

Immanuel Kant

The Retributive Theory of Punishment

For biographical information on Kant, see his reading in Chapter 1.

On Kant's retributive theory of punishment, punishment is not justified by any good results, but simply by the criminal's guilt. Criminals must pay for their crimes; otherwise an injustice has occurred. Furthermore, the punishment must fit the crime. Kant asserts that the only punishment that is appropriate for the crime of murder is the death of the murderer. As he puts it, "Whoever has committed a murder must die."

Judicial or juridical punishment (*poenaforensis*) is to be distinguished from natural punishment (*poena naturalis*), in which crime as vice punishes itself, and does not as such come within the cognizance of the legislator.

Immanuel Kant, *The Philosophy of Law, Part II* trans. W. Hastie (1887).

144 *Contemporary Moral Problems*

Juridical punishment can never be administered merely as a means for promoting another good, either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted *has committed a crime*. For one man ought never to be dealt with merely as a means subservient to the purpose of another, nor be mixed up with the subjects of real right. Against such treatment his inborn personality has a right to protect him, even although he may be condemned to lose his civil personality. He must first be found guilty *and punishable*, before there can be any thought of drawing from his punishment any benefit for himself or his fellow-citizens. The penal law is a categorical imperative; and woe to him who creeps through the serpent-windings of utilitarianism to discover some advantage that may discharge him from the justice of punishment, or even from the due measure of it, according to the pharisaic maxim: 'It is better that *one* man should die than that the whole people should perish.' For if justice and righteousness perish, human life would no longer have any value in the world.— What, then, is to be said of such a proposal as to keep a criminal alive who has been

condemned to death, on his being given to understand that if he agreed to certain dangerous experiments being performed upon him, he would be allowed to survive if he came happily through them? It is argued that physicians might thus obtain new information that would be of value to the commonweal. But a court of justice would repudiate with scorn any proposal of this kind if made to it by the medical faculty; for justice would cease to be justice, if it were bartered away for any consideration whatever.

But what is the mode and measure of punishment which public justice takes as its principle and standard? It is just the principle of equality, by which the pointer of the scale of justice is made to incline no more to the one side than the other. It may be rendered by saying that the undeserved evil which any one commits on another, is to be regarded as perpetrated on himself. Hence it may be said: 'If you slander another, you slander yourself; if you steal from another, you steal from yourself; if you strike another, you strike yourself; if you kill another, you kill yourself.' This is the right of retaliation (*Jus talionis*); and properly understood, it is the only principle which in regulating a public court, as distinguished from mere private judgment, can definitely assign both the quality and the quantity of a just penalty. All other standards are wavering and uncertain; and on account of other considerations involved in them, they contain no principle conformable to the sentence of pure and strict justice. It may appear, however, that difference of social status would not admit the application of the principle of retaliation, which is that of 'like with like.' But although the application may not in all cases be possible according to the letter, yet as regards the effect it may always be attained in practice, by due regard being given to the disposition and sentiment of the parties in the higher social sphere. Thus a pecuniary penalty on account of a verbal injury, may have no direct proportion to the injustice of slander; for one who is wealthy may be able to indulge himself in this offence for his own

gratification. Yet the attack committed on the honour of the party aggrieved may have its equivalent in the pain inflicted upon the pride of the aggressor, especially if he is condemned by the judgment of the court, not only to retract and apologize, but to submit to some meaner ordeal, as kissing the hand of the injured person. In like manner, if a man of the highest rank has violently assaulted an innocent citizen of the lower orders, he may be condemned not only to apologize but to undergo a solitary and painful imprisonment, whereby, in addition to the discomfort endured, the vanity of the offender would be painfully affected, and the very shame of his position would constitute an adequate retaliation after the principle of like with like. But how then would we render the statement: 'If you *steal* from another, you steal from yourself?' In this way, that whoever steals anything makes the property of all insecure; he therefore robs himself of all security in property, according to the right of retaliation. Such a one has nothing, and can acquire nothing, but he has the will to live; and this is only possible by others supporting him. But as the state should not do this gratuitously, he must for this purpose yield his powers to the state to be used in penal labour; and thus he falls for a time, or it may be for life, into a condition of slavery.— But whoever has committed murder, must *die*. There is, in this case, no juridical substitute or surrogate, that can be given or taken for the satisfaction of justice. There is no *likeness* or proportion between life, however painful, and death; and therefore there is no equality between the crime of murder and the retaliation of it but what is judicially accomplished by the execution of the criminal. His death, however, must be kept free from all maltreatment that would make the humanity suffering in his person loathsome or abominable. Even if a civil society resolved to dissolve itself with the consent of all its members—as might be supposed in the case of a people inhabiting an island resolving to separate and scatter themselves throughout the whole world—the

last murderer lying in the prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realize the desert of his deeds, and that bloodguiltiness may not remain upon the people; for otherwise they might all be regarded as participators in the murder as a public violation of justice.

The equalization of punishment with crime, is therefore only possible by the cognition of the judge extending even to the penalty of death, according to the right of retaliation.

Review Questions

1. According to Kant, who deserves juridical punishment?
2. Why does Kant reject the maxim "It is better that *one* man should die than that the whole people should perish"?
3. How does Kant explain the principle of retaliation?

Discussion Questions

1. Does Kant have any good reason to reject the "serpent-windings of utilitarianism"?
2. Is death always a just punishment for murder? Can you think of any exceptions?