with P3, facilitating contrition and reform. Penal theorists have rarely taken this relationship seriously. When this relationship receives attention, it is usually treated in passing with Samuel Johnson’s famous quote, “Depend upon it, Sir, when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully.”³⁴ However, the message of death could be richer. It is not merely an instrument that helps to focus one’s mind on a certain message of correct values. Death itself is the message. When used for radically evil murderers whose crimes are totally devoid of any human element, the death penalty conveys the ultimate message of equality between the evildoers, the victims and the rest of society. Radical evildoers typically harbor the illusion of their inherent superiority over their victims or the rest of humanity. But death is the single ultimate reminder of the inherent equality of all human kind. No matter how high one places oneself over others, no human beings have the privilege of claiming exception before the ultimate fate of death. It is unfortunate that this reminder has to be used in exceptional cases. Nonetheless, to awaken the humanity that has been buried or overwhelmed by evil, such a reminder may be necessary in rare cases. Paradoxically, the message of death may help to restore the evil offender’s appreciation of life.

Executing the unrepentant: a genuine dilemma

³⁴ Boswell (1887, p.470).

Communicative retributivism places special emphasis on pardon and mercy. What should be done, if the offender gets the message and repents? Since the death penalty is seen primarily as a message *for* the offender, a communicative retributivist would require that the offender be commuted from death. For instance, Karla Faye Tucker was a death row inmate in Texas who had converted to Christianity soon after she was imprisoned. In the following years, many including the warden and the correction officers came to believe that she had genuinely repented. Despite a significant campaign for clemency, she was executed fourteen years after her conviction.³⁵ Such a case should not happen according to the tenets of communicative retributivism. The exercise of mercy necessarily involves complex technical problems. But in principle, unlike other conceptions of retributivism which treats mercy as a distinct issue, the exercise of clemency is built into the fabric of communicative retributivism's theory of death penalty.

What if a death row inmate never repents? Should the execution be carried out? Note, again, that P3 is not negated by P2 in the case of capital punishment. It is only structured, confined within a period of time, instead of allowing indefinite time before the criminal's natural death. Moreover, the institution can certainly be so designed as to allow a substantial length of time before execution, specifically for the purpose of facilitating repentance. Not to execute the unrepentant amounts to abolishing capital punishment altogether. It defeats P2 (substantive fit) for the sake of certain version of P3, namely facilitating repentance without timeframe. P2 is defeated, because any punishment short of death is disproportionate to the extravagantly evil crime. Life imprisonment only deprives the criminal of connections with the general society. It cannot potently convey the messages carried by death. In face of the serious tension between P2 and P3, there are two options. Option A is to reconcile P2 and P3. This option preserves P2 while accommodating P3 with a meaningfully long but limited timeframe. Option B is to compromise P2 for the sake of P3 without timeframe.

³⁵ This case is discussed by Jeffrie G. Murphy. See Murphy (2012, pp. 137-138).

Option A (capital punishment): P2 + P3 (limited timeframe)

Option B (life imprisonment) : P2 ↓ (compromised) + P3(without timeframe)

How then do we choose between Option A and Option B? A reasonable suggestion is as follows. Given that P2 and P3 are equally important, an option that does not compromise either of the two central tenets is superior to an alternative that does. According to this operative principle, therefore, Option A is superior to Option B.

However, one can argue that P3 with a long but limited timeframe is not a meaningful version of P3. The only meaningful version of P3 is facilitating repentance without such a timeframe. Option A actually involves a defeat of P3. And that would even the score between Option A and B, because both compromise one central tenet of communicative retributivism. But how do we make sense of the potential claim that the only meaningful version of P3 is facilitating repentance without a timeframe? A possible answer goes like this: the purpose of penal communication is premised on the moral conviction that the criminal is still a member of the moral community capable of receiving the message, even though he may choose to reject the message. Even if a long waiting period facilitating repentance is instituted, the execution terminates any future possibility of repentance, however remote that may be. Isn't the execution defeating the very purpose of communication?

I do not think that a P3 with a long but limited timeframe is a compromised version of P3. If a death row inmate gets the message sent by the death sentence, repents, and is commuted from death, how does it follow that the institution of capital punishment is meaningless for the purpose of facilitating repentance? The extraordinary message was potently sent, received, and accepted. On the other hand, if the criminal does not accept the message, the fact that he does not do so hardly renders the communication meaningless. It is a fundamental idea of communicative retributivism that even if the reprimanding message is rejected, the act of communicating censure is still a meaningful enterprise.

Nevertheless, execution does mean communication has come to an end. Yet putting an end to an enterprise does not nullify what is done before. The real question is: do extravagantly evil murderers deserve a type of capital punishment that gives them a meaningfully long but limited timeframe for repentance? Or do they deserve a type that leaves room for repentance indefinitely? I would choose a limited timeframe, because the extraordinary nature of the crime necessitates death as a counter-message. Execution is actually the result of the criminal's own choice. The choice is to reject the political community's censure, after a long period of contemplation. But I acknowledge that the other option is sensible too. Those who choose abolition may think that the act of communication presumes that a trace of humanity may be found in the criminal. As long as there is hope for repentance, we should not execute him. I believe both options are consistent with the central tenets of communicative retributivism.

This is a genuine dilemma. To make a rational choice requires further inquiries that transcend what the central ideas of communicative retributivism can illuminate. These issues include, for example, the nature of "extravagant evil" and what it means to humanity, the nature and moral implications of repentance, the possibility and nature of "irredeemability", the meaning of death, the boundary of state authority of a liberal community, and so on. I have to leave these issues for future inquiries. But I want to point out that even if one chooses abolition for the sake of preserving hope for repentance, it is a genuine dilemma from which one is choosing. Either you compromise substantive fit for the sake of unlimited repentance, or you timeframe repentance for the sake of substantive fit. The dilemma should be recognized, rather than be theorized away. By recognizing the dilemma, societies which make the opposite decision will find each other's choice sensible despite the disagreement. And such mutual understanding is necessary, if a world divided by the issue of the death penalty seeks to continue the dialogue in a constructive and respectful manner.

Capital punishment and human dignity

Granting that capital punishment is different from torture in important ways, does it follow that capital punishment is consistent with human dignity? Not necessarily so. Let me develop a metaphor. Imagine an exquisite glass holding an invaluable wine, say, 1787 Chateau Lafite. The glass is valuable in itself. But the glass is not really unique. The wine alone is what truly distinguishes this particular glass. Now, imagine two ways this invaluable glass of wine can be spoiled. The first is to sully the glass by adding foul sewage to the wine. The second is simply to break the glass that holds the wine. Which is worse? Some may say that they would rather see the wine spilled than to see it sullied. At least the wine is intact in its quality. But others might say that both are horrendous ways of spoiling the wine and the difference is insignificant, because wine is really for the tasting and both ways disrupt its use.

Life underpins human autonomy and reason, much in the same way the glass holds the wine. What torture does to human autonomy and reason is like pouring foul sewage into the invaluable wine. It directly corrupts the invaluable essence. By contrast, what death does to life resembles breaking the glass. It does not corrupt the wine, but only breaks what holds it together. It would be odd to say the former is far better and that the latter is not a way of spoiling the essence. Both may be important yet distinct ways of contravening human dignity. Assaulting autonomy by torture, like sullyng the wine, is never justifiable as a form of punishment. However, is capital punishment likewise never justifiable? Should the glass never be broken?

There are two ways the glass may be broken without violating human dignity. The first is for life to be terminated as a result of exercising one's own autonomy, namely a decision to have one's own life taken. Not all such kind of decisions, however, are consistent with human dignity. Some such decisions show inadequate appreciation of the worth of life, such as suicide for insufficiently weighty reasons. Yet still we can easily imagine instances that are consistent with dignity. For example, a terminally ill

and suffering patient may choose to die with dignity; a soldier in war may die for his/her comrades with honor and dignity; a guilt-ridden politician may, in some Asian cultures, commit ritual suicide with dignity to atone for the shame he has brought upon his family and society.

The second way is for the political community to affirm someone's autonomy by holding him responsible for his criminal offenses. It means censuring the offender and imposing proportionate punishment with a purpose to bring him face to face with the nature and significance of the offense. When murderous offenses show extravagant evil, the proportionate punishment should be the death penalty. Autonomy and reason is closely connected with moral responsibility. We do not hold a lion responsible for killing a human being, because a lion kills out of natural necessity alone. We hold someone responsible only because he has autonomy and reason, a capacity to understand moral laws and to make choices for action. We owe it to the offender to show him the nature and significance of his choice and action. Extravagantly evil crimes seriously denigrate the worth of life. Such an offender degrades his own life, because the extraordinary crime reveals the depth of his personality, which has lost connection with correct values that make one's life worth living. To use the wine/glass metaphor again, breaking the glass does not spoil the wine. The wine has already been spoiled. For actual wine decayed, we can simply pour it into the drainage. In the case of life and deed, by contrast, the liquor cannot be separated from the glass. That is, the worth of a life cannot be separated from the deed that comes to define the life. When the wine decays to an extraordinary degree with serious harmful effect, the glass should be broken.

So far the wine/glass metaphor has been useful for illustrating my argument. However, a metaphor is most useful when its limit is recognized at the same time. The wine/glass metaphor inclines toward a particular conception of human dignity, namely human dignity as worth. This is because we evaluate wine/glass based on its value for us. But it raises two concerns. First, if the worth of one's autonomy and life is destroyed by his extravagantly evil offenses, why are we still obligated to treat him

respectfully and to refrain from humiliating him? Is not human dignity inalienable no matter how much someone's life is worth? Second, the worth of both the wine and the glass is instrumental. We judge its worth based on the value it creates for its users. The metaphor risks mischaracterizing life's worth as the value it creates for the society, not as a value standing on its own.

To address these two concerns, it is necessary to recognize two important conceptions of human dignity. The first concern points to the conception of human dignity as the revered status of human kind. Let me call it dignity as revered status. Someone's revered status requires that we treat him with respect. Treating someone with respect does not mean always complying with his demands. When morality and law requires dealing with someone against his wishes, such as holding him responsible for crime, human dignity requires treating him respectfully at all times, even when imposing death penalty. The second concern has to do with an alternative conception of human dignity, which is intrinsic value of humanity that is "unconditional and incomparable", to use Kant's terms.³⁶ Let me call it dignity as intrinsic worth. By using dignity in this sense, an abolitionist can argue that despite the decay, the wine possesses such unconditional value that the glass should never be broken.

Whether capital punishment violates human dignity appears to hinge on which sense of dignity is used. Dignity as revered status allows for capital punishment so long as it is administered in a respectful manner and is used rightfully as moral desert. Dignity as intrinsic worth, by contrast, creates greater difficulty for capital punishment since it signifies intrinsic worth that should not be subject to destructive treatment. However, even if we use dignity in the sense of intrinsic worth, it does not necessarily follow that capital punishment is illegitimate. It depends on what it is precisely that has intrinsic worth. Life is not the definitive element of human dignity. Autonomy and reason is. What possesses intrinsic worth is the human potential to pursue the plurality of values with creativity, while refraining from harming others in a way that treats other human beings merely as means. Extravagantly evil crimes come to define the

³⁶ See Kant (1996(1785), p.85)

life of the offender and testify that the human potentiality may never be fulfilled. The worth of life is negated by the crime.

Conclusion

Does communicative retributivism necessarily negate capital punishment? My answer is no. I argue that there is a place, though a very limited and unsettled one, for capital punishment within the theoretical vision of communicative retributivism, properly understood. The death penalty, when it is reserved for extravagantly evil murderers for the most heinous crimes, is justifiable by communicative retributive ideals as I understand them. I argue that punishment as censure is a response to the preceding message sent by the offender through his criminal act. The gravity of punishment should be commensurate to the preceding criminal message, so that the offender can face up to the nature and significance of his crime. All murders are not the same. To measure up to the most evil and humanity-hating murderous message, capital punishment should be the counter-message. Next, I argue that capital punishment does not violate human dignity. The death penalty and torture both disrupt human dignity, yet in very different ways. The death penalty terminates life, the vessel that holds together autonomy, while torture directly assaults autonomy. Torture is never permissible. But death penalty, when used only on the extravagant evildoers, is justifiable, as autonomy is thoroughly degraded by his own evil act. Moreover, I argue that mercy is built into communicative retributivism with respect to capital punishment.

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