Kant's Retribution: A Framework of Punishment Consistent with Liberal Democracy

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Abstract: In *On the right to punish and grant clemency*, Immanuel Kant attempts to resolve a potential paradox in social contract theory. The government is the political authority tasked with execution of the rule of law. On the one hand, the execution of the rule of law is consensual and meant to serve the individual citizen. On the other hand, the execution of the rule of law requires punishment (a nonconsensual action). A consensual condition requires a nonconsensual component. This thesis analyzes Kant's attempt to resolve this issue through his use of a retributivist framework of punishment.

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Introduction

Any liberal democracy seems to face a fundamental paradox. At the heart of liberal democracy is the rational individual. The rational individual is the end for which a political community is created, and all laws are created and enforced to ensure that the freedom of the individual is maximized in accordance with every other individual's freedom. The entire political regime is consensual and remains legitimate *only* if it remains consensual.

Additionally, an essential element of a political regime is punishment. The rule of law is only possible if there is an enforceable component to its claim. An enforceable law is an oxymoron. Therefore, a political regime must punish transgressions of the consensual law, or else it faces a state of lawlessness.

The potential paradox here is the irreconcilability of consent and punishment. A liberal democracy requires both consent and punishment, yet why would an individual consent to their own punishment? Furthermore, if a political community is created to maximize individual freedom, then how can the same political authority which ensures that freedom also be the force which can take it away?

Kant is aware of this potential paradox and attempts to reconcile the issue in his passage "*On the right to punish and grant clemency*." In this passage, Kant reconciles this paradox through a punishment of retribution. Retribution is the proper framework for punishment to remain consistent with consent and liberal democratic philosophy. When individuals enter into a political community, they consent to both follow the law and to bestow political power into a greater united (rather than their individual) will. Therefore, individuals do not consent to punishment but to the promise that they will follow the law.

If they do not, then the greater political authority will punish. This punishment must preserve the individual as the end of the political community, so they cannot be reduced to a means even in the process of punishment. They must only receive a punishment equal to their crime. This is the punishment Kant defends in this passage.

In order to properly break down Kant's argument on punishment, this paper will be divided into three chapters. The first chapter is "Judgment and Punishment." This will focus on the concentration of coercion from a general means to coerce to the specific form of punishment. The second chapter is "Execution and Punishment." This will explore the *law of retribution* as the proper principle and measure of punishment in accordance with justice. The third chapter is "Will and Punishment." This will examine the relationship between the *will* and punishment to finally establish punishment justly in a civil condition. Ultimately, this paper will help firmly cement Kant's theory of punishment and serve as an analytical tool for the purposes of the current penal system.[1]

[1] This thesis recognizes the secondary literature on this subject but has chosen to ignore it.

Judgment and Punishment

On The Right to Punish

The Authorization to Use Coercion to Punish

On the right to punish and to grant clemency, Kant tackles the difficulties that punishment poses in the civil condition. In contrast to competing schools of thought, Kant takes a different approach. In order to remain consistent within his *Doctrine of Rights*, he enters this section where he entered this larger work: on the concept of **right**.

This section begins with "The *right to punish*" as the right a ruler has to "inflict pain" upon a subject because they have "committed a crime" (6:331). At the beginning of the *Doctrine of Right* Kant establishes right as an action which "can coexist with everyone's freedom in accordance with a universal law" (6:230). In other words, if an action is a hindrance to the external freedom of another it is "*wrong*" and cannot coexist with the practice of universal law. Kant recognizes rather quickly an oxymoron baked into the understanding of right. A right cannot be a right if there is no resistance which can hinder hindrances to external freedom. Rather, a right to external freedom and the authorization to use resistance (coercion) to counter that hindrance are one and the same thing. Kant calls this the "authorization to use coercion" (6:231). According to the principle of contradiction, the authorization of coercion (to impose a *hindering of a hindrance*) is consistent with right (action which does not hinder the external freedom of everyone else).

Punishment is more than just an authorization of coercion. It is an implementation of coercion for the practices of justice in the civil condition. Punishment is a right

exercised by the united will in the civil condition, therefore, it is an authorization of coercion. However, punishment is not just another word for coercion in the same way that it is not just another word for right. Instead, punishment is a specific form of coercion present in the civil condition.

Kant understands right and coercion to be one and the same thing: without one connected to the other justice would be impossible. Therefore, when Kant decides to begin with "the *right to punish*," in effect he is arguing for a distinction between coercion and punishment. So, what does Kant mean when he suggests that there is an authorization to use coercion to punish? There are a few implications.

The first implication is that Kant is distinguishing the definitions of *coercion* and *punishment*. Coercion is defined as a *hindering of a hindrance to freedom*. This leaves open the possibility of any kind of resistant force to action which hinders freedom. This includes force on a continuum from the most delicate (such as commanding) to the most severe (such as killing). On the other hand, punishment is much narrower.

There are two key locations where Kant hints at this. In his "Preliminary Concepts of the Metaphysics of Morals (*Philosophia Practica Universalis*)," punishment is defined as "The *right* effect of what is culpable" (6:228). Culpable is an action which is less than what the law requires. In other words, the threshold for civic action is to act no less than what the law requires (when in a civil condition). Based upon Kant's previous discussion on law, this would mean to act with regard to the categorical imperative. The outcome of breaking the law (acting less than what the law requires) is civically wrong, and a civil condition which derives its legitimacy from this must use a type of coercive force against

the action. All of this is to say that punishment is the proper effect (or opposite reaction) to what is civically wrong.[2]

The second key location immediately follows the right to punish: "the right a ruler has against a subject." Kant is hinting at the specific connection between the practice of law and punishment. Only in a civil condition is there a relationship between a ruler and a subject that is juridically right. Furthermore, it is a force that the ruler has "against" a subject. It is a form of coercion which is specifically a power of a ruler over people who subject themselves to the laws under a united will. Here lies the distinction between coercion and punishment: coercion can exist in the state of nature while punishment can only exist in the civil condition.

The nature of this distinction is made clearer with the introduction of right, acquired or innate. According to Kant, there is a division of rights into innate and acquired rights (6:237), but both require a civil condition if they are to be actualized (through a legitimate coercive authority). Innate rights are different from mere freedom as a state of being. All persons are considered free. In this state, which underpins the

[2] It should be noted that what is civically wrong is also morally wrong but not all moral wrongs are civically wrong. That is to say, moral wrongs may include injustices to oneself while not affecting others' external freedom. If a citizen partakes in habits which are bad for their health, they may be said to be acting morally wrong. However, they cannot be punished for these habits because they do not infringe upon others' external freedom. Only action which infringes upon others' external freedom is civically wrong and, therefore, punishable.

origins of political practice, a person's freedom is the grounds by which they become an end within themselves. This cannot be taken from them even if they are completely stripped of all external freedoms. The innate right to freedom is different. This is a natural outcome which arises from the condition of freedom. Innate rights finds its origin in the internal and, therefore, "belongs to everyone by nature." It is a prerequisite of being a human being, or "by virtue of his humanity" (6:237). However, the innate right to freedom is a right and as a right is a claim against other free beings. Therefore, it requires a mediating authority which can properly use coercion to ensure that everyone's freedom from one another remains protected.

For acquired rights, their origin is external and, therefore, requires an act. Acquired rights are only possible in a civil condition because the external origin of the right requires hindering other's freedom. By *willing* something as externally yours, you must 'declare that everyone else is under obligation to refrain from using that object" (6:255), but this, according to the principle of universal law, requires placing yourself under obligation to every other "to refrain from using what is externally" theirs. Furthermore, this reciprocal limitation of one's own actions is only possible if everyone enters into a "collective general (common) and powerful will" which provides assurance that everyone behaves according to the same principles (6:256).

Punishment, as defined in this passage, is only possible in the civil condition. It is the form of coercion which is associated with the enforcement of rights, innate or acquired. All notions of rights require that people unite under a common will, and they require that they are accompanied through coercive measures. Punishment is the coercive measures instituted following the conviction of a crime against rights in the civil

condition. It is the authorization to coerce which follows a condition necessary to institute the realization of all rights.

The second implication of beginning this passage with "an authorization to use coercion to punish" is the character of force being imbued. The character of coercion is simply resistance. An extreme example would be if someone was threatened with a weapon. Since their "independence from being constrained by another's choice" is being hindered, they have the authorization to use coercion to free themselves from that situation. This can be either by knocking them out or killing them, but either way the character of resistance is the same and remains in accordance with the principle of justice. The character of punishment is also simple according to Kant. That is, punishment is the infliction of pain. Pain, understood in this context, simply refers to any hindrance to a person's external freedom. It is an authorization to use coercion which limits another's ability to make a choice as a free being. This is the specific form of coercion employed when punishing.

Now it is necessary to bring all of this together. The answer looks like the following: punishment is a specific form of coercion reserved to the ruler only. While coercion is broadly the action of hindering hindrances to freedom, punishment is a tailored form of coercion which is both only possible in the civil condition *and* informs the laws for which the civil condition is grounded upon, i.e., the just reaction to "having committed a crime."

What is Crime?

This brings the discussion to the next step. What is a crime? In the section "Preliminary Concepts," Kant seeks to define useful terms as simply as possible. For the purposes of coherency, it is important to take a step back and clarify how Kant defines *crime* by tracing his definitive deduction from the categorical imperative to crime. When Kant uses "categorical imperative" he is referring to a representation of an action that is "objectively necessary." (6:222) In other words, a categorical imperative describes an action which is necessary regardless of person or context. These are moral laws which can be deduced by what people ought to do in accordance with the principles of justice. *Obligation* is a free action under a categorical imperative. A person possesses inner freedom and the capacity to choose, but their actions, bound by morality, must fulfill their obligations. Why? Because at the intersection of pure reason and freedom lies the question "What ought I to do?" Reason informs what one ought to do through unconditional a priori laws, and these laws inform the obligations a person has under a categorical imperative.

Duty takes obligation further than a mere deduction of necessity and places the person in motion: it "is that action to which someone is bound." They are bound to permitted action (action consistent with obligation) which, not limited to "any opposing imperative" is called authorization. Therefore, the authorization to coerce simply means that there is a moral necessity to use coercion in order to act in accordance with obligation. In relation to coercion, duty would simply be that action which requires someone to use coercion. In fact, it would be against one's duty if they were authorized to use coercion and decided to refrain. Acting against one's duty is called a *transgression*,

and if it was an intentional transgression ("one accompanied by consciousness of its being a transgression") it is called a *crime* (6:224).

On the right to punish, Kant adds a clarifying phrase. Crime is not just an intentional transgression of duty, but a transgression of "public law that makes someone who commits it unfit to be a citizen." This takes duty (and moral action) and places it squarely in the civil condition. In this passage, law is more clearly defined as a public law. This indicates that his clarification of obligations and the categorical imperative are only possible in a civil society because it is the only condition where all persons can be placed equally into a state of acquired rights. Crime (and punishment) are components of acquired rights and, therefore, they only exist in a civil condition.

Bringing the definition of crime together with its clarification in this passage, Kant also critiques obligation. A person who commits a crime is someone who, because they possess a moral personality, can be said to have intentionally acted against their obligations. They were aware of the constraints civic obligation places upon their actions and decided to act against them anyway. This action is incompatible with the civil condition. In a civil condition, the will of a community of people is brought together and united. These human beings create a state, or a constitution consisting of laws and institutions "in accordance with the pure principles of right" (6:313). They become citizens. These laws not only inform action but make certain actions necessary for a state to remain in accordance with the principles of justice. In other words, the creation of a state immediately requires the designation of both rights and duties to all its members if it is to "maintain itself perpetually" (6:326). An intentional transgression of these duties is a

clear sign of wrongful action against the state as a whole. Kant deduces that having committed a crime "makes someone who commits it unfit to be a citizen."

The Exception of the Ruler

So, if all free beings in a civil condition are subject to the principles of pure reason and the associated laws, why does Kant exclude the head of state from punishment? In other words, it is somehow in accordance with justice for a ruler to have the power to punish but be excluded from punishment. The answer to this question is actually rather clear according to the principle of contradiction. If a ruler of a state is the "person whom executive authority belongs," then they also have "the supreme capacity to *exercise coercion*" (6:316-7). It is the *obligation* of the ruler to punish. This means that the ruler cannot themselves be punished, because it is self-contradictory for the punisher and punished to be the same person. However, this goes further than just self-contradiction. Kant will explore further why a person cannot be both punisher and punished later in this passage, but, for now, it is important to remember that punishment must involve some infliction of pain. Although someone might enjoy pain (pain and pleasure become confused with one another), this is meant to be a negative perception of pain. This is not pain as a description of a biological phenomenon but a description of an experience which is uncomfortable in origin. A person cannot inflict pain upon themselves in such a way to be conducive to the purpose of punishment. Therefore, a ruler of a state cannot punish themselves and, therefore, cannot be punished. The ruler can "only withdraw from his dominion."

Furthermore, the ruler cannot be punished for the same reason that punishment is only possible in the civil condition. When people unite into a political community and subject themselves to the laws, they place the authoritative power to judge and execute into separate, representative political powers. The power to execute is concentrated into the executive authority, which is led by the ruler. The very purpose of this authority is to execute the law, so it is part of their duty to punish. This transfer of power from the people into the executive means that no other authority has the power to punish. Since a ruler cannot punish themselves, there is no other authority which can punish them. Therefore, a ruler cannot be punished.

Punishment and the Court

The Court's Coercion

Taking into account the previous distinction between the authorization to coerce and punish, Kant continues to build off of the difference between the state of nature and the civil condition. In both the state of nature and the civil condition, "*natural punishment*" looms between the actions of free beings. This form of punishment is described as vice punishing itself, but it should be noted that it is not a true form of punishment. Instead, it is a term used by Kant to describe the natural consequence of an action (if you do not drink water, you will become dehydrated). This form of "punishment" is a natural consequence of action (not an action associated with laws), therefore it is action "which the legislator does not take into account." However, the connection between natural punishment and punishment by a court (positive punishment)

is simple and reflects a common formula: an action (a) has a consequence (b). In a civil condition, a crime (a) results in a punishment (b).

In contrast, Kant introduces "*Punishment by a court*" which is defined directly in contrast to natural punishment, i.e., punishment which the legislator does take into account, lays down a judgment and determination. This is Kant sifting away the differences between natural punishment (immediate, local justice), coercion (a hindering of a hindrance), and positive punishment (justice executed following a rational determination from the people). Positive punishment is natural punishment which is filtered through the rational subjection of the universal laws, through the political authorities, and executed in accordance with justice (public justice).

It is necessary to understand why Kant suggests that positive punishment is something which the legislator takes into account, what the legislator is, and its relationship with the other authorities. The legislator, or simply the *sovereign*, is the authority which belongs "only to the united will of the people" (6:313). Since freedom (the only innate right) is independence from other's choices in accordance with everyone else's freedom, the union of persons into a united will requires the preservation of that choice. Additionally, because universal laws involve the relationship between persons (an acquired right is one which everyone else restrains their actions in order to preserve their own rights), it is necessary for law-making to consist of the persons which restrain themselves for each other's sake. Together, the legislative authority is only legitimate (that is, consistent with justice) if it is composed of every person who will be constrained so that they can maintain their independence from another's choice. In effect, they preserve their independence even if they fall in or out of the majority. Kant suggests that

this united will of the people takes into consideration positive punishment through the law-making process. The legislator is not the court (the judicial authority) and not the executioner (the executive authority) but merely a united will which decides upon positive laws in accordance with universal laws. With regard to punishment, when Kant writes that the legislator does not take into account natural punishment, he is detaching the function of the legislator (law-making) from anything that is not related to a juridical relationship. The legislator is the body through which the question "What ought we to do" is both deliberated and determined but not executed.

Humanity and Innate Personality

Following distinction between coercion generally and punishment specifically, Kant lays down his most consequential premise on punishment, i.e., punishment

> can never be inflicted merely as a means to promote some other good for the criminal or for civil society.

Kant directly objects to any notion of punishment as a tool for deterrence or a mechanism which maximizes the happiness of a community. A person, for whom the political community is created, cannot be a tool for the political community itself. This is the case because persons are not *things*, or "that to which nothing can be imputed." By punishing a person for the good of something else, they become reduced to merely a thing which other people have a right to, i.e., "put among the objects of rights of things." However, why does promoting some other good through punishment reduce a person to a thing? The answer is because a thing is an object which possesses no rights. A thing is the means to which a person fulfills their obligations, or, in other words, it is an external

means to achieve some other end. A person is not a means but an end: they are the "subject" who makes use of things for their own ends. Therefore, "a human being can never be treated merely as a means to the purposes of another" because it makes them an object.

Positive punishment is especially prone to reducing humanity to a means. The unity of the people into a common will takes their political capacities out of their direct hands and places them into representative authorities. Representation runs the risk of reducing people to a mere means since they no longer directly make political decisions. They may be seen as smaller parts of a larger whole. This is a typical problem with the "public good." People can become seemingly irrelevant, even counter-product, to the realization of the public good. Punishment may be executed in light of this interpretation of the political community. Therefore, it is the responsibility of the political authorities to ensure their actions remain consistent with the argument that it is each and every citizen which is an end in themselves.

Kant further clarifies why people cannot be reduced to means when he writes that "his innate personality protects him from this." 'Innate personality' branches off the concept of *moral personality*. Moral personality characterizes the person as someone who has "the freedom of a rational being under moral laws." The laws, or rules which determine the right action, are the ones which a person gives themself in accordance with others. Kant distinguishes moral personality from "psychological personality." The former is consciousness of the responsibility that freedom poses to a rational being, while the latter is consciousness of one's identity. What truly distinguishes moral personality from psychological personality is the intangible object with which the rational being finds

itself addressing, i.e., law (moral) or identity (psychological). What they both share in common (what singles out the term *personality*) is the freedom which a rational being possesses. Freedom is not just a mere condition of human beings but a state of mental experience. Freedom is a description *of* existence. Therefore, freedom itself is an objective description of a condition with which free beings live, but as free beings each and every experience of reality is tied to some subjective inclinations. Freedom and the awareness of being free (consciousness) breed a sort of pattern of thought unique to each individual. Thus, personality is a disposition of an individual limited by/subject to the context in which it finds itself. It qualifies the definition of *person* by including the complex interaction between freedom and the conscious experience of freedom. This is innate and inextricable from freedom. Furthermore, if freedom is the basis for which Kant builds his doctrine of rights, and freedom and conscious experience are tied together, then "innate personality" indicates that conscious experience is an end within itself.

Innate personality protects a criminal from being treated as a means because it is through personality that the laws find their origin. The only right which remains internal and unbounded by natural condition is the innate right to freedom. This observation is the basis for Kant's entire doctrine of right. All rights arise out of this simple observation that persons are free rational beings who can make their own choices. Rights, laws, punishment, etc. all arise out of this innate right to freedom. Thus, the person themself is the end of the political art. If they are reduced to something less than an end, then the entire political doctrine of right comes crashing down with it. Therefore, if a person becomes reduced to a means for any reason, even an abstract notion of the public good,

then the entire civil condition becomes reduced to something far worse than the state of nature. *Person* becomes useless, and everyone becomes objects. In order to avoid this catastrophe, all people, even criminals, must remain ends in themselves. Breaking the law is unjust, but reducing human beings to the category of things is a far greater injustice. As Kant concludes, "if justice goes, there is no longer any value in human being's living on the earth."

However, criminals can lose what Kant calls their "civil personality." This refers more pointedly to acquired rights. The civil condition is the condition which is erected following the need to establish some form of system to enforce what is externally "mine or yours." Any other right, other than innate right, requires a declaration "that everyone else is under obligation to refrain from" infringing upon what is externally mine (6:255). This declaration is made possible only if there is a "collective general (common) and powerful will." This is otherwise known as a condition in which there is a body of "general external lawgiving" that possesses the power to enforce this declaration (6:256). Kant calls this the *civil condition*. Therefore, *civil* is different from a *pre-civil* condition by the very existence of this collective lawgiving power. *Civil personality*, then, is a qualification of both civil and person, i.e., the freedom a person exercises in connection to the sovereign power. Since the sovereign power (the legislative) **is** the united will, the giving up of one's civil personality means the giving up of one's freedom to exercise their independence regarding lawgiving. Essentially, they give up their power to place others under obligation to refrain from infringing upon that which they make rightful claims. This power becomes temporarily sacrificed to the united will.

In order to lose one's civil personality and be subjected to punishment by the ruler, a person "must previously have been found *punishable*." Because a person is an end in themselves, they cannot be punished for some greater good other than themselves. Since punishment can only be aimed in a direction consistent with persons as ends in themselves, a person cannot be punished *before* a crime has been committed as this introduces a problem of what the punishment is directed toward. Therefore, they must have been "found" having committed a punishable act. The process by which a person can be "found" guilty is through a procedure of judgment in accordance with justice. "A people judges itself," writes Kant, "whom it designates as its representatives for this by a free choice and, indeed, designates especially for each act" (6:317). This power is not invested into either the legislative or executive authority because each individual is "only passive in" their relationship to these powers. In other words, it would not purely be the people who judge and pronounce "a verdict of *guilty* or *not guilty*" but some representative body of power–there would be a degree of separation between the people's judgment and the person being judged. It would be a power exercising another power, and this creates an issue of function. Instead, the need for a separate judicial authority is born. This authority consists of two parts. The first is the jury (where "the *people* can give a judgment upon one of its members, although indirectly, by means of representatives") and the court (which is some shared power between the jury and the executive, more than likely to come to fruition in the concentrated power of a judge). This is the process and power distribution which makes it possible to find a person *punishable* in accordance with justice. If a jury finds a person punishable, then, and only then, can a person be justly punished.

What, then, is the object being judged? Later in the passage, Kant will clarify that a person is punishable when they are found to have "willed a *punishable action*" (6:335). *Action* is what should be emphasized when Kant uses the verb *committed* a crime. When under judgment, a person is on trial for an action which has been committed already. More on this will be discussed later.

The Price(lessness) of Justice

Kant finishes this section of the passage with an ethical dilemma. This ethical dilemma is presented in the form of a question:

> What, therefore, should one think of a proposal to preserve the life of a criminal sentenced to death if he agrees to let dangerous experiments be made on him and is lucky enough to survive them, so that in this way physicians learn something new of benefit to the commonwealth? (6:332)

This question is a qualification of the Pharisaical saying he poses a few sentences beforehand. In fact, he answers this question before he even raises it. A failure to punish what is punishable is a failure to remain in accordance with justice. The very notion of allowing a criminal to escape punishment even for some other good places the entire civil condition into an unjust state. Why is this so? It may seem clear. Persons cannot be used as a means for some other good, as Kant originally posited. But, Kant is pointing to something else here. He is suggesting that failure to punish is a failure to preserve "the law of punishment" as a categorical imperative. What is a civil condition if it is not the preservation of universal laws? And, if a united will under a civil condition cannot properly secure the laws through just force, then it cannot preserve itself. Therefore, if a

criminal is able to commit a crime without facing the reciprocal punishment which accompanies the action, it would lead to the deterioration of the civil condition and, ultimately, cause "an entire people to perish."

Furthermore, Kant responds to this question afterwards when he suggests that agreeing to, and surviving, dangerous experiments is a form of *buying* justice. In a sense, it really is purchasing justice because the criminal buys their life in exchange for being used as a means of research. If they happen to survive the experiments, then they happen to escape justice. They become above the law and cause justice to cease to be justice "if it can be brought for any price whatsoever." A court must reject any such proposal and ensure that the proper punishment will be executed.

There is one last remark worth mentioning about this ethical problem. Kant poses the problem as one in which the criminal can *agree* or not to let these dangerous experiments be made upon them. This seems like a somewhat odd component of post-conviction. If a criminal has been found guilty and sentenced to death, what choice do they really have regarding their punishment? Kant is, in fact, posing an inconsistency of this hypothetical dilemma with his doctrine of right. Persons, whether criminals or not, preserve their innate right to freedom. They lose their civil personality but preserve their innate personality. This ethical dilemma is one in which a criminal is posed with a choice: to face justice or to become a means for some greater good. However, if a person becomes a means for some other purpose, they are degrading themselves to the status of a thing, and that is not a possible choice in accordance with a moral personality.

Thus, this ethical dilemma falls apart on two sides. The first is that becoming a thing is not a choice which is possible in a civil condition. The second is that a united will

cannot allow a situation in which proper justice can be avoided even if it is based upon probability and used for some greater good. In either scenario, justice ceases to be justice. A person sentenced to death must be put to death.

This ethical question wraps-up this section, but it also sets-up the following section. Kant has officially established the right to punish in the civil condition. It is directly consequential of his previous passages in the doctrine of right, and it informs those passages by providing the enforcement mechanism needed to keep the civil condition preserved. However, Kant has a long way to proceed if he is to take on the more laborious task of an implementation of punishment which is consistent with justice. This is the contents of the next section. For if justice is to remain justice, it remains necessary to argue a case as to why a criminal sentenced to death is in accordance with his doctrine. Why is it that a person's life can be taken away at all if, even the criminal, is always in possession of their innate right to freedom?

Execution and Punishment

So far, Kant has only discussed the institution of punishment. Punishment is a right which arises out of the establishment of the civil condition and concentrated into the executive authority. Additionally, it is a form of coercion related *only* to crime. Persons are not means but ends. Punishment cannot use persons for the purposes of some other end. Therefore, only actions are punished and are punished in accordance with justice.

The Principle and Measure of Punishment

All of this begs an even greater question, one which Kant anticipates and asks himself. That question is "what kind and what amount of punishment is it that public justice makes its principle and measure?" Before Kant's response is evaluated, it is necessary to parse the parts of this question so that the full breadth of the answer is realized.

The Principle of Equality

The first part worth consideration is what Kant means when he asks what *kind* and what *amount*. Earlier in the passage, Kant rejects the notion that punishment can be used in such a way to turn people into things, i.e., "means to promote some other good." Kind is an interpretation, or iteration, of the more general concept of punishment. One way to conceptualize *kind* is to distinguish between different mechanisms of inflicting pain. One kind of punishment would be imprisonment while another kind is public torture. The

kinds of punishment vary depending upon how they are aligned with the public understanding of justice.

The *amount* of punishment has to do with the degree in which pain is inflicted upon the criminal. *Amount* is a notion with regard to size or degree. For Kant, this evaluation of degree deals with the elemental feature of punishment, i.e., that it has to do with some undesired infliction of pain. Pain, as an experience, exists on a continuum. The ruler has the power to execute a degree of pain suitable with the ends to which they understand the political constitution to be built.

In order to determine the *kind* and *amount* of punishment, it requires some conceptual analysis if punishment is to be in accordance with justice. This is why Kant introduces *principle and measure*. Principle and measure allow descriptive terms (kind and amount) to take on normative weight. The principle and measure of punishment is going to depend upon the political doctrine in which they originate. For Kant, the foundation of political doctrine is the innate freedom of the individual. All other notions of right, understood correctly, are contingent upon the preservation of this right which is independent of any relationship between persons. As has been discussed, the causal logic between freedom and punishment is that individuals are ends within themselves. Therefore, the kind and amount of punishment will be based upon this causal logic. In contrast, another kind of punishment is one of deterrence which Kant would reject on the grounds that it is inflicted as a means for some other good.

The other part of this question is "public justice." Public justice is different from simple coercion because it is the justice actively practiced by the individuals who comprise the civil condition. Kant clarifies justice to be "public justice" because it is the

only form of justice associated with punishment. In other words, public justice is just another phrase for *justice*, and Kant suggest that the "public" component of that phrase is essential for the actualization of justice itself.

Now that the question Kant poses has been parsed, the answer to the question can be examined. The answer to "what kind and what amount" of punishment is based upon the principle and measure of *equality*. The principle of equality is first introduced as an authorization of *freedom*. Innate equality is defined as "independence from being bound by others to more than one can in turn bind them." The innate right to freedom not only implies the consequence of equality, but it is necessary for freedom to remain in accordance with universal laws. The universality of freedom is one which must be equal among all individuals who possess this innate right. Therefore, when Kant introduces this principle of equality, he is grounding punishment directly in the principle and measure of freedom. This allows punishment to remain consistent with Kant's understanding of justice, i.e., originating from one end and that end being the principle of freedom.

By subjecting punishment to the principle of equality, Kant is bringing his fundamental philosophy of rights into a more comprehensive view of the civil condition. Acquired rights are rights which obligate everyone else to refrain from imposing upon that which the right is directed. In turn, a person who makes claims to rights must simultaneously recognize the rights that others have and, therefore, refrain from infringing upon the things with which others make rightful claims. This is the civil condition, and it is only possible if everyone subjects themselves to this principle of reciprocity. Failure to do so would be a failure of rights in general, for what are rights if they are not recognized by others as being legitimate? And, they will not be recognized as

legitimate by others unless they can be certain that their claims will not be infringed upon by the claimant of the original claim. This is, again, a law of reciprocity–both parties must agree to refrain from making claims on the other's things if they are to be secure in their condition.

This concept is the prerequisite for the additional clarification on the principle of equality with regard to punishment:

> Whatever underserved evil you inflict upon another within the people, that you inflict upon yourself. If you insult him, you insult yourself; if you steal from him, you steal from yourself; if you strike him, you strike yourself; if you kill him, you kill yourself.

In Newtonian fashion, Kant lays down his equivalent of the Third Law of Motion, i.e., "For every reaction, there is an equal and opposite reaction." This politically-situated third law of motion is the *law of retribution*. This is the principle of equality being used to bridge the origin of the laws and the failure to fulfill them.

"But what does it mean to say," Kant, again, anticipates the question, "'If you steal from someone, you steal from yourself?'" (6:333). In other words, what does the law of retribution mean? The law of retribution means

> Whoever steals makes the property of everyone else insecure and therefore deprives himself (by the principle of retribution) of security in any possible property. He has nothing and can also acquire nothing; but he still wants to live, and this is now possible only if others provide for him.

The law of retribution is the extension of vice punishing itself. In fact, it is the active practice of ensuring that vice continues to be punished for the sake of justice. Returning

to the logic of equal and opposite reaction, Kant is arguing that intentional failure of one's duty (or an intentional transgression which is defined as a crime) places themselves into an insecure position. If they cannot guarantee to others that they will not infringe upon their rightful claims (fulfill their duty) then they open the possibility for any and everyone to make claims on what they attempt to claim for themselves. That is, by trying to steal from someone else they are, in effect, stealing from themselves. They allow anyone to rightfully (in accordance with justice and the doctrine of right) make claims on their belongings for what was originally protected by the obligations of everyone else. Their actions, imputed to them, cause their acquired rights to be unrecognized by the rest of the members united under a common law-giving authority. Therefore, a criminal places themselves in a position where they could lose their civil personality.

Then enters the need for the judicial authority. Once a criminal has committed a crime, the people (who choose representatives) form a jury. The people want to make a rational decision about whether or not this individual has committed an act which has caused the actor to lose the power of obligation they hold over others. If they are found guilty, then they are found guilty of intentional failure to fulfill their obligations to others. Consequently, the people no longer have an obligation to recognize their external claims to things. The people no longer have an obligation to recognize any other right but their innate right to freedom (their innate personality protects them from becoming a thing with regard to the perspective of the united will). This allows punishment to exist within the realm of justice.

The loss of one's civil personality is not enough. A punishable action has effects far greater than one's which rightfully deserve to take-away the power they hold on

others through obligations. If a criminal has committed murder, they have murdered themself. This is not metaphorical; This is literal. They must experience the consequences of their actions in a literal sense if the true principle of reciprocity is to be fulfilled. Their actions must be turned back toward them. Since rights are relational and enforced by the united will, so too must punishment arise from out of the civil condition. So, the ruler must punish, and they must punish with regard to the principle of equality.

Hierarchy of Crimes

Following the trial and conviction, a criminal faces the punishment equal to the crime they committed. The first example that Kant gives are petty crimes. These are what Kant declared as *private crimes*, or crimes that harm an individual but not the commonwealth, earlier in the passage. Additionally, these crimes may pose a possible problem with the law of retribution. "Now it would indeed seem that differences in social rank would not allow the principle of retribution, like for like," Kant begins, but "the principle can always remain valid in terms of its effect." For example, punishment for a crime that involves a fine will not affect someone of lower social rank (socio-economic status) in the same capacity as someone belonging to the upper class. The law of retribution seems to fail here, for it fails the effect of equality. However, fines are typically imposed as punishment for more petty crimes and serve to offset the small injuries for which are difficult to execute. One example is a verbal injury. Kant uses "verbal insult" as a more specific example of verbal injury, but a clearer one might be a modern case of defamation. If a person publicly defames another (spreads misinformation intentionally to harm their reputation) they are deserving of punishment. But, of what

punishment are they deserving? Considering the nature of the offense (misinformation) it is impossible to redirect targeted misinformation back toward them. A fine is more fitting for the occasion as it can try and strike a balance between the harm done by the misinformation and the harm to someone's monetary supply. However, in the case of the upper classes, they "might indeed allow himself to indulge in a verbal insult on some occasion." The fine is so small compared to their accumulated wealth that the punishment does not have the same effect that it does on a person of a lower social rank.

The solution to such a dilemma is to try to broker an approximate equality between the injury and the punishment. If the criminal attacks someone's "love of honor" with a verbal insult, then they pay with a similar injury "to his pride." This may include a public apology and kissing the hand of the person of the lower class. Therefore, the law of retribution is a law of equality which must address the unequal conditions of individuals.

The second example of a form that the law of retribution takes with regard to punishment is stealing. Stealing, which steals from oneself, is another example that Kant uses to showcase the law of retribution in action. These crimes may either be *private* or *public crimes*, depending upon whether or not they harm an individual or the commonwealth. The equal punishment is to be "reduced to the status of a slave for a certain time, or permanently if the state sees fit." The criminal loses their property but still desires to remain alive. However, "since the state will not provide free of charge," the criminal must let the state use them for work of some kind ("in convict or prison labor"). Kant does not provide a direct reason as to why the state would require a cost, but the answer is already implied and would be redundant for him to include. If the state

provides free of charge, they are essentially providing property to the criminal. The state would be providing them with a right that they had just taken away. Therefore, they must only provide for the criminal if the criminal pays for it through some other means of value, i.e., labor. This labor is slave labor, but slave labor would mean "to degrade any other to a mere means to" some ends (6:450). This is true in some sense because slave labor does reduce the criminal to a means. However, Kant explicitly states that a human being cannot be reduced to a mere means for "the purposes of another." The solution is found in the nature of crime itself. This form of slave labor, a form of punishment, reduces the criminal to a mere means not for another but for themselves. The consequences of their actions now require them to labor if they want to continue to be provided with the property to live. They are a means to themselves which continues to maintain themselves as an end.

The third example is punishment with death. If a criminal has committed murder, "he must *die*." This crime is always a *public crime* because it takes away the very basis of right (the innate right to freedom). According to the principle and measure of equality, there "is no *similarity* between life" and death. There is no likeness between the punishable action and the retribution that they must pay. For a person to take a life, they take their own life. This does not violate any part of the *Doctrine of Right*. The innate right to freedom is not reduced or seized just because the state imposes a death penalty upon a criminal. Instead, the criminal's external freedom is seized in this reality. In contrast, it is the criminal which seized another's innate right to freedom by taking their life. Them, and them alone, are responsible for their own death sentence. Additionally, it would be unjust of the state to impose anything less than the death penalty because it

would be a failure of justice, in accordance with the law of retribution, if the criminal faced anything less than what they justly deserve. The only qualification for the death penalty is it must remain in accordance with Kant's principle that persons are ends within themselves. When sentenced to death, a person still retains their innate personality, so the state must ensure that the execution is "freed from any mistreatment that could make the humanity in the person suffering it into something abominable." Death, not torture, is the punishment rightfully deserved.

Curiously, however, Kant does not include any indication as to what to do about more specific criminal actions which the civil condition would find abominable, e.g., rape or torture. What if the nature of the crime is one which reduces another's humanity "into something abominable"? Are they to then suffer a punishment which also reduces their humanity into this state, or is there some other form of punishment that is approximate to the crime? This is a question that Kant unfortunately does not address and remains debatable. If his overall doctrine of right is to be applied to such an endeavor, one might argue that the ruler cannot stoop to the level of a criminal and seize their humanity. Although the law of retribution requires an equal reaction to the vice committed, the ruler cannot take on measures which reduce humanity to below its dignity. Because public justice is more complex than "vice punishing itself," and, instead, being a process of human beings protecting the ends of humanity, the ruler is limited in their capacity to execute by the principles in which it is founded upon, i.e., universal laws. Therefore, if a criminal makes the humanity of someone else abominable, the ruler must punish in a way which is approximate to the effect of the crime without the loss of dignity. Or else, the

ruler and the people would be no better than the criminal and, therefore, the civil condition would no longer be based upon universal laws.

Capital Punishment

The death penalty is a particularly sensitive principle and measure of punishment. This passage is dominated by the implementation and execution of punishment by death. Kant gives this subject its just due, for a crime which warrants the death penalty is a crime against preservation. The very action of murder is the greatest of public crimes and, when committed, threatens the preservation of the civil condition. The murder of another citizen is an action by which their innate right to freedom is violated along with all subsequent rights. Therefore, if the ruler fails to properly execute the death penalty, then they become an accomplice in this vice. However, death is the end for the doctrine of rights, so it is a delicate matter to execute since there is no retrial once it is finished. This is why Kant treads carefully and from different angles.

The End of Public Justice

Directly following his introduction of the death penalty, Kant brings the reader to the end of a hypothetical civil condition. If a civil condition was "dissolved by the consent of all its members," it is a matter of public justice to make sure that "the last murderer remaining in prison would first have to be executed." This hypothetical seems to be interjected into the passage without much regard for its placement with the surrounding text, but Kant is very aware of its placement and the necessity to further

expand upon his argument for capital punishment. At the end of this interjection, Kant writes that a failure of a dissolving civil condition to execute the last murderer would mean that "the people can be regarded as collaborators in this public violation of justice." This fact applies to a people whether or not they are near the horizon of separating: it is a public violation of justice if the people fail to execute a murderer. Kant only creates a hypothetical situation because it ties together the execution of justice with the execution of a murderer. By showcasing a situation which is nearing the end of a civil condition, and the end of the "public" or united will, Kant is connecting the function of the civil society with the function of punishment–the end of both being public justice. Each must have "done to him what his deeds deserve" so that "blood guilt does not cling to the people" for having allowed an act of murder to go unpunished and a murderer walk freely among the earth's inhabitants.

Even once a civil condition is dissolved, and the public no more, the members of that public still are guided by the laws of morality. The failure to act in their old public will be a failure of them to act in accordance with justice. Guilt will press on their conscious and blood will be on their hands.

By tying together the ends of the civil condition with ends of punishment (by introducing the end of the civil condition), Kant legitimizes the use of the death penalty as public justice in action.

The Man of Honor versus the Scoundrel

There, however, remain difficulties for the institution of capital punishment. What about a situation where two people commit murder but for different reasons? The

differences are contingent upon the measure of inner wickedness. *Inner wickedness* informs the following examples in this section, but this concept will be further explored in the next chapter on the will. For now, inner wickedness can be understood as the measure by which intentional transgressions are judged.

Suppose there are two parties to this conflict: those who believed they were performing a duty and those who were out for their own private interests. Both parties threaten the preservation of the state with an act of rebellion and, therefore, are deserving of a punishment equal to an attempted murder of the state. They are both deserving of death. However, they are granted a choice by the highest court "between death and convict labor." Kant argues that the man of honor would choose death while the scoundrel

(individuals acting only with regard to their personal interest) would choose convict labor. This distinction is supposed to serve as an example of differences in inner wickedness, but, interestingly, this distinction also serves to argue that both the man of honor and the scoundrel are deserving of death.

The man of honor and the scoundrel are both deserving of death, but their different measures of inner wickedness give different reasons for the same punishment. The man of honor is said to value *honor* more than he values life. He executes a rebellion because he believes he "was only performing a duty" that he owed the commonwealth, so his actions come from a place of conflicting choices–one's duty to fulfill the requirements of the public laws with one's duty to fulfill the requirements of the universal laws. Although there is no *actual* conflict between the public and the universal laws, they misperceive the relationship and act accordingly to their rationality.

Ultimately, their intentions come from a place of honor and fail to see the effect their actions have on the preservation of the universal laws on the civil condition. The conclusion is that the man of honor's inner wickedness comes from a place of honor, and that makes their actions admirable to some degree. Therefore, the man of honor is less deserving of punishment and "would be punished mildly in terms of his sensibilities." The death penalty would be welcomed by the man of honor, for it is honor which they value more, and be considered a milder punishment than convict labor. Convict labor, on the other hand, would mean the man of honor "would be punished too severely" by a form of punishment which is more shameful than honorable, thus reducing the association between themselves and honor.

On the other hand, the scoundrel "considers it better to live in shame than not to live at all." Their disregard for the preservation of the civil condition and subordination of the universal principles to their own self-interest makes them dishonorable and possess a greater degree of inner wickedness. They intentionally attempt to murder the civil condition for their private gain. They too are deserving of the death penalty, not because they are like the man of honor but precisely because they are not. The scoundrel desires life more than honor, so to take their life would mean they are punished more "severely" than the man of honor. Their greater inner wickedness means they are deserving of a greater punishment *with regard* to a measure consistent with their desires. In other words, their greater inner wickedness grants a punishment of a greater degree of pain. The man of honor deserves the death penalty because he prefers it; the scoundrel deserves the death penalty because he does not prefer it. In comparison, if the scoundrel was allowed to choose convict labor he would be punished "too mildly for his vile action." *Deserving*,

in other words, is the measure employed with regard to inner wickedness. Purer actions mean one deserves what they prefer, while more malice actions mean one deserves what they do not prefer. For both these men, they are deserving of death. For the entire number of criminals "united in a plot, the best equalizer before justice is *death*."

Unjust Punishment

The previous example served to defend the concept of punishment in accordance with inner wickedness, but Kant has one last qualification before moving on. Kant includes a general overview of the relationship between punishment and inner wickedness. He argues that no one that was sentenced to death for murder has ever complained "that he was dealt with too severely and therefore wronged." Actually, it is not that no one has ever complained, but, if they did complain, everyone would have laughed in his face. If he truly did commit the murder out of malice intention and was sentenced to death, then that is the punishment with which they are deserving. This is not arguable. However, Kant aims to amend this scenario to include an element of error on the part of sentencing. Kant says that if "his complaint were justified…the legislative authority of the state is not authorized to inflict this kind of punishment" even if it is in accordance with the law. In what scenario would a convicted criminal's complaint be justified? There are two possible scenarios. The first involves an element of error before being *sentenced*. This scenario is that the murder was unintentional (manslaughter). Since this comes from neither a place of honor or private interest, it is possible that the criminal was properly *sentenced* to death even though they were incorrectly *convicted* of murder. In this scenario, the legislative authority faces a dilemma between the execution of a

conviction and an execution which is not in accordance with the universal principles of justice. This is an example of error, but it is also an example of the role that inner wickedness plays in the conviction of an action. Unintentional and intentional murders are two different actions with two different punishments.

The second scenario is one in which a citizen acts in accordance with honor but not the laws. This will be addressed in the next chapter.

A Threat to the Preservation of the Civil Condition

In the final part of this section of the passage, Kant presents a new kind of murder: the dissolution of the civil condition. He explains a situation, and the following consequences, that would threaten the preservation of the civil condition. Consider the argument that all murderers should be put to death. Now, this is not just limited to the person who committed the murder but also to the person who "orders it, or is an accomplice in it." Public justice requires that all three parties be put to death for they are responsible for the murder of that person even if they did not physically commit the action. This is what public justice "wills in accordance with universal laws that are grounded a priori." This logical deduction is rational and consistent with the doctrine of right.

However, consider a situation where the "the number of accomplices to such a deed is so great that the state, in order to have no such criminals in it, could soon find itself without subjects." An example would be a popular revolution. What is a ruler to do? If they appeal to the law of retribution, then the civil condition would find itself with no subjects. This is so, not because there would be no people, but because the united will

would no longer be united. If the jury must consist of representatives of the people, but the representatives of the people have a personal stake in the matter, they will be faced with convicting the very same people with whom they love. A conflict of interest of great proportions would undermine the judicial authority, and the will of the individual would be in tension with the will of the united. The three authorities would lose legitimacy among the populace. Consequently, the civil condition would "dissolve, that is, to pass over into the state of nature" where there is no external justice at all. This condition is worse than one which does not strictly follow the law of retribution, so the ruler must find a remedy.

Kant argues that the remedy is to give the sovereign the power "to assume the role of judge (to represent him) and pronounce a judgment that decrees for the criminals a sentence other than capital punishment." One example is deportation. Deportation "still preserves the population" because it allows a large majority of the original convicted population to live, thus sustaining the original connection between the preservation of the people and the preservation of the commonwealth. They lose their political connections while sustaining the social connections which underlie all personal relationships. However, this situation is exceptional. It requires a sort of prerogative power[3] on account

[3] In John Locke's *Two Treatises of Government*, Locke argues that the executive authority possesses the power of "prerogative" to ensure the preservation of the political community. This power allows the ruler "to do several things, of their own free choice, where the law was silent, and sometimes too against the direct letter of the law, for the public good" (§ 164).

of the executive because this decree "cannot be done in accordance with public law." Kant calls it an act of a *right of majesty*, or *clemency*, which is understood as the right a sovereign has of "lessening or entirely remitting punishment" in cases where wrong is done to *himself* (6:336). In the case of attempted revolution, the crime *is* directed toward himself (his legitimate authority), so he has the authority (and the duty) to grant clemency.

Negligence

However, there is one last aspect of intentionality that Kant does not address in this passage. Kant distinguishes between the man of honor and the scoundrel, but what about the difference between crimes of accident and crimes of negligence? Inner wickedness is said to be some sort of measure of internal freedom. The rational being, aware of the universal laws of morality, may freely choose to act against what they know to be right. This is argued to come from some internal wickedness.

On the contrary, if a person unintentionally acts against their duty, they are said to have committed a *fault* (but not a crime). A fault is not measured by a degree of inner wickedness because it is unintentional. However, what about negligence? Negligence is a sort of *carelessness,* but it is not exactly intentional. For example, a carpenter is building a house and they decide to cut corners because they have a tight budget. They may space out the struts too far or fail to place fire breaks within the wall. Whatever it may be, they fail to properly execute their duty as a carpenter, but it is difficult to say whether they fail to execute their duty as a citizen. The result, however, leads to a structural failure and causes the death of the residents inside. Is this punishable? Kant might argue that if the

carpenter is aware of the danger cutting corners poses then they would be said to be held accountable. *Aware*, here, is a form of intentionality. If they are unaware of the danger the negligence poses, they may be said to have acted unintentionally. This is the most consistent solution to negligence in accordance with Kant's doctrine of right.

Will and Punishment

Punishment is the authorization to use coercion against a citizen who has been convicted of a crime. This form of coercion is a specific form of coercion which is only possible through the creation of a united will ruled by laws. The basis to punish a transgression of the law lies within the argument that actions can be imputed to individuals. As free beings, people are ends within themselves. Therefore, they are the beginning and end of their action. But, what makes human beings free? And, what makes it just to punish their actions when they are morally culpable?

Willing Punishable Actions

Inner Wickedness

So, Kant as laid down his justification for the death penalty, but he introduces a concept which stands on its own and is deserving of careful evaluation. This concept is the concept of *inner wickedness*. Inner wickedness is the example Kant uses to defend the "fitting of punishment to the crime" with regard to the death penalty. This concept is directly linked to his definition of crime, i.e., the *intentional* transgression of one's duty. Although there has been no mention of intentionality yet, intentionality looms in the doctrine. The jury, when deciding whether or not a crime was committed (an action is punishable), takes into account the intentionality of action. This is inferred from what has been previously discussed on what constitutes having committed a crime, namely, that there is a distinction between unintentional and intentional transgression. The former

being a *fault*, and the latter being a *crime*. Crimes, not faults, are punishable actions. Punishment is related specifically to actions which are *intentional* transgressions.

Intentionality and inner wickedness are connected with one another. In order to understand why this is the case, *wickedness* needs to be picked apart from Kant's philosophy. In the *Critique of Practical Reason*, Kant attempts to establish a foundation for moral personality. Actions can be imputed to the person in the following logical deduction:

> For, the sensible life has, with respect to the intelligible consciousness of its existence (consciousness of freedom), the absolute unity of a phenomenon, which, so far as it contains merely appearances of the disposition that the moral law is concerned with (appearances of the character), must be appraised not in accordance with the natural necessity that belongs to it as appearance but in accordance with the absolute spontaneity of freedom. One can therefore grant that if it were possible for us to have such deep insight into a human being's cast of mind, as shown by inner as well as outer actions, that we would know every incentive to action, even the smallest, as well as all the external occasions affecting them, we could calculate a human being's conduct for the future with as much certainty as a lunar or solar eclipse and could nevertheless maintain that the human being's conduct is free. If, that is to say, we were capable of another view, namely an intellectual intuition of the same subject (which is certainly not given to us and in place of which we have only the rational concept), then we would become aware that this whole chain of appearances, with respect to all that the moral law is concerned with, depends upon the spontaneity of the subject as a

> thing in itself, for the determination of which no physical explanation can be given. In default of this intuition, the moral law assures us of this difference between the relation of our actions as appearances to the sensible being of our subject and relation by which this sensible being is itself referred to the intelligible substratum in us. (5:99)

In essence, a person's actions come from a place internal and distinct from their external reality. These actions must be imputed to persons on the very notion of freedom, or else if human beings were "mere machinery in the hands of a higher power" it would patent "a mechanism which does away with the freedom of their will" (5:38). Therefore, an action which is punishable is (1) imputed to an internal space within the individual, and (2) must be punished with a view toward wickedness.

What is *wickedness*? Kant does not define wickedness, but it can be inferred that it is related with intentionality. The pulling apart of freedom and the impossibility of knowing "every incentive to action" means that actions can come from an internal space in the subject which is completely independent of any and all external stimuli. It is freedom in its purest form. It then follows that since actions can be internally imputed to the individual, and an individual is a moral being capable of knowing what is right and wrong, then an intentional action against what is right is *wicked*. It is a conscious choice to act against pure reason. It is vice which flouts its own ego. This is what inner wickedness is, and it is the source of crime and grounds for punishment.

Crime can be traced to *inner wickedness*, and the law of retribution must punish the "criminal in proportion" to this inner wickedness. Capital punishment is justified on the basis of moral personality in the criminal, which is then extended to an intentional

transgression of the law, and all notions of doubt can be removed as to whether or not this form of punishment is in accordance with the principle of public justice.

Punishable Action

Now that intentionality and inner wickedness have been cemented, Kant anticipates an issue with imputation. In the final section of this passage, Kant addresses Marchese Beccaria's critique of the will. If all action originates in the individual, then punishment must also originate from the will. In effect, this would mean that in a civil condition people punish themselves.

Beccaria's argument is a possible rebuttal to Kant's justification of capital punishment in accordance with his doctrine of right. Kant anticipates the difficulties of implementing the death penalty in a civil condition in which it is in accordance with the innate right to freedom. In this section, he faces a fundamental question about the death penalty: consent.

This rebuttal originates from a critique from Marchese Beccaria. He posits that "capital punishment is wrongful because it could not be contained in the original contract." Reminiscent of Rousseau's *Social Contract*, Beccaria uses the social contract to argue for penal reform. This reform would specifically end the death penalty on the grounds that the members who enter into the civil condition "would have to have consented to lose his life in case he murdered someone else." The issue, for Beccaria, is that this would mean that people would have originally consented to "dispose of his own life" and this is impossible. For the purposes of Kant, it is not impossible to dispose of one's life but it is a crime in itself. In the *Groundwork of the Metaphysics of Morals*,

Kant writes that someone "who has suicide in mind will ask himself whether his action can be consistent with the idea of humanity *as an end in itself* (4:429). The attempt to escape a condition with suicide would be to reduce themselves to, and treat humanity as, merely a means. Therefore, Beccaria's argument stands to refute Kant's two seemingly competing claims. The first claim is that suicide is a crime in itself as it reduces humanity to something less than an end in itself. It is morally wrong. The second claim is that, through the united will of the people, they create a civil condition which can justly impose the death penalty. The "sophistry and juristic trickery" going on here is that the united will of the people is being mistaken as some sort of will to be punished, when, in fact, they are different.

Kant's counterargument happens to be the greatest metaphysical deduction in this passage of his philosophy:

> No one suffers punishment because he has willed *it* but because he has willed a *punishable action*; for it is no punishment if what is done to someone is what he wills, and it is impossible *to will* to be punished.

The use of *punishable action* may finally get its proper due for the purposes of this examination. In order for punishable action to get its proper due, it is necessary to parse what the will is beforehand. The *will* is not defined directly by Kant, but it can be discovered through the surrounding information in Kant's greater political argument. The will can be understood as the origin of *action*. Persons are more than just mere rational beings–they are rational beings which exist in a state of choices. The will is what brings rise to the question of "What ought we to do," and it is the object with which freedom is concerned. In essence, the *will* is a power (or faculty) exactly like *reason* (or

understanding). Reason is what informs morality, but it is the will which necessitates the need to act morally (or else, no choice could be made).

Kant argues that this *will* does not allow itself to be punished. Beccaria's argument lies in the defense that persons would, in fact, will their own punishment. During the signing of the social contract, the people come together to create a *united* will. It is this same will that punishes the criminal, so this must mean that the criminal is willing their own punishment. Beccaria extends this logic to capital punishment and declares that it is impossible to will to be punished, because it would mean that one is willing their own death, i.e., justly refusing their duty to humanity. While *this* logic may seem consistent, it falls apart on the premise that people will their punishment. It is impossible for the punisher and the punished to be the same person, because it is self-contradictory for the exerciser of coercion to be coerced (it defeats the purpose). Punishment is a form of coercion which must originate from an external source for it to be consistent with logic *and* effective in its purpose. (For example: in the case of natural punishment, vice punishes itself not through the will of the person but from the equal and opposite reaction from the person that was wronged).

Kant admits that the people unite under a common will, but this unity does not directly link the social contract with punishment. By uniting under a common will, the people are consenting to subject themselves "together with everyone else to the laws, which will naturally also be penal laws if there are any criminals among the people." In effect, the united will is something greater than just a collective of individual wills. Here, Kant provides a qualifying reason as to why the judicial authority consists of two distinct entities. The judicial authority consists of the jury and the court. While the jury represents

the people ("each individual in it"), the court represents the executioner ("public justice"). The existence of a judge (the court) is one which sits between the ruler and the jury. It is an entity which does not directly follow from the representation of the people, but from the united will. In other words, the court is the only political body which does not directly follow from the will of the people individually. Instead, it derives its power from the executive authority (the ruler) who grants the judge (rather than himself) the power to punish. Therefore, punishment does not directly follow from the people but from something greater, i.e., the united will.

Additionally, the people subject themselves not to their own punishment but simply to the laws. *Punishable action*, not punishment, is directly associated with law. An action which is punishable is an action which is an intentional transgression of duty. What the people subject themselves to when they enter into a civil condition is the subjection to follow their duty. If they breach that duty, it is *that* which is what they willed. That intentional transgression of duty is counter to the original contract and, therefore, is punishable. This is the difference between willing punishment and willing a punishable action: the original contract was only signed with the agreement that the laws would be followed. Breach of those laws has been placed into a separate entity (the court) which was also consensual during the creation of the original constitution in accordance with the universal laws derived from pure reason.

The Holy Legislative Authority

This argument is further defended by Kant on the grounds of contradiction. "As a colegislator in dictating the *penal law*," Kant continues, "I cannot possibly have a voice

in legislation." His qualification as to why a criminal and legislator cannot be the same is curiously the fact that "the legislator is holy." What Kant means when he suggests the legislator is holy is that the legislator is a body of virtue. It may not literally be holy, but the perception of it must remain pure if it is to represent the authority which brings about the universal laws in the civil condition. Therefore, it is contradictory for the breaker of the law to be the creator of the law; this would imply that virtue and vice are the same thing. So, a person who breaks the law becomes removed from the united will (as discussed earlier). This removal means that the punishment to be enacted upon them is outside the original social contract. Again, to emphasize, the original contract only involves the duty to act in accordance with the universal laws that govern humanity. When a person breaches those laws, they essentially place themselves into a condition outside of the civil condition. Additionally, these must be punished for the sake of justice, so they are sentenced to their punishment. Accordingly, the law of contradiction provides the reason as to why "the social contract contains no promise to let oneself be punished and so to dispose of oneself and one's life."

Sophistry and Juristic Trickery

The "chief point of error" lies in the confusion of the criminal's judgment with their will. Judgment, or *reason*, is the place in which the criminal forfeits his life. A criminal has the capacity to hold a view of rights with regard to pure reason. Their rationality defends the argument that a crime is deserving of punishment without the desire to be punished. A person who commits a crime may intentionally fail to fulfill their duty, and rationality informs them that this is a vice and deserving of punishment.

However, their will (which breaks the law from a place of inner wickedness) should not be confused by this deduction. Reason and will are separate powers within a person, and they function independently from one another. A person who aligns their will with their reason is said to be in accordance with the law. But, a person can consciously break the law (disassociate their will from reason) while still possessing the rational capacity to understand the consequences which justify punishment. Kant argues that the distinction is between the "judgment upon a right" and the "realization of right." Rational determination can conclude with an a priori understanding of right, but it is through the will that the realization of the right is possible.

Law and Honor

With this rebuttal in mind, Kant refers to a previous section of this passage to offer some critiques of the death penalty. In the section between the man of honor and the scoundrel, there is a particular situation in which legislative authority is not authorized to use force. This situation was vague, but it involved a sentencing in which the criminal was justified to complain that they were "dealt with too severely and therefore wronged." An example of this might have been a situation in which the sentencing is lawful, but the conviction is wrong (incorrect determination of the jury). This example was not specific enough to cover all possibilities in which the criminal might be justified to claim wrongdoing. This is why Kant revisits this difficulty in the next part of the passage.

A Failure of Positive Law

Following his discussion on the will, Kant now has the rational premises to further explore exceptions to the death penalty. Based upon the foci of the will, there are "two crimes deserving of death, with regard to which it still remains doubtful whether *legislation* is also authorized to impose the death penalty." Both these crimes cast doubt into whether the legislator is authorized to impose the death penalty because of the presence of the "feeling of honor."

Honor places a wedge in between the neat connection of crime to punishment. Typically, crimes are any intentional transgressions of duty. Duties are typically consistent with the fundamental universal principles. Honor, however, offers a possible alternative that the legislative authority is not equipped to resolve. This is so because honor is intimately tied with *dignity*, that is, the observation that something "can be an end in itself has not merely a relative worth" but an inner worth (4:434). Human beings are ends in themselves; therefore they possess dignity. Honor is the principle by which someone with dignity acts with regard to the preservation of dignity. Honor recognizes the relationship between a duty and the preservation of dignity, and acts in accordance with this understanding. It can also be understood as the reciprocal of inner wickedness. While inner wickedness is an intentional transgression of morality, honor is an intentional servitude to morality. In fact, what is morally right may not always be what is juridically right. Therefore, honor plays an important role when determining authorization to use coercion, and may, in fact, lead persons to act in a way which preserves dignity but, nonetheless, commits a public crime.

The two crimes of murder that the legislator is unauthorized to follow through on is (1) the honor of one's sex and (2) military honor.

The first crime is the *murder of one's child* by their mother (infanticide). This crime is a legislative conundrum because of the prior premises on marriage and sex. Under *Marriage right*, sex must be subject to the laws of marriage in order to protect against an action which would makes human beings into a thing (6:278). Therefore, a union between two members is a necessity so that the restoration of humanity into an end can occur between two people who both make themselves a thing. In order to secure this in a civil condition, marriage between two persons is required. Marriage, therefore, is literally the legal consummation "*by conjugal sexual intercourse*." Since marriage is the only means by which human dignity can be secured, during the action of sex, procreation is only legitimately recognized if the two people having sex are married to one another.

This creates an issue if one of the two partners procreates with someone outside the contract of marriage. If the wife becomes pregnant from a man who is not her husband, she commits a crime. Additionally, the child is illegitimate in the context of the civil condition. The child "comes into the world apart from marriage" so they are "born outside the law (for the law is marriage) and therefore outside the protection of marriage." The child possesses only the innate right to freedom. So, if a mother decides to murder the child she acts in accordance with honor. In fact, the child's death (and life) is completely ignored by the commonwealth because they are nothing more than like stolen contraband smuggled into the commonwealth. Public justice does not concern itself with the child, but it does concern itself with the mother. She has committed murder

(a crime) but not against a member of the commonwealth. Does the legislator have the power to punish such a case?

The second crime is the crime of *murdering a fellow soldier*. Perhaps a junior officer is insulted by their superior officer. This insult calls the inferior officer cowardice, which is considered an insult to the "honor of his estate." Instead of taking the superior officer to court, he challenges him to a duel which will be made public and by the consent of both parties. The outcome of the duel is the death of one of the participants.

The legislative conundrum involves the nature of the crime. The insult of the superior officer targets the courage of the inferior military officer. As a soldier, their willingness to "expose himself to death" is what proves their military courage. Therefore, the only means to prove their courage is to challenge the superior soldier to a duel. The result is murder, although it "cannot strictly be called murder." Again, the legislative authority finds itself in a quandary. It was honorable of the inferior soldier to counter the verbal injury with a show of courage, but it resulted in the death of a fellow commonwealth member. Here, the legislative authority finds its capacity to punish limited.

What these examples both have in common is the discrepancy between the "incentives to honor" and "the measures that are suitable for its purposes." The people act in accordance with their dignity and follow the universal laws which govern humanity. The judicial authority is supposed to act in accordance with the "categorical imperative of penal justice." In other words, honor and public justice seem to be at an impasse when they are supposed to be in-line. Kant does not blame justice. Instead, he blames legislation. The need for legislation to address these discrepancies is a fundamental

necessity to a well-functioning commonwealth. *Murder* is punishable with death, but legislation must be introduced which is able to address these discrepancies in the different possible scenarios of *killing*. In other words, the legislature must identify killing which constitutes an offense of murder and killing which does not. If the legislator is faced with a quandary like the two described above, then they are to pass legislation which remedies the situation. In other words, the discrepancy lies not in Kant's philosophy of punishment but in the missing piece of *public law*. One of the vital roles that public law plays in the civil condition is the capacity to address context-specific situations which have little room in the larger discussion of the doctrine of rights.

In closing, the larger implication of these discrepancies is its commentary on the *will* and the relationship of the will to punishment. What is more exceptional is that the will can be in-line with reason while still committing a crime. If the civil condition fails to adequately account for discrepancies between what is honorable and what is punishable, then that is a failure on the part of the united will to align itself with reason. Justice, existing in its form before the civil condition, finds itself as the grounds for these two parties to appeal to for justification. Honorable action finds its place in this natural justice, and it collides with the legislative authority. Therefore, it is the responsibility for the legislature to remedy these situations through the passing of laws if it is to align the civil condition with justice.

Illegitimate Children: Between an End and a Thing

One last question remains: does the child born outside the civil condition not themself possess dignity? Kant makes the argument that parents have a right over their

children "*akin to a right to a thing*" but that this does not, de facto, mean that children cannot be diminished to the status of a thing (6:282). Although this applies only to the acquired rights in the civil condition, people still possess an innate right to freedom even outside the civil condition. People cannot be things but only ends in themselves. Children exist in a special space where they do not yet fully possess the capacity to reason but are still beings of rationality. Therefore, Kant suggests that they are *like* things whose parents have a right to take control and impound them. However, if the child is born outside the civil condition, does this mean that they lose the very right which keeps them from being reduced to merely a thing (not just *like* a thing). Persons are ends in themselves, and even if children are not yet fully persons, they still are *potential* persons and, therefore, deserve recognition of their humanity. They may not be recognized by the civil condition, but they should be recognized the same as in pre-civil conditions where freedom of the individual is defended.

Conclusion

This thesis set out to discover how punishment is consistent with the consensual premise underpinning liberal democracy. Specifically, this question was explored through Immanuel Kant's passage on punishment in his *Doctrine of Rights*. *On the right to punish and to grant clemency* gives the reader a targeted passage on punishment where Kant explores the very same question as this thesis does. Like Kant, the problem that punishment poses to justice is what force is "authorized" to use against another human being. Punishment is necessary, but it is plagued with the need for it to appeal to the principle of justice.

A political community grounded on rights is a political community who recognizes each individual as an end in themselves. As an end in themselves, politics is an art which serves the people who make up the political community. In other words, the purpose of government is to serve the people. Therefore, it seems rather strange that punishment is a consensual political practice and made legitimate by the erection of the political authorities. Why would a person allow themselves to be punished by the same government which is supposed to serve them and their rights?

The problem, then, is how is punishment just among a population of ends. Kant is aware of this problem and his doctrine of right stares down on this passage with the same issues as the one's posed in this conclusion. Yet, Kant successfully defines the institution and implementation of punishment in the political regime.

In the first part of the passage, Kant is able to successfully implement punishment by appealing to the mutually reciprocal relationship of rights and coercion. A right is both a claim over someone else's actions *and* the authorization to use force to ensure that right

is realized. In effect, a claim holds no weight if it cannot be ensured through force when necessary. In the civil condition, coercion is a necessary force for the execution of justice. In fact, Kant argues that punishment is an extension of justice under the united will. Someone who is wronged must appeal to the corresponding political authority for the sake of justice. Additionally, the effect of an injustice can extend beyond just an individual and aimed at the entire civil condition. Through a process of trial and sentencing, the jury and executioner are separated, and once convicted the executioner must redirect the injustice back toward the criminal.

In the second part of this passage, Kant provides the just implementation of punishment. Remembering that all members of the commonwealth are ends in themselves (even the criminal), Kant understands that punishment cannot be used in such a way to reduce the individual to a means for some other good. Therefore, Kant lays down an extension of the reciprocal nature of rights to coercion: punishment is proportional to the crime. Punishment must appeal to the principle of equality if it is to remain just. This is Kant's Newtonian equivalent of the third law of motion.

But, Kant still faces the problem of responsibility. His answer focuses on two key points, i.e., moral responsibility and inner wickedness. As a free, rational being a person's actions are not only imputed to them but they originate from within themselves. It would be contradictory to presume that a being is free (independent from another's choices) while their actions originate from an external source (not independent and free). All matters of actions, with which crime is concerned, originate in the actor themselves.

In the final part of this passage, Kant addresses the problem of consent originally posed in this conclusion. If a civil condition is erected from the consent of its members,

why would the members consent to punishment. The answer is that they do not consent to punishment. Kant argues that the civil members consent to subject themselves to the laws. They consent to be subjected to justice. If they break the law, then they have willed the action which breaks the law. They have willed a punishable action. Punishment is justice following that action which is punishable.

Together, Kant draws his connection between consent and punishment. Not only can punishment be in accordance with justice, but it is necessary for the sake of justice. Without punishment, justice would not be possible. Rights would not be possible in the civil condition, so human beings would not be able to exercise their right to freedom. The consequence is that humanity would cease to be an end in itself.

The larger implication of this thesis is the application of Kant's theory of punishment to contemporary systems of penal justice. When evaluating contemporary penal systems in liberal democracies, one has to wonder whether the system is in accordance with the fundamental political principles it espouses to defend. Do the people who serve as the end to the political regime believe the penal system to be in accordance with justice? If not, why? The answer may be that the proportion of the punishment is inconsistent with the crime. Is it just to be put in prison longer for possessing marijuana than for accidentally killing someone? Is it just for the government to use modern surveillance technology to increasingly intrude on the private lives of citizens who live in a civil condition which defines them as free beings? The use of coercion by the sovereign authority in a liberal democracy is one which requires remaining consistent with its fundamental principles (to serve the people as ends in themselves) or risk criticism.

Skepticism of government is closely related to the choices of the sovereign authority to implement coercive tactics which extend beyond the retributivist approach.

An emphasis on a retributivist framework to punishment has the ability to restore potential injustices in the contemporary penal system. Moreover, this framework may help to broadly restore the proper role of government and alleviate the chronic skepticism of government which plagues the modern liberal order.

References

Bentham, Jeremy. *An Introduction to the Principles of Morals and Legislation. Printed in the Year 1780, and Now First Published. By Jeremy Bentham*,... London: printed for T. Payne, and Son, 1789.

Bloom, Allan, *The Republic of Plato*. New York: Basic Books, 1968.

Charles de Secondat, Baron de Montesquieu. *The Spirit of the Laws*. translated by Thomas Nugent, revised edition. (New York: Colonial Press, 1899).

Descartes, René. *The Philosophical Writing of Descartes*. Cambridge [Cambridgeshire]; New York: Cambridge University Press, 1985.

Foucault, Michel. *Discipline and Punish: the Birth of the Prison*. 1st American edition. New York: Pantheon Books, 1977.

Hobbes, Thomas, and Gaskin, J. C. A., editor and writer of introduction. *Leviathan*. New York: Oxford University Press, 1998.

Kant, Immanuel, and Allen W. Wood. *Practical Philosophy*. Edited by Mary J. Gregor, The Cambridge Edition of the Works of Immanuel Kant. Cambridge: Cambridge University Press, 1996. doi:10.1017/CBO9780511813306.

Locke, John. *Two Treatises of Government by John Locke*. London: London printed MDCLXXXVIIII reprinted the seventh time by L. Whiston, W. Strahan, J. and F. Revington, L. Davis, W. Owen [and 19 others in London], 1772.

Locke, John, and Nidditch, P. H. *An Essay Concerning Human Understanding*. Oxford: New York: Clarendon Press; Oxford University Press, 1979.

Pangle, Thomas L. *The Laws of Plato*. University of Chicago Press edition. Chicago: University of Chicago Press, 1988.

Plato, Josiah Royce, and Benjamin Jowett. "Crito." *Dialogues of Plato*. [Aldine edition] New York: D. Appleton and company, 1898.