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Compassion and the Death Penalty
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I would like to dedicate this article to the memory of Michael Mandel, a law professor and scholar whose compassion was simultaneously courageous and defensible.

Support for the death penalty often contains an interesting contradiction. Normally, political conservatives support the death penalty, yet conservative political ideology emphasises individual freedom from state oppression, limited government, and fiscal conservatism. The death penalty contradicts each of these principles: it is the most brutal form of state power, requires massive state administrations and it costs significantly more than life imprisonment which is both more humane and equally effective. In the context of an international community that has been steadily abolishing the death penalty since the 1970's, capital punishment remains a defining characteristic of American political identity. Despite what David Garland refers to as the "institutional ambivalence"¹ with which the legal system relates to the death penalty—only a small fraction of killers are executed—its support has remained relatively constant in the face of global abolitionism. Why?

Garland argues that America's maintenance of capital punishment reflects two broad cultural and political phenomena: the reticence of federal politicians to abolish the penalty in the face of strong localised state support and the persistence of profound and violent racism within those locales.² Of course, these are related phenomena. The states that defend capital punishment the most are the ones with the most pervasive forms of racism. In practice, the death penalty officiates the severity of racialisation: all other things being equal, people of colour are more likely to be executed than white people, and people who kill black people are

¹ Garland, *Peculiar Institution: America's Death Penalty in an Age of Abolition*, 11.

² *Peculiar Institution: America's Death Penalty in an Age of Abolition*.

less likely to be executed than those who kill white people.³ Race is not the only factor external to the crime itself in determining whether an individual will receive a death sentence, but it does illustrate the powerful role that 'otherisation' plays in the sentencing process. By structuring the offender as the outside other it becomes easier to disregard his humanity.

Capital punishment solidifies and affirms divisive communal relations by institutionalising and acting upon an us-versus-them concept of social relations. Capital punishment also creates divisions within communities by reifying imaginary categories into which people can be placed, such as safe and dangerous, good and evil, and ultimately, human and non-human. It is possible that life imprisonment also reifies these divisions. But the finality of taking someone's life in a nation that claims to value individual life above all else places a particularly powerful stamp on the us-versus-them worldviews. While life imprisonment separates people from the social community, executions exclude them from the human community.

There exists an ontological tension between the thoughts and worldviews associated with pro- and anti-death penalty beliefs, with ontology understood narrowly to mean the nature or flavor of individual and collective human existence on a day-to-day level, *i.e.*, our states of being. Put simply, the tension involves non-dualist and dualist experiences of human relations colloquially referred to as compassionate and callous regard for the suffering of others. Opposition to capital punishment on the grounds of the possibility of wrongful conviction offers an opportunity to transcend this tension.

How do our states of being and underlying beliefs about the world connect, and how do these tie in with attitudes about capital punishment? To answer these questions I would like to use both Buddhist philosophical concepts of ontology as well as a psychological theory called *Cognitive Experiential Self Theory* (CEST), which bifurcates thought into two interactive but distinct dimensions of logical/calculating and intuitive/experiential. These theories will work together by facilitating a connection between ways of being, ways of thinking, and attitudes about the death penalty.

The paper's first part will briefly survey ontologies associated with Marxist and Postmodern traditions in order to demonstrate a degree of continuity between them and Buddhist ontological understandings, which I will discuss in the following section along with CEST. The next section will explain why the risk of executing innocents has lowered support for capital punishment to the extent that it has, beyond the cursory explanation of not wanting to kill an innocent person. Following this discussion the paper will focus on the recent emergence of conservative opposition to capital punishment, and will conclude with a discussion of why relying exclusively on wrongful conviction to accomplish abolition may not be optimal. Without deeper changes in social attitudes toward criminals the rapidly intensifying level of surveillance may provide a challenge to the view that the legal system will continue to be unable to determine guilt with absolute certainty. Should a brutal murder ever be recorded the event could challenge opposition to the death penalty where that opposition stems from the risk of wrongful conviction.

Post-Modern and Marxist Ontologies

Support and opposition to the death penalty differ in at least three related respects: ontologically, emotionally and cognitively. In this paper I am considering the ontological states of dualism and non-dualism, and each of these states assumes a different ontic status of feelings and thoughts vis-à-vis their relationship to a 'self' (which they also assume have different ontic statuses). Crudely, from a dualist perspective feelings and thoughts have a certain materiality that prove the existence of a separate self whereas from a non-dualist or

³ DPIC, "Race and the Death Penalty."

enlightened perspective feelings and thoughts are illusions that an imaginary self perpetuates in order to convince itself that it exists as a solid entity.

Be that as it may, I would like to set this distinction aside in order to focus on the simpler point that ontological states, feelings, and thoughts associated with support or opposition to the death penalty are different. On the one hand, the states, feelings and thoughts associated with support fit together, as do those of opposition. But on the other hand, those associated with support and opposition are mostly mutually exclusive. It is not possible, for example, to crave vengeance in a state of non-duality.

Speaking generally for sake of argument, opposition to capital punishment is often linked to a refusal to create suffering which is viewed as a form of cruelty because it is not necessary. It is common to hear the death penalty described as “barbaric” with reference to the offender’s painful experience of the execution,⁴ which implies a state of ontological openness to the offender’s suffering. But support for capital punishment is often accompanied by an insensitivity for the offender’s experience that allows supporters to feel positive, if not celebratory, about his suffering. “Let’s get that electrical current flowing. Drop those pellets [of poison gas] now!” a popular journalist demanded publicly,⁵ and in preparation of mass-murderer John Gacy’s execution:

...in downtown Chicago, hundreds of singing, laughing people, some wearing party hats and others dressed as clowns, marched through downtown in celebration of the impending execution.⁶

Gacy’s crimes were particularly horrific—he killed 33 young men—which explains the extremity of the support for his execution. Nonetheless, the comedic celebration of someone’s death, regardless of how deranged and dangerous he is, illustrates the degree to which capital punishment as a social institution can facilitate not only the objectification of an individual but an ontological state of complete separateness.

Of course there is a middle ground between these extremes. On the one hand, support for capital punishment is sometimes premised on the absence of suffering. The state of Oklahoma, for example, recently put a stay on executions after a gruesomely botched attempt for fear of causing a similar level of suffering for other offenders.⁷ Even the prohibition of cruel and unusual punishment implies acceptance of the death penalty with at least minimal consideration of the offender’s level of suffering. On the other hand, retributive individuals may oppose capital punishment because they believe life behind bars will cause even more suffering than death.

In this article, however, we are primarily concerned with the ontological states associated with views of punishment and not the views themselves. We are comparing the ontological states involving regard and disregard for another’s suffering, and these two states are mutually exclusive. We may oscillate between the two but we are unable to experience them simultaneously. So where support and opposition to capital punishment are grounded in these ontological states, there is an intellectual as well as an ontological tension between opposing positions notwithstanding those identified as occupying the middle ground.

Buddhism articulates the general conditions of reality as the metaphor of the Three Pillars: Suffering, No-Self, and Impermanence. These overlap to create a comprehensive

⁴ Hamer, “America’s Death Penalty Is Barbaric.”

⁵ Royko, “The Morality of Capital Punishment.”

⁶ Times Wire Services, “U.S. High Court Rejects Gacy’s Execution Stay : Appeal: Rebuff Is Second in Day. Another Plea by Man Convicted of Killing 33 Boys and Young Men Is Now before Illinois Supreme Court.”

⁷ Fretland, “Oklahoma Agrees to 180-Day Stay of Execution for Death-Row Inmate.”

ontological understanding of existence insofar as all sentient beings suffer because they try to establish and maintain permanent structures in an impermanent world, like sandcastles on the beach. Individuals try to guard themselves against the sources of their sufferings by creating what they hope are permanent barriers between themselves and others. These structures include any phenomena one wishes to make static, from personal identities, characteristics of self and others, and classifications of people as good or bad, to political, economic or legal ideals or procedures. The more individuals attempt to establish any kind of permanence, the more they suffer trying to defend it against the reality of impermanence. The irreversibility of capital punishment speaks to this desire for permanence.

Because impermanence fundamentally characterises the real, and because we humans are part of the real, we are impermanent. This is to say that our identities and character traits do not exist in any solidified sense. Selflessness is therefore not only of psychological importance, but of ontological importance as well. This, however, does not mean that we will or must change. It means that what we are in this moment is susceptible to change and that change is contingent or dependent on other factors, which are themselves susceptible to change. These ontological concepts connect with broader philosophical currents, particularly those of postmodernism's treatment of the individual subject and of Marx's ontology of matter.

Preceding postmodernism, Nietzsche cast doubt on the actuality of the modernist self. In his view the idea of a stable independent self was a fiction that imposed the "ideal of Being on the fact of becoming",⁸ a view virtually identical to that of Buddhism, as we shall see. Similarly some poststructuralists see the subject as a kind of momentary artifact created by the forces of time, place, and language.⁹ Skeptical postmodernists go further and argue that the subject possesses "no positive identity of any substantive character" and is more like a "disintegrating patchwork of a *persona*" that rejects the possibility of ranking normative orders against any stable criteria.¹⁰ Finally, as an affirmative postmodernist, Julia Kristeva uses the term "subject-in-process" to articulate her concept of individual identity that is in a state of motion.¹¹

All of these concepts of the subject overlap with the Buddhist concept of self insofar as they focus on the impermanence of individual identity. Similarly, Marx's ontology of matter also takes issue with permanence, or in his words, transcendence. Although it may seem strange to associate Marxism with Buddhism, the philosophies overlap in some foundational ways. Marx's concept of 'species-being', for example, provides the ethical core of his political-economic critique:

Without species-being, Marx's critique of capitalism would have no ethical basis and his politics would seem directionless and arbitrary. It is paramount, therefore, that if one is to understand Marx and Marxism, one must begin with species-being.¹²

By species-being Marx is referring to the unalienated experience of one who 'adopts the species as his object...[and] because he treats himself as the actual, living species; because he treats himself as a *universal* and therefore a free being'.¹³ Although he does not use the term, Marx is speaking of a form of self-transcendence that is identical to that of Buddhism:

⁸ Booth, "Nietzsche on the 'Subject as Multiplicity,'" 133.

⁹ Ashley, "Living on Border Lines: Man, Poststructuralism, and War."

¹⁰ Rosenau, *Post-Modernism and the Social Sciences: Insights, Inroads, and Intrusions*, 54–5.

¹¹ *The Kristeva Reader/Julia Kristeva*, c.3.

¹² Held, "Marx via Feuerbach: Species-Being Revisited," 239.

¹³ Marx, *The Economic and Philosophic Manuscripts of 1844*, 112.

“individuals are such in so far as they are thought of in connection with one another and also with the whole system which they compose”.¹⁴

On the topic of ontology (in the general sense of the nature of reality) Marx rejects the conception of matter as an abstract entity “that transcends all historical periods”, and this rejection precludes his critique of commodity fetishism. Marx’s “real concern lies in the concrete states of matter under capitalism, that is, how commodity comes into being, as a ‘social thing’, through the process of productive labour”.¹⁵ The fetishized commodity achieves a transcendent quality by hiding the physical characteristics of the materials as well as the labour processes used to produce it.

The form of wood, for instance, is altered, by making a table out of it. Yet, for all that, the table continues to be that common, every-day thing, wood. But, so soon as it steps forth as a commodity, it is changed into something transcendent....[T]he existence of the things *qua* commodities...have absolutely no connexion with their physical properties and with the material relations arising therefrom.¹⁶

In the *Grundrisse*, Marx observed the same impermanence of matter to characterise not only social structures, but individuals and their relations: “everything that has a fixed form...appears as merely a...vanishing moment”, and that individuals and their relations “equally reproduce and produce anew”.¹⁷ For Marx it is the ability to disguise the impermanence of political-economic systems with costumes of permanence or eternalism that lies at the heart of the power to legitimise oppression:

The selfish misconception that induces you to transform into eternal laws of nature and of reason, the social forms springing from your present mode of production and form of property—historical relations that rise and disappear in the progress of production—this misconception you share with every ruling class that has preceded you.¹⁸

Like the above ontological perspectives, Buddhism emphasises impermanence as an integral part of its philosophical system.

Buddhist Ontology and CEST

In Buddhist terms, modernist notions of self, commodification and the eternalisation of social relations and institutions conceal their impermanence. Existence is not transcendent, but dependent on prior conditions and processes and therefore susceptible to change. In a similar way capital punishment is legitimised by hiding the social circumstances that ‘produced’ the offender. It asks us to see not a historically contingent individual shaped by social relations in the process of becoming, but an abstracted being with a permanent evil nature.

Because of this contingency it is unreasonable for us to hold our predictions or assessments beyond review, such as concluding that a violent individual will remain so forever. To do so would be “to hold the primacy of being over becoming”,¹⁹ which contradicts Buddhist ontology. The *Angulimala Sutta*, for example, symbolises this concept directly with

¹⁴ Suzuki, “Passivity in the Buddhist Life,” 280.

¹⁵ Wujin, “Marx’s Ontology of the Praxis-Relations of Social Production,” 411.

¹⁶ Marx, “Capital,” 320-21.

¹⁷ Marx, “The Grundrisse,” 290.

¹⁸ Marx and Engels, “The Manifesto of the Communist Party,” 487.

¹⁹ Chinchore, *Aniccata/Anityata An Analysis of Buddhist Opposition to Permanence/Stability and Alternative Foundation of Ontology And/or Anthropology*, 89.

the story of a wild, murderous man who was “trapped in evil” and destined to be executed. After the Buddha peacefully enabled his transformation to a monk the King admits he “could not do that with clubs and swords”.²⁰ The *Sutta* unequivocally rejects vengeance as a response to violence by affirming the impermanence of destructive character traits, an ontological view that underpins current rehabilitative responses to violent offenders while rejecting the efficacy of retribution.

There are, however, reasons other than vengeance for killing someone, and Buddhism recognises that there may be times when it is acceptable to take life. Shantideva, one of the great Buddhist teachers, relates a story about the execution of King Langdarma,²¹ and the Buddha shares a parable about himself in a previous life as a ship’s captain who kills a passenger. In the first story the king was about to destroy all the Buddhists in his country, and in the second story the captain killed a man who was certain to murder all five hundred passengers.²² These may appear to lend support to an interpretation of Buddhism that might support capital punishment, but the larger philosophical context suggests otherwise.

The Langdarma story is historically inaccurate and there is no evidence of the king’s assassination,²³ so like the boat story it must be seen as a parable that illustrates a principle, and not read literally as condoning killing for political purposes. The principle that both parables illustrate has less to do with killing and than it has to do with the more general question of how to relate to Buddhist precepts. Both parables are associated with the virtue *upaya*, or ‘skillful means’, which requires individuals who are working for the enlightenment of others to employ whatever means necessary to achieve that goal, and this includes violating the primary prohibition of taking life. In the king and boat captain parables, the characters were killed because they would have accrued immeasurable negative karma had they lived to carry out their evil deeds, so killing them was an act of compassion. The deeper lesson here is that none of the Buddha’s teachings are ends in themselves, they are guidelines that are open to violation should their violation be the most compassionate choice.*

It is possible that capital punishment is the more compassionate choice, but more compassionate than what? So long as the possibility of humanising prison conditions and parole exist—and for practical purposes they will almost always exist—then executions will not be compassionate. Further, in the parables the killings took place to prevent, not avenge, greater harms. If rehabilitation is not possible for certain individuals then life in prison will be the only choice, but this need not be inhumane. This will be an exception to the norm, however, given Buddhism’s emphasis on impermanence.

Buddhism as a spiritual practice is concerned with our ontological states which it sees as inherently impermanent. On one end of the continuum lies ego, and on the other end lies compassion. Ego and compassion are not ‘feelings’, they are ways of relating to the world around us. The deepest level of compassion is described as ‘compassion without reference points’ with reference points understood as fixed concepts of self or other. The ontological state of emptiness involves the release of all fixations and thus contextualises compassion as a way of relating to others:

²⁰ Blumberg, “Angulimala Sutta.”

²¹ Shantideva, *A Guide to the Bodhisattva Way of Life (Bodhicaryavatara)*, para. 106–7.

²² Victoria, *Zen at War*, 225–26.

²³ Schlieter, “Compassionate Killing or Conflict Resolution? The Murder of King Langdarma according to Tibetan Buddhist Sources by.”

* A discussion of Buddhism’s complex relationship to violence is greater than this paper allows. Like Christianity, Judaism and Islam, Buddhism has been used to justify aggression by various nations throughout history. This does not mean these religions endorse violence, but it does imply the importance of drawing conceptual distinctions between philosophical analysis of religious doctrine and historical analysis of the political exploitation of those doctrines.

A true realization of emptiness entails the recognition that one has no ground on which to stand and no personal territory to maintain; the natural expression of such a realization is compassionate responsiveness to the needs of others.²⁴

The absence of fixed concepts of self, other, or ‘territory’—such as fixed ideologies or categories—precludes distinctions between victims and offenders that might lead to a lessening of concern for either. In other words, given the impermanence of self and the absence of fixed categories such as good vs. bad, what remains is individual suffering, which is inherently worthy of compassion.

To choose not to care about someone’s suffering requires one to erect an ontological barrier between one’s self and the world, which Buddhists describe as dualism. Dualism refers to the ontology of separate existence, where we relate to the experiences of others through the filter of a separate self, or ego, as opposed to experiencing them directly, as if we were the other. In a state of non-duality we experience a direct connection with others. It is important to understand that the experience of non-duality is not nearly as romantic or delightful as is commonly believed. There is a Buddhist metaphor that describes dualist existence as experiencing the suffering of others as the feeling of a hair crossing the back of one’s hand, and non-duality as a hair crossing one’s eyeball. Enlightenment is a state of being in which one connects deeply with the joys and sufferings of the world, and ego is the barrier we create to protect ourselves from the intensity of these experiences. Even the suffering of those who cause suffering is let in.

In Buddhism, the ego is an imagined “solidified, conceptualized ‘self’”. It is the illusory ‘identity’ we conceive ourselves to be when we engage in self-focused thinking. Since ego is an illusion without inherent existence it must be maintained from moment to moment in order to create the sense of permanence.²⁵ This necessitates a perception of the world as containing permanent fixtures that take the shape of normative and ideological categories such as good vs. bad, right vs. wrong, and us vs. them. Ego uses these categories as hooks onto which it can attach itself to create the illusion of consistency between a permanent self and a permanent world.

These dualist dichotomies begin with the separate self and often lead to violence in order to be maintained. They generate three basic energies that Buddhism describes as passion, aggression, and ignorance: the desire to attach to or preserve that which confirms one’s sense of self, the desire to destroy that which threatens one’s sense of self, and the desire to ignore that which neither confirms nor threatens the self.

Compassion, however, is the individual ontological correlate of non-duality: it is to embrace “each and all” over “for me, for them”.²⁶ To be compassionate is to open one’s self to the experience of others without regard to the relevance of that experience for one’s self. Tibetan Lama and scholar Chogyam Trungpa describes compassion as “a clarity that contains fundamental warmth” and which creates a “bridge to the outside world”. It is a state of being in which we have “total openness” without a sense of ground or territory, in which we practice “passionlessness or non-aggression”.²⁷ Compassion is more than an individual attitude or a perspective, it is the “key to and the basic atmosphere” of the path to enlightenment.²⁸

²⁴ Ray, *Indestructible Truth: The Living Spirituality of Tibetan Buddhism*, 326.

²⁵ *Ibid.*, 18.

²⁶ *Ibid.*, 324.

²⁷ Trungpa, *The Myth of Freedom and the Way of Meditation*, 59.

²⁸ *Cutting Through Spiritual Materialism*, 97–99.

Compassionate activity is premised on the non-existence of self and the impermanence of the world and others, and this includes the character traits of individuals.²⁹ The absence of a permanent self removes the need to create permanent external fixtures, and those who have achieved high levels of compassion work to help others “transform and emancipate themselves”.³⁰ In other words, compassion and permanence are mutually exclusive.

To characterise someone who has killed another person as essentially evil is to abandon compassionate action, and to have compassion for murderers is to believe they can change in some way, that there is something redeeming about them no matter how small. Compassion and detachment to permanence are dialectically related and each cannot exist without the other.

The question of duality speaks to the decision to execute offenders insofar as executions often involve, if not require, the dehumanization of the offender. The law-and-order ideology that emerged by the mid-1990’s in the US relied upon the public’s increasing inability to relate compassionately with offenders.³¹ This was partly achieved by the media’s portrayal of criminals’ violent behaviour without attention to the social circumstances that encouraged it. This background knowledge is the ground of understanding and compassion and without it only the ‘evil’ remains, and the offender is therefore viewed as a non-human.³² This construction of criminals invites passion and aggression.

As the ultimate expression of ‘justice’, capital punishment models a response to antisocial behaviour that discourages compassionate responses to antisocial behaviour among citizens. Relating to the world with more or less compassion is a defining characteristic of the human condition. Indeed, on a conceptual level the notion that individuals can and should respond compassionately to each other threads together the world’s major religions and forms the basis of Buddhist concepts of enlightenment.*

Although I have presented an interpretation of Buddhism that precludes the practice of capital punishment, there are some countries who maintain both capital punishment as a penal practice and Buddhism as the official or dominant religion, particularly those located in Southeast Asia. This suggests that a Buddhist perspective does not necessarily embrace abolitionism. Beneath this cursory coincidence, however, are complex relationships between religion and state that contradict the appearance of Buddhism’s embrace of the death penalty.

Southeast Asian Buddhists tend not to be active in death penalty debates, and their general political influence in these countries is moderate at best. To the extent that Buddhism is practiced by members of the general population, it does not influence their public lives. There also exists a belief among some lawmakers that the death penalty is necessary for social control, custom, or retribution. Further:

²⁹ Chinchore, *Aniccata/Anityata An Analysis of Buddhist Opposition to Permanence/Stability and Alternative Foundation of Ontology And/or Anthropology*, 94.

³⁰ *Ibid.*, 222.

³¹ Gaubatz, *Crime in the Public Mind*, 163.

³² Haney, *Death by Design: Capital Punishment as a Social Psychological System*, 59.

* It is tempting to apply the categories of good and bad, for example, to compassion and aggression. While Buddhism rejects categorical classifications such as good and evil, it appears to categorise the ontological states of enlightenment and dualism as good and bad. In this regard capital punishment seems ‘bad’ and abolition ‘good’. Without going into too much detail, Buddhism indeed draws a distinction between what should and should not be done, or more specifically, what is meritorious and what is not meritorious. While acting out of one of the three root poisons (passion, aggression and ignorance) is not meritorious and therefore should not be done it does not follow that aggressive or compassionate people are ‘bad’ or ‘good’, they just ‘are’, and they are equally worthy of compassion and love. Taken to its conclusion Buddhists hold that the enlightened person does not distinguish between samsara and nirvana (hell and heaven) beyond working to alleviate the suffering of others.

The death penalty existed before Buddhism was disseminated, and people were already used to this “tradition” of punishment. A long history of the death penalty, coupled with a tendency to avoid learning from experience, may explain the tenacity of capital punishment (in Southeast Asia).³³

One possible reason to explain the tenacity of capital punishment is the psychological nature of its support. The ability to respond compassionately to life’s events is not merely an intellectualised approach to the world, it is a part of our individual and collective identities. In psychological terms, compassion shapes the kinds of implicit theories of reality individuals develop. It is the ontological context within which an individual forms her worldviews, a concept that plays a role in Cognitive-Experiential Self-Theory, or CEST (I will use the terms “worldviews”, “implicit theory of reality”, and “social story”, interchangeably from now on).

I use CEST as a theoretical lens in this discussion because it lays out the two general forms of thought that people use—logical and intuitive—and the relationship between them. This is not to imply that either of these categories are ‘pure’ but that our choices and values are influenced by both of them, but not necessarily equally. The role of this discussion here is to set up the argument that where support for the death penalty is more intuitive than rational, the use of logical argumentation against capital punishment will be less successful than if that support were more reasoned.

CEST compliments Buddhism’s understanding of the mind or mental processes. The Abhidharma is the third of three ‘blocks’ of the Buddha’s teaching, and it outlines the psychological makeup of the individual. According to it the human mind is a collection of five skandhas or five heaps: form, feeling, perception, intellect and consciousness. Although the skandhas do not align with CEST’s concepts directly, the two are consistent:

...the thoughts produced by consciousness are the undergrowth of [intellectual] thoughts...The whole pattern of psychology works in such a way that it is impossible for the explicit thoughts...to be suspended in nowhere, without any context whatsoever. The subconscious thoughts make the context that is necessary for (intellectualisation).³⁴

In his introduction to his discussion of the Abhidharma, Tibetan Lama Chogyam Trungpa identifies two “channels”³⁵ for studying the text—intuitive/emotional and scholarly/theoretical—and he ends the book by characterising the two modes of analysis as belonging to practitioners (experience) and scholars (logic).³⁶

CEST sees one’s implicit theory of reality as the ground of an individual’s personality. The theory examines the relationship between rational thought and deeply held beliefs about such things as human nature, justice and social relations. As a dual-process theory of cognition, CEST examines the characteristics of, and relationships between, intuitive and rational thinking. It offers an explanation of why individuals tend to cling emotionally to perspectives about certain social issues, such as the death penalty. It also explains why reason often fails to adjust these perspectives despite their factual inaccuracy.

[E]veryone...automatically constructs an implicit theory of reality that includes a self-theory, a world-theory, and connecting propositions. An implicit theory of reality consists of a hierarchical organization of schemas. Toward the apex of the conceptual structure are highly general, abstract schemas, such as that...people are trustworthy, and the world is orderly and good. Because of their abstractness, generality, and their

³³ Alarid and Wang, “Mercy and Punishment: Buddhism and the Death Penalty,” 240–41.

³⁴ Trungpa, *Glimpses of Abhidharma: From a Seminar on Buddhist Philosophy*, 74.

³⁵ *Ibid.*, 2.

³⁶ *Ibid.*, 107.

widespread connections with schematic networks throughout the system, these broad schemas are normally highly stable and not easily invalidated. However, should they be invalidated, the entire system would be destabilized.³⁷ (emphasis added)

In other words, individuals develop deep implicit understandings of themselves, the world, and the relationships between the two. These highly abstract, general understandings combine to create the ground upon which individuals develop more specific knowledge constructs, such as positions on the death penalty. Because of its foundational role in an individual's personality structure, this 'ground' is highly resistant to change, as are the concrete beliefs that develop within or upon it. To criticise someone's position on capital punishment, for example, would likely be met with resistance because of its connection to underlying implicit beliefs. This kind of criticism would appear to threaten the entire system's viability insofar as the individual's attitude on the death penalty formed an important part of her general theory of reality.

Implicit beliefs ensure relative consistency among specific beliefs, thereby promoting certain beliefs while discouraging others. Implicit beliefs shape specific beliefs as soil composition would determine which flowers can grow. In the classic study of fascist personality traits *The Authoritarian Personality*, Adorno et. al. noted that their most significant finding was:

...a close correspondence in the type of approach and outlook a subject is likely to have in a great variety of areas, ranging from the most intimate features of family and sex adjustment through relationship to other people in general, to religion and to social and political philosophy...³⁸

They went on to observe the impotence of rational discourse to change the (implicit) beliefs that underlay these more concrete views, such as social and political perspectives:

...it is not difficult to see why measures to oppose social discrimination have not been more effective. Rational arguments cannot be expected to have deep or lasting effects upon a phenomenon that is irrational in its essential nature.³⁹

Current research validates these findings. But instead of categorising an individual's underlying world theories as "irrational", they are now conceived to be the result of a healthy intuitive thought process that contextualises conscious rational thought. This process enables individuals to frame their conscious experiences in ways that allow them to find meaning and sense in their lives and it facilitates the development of consistent but often rigid worldviews.

Like Adorno et.al., recent studies have examined the impact of implicit theories of reality on the formation of Right Wing Authoritarianism. It was found that although conscious personality traits might mediate how individuals perceive the world as more or less dangerous or competitive, they did not moderate "the degree to which social worldviews...predict [Social Dominance Orientation] and [Right Wing Authoritarianism]."⁴⁰

³⁷ Epstein, "Cognitive-Experiential Self-Theory of Personality," 4.

³⁸ *The Authoritarian Personality*, 2:971.

³⁹ *IBID.*, 2:973.

⁴⁰ Sibley and Duckitt, "Big-Five Personality, Social Worldviews, and Ideological Attitudes: Further Tests of a Dual Process Cognitive-Motivational Model," 556.

Individuals with implicit theories of reality that entailed racist views exhibited racist tendencies despite a conscious knowledge that racism was wrong. The same can be said of dedication to the death penalty: when support is more intuitive than rational—as most is—then it is more resistant to logical critique.⁴¹

The experiential mind operates emotionally in a way that is “preconscious...holistic, concrete” and it encodes information in the form of generalisations and “prototypes, metaphors, and narratives”. This system enables us to develop explanations of events in ways that are emotionally satisfying and as consistent with existing beliefs as possible. The rational system, however, operates in a way that is “conscious, analytical, [and] affect-free”, but at the same time tries to arrive at explanations that are also emotionally satisfying for the experiential system. The shared goal of both modes of thought is to “maintain a stable conceptual system”.⁴²

Few issues elicit as strong an emotional response as capital punishment.⁴³ This suggests that personal positions on the death penalty are embedded within an individual’s implicit theories of reality. These positions reflect the constitution of more general beliefs that transcend the specificity of the positions themselves, such as the legitimacy of state violence per se. Whether the state has the right to kill its citizens is perhaps the most foundational question of legal order, from which follows the nature of state-citizen relations. Similarly, retributiveness is another example of an implicit belief that is related to attitudes about both the death penalty and military action and it is associated with support for both of them.⁴⁴ To question support for the death penalty in these cases is to implicate an individual’s deep-seated beliefs about the role of government and the proper way to right wrongs, and this explains attitudinal rigidity on these sorts of issues.

There is another way of understanding attitudinal rigidity that goes beyond systems of thought. Buddhism’s focus on duality and non-duality identify a psychological process in addition to, and inseparable from, feeling and thought. For Buddhists, the transition from duality to non-duality is the deepest alteration of being.

Duality and non-duality are more than ways of thinking or imagining, they are the ontological *context* within which rational and experiential thoughts manifest: “the mentality of dualism [is like the root of a tree and] the thought process, including the so-called emotions, is like the branches of a tree”.⁴⁵ The ontological states of compassion and ego are the ‘roots’ from which grow social stories and their rationalisations. This might shed some light on the coincidence of ideological rigidity and support for the death penalty on both individual and policy levels: within the context of dualist existence selves appear permanent, so the permanence of the offender’s ‘evil’ reinforces the apparent permanence of the supporter’s identity of which a belief in capital punishment comprises a significant part. In other words, one’s law-abidingness is solidified as ‘real’ in opposition to ‘real’ evil.

By focusing on the question of ontology, it is possible to explain one potential reason why the risk of wrongful conviction has lowered death penalty support more than any other reason to oppose it. An ontological focus will also suggest the importance of grounding opposition to the death penalty in deeper levels of consciousness, such as implicit theories of reality and ways of being.

Wrongful Conviction

⁴¹ Kennedy-Kollar and Mandery, “Testing the Marshall Hypothesis and Its Antithesis: The Effect of Biased Information on Death-Penalty Opinion.”

⁴² Epstein, “Cognitive-Experiential Self-Theory of Personality,” 6–11.

⁴³ Unnever and Cullen, “Christian Fundamentalism and Support for Capital Punishment,” 169.

⁴⁴ Liberman, “An Eye for an Eye: Public Support for War against Evildoers.”

⁴⁵ Trungpa, *The Path Is the Goal: A Basic Handbook of Buddhist Meditation*, 61.

Up until the end of the last century, the dominant stated justification for capital punishment was a belief in its deterrent effect.⁴⁶ But when decades of factual evidence proved this to be false,⁴⁷ instead of abandoning the penalty, supporters turned to a new justification, *i.e.*, the idea that capital punishment offers closure for victims.⁴⁸ It was only when, a few years later, the risk of executing innocents became increasingly evident, that support for capital punishment declined to the lowest level since 1996, from 78% to 55%, and opposition increased from 18% to 37%.⁴⁹ The most common reasons for declining support were the risk of executing innocents and the immorality of the punishment.⁵⁰ Arguably, since the only new variable in the debate was an awareness of the risk of wrongful conviction, it stands to reason that the perception of the immorality of the punishment is linked to the risk of executing innocents.

Currently support for the capital punishment is the lowest it has been in forty years.⁵¹ The risk of executing innocents has created a “crisis of confidence” in the country’s faith in capital punishment and has produced a “massive shift” in the nature of the debate. In the 1990’s the debate about capital punishment was dominated by philosophical arguments about the morality of the punishment, but now the debate has focused on the procedural problem of wrongful execution.⁵²

Evidence of the death penalty’s weak deterrence—its inability to deter murder more effectively than life sentences—did not significantly weaken support for executions. In part, this can be attributed to the emergence of the possibility of ‘victim closure’ as a renewed justification for capital punishment. It provided death penalty defenders with a way to maintain executions despite their lack of social utility. This desire to find a way to continue justifying state killing suggests a deep emotional commitment to the penalty grounded in underlying experiential beliefs and worldviews.

The victim closure justification—perhaps building on class and race stratifications already present in the system—was able to save capital punishment because it diminished the value of the offender’s life in relation to the victim’s family’s suffering. As a less valuable member of society, the offender’s (and his family’s) suffering was instrumentalised and subordinated to provide ‘closure’ to the suffering of victims which was seen as more weighty in comparison.

Why has the awareness of the risk of wrongful conviction eroded support for the death penalty more than weak deterrence? Weak deterrence is a perfectly rational reason to oppose capital punishment because it renders executions—indeed, all executions—unnecessary. Without a social purpose, it is difficult to justify taking someone’s life if not for the sake of the individual himself then for the sake of those who would suffer in response to his death. Further, it is my belief that unnecessarily killing someone diminishes respect for the value of individuals, it turns them into objects, and lowers our commitment to valuing the lives of individuals generally.

Wrongful executions also violate the sanctity of life but in a different way. They cast doubt on the certainty of the process of conviction and therefore raise the specter of killing an innocent person. This deflates the victim closure justification: the risk of executing an innocent person negates the possibility of full emotional closure by raising doubt that the

⁴⁶ Banner, *The Death Penalty: An American History*, 10.

⁴⁷ DPIC, “Deterrence: States Without the Death Penalty Have Had Consistently Lower Murder Rates | Death Penalty Information Center.”

⁴⁸ Gerber and Johnson, *The Top Ten Death Penalty Myths: The Politics of Crime Control*, 125.

⁴⁹ Jones, “U.S. Death Penalty Support Lowest in More Than 40 Years.”

⁵⁰ Lipka, “Support for Death Penalty Drops among Americans | Pew Research Center.”

⁵¹ Jones, “U.S. Death Penalty Support Lowest in More Than 40 Years.”

⁵² Hoffmann, “Protecting the Innocent,” 562.

perpetrator was actually killed. But wrongful convictions do not undermine the legitimacy of capital punishment in the same way as weak deterrence, which is why they have had such an impact on conservative levels of support.

Weak deterrence challenges the legitimacy of the death penalty *per se*, as an institution. It claims that executions must serve society and must save more lives than they claim. Since they do not do this, they are illegitimate. Implicit in this claim is a recognition of the offender's full humanity, not diminished by his behaviour or in relation to his victims. But wrongful executions do not strike at capital punishment *per se*, they strike at the way it is practiced at this point in our technological development. Because we do not have the capacity to prove guilt absolutely in a way that is consistently reliable, we should not risk a mistake. It does not question the traditional goals of capital punishment—victim closure, denunciation, retribution—but defers their realisation until such time technology can result in absolutely certain convictions.

If we oppose capital punishment because of weak deterrence, we are admitting that penal severity does not impact crime rates. This affirms the recognition of crime as partly a product of social phenomena that cannot be reduced to individual autonomy which in turn weakens the neo-liberal assumptions of free will that inform our political-economy. Ultimately, opposing the death penalty because of weak deterrence coincides with a deeper social story that recognises individual inter-relationship and the political economy consistent with it (decrease inequality, non-competitiveness, etc.). Again, death penalty attitudes reflect implicit beliefs about social organisation as much as beliefs about penal policy.

Opposing the death penalty because of wrongful execution avoids a worldview that supports inter-relationship. It also provides conservatives with an opportunity to abandon a penal practice that is increasingly seen as procedurally flawed without having to abandon orthodox conservative worldviews. Wrongful conviction is being woven into a traditionally conservative worldviews, where execution of innocents exemplifies yet another example of the public sector's incompetence and wastefulness. It extends ideological support to the privatisation of public institutions and the reduction of social programs.

Conservative worldviews do not necessarily include a view of capital punishment as an effective deterrent of murder, otherwise evidence of weak deterrence would have problematized capital punishment among the political Right a long time ago. Conservative justifications of the death penalty are often embedded in religious ideals and values⁵³ that transcend concerns of social utility, like deterrence. These ideals and values might include beliefs that the world is just and that evil exists as an actual entity. Indeed, such beliefs are associated with "more punitive and aggressive criminal attitudes [including] greater support for the death penalty".⁵⁴ More than weak deterrence or economic inefficiency, the risk of wrongful conviction may lessen support for capital punishment more effectively because only it creates doubt about whether the system is actually confronting evil.

It seems that the risk of wrongful conviction undermines support across the political spectrum. Some conservatives have been able to abandon this hallmark of their social story while leaving other fundamental aspects of the story in place. Conservatives have managed to exploit concerns about wrongful conviction in a way that strengthens the remaining core worldviews and leaves their dualistic ontologies unexamined.

As noted above, few issues evoke as strong and consistent an emotional reaction,⁵⁵ both for supporters and abolitionist alike. This suggests that abolitionists also ground their position on the death penalty in their worldviews, and the presence of intense emotion

⁵³ Gross and Ellsworth, "Second Thoughts: Americans' Views on the Death Penalty at the Turn of the Century."

⁵⁴ Webster and Saucier, "Angels and Demons Are Among Us: Assessing Individual Differences in Belief in Pure Evil and Belief in Pure Good," 1461.

⁵⁵ Unnever and Cullen, "Christian Fundamentalism and Support for Capital Punishment," 169.

suggests a level of passion, and therefore ego, on both sides of the debate. Anger towards murderers and even abolitionists is consistent with support for capital punishment and does not undermine the position, but anger on the side of abolitionists contradicts and undermines their goal. As I argue below, abolition is most secure when grounded in compassion, and it is not possible to evoke compassion with anger. Further, 'environmental' compassion requires compassion for everyone including those with whom one disagrees. In less inflammatory contexts this entails an openness to the other's views, but in this case, it entails meeting the aggression of state killing and its supporters with an understanding that that aggression is itself a form of suffering also worthy of compassion and respect. It makes no sense to have compassion for someone who has murdered another—likely out of passion and aggression—while withholding compassion from those whose similar emotions drive them to do the same thing.

Abolitionist anger or aggression also reveals the presence of ego and dualism. What begins as a compassionate motivation to stop capital punishment can risk fueling the same states of being—passion, aggression and ignorance—that maintain it in the first place. This is not to imply that the promotion of peaceful social policy must take place with an aura of calm indifference. Buddhism embraces the emotional aspects of our being when they arise in connection with the joys and sufferings of others and not as reactions to that which fulfills or threatens our ego existence. According to Buddhist lore, the Buddha reincarnated because he cared about sentient beings and wanted to teach them how to transcend their suffering, and the Bodhisattva—an individual on the cusp of enlightenment—postpones realisation by reincarnating to serve others. In other words, far from creating a state of detached nihilism, compassion and impermanence lead to a deep and selfless concern for the other without attachment to maintaining or defending ego.

Conservative Opposition to Capital Punishment

Kentucky republican Governor David Floyd recently introduced legislation to repeal capital punishment due to concerns about executing innocents. He notes that in 2007 when he first began questioning the death penalty "he was the only conservative legislator in a group of liberals" (Floyd 2014). Although still occupying a minority position among the Right wing, conservative opposition has been growing. In 2013 the group *Conservatives Concerned About the Death Penalty* (CCATDP) was created and its founder, Richard Viguerie, articulates the group's rationale as follows:

Conservatives have every reason to believe that the death penalty is no different from any politicized, costly, inefficient, bureaucratic, government-run operation...But here the end result is the end of someone's life.⁵⁶

The website also emphasises the high cost of executions and the sanctity of life as reasons to oppose the death penalty. But along with weak deterrence, these realities have been known and dismissed by conservatives for decades, so it is unlikely they are the dominant concerns of the conservative abolition movement. It may be the case that some Christian Conservatives oppose capital punishment out of compassion for the offender, but they are not the majority and compassion hardly typifies the tone of such opposition. It is wrongful conviction that predominately motivates right wing opposition, and it has created an altered conservative worldview in which opposition to the death penalty now *bolsters* other core conservative worldviews and ideologies. Consider the following statements from some CCATDP members:

⁵⁶ "Conservatives Concerned About the Death Penalty » What Conservatives Are Saying."

Who among us is not above redemption...The one thing my faith teaches me—I don't get to play God.

[The death penalty] gives the state too much power.

Ultimately, it costs taxpayers more to put a man to death than keeping him locked up for life.

The same people who don't believe that government can efficiently deliver health services or regulate the economy believe it can execute people without a mistake.

For all who are pro-life, we are called to oppose all threats to life from conception to natural death – including the death penalty.

Everything that makes one a conservative – skepticism toward concentrated power, opposition to government wastefulness, an awareness of government corruption and incompetence – leads to the inevitable conclusion that the death penalty absolutely must be abolished.

California created a fiscal monster that's taking a human toll on the very people we wanted to protect.

Conservative opposition to the death penalty now sits as comfortably with traditional right wing orthodoxies as had support for it. These orthodoxies include skepticism about the state's ability competently to manage legal/procedural and fiscal affairs, attacks on public health care and reproductive rights, a belief in a Christian god, and an indiscriminate fear of state power. While the possibility of a criminal's redemption reflects a compassionate sentiment, it is far from characterising the nature of the opposition as a whole. Indeed, conservatives who oppose capital punishment continue to mock attempts to recognise an offender's humanity. This statement, for example, appeared in a piece *against* the death penalty: "...candle-light vigils for death row inmates are par for the course for bleeding hearts".⁵⁷ It seems that some conservatives are more comfortable opposing the death penalty when they are able to avoid questioning the clear lines between good and evil, right and wrong, them and us. In other words, conservative political ideology can accommodate abolitionism if it leaves in place the underlying dualist ontologies and does not make compassion the essence of opposition.

From a Buddhist perspective, conservative politics appear to resist the reality of impermanence. At its heart conservative ideology is primarily concerned with maintaining the status quo and attempting to thwart the ontology of impermanence.

Whatever else it may entail, conservatism is based on a respect for lawful authority, tradition and continuity in human affairs...[Conservatives] agree with Edmund Burke's dictum, "A *disposition* to preserve, and an ability to improve, taken together, would be my standard of a statesman".⁵⁸ (my italics)

As a political movement conservatism advocates change albeit in a direction that makes future changes more difficult. Through tax cuts, deregulation and privatisation conservatism

⁵⁷ Johnson, "Right Side Round Table: Should the Death Penalty Be Repealed? | Times Free Press."

⁵⁸ Christian, "Conservatism."

wants to undo the welfare state in ways that are “politically irreversible”.⁵⁹ In other words conservatives want to move resources from democratic control and public circulation to private accumulation. Private and not public ownership is a far more effective basis on which to build a solidified sense of ‘me and mine’ because it emphasises personal acquisition as a way of confirming one’s solidified sense of self in a relatively stable material world.

Conservative opposition to the death penalty is just that: conservative. It conserves the dualist individual ontologies that exist among victims and perpetrators, and among perpetrators and the retributive public, the us’s and the them’s. It also conserves if not strengthens broader dualist social ontologies by capturing our feelings about wrongful conviction and redirecting them from examining the underlying issues that belie wrongful conviction—such as inequality of power among the actors—to attacking the social programs that attempt to address the similar issues that lead to wrongful conviction in the first place.

Conclusion

Capital punishment is among the most powerful icons of state-citizen relations, as Garland’s *Peculiar Institution* suggests. Because of this power, that which underlies our positions on the death penalty matters. It is beyond the scope of this paper to consider alternatives to capital punishment in a creative or extensive way. Given the dominance of retributive political discourse, I would like to suggest life imprisonment with parole as an appropriate response to murder. Not only does it allow for the overturning of wrongful convictions, but it also concedes that violent individuals can and do become non-violent given the appropriate environments and supports. It implicitly admits that individuals are more than their legal labels and that most of them are like us: human. Institutional recognition of the offender’s humanity and the possibility of rehabilitation could lead to improved prison conditions. On the one hand it provides room for compassion and on the other hand it forces us to come to terms with the fact that the offender will likely live among us at some point in the future and that society has a stake in his well being.

Wrongful conviction has decreased conservative support for capital punishment, in part because it does not require people to develop compassion for criminals. For Buddhists, compassion (or its opposite, ego) is the basis for all forms of thinking in the same way the root of a tree is the basis for the branches and leaves: “The first one is basic duality, and the second one is the activities of that”.⁶⁰ In other words, implicit theories of reality and worldviews flow from ontological states. Since opposing capital punishment for reasons unrelated to compassion allows dualist ontologies to remain unchallenged, the remaining worldviews can persist, and this would include all those other core political beliefs that constitute conservative ideology.

The problem is that without a change to the underlying worldviews, and more importantly, without a change to the ontological states that create the contexts within which they form, opposition to the death penalty is psychologically shallow and risks being reversed in response to threatening situations. Support for capital punishment spiked to its highest ever after the 2013 Boston Marathon bombings, for example.⁶¹

The emergence of technology that can prove guilt conclusively could turn conservative opposition into support if the opposition is based solely on the risk of executing innocents. The enduring conservative worldviews have remained consistent with support for capital punishment, so they will offer no resistance.

The risk of wrongful conviction is largely a technological problem that can be addressed by increased surveillance. To record a brutal murder with clarity would remove any doubt

⁵⁹ Gray, *Post-Liberalism: Studies in Political Thought*, 274–75.

⁶⁰ Trungpa, *The Path Is the Goal: A Basic Handbook of Buddhist Meditation*, 63.

⁶¹ “Support for Death Penalty in U.S. Surges After Boston Bombings | Angus Reid Global.”

about the offender's guilt and if these types of recordings became relatively common they could weaken opposition to the death penalty on the grounds of wrongful conviction. Of course this would require an extensive surveillance system, which may be on its way. The American Civil Liberties Union has pointed out that the "mass surveillance of American citizens has greatly expanded" since September 2001, and that state surveillance has "infiltrated most of the communication technologies" we use daily,⁶² such as cellphones with cameras. Sophisticated technology systems have made surveillance of the details of individuals' lives a reality:

Enabled by high-speed computing systems and marked by an intensification of command and control properties, new technologies have expanded and, in some cases, intentionally surpassed the scope of the senses...[they] promise the seemingly infinite catchment and infinitesimal account of human actions...⁶³

Crime Stoppers has developed an application that effectively turns smartphones into mobile police cameras that can go anywhere.

The application includes interactive features that enable citizens to alert police, in real time, about a crime or potential crime through photos, video footage, e-mails, text as well as a button that autodials Crime Stoppers' number.⁶⁴

This level of surveillance could lead to a situation where guilt could be proved with absolute certainty and this in turn could generate political will for reinstatement. As long as there are criminals, politicians will scapegoat them for political gain. Without compassion there will be nothing to prevent that from translating into more retributive policies.

Compassion does not rule out the detention of people who present a danger to others. In fact, it requires it because compassion for perpetrators does not exclude compassion for present and potential victims. But because of Buddhism's emphasis on impermanence, compassion also requires the recognition that "there is nothing indelible" about our negative characteristics,⁶⁵ including the violent ones. It is this understanding that lies at the heart of humanist and spiritualist oppositions to capital punishment. Unfortunately it is not possible to connect non-indelibility to the issue of wrongful conviction because that form of opposition does not concern itself with the characters of offenders. Until we abolish capital punishment for the sake of the murderers themselves, abolition may be more of an intermission than a genuine social transformation.

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⁶² American Civil Liberties Union, "Time to Rein in the Surveillance State | American Civil Liberties Union."

⁶³ Soderlund, "Introduction to 'Charting, Tracking, and Mapping: New Technologies, Labor, and Surveillance,'" 163.

⁶⁴ Toronto Police Services, "Crime Stoppers App Reaches 5,000 Downloads."

⁶⁵ Roy, "Healing Justice," 88.

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