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# The *Lex Talionis*, the Purgative Rationale, and the Death Penalty

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*In The Ethics of Capital Punishment: A Philosophical Investigation of Evil and Its Consequences, Matthew Kramer argues that none of the standard rationales used to justify capital punishment successfully vindicates it and that a new justification, the purgative rationale, justifies capital punishment for defilingly evil offenders. In this article, it is argued, first, that a version of retributivism that adheres to the lex talionis as Kramer understands it does seem to call exclusively for the death penalty. Second, it is submitted that the purgative rationale is over-inclusive inasmuch as Kramer considers it applicable to certain offenders with abusive or deprived backgrounds, some offenders indoctrinated to adhere to pernicious ideologies that have impelled their crimes, and wrongdoers who have sincerely repented. Third, doubts are expressed about whether the purgative rationale justifies the execution of any offenders. Even if it is true that the continued existence of an extravagantly evil offender represents an affront to humanity, as Kramer suggests, a moral obligation to execute him does not follow. Since repentance is intrinsically valuable and since repentance would extinguish the affront to humanity, the community in which an unrepentant evil offender abides is duty-bound to foster repentance on the part of the offender by imposing banishment or life imprisonment, sanctions that afford the offender the most extensive opportunity for repentance. The community is therefore obligated to impose one of these sanctions instead of capital punishment.*

**Keywords:** capital punishment, *lex talionis*, purgative rationale, life imprisonment, banishment, repentance

## 1. Introduction

As one of the state's most extreme exercises of power against citizens, capital punishment requires very

compelling justification. In a recent book on the moral legitimacy of the death penalty, *The Ethics of Capital Punishment: A Philosophical Investigation of Evil and Its Consequences*, the most sophisticated and rigorous book-length treatment of this topic to date, Matthew Kramer pursues two

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projects, one critical and the other justificatory. His critical endeavor involves his showing that none of the standard rationales used to justify capital punishment—deterrence, retribution, denunciation, and incapacitation—successfully vindicates this sanction, either in isolation or in combination. His “positive,” justificatory project consists in his advancing a new justification for the death penalty, the purgative rationale, and defending it against anticipated objections. Kramer’s book makes things difficult both for those seeking to justify the death penalty *and* for those who want to argue that capital punishment is morally illegitimate even for the worst offenders.

Kramer, who is a deontologist, does an excellent job of rebutting the standard consequentialist justifications for capital punishment, the deterrence-oriented, incapacitative and denunciatory rationales. He demonstrates that the empirical evidence adduced in support of these justifications is inconclusive and that even were such evidence satisfactory, none of these justifications would vindicate capital punishment, since they are defective on moral grounds relating to their consequentialist underpinnings. (He shows, for example, that even when supplemented with retributivist side-constraints each of these rationales purports to justify execution of the innocent in utility-maximizing circumstances.) He contends further that capital punishment is unjustified since there is at least one sanction—life imprisonment—that is less severe and which would satisfy the purposes served by each of these justifications. Capital punishment is morally illegitimate because it is inconsistent with the Minimal Invasion Principle, which Kramer considers a “central tenet of

liberalism.”<sup>1</sup> According to this principle, a punishment will be justified only if there is no “significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted,” as Justice Brennan put it in the famous U.S. death penalty decision, *Furman v. Georgia*.<sup>2</sup>

Kramer’s arguments against the retributivist justification for the death penalty are different from those he advances against the standard consequentialist justifications. He does not seek to impugn the tenets of retributivism as a general theory of punishment.<sup>3</sup> Instead, he contends that retributivism cannot justify the imposition of capital punishment because it does not *require* that this sanction be imposed even on the worst offenders. He argues with reference to commensurateness, proportionality, and the *lex talionis* principle, each importantly related to the concept of desert, that retributivism does not prescribe that sanctions be at certain levels of severity and be of particular types. Commensurateness, which mandates that the severity of the punishment must reflect the negative desert of the wrongdoer, and proportionality, which requires that the levels of severity of punishments must reflect levels of seriousness of the crimes for which they are imposed so that the more serious the crime the more severe the punishment, are both, he says, significantly indeterminate and, as a result, although they can disqualify certain punitive possibilities, neither singles out specific sanctions as uniquely appropriate for specific types of crimes. The *lex talionis* doctrine, according to which like must be returned for like in any just punitive response to wrongdoing, is also, he says, only a limitedly determinate

criterion for punishment and likewise never renders execution morally obligatory. Since retributivism in all its varieties possesses limited determinacy and because at least one less severe sanction, life imprisonment without the possibility of parole, satisfies the tenets of retributivism, the Minimal Invasion Principle requires that life imprisonment and not capital punishment be imposed.

Kramer's purgative rationale for capital punishment, which is inspired in part by the execution of Achan recounted in the seventh chapter of the Book of Joshua, holds that some crimes are so evil "that the continued existence of the thugs responsible for them is a blot on the moral order of the community in which those thugs are kept alive."<sup>4</sup> The commission of these atrocities represents an expression by the evildoer of "utter contempt for basic human capacities and thus for humankind as a whole." The repudiation of humanity his extravagantly evil actions bespeak is such that his continued existence "taints the relationship" between the community in which he lives and the rest of humanity.<sup>5</sup> The community is under a moral duty to repair the relationship between itself and humankind by executing such individuals. Execution under the purgative rationale does not violate the Minimal Invasion Principle as it does under the standard justifications for the death penalty, since the purgative rationale calls determinately and exclusively for capital punishment. Only execution will restore the community's moral standing.

My purpose is to show that neither of the projects Kramer sets for himself is completely successful. There is much to admire in his critical project. His rebuttal of the consequentialist

deterrence-oriented, incapacitative and the denunciatory justifications for capital punishment is, I believe, entirely persuasive.<sup>6</sup> Further, his efforts to show that retributivism cannot justify capital punishment are successful with respect to almost all versions of retributivism. They fail, however, as I shall argue in section 2, for the variant of retributivism that adheres to the *lex talionis*. I argue that the *lex talionis* as Kramer understands it *does* seem to call exclusively for the death penalty. In sections 3 and 4, I raise some objections to the purgative rationale. In section 3, I argue that the purgative rationale is over-inclusive, inasmuch as Kramer considers it applicable to some who, I believe, should be ineligible for a punishment as severe as capital punishment. This group includes certain offenders with abusive or deprived backgrounds, some offenders indoctrinated into adherence to pernicious ideologies that have impelled their crimes, and wrongdoers who have sincerely repented. The objections to the purgative rationale that I raise in section 3 are not fatal to it, since the purgative rationale could still be applicable to those without troubled backgrounds, whose crimes have not been impelled by noxious ideologies, and who are unrepentant. These objections show only that the purgative rationale is applicable to fewer offenders than Kramer imagines. In section 4, however, I question whether the purgative rationale justifies the execution of *any* offenders. I argue that even if it is true that the continued existence of extravagantly evil offenders represents an affront to humanity, a moral obligation to execute them does not follow. Since repentance is intrinsically valuable and since repentance would extinguish the affront to humanity, the

offender's community is duty-bound to foster repentance by imposing a punishment that provides offenders with the greatest opportunity possible to repent. Since banishment and life

imprisonment afford the offender maximum opportunities for repentance, the community is obligated to impose one of these sanctions and to eschew capital punishment.

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## 2. The *Lex Talionis* and Capital Punishment

Although many retributivists are dismissive of the *lex talionis*, Kramer evinces considerable enthusiasm for it.<sup>7</sup> He acknowledges that it may, calling as it does for like to be returned for like, appear to prescribe the death penalty as punishment for murderers. Some retributivists who adhere to the *lex talionis*, most notably Kant, argue that capital punishment is the only suitable sanction for murderers.<sup>8</sup> They believe that only capital punishment would return like for like in these circumstances.

Not all versions of the *lex talionis* call exclusively for capital punishment to be imposed on murderers, however. Some versions, including those formulated by Jeremy Waldron and Jeffrey Reiman, while allowing this sanction to be imposed, do not require that capital punishment be imposed for any crime, including murder.<sup>9</sup> Kramer agrees with Waldron and Reiman that the *lex talionis*, properly understood, never requires the imposition of capital punishment even for the worst murderers. He argues that since the *lex talionis* would not only be satisfied by the imposition of capital punishment, but also by the less severe life imprisonment without parole, the Minimal Invasion Principle prescribes life imprisonment as the appropriate punishment. The *lex talionis*, he

concludes, cannot vindicate capital punishment.

Kramer follows Waldron in construing the *lex talionis* as a *qualitative* principle according to which punishment must partake of at least some of the wrong-making features of the crime for which it is imposed (those properties of the offence on which its deontic features supervene). Waldron states that we need to identify the wrong-making features of a crime so as to arrive at a fitting punishment. We also need to choose between different levels of abstraction or generalization at which the wrong-making features of the offence are to be expressed. Our choice of level is to be guided by "our sense of what ultimately matters in our reckoning something an offence, our sense of finally why it is wrong."<sup>10</sup> Kramer agrees with Waldron that the wrongness of murder supervenes on the property of its being a killing of another. It is this feature of the offence that, both Waldron and Kramer think, must be reproduced in the punishment.

This might suggest that the *lex talionis* calls determinately and exclusively for capital punishment for murder. First appearances are deceptive, however, since on Waldron's (and Kramer's) understanding this wrong-making feature (killing) can be expressed at a higher level of

abstraction by asking what makes killing wrong. In Kramer's view, which is consistent with the deprivation account of the badness of death, the wrong of murder consists in "its irreversibly complete termination of any opportunities for the victim to undergo future positive experiences."<sup>11</sup> This feature is, as he says, predicable of the murder of even senile and mentally retarded people. He adds that it is also predicable of the murder of comatose individuals, since although a coma may be irreversible using current technology, there is a small chance while the comatose person remains alive that a future technological innovation will enable her to undergo positive experiences.

When the wrong of murder is expressed at this level of abstraction, capital punishment will be consistent with, but not required by, the *lex talionis*:

*A murderer's irreversibly complete termination of any prospect of future positive experiences can obviously be reproduced in a legal-governmental system's punitive response through the execution of the perpetrator, but it can also be reproduced through a sentence of lifelong imprisonment-without-parole in drably austere conditions of solitary confinement.*<sup>12</sup>

Kramer concludes that since there is at least one alternative sanction less severe than the death penalty that satisfies the demands of the *lex talionis*, and since the Minimal Interference Principle enjoins that the least severe punishment that would satisfy a particular justification must be imposed, capital punishment is unjustified, even for retributivists who adhere to the *lex talionis*.<sup>13</sup>

I want to show that Kramer's arguments to establish that the *lex talionis* does not require that capital

punishment be imposed on murderers are unsuccessful and that, as a result, he has not shown that no version of retributivism can vindicate capital punishment. There are several difficulties with Kramer's argument that the *lex talionis* does not exclusively enjoin use of capital punishment. First, life imprisonment in bleakly austere conditions of solitary confinement without the possibility of parole or commutation will not completely eradicate opportunities for an offender subjected to it to undergo positive experiences. Such an offender may have pleasurable experiences. No matter how disagreeable the conditions of confinement, that is, even if prisoners are almost completely isolated from human contact, their diet restricted to unvaried and unflavorful food, and access to books, magazines, and other sources of entertainment severely restricted so that they are afforded almost no opportunity for mental stimulation, they will still be in a position to undergo at least some positive experiences. Grim satisfaction may accompany the ingestion of some meal, however bland. An inmate may derive basic physical pleasure from voiding his bowels. He might have some pleasurable memory of his life prior to incarceration. Or he might experience momentary *joie de vivre* for some other reason. Since it will be possible for delinquents even in the harshest conditions of confinement to undergo positive experiences, imprisonment, unlike death, will not terminate completely the opportunity for positive experiences. The effect of such conditions may be, as Kramer reflects in a more careful formulation, "to minimize their opportunities for future positive experiences."<sup>14</sup> But life imprisonment



under these conditions will not irreversibly and completely terminate these opportunities. Imposition of life imprisonment in austere conditions for the worst murderers would therefore not be consistent with the version of the *lex talionis* he supports. If the appropriate sanction for murder must reproduce the wrong-making features of murder as Kramer understands it, it is obscure why we should not follow Kant, who, in explicating the demands of the *lex talionis*, insists that “there is no *similarity* between life, however wretched it may be, and death, hence no likeness between the crime and the retribution unless death is judicially carried out upon the wrongdoer.”<sup>15</sup>

Second, even if we allow that life imprisonment without the possibility of parole under bleak and highly restrictive conditions of solitary confinement could completely deprive the offender of the possibility of any positive experiences, it is not clear that this sanction will be less severe or invasive than capital punishment, which it must be for the Minimal Interference Principle to prescribe that it be imposed in preference to capital punishment. Kramer assumes that “capital punishment is a more severe imposition than any other punitive measure that is employed within liberal democracies.”<sup>16</sup> This proposition does not command universal assent. Mill, for one, denied as much:

*What comparison can there really be, in point of severity, between consigning a man to a short pang of rapid death, and immuring him in a living tomb, there to linger out what may be a long life ... without any of its alleviations or rewards—debarred from all pleasant sights and sounds, and cut off from all earthly hope, except a slight mitigation of*

*bodily restraint, or a small improvement of diet?*<sup>17</sup>

For a hedonist such as Mill, to judge whether life imprisonment will be more severe than execution, we must add up all the pleasures yet to be experienced by the offender subjected to this sanction, subtract all the pains, and determine whether the net balance is positive or negative. If life imprisonment will afford more pain overall than pleasure, the offender is better off dead, given that, at least on a plausible physicalist view of persons, death involves no experience, positive or negative, at all. In these circumstances, life imprisonment will be more severe than capital punishment.

If, however, the balance of pleasure over pain is positive, better than zero, life imprisonment will be less severe than execution. So whether life imprisonment is a more severe punishment than imprisonment depends on the conditions of incarceration and on what opportunities for pleasure and pain such conditions provide. If the conditions of life imprisonment are relatively humane—if prisoners are allowed visits by family and friends on a regular basis and afforded access to education, recreation, and entertainment, consistent with their interests and proclivities, for example—the balance of pleasure and pain could be positive. But if the conditions of life-long confinement are unremittingly grim, as Mill envisages them to be in the passage quoted above and as Kramer thinks they must be if the *lex talionis* is to be satisfied, if life is not on balance positive, life imprisonment will be more, not less, severe than capital punishment.

As it happens, I do not accept hedonism, so I do not think that pleasure and pain, mental states, are the only things that matter intrinsically. External goods and bads also matter for determining well-being, such as whether the individual will be able to achieve his important goals and ambitions, whether he will have friendships and other loving relationships and whether he will be in a position to improve his education and knowledge. Nevertheless, on the version of well-being I accept, life imprisonment in solitary confinement without the possibility of parole under conditions Kramer takes to be in keeping with the demands of the *lex talionis* will be more severe than capital punishment. Life imprisonment under humane conditions of confinement would allow the offender to realize many external goods. But in the conditions of life-long solitary confinement that Kramer thinks would satisfy the *lex talionis*, the offender would probably not be able to realize any of them. Execution, it is true, will equally deprive the offender of the opportunity to experience pleasure and to realize external goods. But it will also prevent the offender from experiencing pain and prevent the occurrence of external bads. By contrast, the offender incarcerated under conditions of austere isolation will not only be deprived of positive experiences, his life will be horrible, full of suffering, disappointment, and frustration. This suggests that capital punishment is the less severe punishment of the two sanctions that would satisfy Kramer's version of the *lex talionis*. The Minimal Invasion Principle demands that capital punishment, not life imprisonment, should be imposed on the worst murderers.

Some scholars subscribe to valuable container theories according to which life itself has positive value, irrespective of whether the contents of a life are on balance positive or negative.<sup>18</sup> From this perspective, life is beneficial for an individual independently of what is occurring in that life. Those who accept such a theory hold that it is not sufficient simply to add up all the positives in an individual's life and subtract all the negatives to determine whether he is better off being alive than dead. Once this calculation has been completed, we would also have to add positive points for his being alive at all. This means that even if the contents of a life are on balance negative, overall that life may still have positive value. I am not sure we should accept any valuable container theory, but, if we do, we should reject as implausible those versions which hold that being alive is so valuable that no matter how awful the contents of a life may be, it will always be better to be alive than dead. If we are inclined to accept a valuable container theory, we should accept a modest version which holds that, although being alive in itself is beneficial, the contents of an individual's life, if they are sufficiently bad, can outweigh the good of being alive. If some future period would, as Kagan puts it, "have been slightly bad for you in terms of the contents of your life, it might still be the case that the value of being alive per se outweighs that negative subtotal, so that it would be *better* for you to remain alive."<sup>19</sup> The trouble is that the contents of a life under conditions of solitary confinement coupled with the grimmest austerity would not be only "slightly bad." Such a life would be very bad. So even if we accept a

moderate container theory, we should conclude that in the circumstances of an offender subjected to lifelong solitary confinement in joyless conditions the positive value of being alive will be outweighed by the badness of the contents of life. Accordingly, if both capital punishment and life imprisonment under these circumstances will satisfy the *lex talionis*, the Minimal Invasion Principle requires that capital punishment should be imposed.

This brings me to the third difficulty with Kramer's claim that the *lex talionis* does not justify capital punishment since it could be satisfied by life imprisonment in solitary confinement. It is far from clear that lifelong imprisonment in solitary confinement and under conditions that would impose a kind of "living death" on incarcerated is morally legitimate, even for the worst murderers.<sup>20</sup> The potentially serious psychologically harmful effects of solitary confinement for a prolonged duration have long been documented.<sup>21</sup> "Psychosis, suicidal behavior, and self-mutilation are commonly seen among prisoners in long-term solitary confinement."<sup>22</sup> Kramer indicates that he does not "endor[s] every aspect of supermaximum facilities in the United States or in any other country."<sup>23</sup> Yet he does countenance the use of life imprisonment under "supermaximum conditions," which include solitary confinement coupled with certain severe restrictions and deprivations.<sup>24</sup>

Further, prolonged solitary confinement inflicts on prisoners severe psychological pain and suffering. Is it therefore not appropriately classifiable as psychological torture? The psychological effects it produces, which include confusion and impaired concentration, perceptual distortions,

paranoia, identity-disintegration and psychosis,<sup>25</sup> may have the effect of undermining—or overwhelming—the reflective, deliberative agency of victims. It may fail "to respect the dignity of its victim as a rationally self-governing agent."<sup>26</sup>

Several responses to the objection that subjecting inmates to prolonged solitary confinement amounts to torture are imaginable. It is not clear, however, that Kramer is in a position to make any of them or that any are successful. It might be retorted that only physical suffering can qualify as torture. However, as Kramer himself recognizes in a recent book on the ethics of torture, "denial of the reality of psychological torture is untenable."<sup>27</sup> It could also be replied that punishment imposed and administered for criminal offences subsequent to the guilt of such offenders having been established in a court of law cannot amount to torture. Yet, as Kramer rightly insists, "[t]he sheer fact that the law of a jurisdiction prescribes a course of torturous mistreatment as a punishment for some crimes does not render such a course of mistreatment non-torturous."<sup>28</sup> Finally, it might be objected that life imprisonment under conditions of solitary confinement and deprivation cannot amount to torture because the officials responsible for imposing and administering this sanction do not *intend* to inflict severe mental suffering. Although in most instances of torture severe pain and suffering is intentionally inflicted, it may indeed be the case that in certain instances torturers do not intend to bring about severe pain and suffering. They may, as Kramer acknowledges, be "utterly indifferent" towards the pain and suffering



their acts produce, the eliciting of which is then, as Kramer puts it, "extravagantly reckless rather than intentional." That is, since the likelihood of severe psychological pain or suffering is very high, given obvious facts about human psychology and the evidence from studies we have about the effects of prolonged solitary isolation, officials responsible for imposing and administering it may view the psychological torment prolonged solitary confinement induces with indifference, rather than as something desired either as a means or an end.<sup>29</sup>

Even if for some reason prolonged solitary confinement does not amount to torture, there is reason to think that it should be classified as cruel, inhuman, and degrading punishment which is prohibited in several international human rights conventions.<sup>30</sup> Some courts have ruled to this effect. The Inter-American Court of Human Rights, for example, has determined that "prolonged isolation and coercive solitary confinement are, in themselves, cruel and inhuman treatments, damaging to the person's psychic and moral integrity and the right to respect of the dignity inherent in the human person."<sup>31</sup> The mental anguish inflicted through prolonged solitary confinement may "compromise[] or undermine[] the very capacities constitutive of autonomous agency itself."<sup>32</sup> The prohibition of inhuman, degrading punishment is a principle of political morality that rules out subjecting offenders to life imprisonment in solitary confinement under conditions of drab austerity.

My objections to Kramer's claim that the *lex talionis* does not vindicate

capital punishment do not, of course, show that retributivists must support this sanction. Perhaps the wrong of killing could be expressed differently from the way in which Kramer formulates it. Or perhaps, a possibility raised by Waldron, retributivists committed to the *lex talionis* could focus on wrong-making features of murder apart from killing, in which case life imprisonment could reproduce these characteristics of murder and satisfy the *lex talionis* to some extent.<sup>33</sup> Alternatively, retributivists could accept a version of the *lex talionis* that differs from Waldron's. Kramer himself expresses qualified support for Reiman's understanding of the *lex talionis*.<sup>34</sup> Grist to Kramer's mill is Reiman's assertion that "there is a range of punishments that includes some that are just enough though they exact less than the full measure of the *lex talionis*." Capital punishment, which exacts the full measure of the *lex talionis*, is located at the top of this range, but provided the punishment imposed falls within this range it will not be "incompatible with the *lex talionis* at the top end."<sup>35</sup> Reiman considers that since life imprisonment without the possibility of parole would fall within this range of punishments, sparing the lives of murderers would not be unjust.<sup>36</sup> If this is so and if the Minimal Interference Principle is accepted, we are morally obligated to impose life imprisonment instead of capital punishment.<sup>37</sup> A further possibility is to reject the *lex talionis*. As Michael Moore rightly points out, "It is quite possible to be a retributivist and to be against both the death penalty and the *lex talionis*."<sup>38</sup>

### 3. The Over-inclusivity of the Purgative Rationale

In this section, I express concerns about the scope of the purgative rationale as Kramer explicates it. In Section 3.1, I argue that it fails to accord extenuative or mitigating force to certain aspects of offenders' childhoods and backgrounds for which they are not responsible and but for which they would not have committed their evil act(s). In section 3.2, I contend that the purgative rationale fails to accord sufficient extenuative or mitigating force to repentance by evil offenders.

#### 3.1. Inflexibility Concerning Culpability

My initial difficulty with the purgative rationale as Kramer sets it out concerns the narrowness of his understanding of extenuating circumstances. He considers the extenuating effects of deprived or terrible backgrounds of defilingly evil offenders to be "typically nil." The purgative rationale is applicable to a vile criminal even if "his perpetration of ghastly crimes can plausibly be attributed in part to his having emerged from such travails"—even if, that is, "he has formed his deprived outlook partly in reaction" to his background. He justifies this avowedly inflexible view on the grounds that a terrible upbringing "amounts to a (fairly weak) tendency rather than an irresistible impulse" to commit monstrous crimes, that even offenders with "hellish" backgrounds "have played major roles in forming their own characters" and that "most people who grew up in harrowing conditions do not become iniquitous murderers and torturers."<sup>39</sup> He explains that at lower

levels of criminality facts relating to deprived or terrible backgrounds may have mitigating force. Yet he insists that there is no place for leniency in relation to extravagantly rebarbative crimes. Since defilingly evil offenders "are reflective agents rather than automatons ... they are rightly held fully responsible for their crimes against humanity."<sup>40</sup>

This inflexible view of blameworthiness for terribly wrongful acts is unfair. Kramer identifies himself as a compatibilist about free will.<sup>41</sup> Yet compatibilists, although committed to agreeing with Kramer that many people with terrible backgrounds and upbringing are not automatons, need not and should not take the view that information about a wrongdoer's childhood should not affect our disposition to hold such an offender morally responsible in cases in which morally heinous crimes have been perpetrated. R. Jay Wallace, for example, holds that it is a condition of moral responsibility that agents possess what he terms "powers of reflective self-control: the general ability to grasp and apply moral reasons and to regulate their behavior by the light of such reasons."<sup>42</sup> Ordinarily, Wallace thinks, we view normal mature adults as possessing powers of reflective self-control. Yet he thinks we are rightly "reluctant to blame *even those who have committed quite horrible crimes* when we learn that they were subject to quite unusual deprivation in their youth" such as "physical and verbal abuse, emotional neglect and inattention, withdrawals of love and concern, extreme arbitrariness and hypocrisy in the application

of punishments and rewards, and an atmosphere of violence, insecurity and hopelessness."<sup>43</sup> We should regard such deprivation as diminishing responsibility

*even if we did not accept that it strictly necessitates adult wrongdoing. We might think it perfectly possible that someone with such a background should have stayed out of trouble as an adult, but we should still consider it unfair to treat the person as a fully accountable agent and we would be reluctant to respond with ordinary moral blame when the person did something wrong.*<sup>44</sup>

What explains our reluctance to hold perpetrators of even horrible acts fully responsible, Wallace explains, is that powers of reflective self-control are not an "all-or-nothing affair." They can be "more or less fully developed" and "it is extremely plausible to suppose that how far one's powers of reflective self-control are developed will largely be a function of the environmental and educational circumstances to which one is exposed in childhood and youth."<sup>45</sup> The development of powers of reflective self-control is detrimentally affected not only by abuse and neglect in childhood, but also by conditions of extreme poverty and violence in which some people are raised. Those raised in circumstances of extreme poverty or violence may

*find it much more difficult to take morality seriously than those whose formative circumstances and life prospects are more fortunate ... morally it seems that we ought to take their social and developmental circumstances into account, recognizing those circumstances to be mitigating factors when the responses of blame and moral sanction are in question.*<sup>46</sup>

Viewing accountability in this way reveals that the main impediments to

holding people fully responsible are "the political and social circumstances in which we live."<sup>47</sup>

Kramer recognizes that many evil atrocities are perpetrated by those acting under the influence of "odious ideologies" including "racism or misogyny or religious bigotry or Communist zealotry" which may result in the mind of the person in the grip of such "poisonous ideologies" being "warped" so that he will be inclined to dehumanize certain people and be disposed to take pleasure in their misery.<sup>48</sup> Yet, despite his admission that such ideologies may be mind-warping, the fact that an evil atrocity was committed by someone in the grip of some such noxious ideology does not in Kramer's view have extenuative force. This too seems potentially unfair, particularly where the wrongdoer succumbed to the ideology in consequence of his being indoctrinated as a child and/or youth. Wallace more plausibly holds that "systematic disinformation or indoctrination could deprive one of the capacity to apply moral obligations, by making one unable to judge accurately the morally relevant features of the situations one confronts; the result of such a process might thus resemble the effects of a delusion."<sup>49</sup>

It is tempting to think that at least some extravagantly evil individuals lack full sanity in Susan Wolf's special sense of sanity as "the minimally sufficient ability cognitively and normatively to recognize and appreciate the world for what it is." Wolf gives the example of Jojo, the son of an evil and sadistic dictator, whose education and upbringing are under the control of his father. Jojo views his father as a role model and on reaching adulthood commits murder and

torture as his father did before him. In the light of his upbringing and education, Wolf suggests, Jojo's deepest self is not fully sane, in the sense that "a person who, even on reflection, cannot see that having someone tortured because he refused to salute you is wrong plainly lacks the requisite sanity."<sup>50</sup> This understanding, says Wolf,

*explains why we give less than full responsibility to persons who, though acting badly, act in ways that are strongly encouraged by their societies – the slaveowners of the 1850s, the Nazis of the 1930s, and many male chauvinists of our father's generation for example. These are people, we imagine, who falsely believe that the ways in which they are acting are morally acceptable, and so, we may assume, their behaviour is expressive of or at least in accordance with these agents' deep selves. But their false beliefs in the moral permissibility of their actions ... may have been inevitable, given the social circumstances in which they developed.*<sup>51</sup>

Kramer considers the execution of Oklahoma bomber Timothy McVeigh as justified under the purgative rationale notwithstanding the fact that he was at the time "beguiled" by a "fascist ideology."<sup>52</sup> He recognizes, that is, that the noxious ideology in whose grip a wrongdoer acts may lead him into moral error. Yet in Kramer's view, "if atrocities are committed by someone with a mental aberration that consists in egregious misapprehensions of moral principles, the atrocities are straightforwardly covered by the purgative rationale for capital punishment."<sup>53</sup>

This seems wrong. Suppose an individual, X, who has committed mass murder, has acted on the basis of a belief or set of beliefs that, if true, would justify, fully or partially, his killings. Perhaps X holds the belief

that all members of some group—Jews or people of color, for example—are defilingly evil, that their continued existence taints the community in which they abide and besmirches the relationship between that community and the rest of humanity, and that he is under a moral obligation to execute members of the reviled group. Why should we hold X fully culpable for his terrible actions when he acted on the basis of these spectacularly false moral beliefs? One reason that *might* be offered for holding X fully responsible for his actions is this: X is fully culpable for his actions because he is responsible for the beliefs he holds. That is, X should be held fully responsible for his actions because he has failed to exercise epistemic responsibility.

An individual can only be responsible for his beliefs if they are under his control (ought implies can). If he lacks the relevant control over his beliefs, he cannot be held culpable for holding them.<sup>54</sup> Yet it is doubtful whether attempts to show that our beliefs are under our voluntary control, including the efforts of compatibilists, have been successful.<sup>55</sup> Although agents are sometimes responsible for their beliefs, there are stringent conditions that must be met before wicked individuals can be held responsible for their actions on this basis, and these conditions are only infrequently jointly satisfied. As Neil Levy explains, "the comparative rarity of doxastic responsibility gives us little reason to expect that we shall often be able to find a way to hold agents responsible for their actions which derives from their responsibility for their beliefs."<sup>56</sup>

Finally, Kramer does not appear to think that circumstances relating to defilingly evil offenders' history and upbringing that pose obstacles to the

formation of a virtuous character can found a case for mercy. John Tasioulas has argued convincingly (in my estimation) that even if the presence of such considerations does not have the “effect of diminishing the offender’s status as a moral agent responsible for their actions,”<sup>57</sup> such facts may generate charitable reasons for leniency. For Kramer, although such considerations might be grounds for leniency with respect to perpetrators of less serious crimes, there is no room for leniency in punishment of perpetrators of extravagantly heinous offences. I cannot see that Kramer has good grounds for distinguishing in this way.

### 3.2 *An Excessively Limited Role for Repentance*

Kramer denies that repentance on the part of a defilingly evil offender is in most cases grounds for a reduction in punishment from capital punishment, which would otherwise be obligatory under the purgative rationale, to a more lenient sanction. He accords no punishment-reducing significance to repentance in most cases for two reasons. First, he claims, repentance consists in more than just *feelings* of contrition and remorse, but also in “giving effect to those feelings by atoning adequately for the wicked misdeeds that have occasioned them.” He quotes and endorses Antony Duff’s view that “undertaking a penance ... is a way of taking the matter seriously; it partly *constitutes* the repentant sinner’s earnest repentance.” In cases of appallingly evil atrocities, Kramer says, “there might well be nothing—short of unflinchingly abject submission to capital punishment—that would amount to a satisfactory form of atonement.”<sup>58</sup>

Since they cannot satisfactorily atone for their crimes, perpetrators of extravagantly evil wrongdoing are, he believes, beyond repentance.

I have two responses. First, Duff, whose view of repentance Kramer purports to endorse, *opposes* capital punishment precisely on the ground that “we can never properly see another as beyond redemption”—that is, beyond repentance and self-reform.<sup>59</sup> So for Duff the idea that for the most wicked offenders only submission to capital punishment will serve as appropriate atonement is anathema. Second, it is not clear that offenders must make amends *fully* in order to repent. As Tasioulas remarks, “repentance should not be conceived as an all-or-nothing matter; instead, we can admit degrees of repentance.” Even if the offender’s fulfillment of some of the conditions for repentance is imperfect, he may still be considered repentant in a way that carries “moral weight, especially in deliberating about the justified punitive response to his wrongdoing.”<sup>60</sup> Suppose that prior to punishment being imposed a defilingly evil offender comes to see that his wicked acts were wrong, blames himself for and repudiates these acts, apologizes for what he did, commits to, and sets about, making reparation, indicates his willingness to accept any punishment that is properly imposed as a penance, and resolves to reform his character and never to commit such offences again. In such a case I think there will be repentance enough for some leniency in punishment to be appropriate.

Tasioulas argues persuasively that repentance should be considered a ground for leniency in punishment.<sup>61</sup> Because “repentance takes as its object the wrongful act one has



committed” and because “repenting is the correct personal response to one’s wrongdoing,” it is legitimate in determining the severity of punishment to be imposed to widen the facts to be taken into account “beyond those that relate to the existence and gravity of the wrong, to encompass facts about his response to the wrongdoing *qua* wrongdoing.” If repentance is a hoped-for consequence of punishment, and if the wrongdoer has repented prior to the imposition of punishment, there is, he says, “an unavoidable sense of excess” in punishing the repentant offender as severely as would have been appropriate had he not repented.<sup>62</sup>

Kramer’s second reason for refusing to consider repentance on the part of defilingly evil offenders in most cases as grounds for leniency is the difficulty of determining whether such offenders are genuinely repentant. Apart from potential for deceit, there is also the possibility of self-deception, that is, a chance that what the offender may experience as feelings of remorse may in reality be “products of his own wishful thinking induced by the pressures on him to show contrition.”<sup>63</sup> Kramer nevertheless shows that he does not in fact believe that the possibility of mendacity and self-deception on the part of offenders concerning feelings of remorse is an insurmountable obstacle to leniency in punishment in light of remorse shown. He is prepared to consider repentance as punishment-reducing in cases in which a defilingly evil offender has committed extravagantly evil conduct “on only a single occasion.”<sup>64</sup> Commenting on the appropriate sanction to be imposed on an individual who has detonated a bomb killing 168 people

but who has not previously committed any evil acts, and who has indicated readiness to undergo capital punishment but also to spend the rest of his life in prison warning others not to succumb to the ideology under whose influence he committed his evil acts, Kramer declares: “If the criminal-justice authorities could have satisfied themselves concerning the genuineness and lastingness of his repentance they would have been well advised ... to commute his death sentence to a term of lifelong incarceration.”<sup>65</sup> This presupposes that it is at least possible in some cases to determine with a sufficiently high degree of probability the sincerity of the professed feelings of remorse, since otherwise the purgative rationale leaves no room at all for leniency on the grounds of repentance, as Kramer avouches it does. Further, Kramer’s willingness to accept sincere and lasting repentance by perpetrators of a single extravagantly evil act as ruling out capital punishment casts doubt on his earlier claim that perpetrators of extravagantly evil acts are beyond repentance because they will be unable to atone adequately for their terrible wrongdoing. That is, he appears to think that in the case of a bomber responsible for 168 deaths, life imprisonment during which the offender “warn[s] others against the fascist ideology that had beguiled him” represents atonement sufficient to make repentance for the murder of 168 people possible.<sup>66</sup>

Kramer’s differentiation between repentance in cases of only one atrocity, which he considers may be grounds for leniency, and repentance in cases in which more than one terrible crime has been committed, which he does not take to be grounds

for leniency, is unconvincing. The justification he provides for distinguishing in this way is that a perpetrator of only a single extravagantly evil act can imbue "his life with positive value through genuine repentance," which may have the effect of "separat[ing] that atrocity from the rest of his life sufficiently to render the purgative rationale for capital punishment inapplicable."<sup>67</sup> By contrast, if an offender has committed more than one evil act these acts are "determinative of the ethical character of his whole life."<sup>68</sup> As Trudy Govier expresses this thought, these crimes are "*horrors that have become inseparable from his personal*

*and moral identity and in a sense define who he is ... his evil deeds have made him rotten to the core.*"<sup>69</sup>

If this rationale grounds Kramer's insistence that perpetrators of numerous atrocities are beyond repentance it is to be resisted. As Govier insists, although in the case of numerous atrocities "the insult to humanity, and to moral principles, is profound ... We go too far if we insist that some people have become so indelibly evil that there is no possibility of their moral change."<sup>70</sup> We go too far because the "human capacity for moral choice and change ... is the very foundation of human worth and dignity."<sup>71</sup>

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#### 4. Defilement, Purgation and Repentance

The *Oxford English Dictionary* offers as one of the definitions of "defile": "To render morally foul or polluted; to destroy the ideal purity of; to corrupt, taint, sully."<sup>72</sup> It is easy to see how a person might defile *himself* through commission of terribly evil crimes. It is harder to see why extravagantly evil offences "besmirch the moral standing of the community" in which they abide, or that this community is defiled by their continued existence, as Kramer claims.<sup>73</sup> His purgative justification for capital punishment proceeds as follows. The iniquities of defilingly evil perpetrators are "crimes against human dignity" and express "contempt for basic human capacities."<sup>74</sup> These perpetrators are defined by their crimes: they are thoroughly and extremely evil. Their continuing existence represents an affront to humankind. Members of the community in which these offenders abide are under a collective

moral responsibility to respond to this affront appropriately. Prolonging the lives of such offenders once they have been found guilty of their crime(s) and their appeals have been exhausted defiles the relationship between the community and the rest of humankind. Only executing defilingly evil offenders will eliminate the affront to humanity they represent and remove this taint. The offenders' community is therefore morally obliged to execute them.

I do not think this argument vindicates capital punishment even for the worst criminals. Why would it not suffice for the state to communicate condemnation of the offender's evil acts to the offender and everyone else by imposing non-capital punishment on him commensurate in severity with the seriousness of his offences? Instead of executing the offender, why should the community's response not be both to impose

hard treatment on him and to provide him with as great an opportunity to repent as possible? Executing a defilingly evil offender will extinguish the affront that his evil presence represents, but so would his repentance and self-reform. Kramer derives his version of the purgative rationale primarily from the story of Achan in the Book of Joshua. Consider, however, the following verses from Ezekiel: "But if the wicked man will turn from all his sins that he hath committed, and keep all my statutes, and do that which is lawful and right, he shall surely live, he shall not die" and "Have I any pleasure at all that the wicked should die? saith the Lord God: and not that he should return from his ways, and live?"<sup>75</sup> The New Testament contains several approving references to repentance and exhortations to repent.<sup>76</sup> These examples inspire the thought that it would be preferable if the wicked repented and reformed themselves, instead of their being executed without having repented and reformed. It is plausible to think, with Duff and Tasioulas, that repentance and reform are intrinsic goods, to be valued independently of the consequences they produce, and that fostering repentance is an important end of punishment. In the course of an instructive discussion of the nature and value of repentance, Tasioulas argues that the intrinsic value of repentance consists in two things. First, in repenting the offender reorients his judgments, character, and future conduct in conformity with genuine moral demands. The process culminates in his being "at one with the values he transgressed and also with himself qua moral agent whose nature is to be subject to moral requirements." Second, repentance positively transforms

his relationship with the "community of moral agents in general," with the rest of humankind, and with his local community.<sup>77</sup> Since repentance is intrinsically valuable, there is an obligation to foster its emergence and to prevent the possibility of its occurrence from being foreclosed prematurely. Duff and Jeffrie Murphy have both argued that to execute an *unrepentant* offender is to place him beyond redemption, in the sense that he will be denied the opportunity for remorse, repentance and reform that the rest of his natural life would have afforded him had he not been executed. They oppose capital punishment on the grounds that since repentance has great intrinsic value, offenders should have the most extended possible opportunity for repentance and reform.<sup>78</sup>

Kramer does not deny that repentance on the part of an evil offender would extinguish the affront to humanity posed by the continuing presence of extravagant evil that he believes generates the moral obligation to execute. By repenting, the offender will cease to be evil and will invest his life with "positive value."<sup>79</sup> Kramer considers that in circumstances in which defilingly evil offenders are able to repent the purgative rationale is inapplicable. He states, however, that most defilingly evil offenders, including all those who have committed extravagantly evil acts on more than one occasion, are beyond repentance, since they could not satisfactorily atone for their crimes short of submitting to capital punishment. But, as I have argued above, this is to deny the opportunity for moral choice and reform that is foundational to human dignity itself. Even those who have committed several heinous crimes are

not beyond repentance. So, if an offender has genuinely repented prior to the imposition of punishment there is reason enough to abjure capital punishment. And if the offender is unrepentant at the time of sentencing, since repentance is intrinsically valuable, and since it would be preferable that the extremely wicked transform themselves in relation to genuine moral requirements, rather than be executed, we have an argument either for life imprisonment or banishment. Either way, capital punishment is ruled out. Were either life imprisonment or banishment to be imposed, the offender would be afforded the opportunity to repent while undergoing punishment. If he takes advantage of the opportunity, he will cease to be defilingly evil. The affront to humanity will be removed. If he does not, the dignity and basic capacities of all humans will have been affirmed, the affront the evil offender represents will have been symbolically repudiated and disavowed, the offender will undergo prolonged suffering, and when he dies the evil he represents will be extinguished, anyway.

Kramer thinks that imposing life imprisonment or banishment instead of capital punishment fails to satisfy the purgative rationale not only (though primarily) because preserving a life that affronts the dignity of humanity perpetuates this affront and fails to remove the taint that sullies the relationship between the community and the rest of humanity, but also because these punishments necessitate that the wrongdoer's community devote significant resources to continuing a state of affairs that sullies its relationship with the rest of humanity.<sup>80</sup> He considers it permissible to devote significant resources to

the punishment of extravagantly evil offenders only if the sanction imposed results in their death.

My response is as follows: first, I disagree with Kramer that banishment or exile will require the allocation of "a considerable quantity of resources."<sup>81</sup> Banishment is an "inexpensive punishment."<sup>82</sup> Life imprisonment would, of course, be more expensive. The cost of this sanction could at least in some cases be borne by the offender. Kramer thinks it would be wrong to devote resources to cover the costs of a defilingly evil offender's life imprisonment even if the offender's own resources could be used to cover the costs of his imprisonment. His reason is that the state would be "determining that those funds are to be used for the purposes of keeping him alive rather than for terminating his life or for other purposes" and would accordingly be "directly implicated in the continuation of his existence."<sup>83</sup> I am doubtful about this argument. Suppose an offender donates funds to the state sufficient to cover the costs of his life imprisonment and that the donation is conditional upon the funds being used for this purpose. Permitting the offender to expend his own resources on the continuation of his own life does not seem, from the standpoint of the state's complicity, anything like on a par with the use of state resources to cover the costs of his punishment. It seems strained to say in these circumstances that *the state* would be determining that these funds be used to extend his life. The offender would be making this determination. Further, even if the state *did* have to bear the cost of banishment or life imprisonment, it is far from obvious that there is anything wrong with its doing so if at least part of the

purpose of imposing these punishments is to allow and promote the repentance of evil wrongdoers.

In a response to critics of his book, Kramer defends his claim that it would be wrong to devote resources to the continuation of a defilingly evil offender's life. He states that allocating resources to the prolongation of the offender's life "will be inconsistent with the conditions under which any members of humanity can warrantably feel self-respect." He draws an analogy between punishing by means that keep the offender alive and a case in which the victim of a heinously evil wrongdoer, Mary, donates one of her kidneys to save the life of the wrongdoer, John, who has shown no remorse for his crimes. In Kramer's view, Mary is under a moral obligation to *decline* to save John's life, since donating her kidney for this purpose would express a "turn-the-other-cheek ethic" that amounts to "an ethic of self-contempt."<sup>84</sup>

I do not think this is necessarily so. Suppose Mary donates her kidney to save John's life in the hope that this will enable him to be punished by undergoing banishment or life imprisonment. Her underlying hope is that in the course of being punished John will repent and undergo self-reform. Or suppose instead that Mary donates her kidney to John so that he may undergo life imprisonment or exile which she considers fitting punishments for his crimes—she considers capital punishment morally illegitimate even for the most evil offenders. In either case her actions will not express a "turn-the-other-cheek ethic," nor do they necessarily manifest self-contempt. It is therefore not the case that Mary has a duty to refrain from donating a kidney to John.

Meaningful purgation, albeit not purgation as Kramer understands it, could be achieved through non-capital punishments such as banishment. That is, banishment could effectively purge the community in which the offender abides of the evil that he represents by removing him from the community. Kramer acknowledges that "[u]nder some traditional renderings of the purgative rationale for capital punishment, admittedly, banishment is on a par with the death penalty as an apposite punitive response to extravagantly wicked conduct" and that in *Oedipus Rex* Creon expresses the view that banishment is fitting "as a means of overcoming the defilement of a community that has ensued from the presence of a horrible murderer." Despite this acknowledgment, Kramer rejects banishment as a substitute for execution under the purgative rationale on the grounds that although it places "physical distance" between the offender and the community, it does not result in comparable "normative distance."<sup>85</sup> By contrast, I think that banishing the offender places normative distance between the offender and the community. This sanction expresses symbolic disavowal of his contempt for humanity and repudiation of human dignity. It also encourages him to repent. Kramer rejects banishment for the further reason that it would require the state to devote resources to a punishment that keeps a defilingly evil offender alive. But if banishment would be significantly purgative, as I believe, and if, as I have argued, among the purposes of punishing an offender in a way that permits him to live is to allow and stimulate his repentance, we need not view this as wrong.



## Conclusion

In conclusion, despite his often forceful and insightful arguments, I do not believe that Kramer succeeds in showing that no version of retributivism could justify capital punishment

or that the purgative rationale vindicates this sanction. His critical project and his justificatory project are incomplete as they stand.

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## Notes

[I am grateful to Jonathan Jacobs for very helpful comments on a previous version of this paper].

1 Kramer, *Ethics of Capital Punishment*, 117.

2 *Furman v. Georgia*. 408 U.S. 238 (1972) at 279. This consequentialist principle has previously been developed as the basis for an argument against the death penalty by Hugo Adam Bedau, who traces it back to Beccaria's *An Essay on Crimes and Punishments*. The principle holds: "Governmental invasions of an individual's privacy, liberty and autonomy (or other fundamental values) are justified only if no less invasive practice is sufficient to achieve an important social goal." See Bedau, "Minimal Invasion Argument," 4.

3 Elsewhere he indicates support for retributivism as a justification for punishments other than the death penalty. See Kramer, *Torture and Moral Integrity*, 177.

4 Kramer, *Ethics of Capital Punishment*, 186.

5 *Ibid.*, 230.

6 I share Kramer's strongly deontological moral outlook.

7 Kramer, *Ethics of Capital Punishment*, 128. For an instructive discussion of some well-known and less well-known difficulties with the *lex talionis*, see Shafer-Landau, "Failure of Retributivism," 299–301.

8 Kant, *Metaphysics of Morals*, 106.

9 See Waldron, "Lex Talionis," and Reiman, "Justice, Civilization and Death Penalty."

10 Waldron, "Lex Talionis," 37.

11 Kramer disagrees with Waldron about murder being wrong because it "radically disrupts an autonomous life." Kramer, *Ethics of Capital Punishment*, 42. Kramer objects that this position "cannot explain the wrongness of an act of murder that is committed against someone who is afflicted by profound dementia or profound mental retardation." *Ibid.*, 134.

12 *Ibid.*, 133.

13 *Ibid.*

14 *Ibid.*, 152; emphasis added.

15 Kant, *Metaphysics of Morals*, 106; emphasis in original.

16 Kramer, *Ethics of Capital Punishment*, 279.

17 Mill, *Utilitarianism and Capital Punishment*, 66. For a more recent questioning of the claim that life imprisonment is less invasive than capital punishment, see Flanders, "Case Against the Case."

18 For a discussion of such theories, see Kagan, *Death*, 258–263.

19 *Ibid.*, 261; emphasis in original.

20 See Lippke, *Rethinking Imprisonment*, 113.

21 See, for example, Grassian, "Psychopathological Effects"; Grassian and Friedman, "Effects of Sensory Deprivation";

- Haney, "Mental Health Issues"; Smith "Effects of Solitary Confinement."
- 22 Arrigo and Bullock, "Psychological Effects," 628.
- 23 Kramer, *Ethics of Capital Punishment*, 152n7.
- 24 *Ibid.*, 248.
- 25 See Smith, "Effects of Solitary Confinement."
- 26 Sussman, "What's Wrong With Torture?," 19.
- 27 Kramer, *Torture and Moral Integrity*, 42.
- 28 *Ibid.*, 40.
- 29 *Ibid.*, 62–63. It is not open to Kramer to contend that even if life imprisonment without parole in solitary confinement amounts to torture it may be morally legitimate. In his view, the use of punitive torture is always morally forbidden. Cf. *ibid.*, 103–209.
- 30 Article 5 of the United Nations Declaration of Human Rights of 1948 proscribes "cruel, inhuman and degrading" treatment or punishment, as does Article 7 of the International Covenant on Civil and Political Rights. Article 3 of the European Convention on Human Rights provides that "no one shall be subjected to ... inhuman or degrading treatment or punishment." Similar provisions are contained in several national constitutions. Section 12(e) of the South African Constitution, for example, forbids anyone from being punished "in a cruel, inhuman or degrading way." The Eighth Amendment in the U.S. Bill of Rights forbids "cruel and unusual punishment," as does section 12 of the Canadian Constitution.
- 31 Quoted in Lobel, "Prolonged Solitary Confinement," 123. Lobel's article contains an excellent survey of the international law jurisprudence on this question, as well as arguments in support of the proposition that prolonged solitary confinement is cruel and inhuman.
- 32 Sussman, "What's Wrong With Torture?," 14.
- 33 Waldron, "Lex Talionis," 41.
- 34 Kramer, *Ethics of Capital Punishment*, 129–130.
- 35 Reiman, "Justice, Civilization and Death Penalty," 128.
- 36 *Ibid.*, 130.
- 37 Kramer cannot embrace Reiman's account of the lex talionis without difficulty or contradiction, however. For one thing, Reiman's account is in important respects inconsistent with Waldron's, which Kramer accepts. Reiman insists only that punishment must be "comparable in gravity" to the crimes for which it is imposed. *Ibid.*, 129. He does not require that punishments must reproduce (at least some of) the wrong-making features of the offences to which they are a response, as Waldron and Kramer do. Further, Reiman opposes capital punishment because he considers it inherently morally unacceptable. Kramer cannot follow Reiman in this respect. After all, he wants to justify capital punishment for at least some offenders.
- 38 Moore, "Moral Worth of Retribution," 632.
- 39 Kramer, *Ethics of Capital Punishment*, 241–242.
- 40 *Ibid.*, 243.
- 41 *Ibid.*, 241n33.
- 42 Wallace, *Responsibility and Moral Sentiments*, 155.
- 43 *Ibid.*, 232; emphasis added.
- 44 *Ibid.*
- 45 *Ibid.*
- 46 *Ibid.*, 233.
- 47 *Ibid.*, 234.
- 48 Kramer, *Ethics of Capital Punishment*, 189–190.
- 49 Wallace, *Responsibility and Moral Sentiments*, 176.
- 50 Wolf, "Metaphysics of Responsibility," 56.
- 51 *Ibid.*, 57; emphasis added.
- 52 Kramer, *Ethics of Capital Punishment*, 240.

- 53 *Ibid.*, 246.
- 54 Alston, "Deontological Conception," 116–118.
- 55 For an illuminating discussion, see Levy, "Doxastic Responsibility."
- 56 *Ibid.*, 147. For a related defense of the thesis that confident positive judgments of culpability are never justified, see Rosen, "Skepticism About Moral Responsibility."
- 57 Tasioulas, "Mercy," 116.
- 58 Quoted in Kramer, *Ethics of Capital Punishment*, 238; Duff's emphasis.
- 59 Duff, *Punishment, Communication and Community*, 155.
- 60 Tasioulas, "Repentance and Liberal State," 489.
- 61 Tasioulas, "Punishment and Repentance," 311.
- 62 *Ibid.*, 317–318.
- 63 Kramer, *Ethics of Capital Punishment*, 239. For similar concerns, see Murphy "Remorse, Apology and Mercy."
- 64 Kramer, *Ethics of Capital Punishment*, 239.
- 65 *Ibid.*, 240.
- 66 *Ibid.*
- 67 *Ibid.*
- 68 *Ibid.*, 236.
- 69 Govier, "Forgiveness and the Unforgivable," 69; emphasis in original.
- 70 *Ibid.*
- 71 *Ibid.*, 71. Avishai Margalit agrees: "What is involved here is the ability of human beings to repent of their sins, in the secular sense of this concept – that is, to abandon their evil ways. The claim is that humans have this ability ... Even the worst criminals are worthy of basic human respect because of the possibility that they may radically re-evaluate their past lives and, may live the rest of their lives in a worthy manner."
- Margalit, *Decent Society*, 70; emphasis added.
- 72 Oxford English Dictionary, online ed., accessed March 11, 2015. <<http://www.oed.com/view/Entry/48862?rskey=C6oXF2&result=3&isAdvanced=false#eid>>, s.v. "defile."
- 73 Kramer, *Ethics of Capital Punishment*, 228–229.
- 74 *Ibid.*, 230–231.
- 75 Ezek. 18:21, 23.
- 76 See, for example, Matt. 4:17; Luke 5:31–32; Luke 17:3; Isa. 30:15; Acts 3:19; Acts 20:21.
- 77 Tasioulas, "Repentance and Liberal State," 492–493.
- 78 See Duff, *Punishment, Communication and Community*, 155, and Murphy "Remorse, Apology and Mercy," 446. The claim here is not that imposing the death penalty will afford offenders no opportunity for repentance and self-reform. As Kramer rightly contends, offenders sentenced to death will have an opportunity to repent in a jurisdiction in which the interval between sentencing and execution is prolonged, as it must be if procedural safeguards are to be observed. Kramer, *Ethics of Capital Punishment*, 105–110. The claim is instead that many offenders who are executed will be unrepentant and will be denied the time that the rest of their natural life would have given them to repent.
- 79 Kramer, *Ethics of Capital Punishment*, 240.
- 80 *Ibid.*, 232–237.
- 81 *Ibid.*, 234.
- 82 Borrelli, "Banishment," 475.
- 83 Kramer, *Ethics of Capital Punishment*, 236.
- 84 Kramer, "Purgative Rationale," 9.
- 85 Kramer, *Ethics of Capital Punishment*, 234.

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