



The Right of Punishing

Immanuel Kant

1. The right of administering punishment is the right of the sovereign as the supreme power to inflict pain upon a subject on account of a crime committed by him. The head of the state cannot therefore be punished; but his supremacy may be withdrawn from him. Any transgression of the public law which makes him who commits it incapable of being a citizen, constitutes a crime, either simply as a private crime (*crimen*), or also as a public crime (*crimen publicum*). Private crimes are dealt with by a civil court; public crimes by a criminal court. Embezzlement or speculation of money or goods entrusted in trade, fraud in purchase or sale, if done before the eyes of the party who suffers, are private crimes. On the other hand, coining false money or forging bills of exchange, theft, robbery, etc., are public crimes, because the commonwealth, and not merely some particular individual, is endangered thereby. Such crimes may be divided into those of a base character (*indolis abjectae*) and those of a violent character (*indolis violentiae*).

2. Judicial or juridical punishment (*poena forensis*) 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. 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 whatsoever.

3. 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. 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 opposed to individuals' private judgement, 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.

4. It may appear, however, that differences 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 classes. Thus a monetary 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 judgement 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."

5. 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 everyone's property 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 support the thief for free, he must 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.

6. 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 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 blood-guiltiness may not remain upon the people; for otherwise they might all be regarded as participators in the murder as a public violation of justice.

7. The equalization of punishment with crime is therefore only possible by judicial sentence extending even to the penalty of death, according to the right of retaliation. This is manifest from the fact that it is only thus that a sentence can be pronounced over all criminals proportionate to their internal wickedness; as may be seen by considering the case when the punishment of death has to be inflicted, not on account of a murder, but on account of a political crime that can only be punished capitally. A hypothetical case, founded on history, will illustrate this. In the last Scottish rebellion there were various participators in it—such as Balmerino and others—who believed that in taking part in the

rebellion they were only discharging their duty to the house of Stuart; but there were also others who were animated only by private motives and interests. Now, suppose that the judgement of the supreme court regarding them had been this: that every one should have liberty to choose between the punishment of death or penal servitude for life. In view of such an alternative, I say that the man of honour would choose death, and the knave would choose servitude. This would be the effect of their human nature as it is; for the honourable man values his honour more highly than even life itself, whereas a knave regards a life, although covered with shame, as better in his eyes than death. The former is less guilty than the other [who acted for his own gain]; and they can only be proportionately punished by death being inflicted equally upon them both; yet to the one it is a mild punishment when his nobler temperament is taken into account, whereas it is a hard punishment to the other in view of his baser temperament. But, on the other hand, were they all equally condemned to penal servitude for life, the honourable man would be too severely punished, while the other, on account of his baseness of nature, would be too mildly punished. In the judgement to be pronounced over a number of criminals united in such a conspiracy, the best equalizer of punishment and crime in the form of public justice is death. And besides all this, it has never been heard of that a criminal condemned to death on account of a murder has complained that the sentence inflicted on him more than was right and just; and any one would treat him with scorn if he expressed himself to this effect against it. Otherwise it would be necessary to admit that, although wrong and injustice are not done to the criminal by the law, yet the legislative power is not entitled to administer this mode of punishment; and if it did so, it would be in contradiction with itself.

8. However many they may be who have committed a murder, or have even commanded it, or acted as art and part in it, they ought all to suffer death; for so justice wills it, in accordance with the idea of the juridical power, as founded on the universal laws of reason. But the number of the accomplices (*correi*) in such a deed might happen to be so great that the state, in resolving to be without such criminals, would be in danger of soon also being deprived of subjects. But it will not thus dissolve itself, neither must it return to the much worse condition of nature, in which there would be no external justice. Nor, above all, should it deaden the sensibilities of the people by the spectacle of justice being exhibited in the mere carnage of a slaughtering bench. In such circumstances the sovereign must always be allowed to have it in his power to take the part of the judge upon himself as a case of necessity—and to deliver a judgement which, instead of the penalty of death, shall assign some other punishment to the criminals and thereby preserve a multitude of the people. The penalty of deportation is relevant in this connection. Such a form of judgement cannot be carried out according to a public law, but only by an authoritative act of the royal prerogative, and it may only be applied as an act of grace in individual cases.

9. Against these doctrines, the Marquis Beccaria has given forth a different view. Moved by the compassionate sentimentality of a humane feeling, he has asserted that all capital punishment is wrong in itself and unjust. He has put forward this view on the ground that the penalty of death could not be contained in the original civil contract; for, in that case, every one of the people would have had to consent to lose his life if he murdered any of his fellow citizens. But, it is argued, such a consent is impossible, because no one can thus dispose of his own life. All this is mere sophistry and perversion of right. No one undergoes punishment because he has willed to be punished, but because he has willed a punishable action; for it is in fact no punishment when any one experiences what he wills, and it is impossible for any one to will to be punished. To say, “I will to be punished, if I murder any one,” can mean nothing more than, “I submit myself along with all the other citizens to the laws”; and if there are any criminals among the people, these laws will include penal laws. The individual who, as a co-legislator, enacts penal law cannot possibly be the same

person who, as a subject, is punished according to the law; for, as a criminal, he cannot possibly be regarded as having a voice in the legislation, the legislator being rationally viewed as just and holy. If any one, then, enact a penal law against himself as a criminal, it must be the pure juridically law-giving reason (*homo noumenon*), which subjects him as one capable of crime, and consequently as another person (*homo phenomenon*), along with all the others in the civil union, to this penal law. In other words, it is not the people taken distributively, but the tribunal of public justice, as distinct from the criminal, that prescribes capital punishment; and it is not to be viewed as if the social contract contained the promise of all the individuals to allow themselves to be punished, thus disposing of themselves and their lives. For if the right to punish must be grounded upon a promise of the wrongdoer, whereby he is to be regarded as being willing to be punished, it ought also to be left to him to find himself deserving of the punishment; and the criminal would thus be his own judge. The chief error (*proton pseudos*) of this sophistry consists in regarding the judgement of the criminal himself, necessarily determined by his reason, that he is under obligation to undergo the loss of his life, as a judgement that must be grounded on a resolution of his will to take it away himself; and thus the execution of the right in question is represented as united in one and the same person with the adjudication of the right.

10. There are, however, two crimes worthy of death, in respect of which it still remains doubtful whether the legislature have the right to deal with them capitally. It is the sentiment of honour that induces their perpetration. The one originates in a regard for womanly honour, the other in a regard for military honour; and in both cases there is a genuine feeling of honour incumbent on the individuals as a duty. The former is the crime of maternal infanticide (*infanticidium maternale*); the latter is the crime of killing a fellow-soldier in a duel (*commilitonicidium*). Now legislation cannot take away the shame of an illegitimate birth, nor wipe off the stain attaching from a suspicion of cowardice, to an officer who does not resist an act that would bring him into contempt, by an effort of his own that is superior to the fear of death. Hence it appears that, in such circumstances, the individuals concerned are remitted to the state of nature; and their acts in both cases must be called homicide, and not murder, which involves evil intent (*homicidium dolosum*). In all instances the acts are undoubtedly punishable; but they cannot be punished by the supreme power with death. An illegitimate child comes into the world outside of the law which properly regulates marriage, and it is thus born beyond the pale or constitutional protection of the law. Such a child is introduced, as it were, like prohibited goods, into the commonwealth, and as it has no legal right to existence in this way, its destruction might also be ignored; nor can the shame of the mother, when her unmarried confinement is known, be removed by any legal ordinance. A subordinate officer, again, on whom an insult is inflicted, sees himself compelled by the public opinion of his associates to obtain satisfaction; and, as in the state of nature, the punishment of the offender can only be effected by a duel, in which his own life is exposed to danger, and not by means of the law in a court of justice. The duel is therefore adopted as the means of demonstrating his courage as that characteristic upon which the honour of his profession essentially rests; and this is done even if it should issue in the killing of his adversary. But as such a result takes place publicly and under the consent of both parties, although it may be done unwillingly, it cannot properly be called murder (*homicidium dolosum*). What then is the right in both cases as relating to criminal justice? Penal justice is here in fact brought into great straits, having apparently either to declare the notion of honour, which is certainly no mere fancy here, to be nothing in the eye of the law, or to exempt the crime from its due punishment; and thus it would become either remiss or cruel. The knot thus tied is to be resolved in the following way. The categorical imperative of penal justice, that the killing of any person contrary to the law must be punished with death, remains in force; but the legislation itself

and the civil constitution generally, so long as they are still barbarous and incomplete, are at fault. And this is the reason why the subjective motive-principles of honour among the people do not coincide with the standards which are objectively conformable to another purpose; so that the public justice issuing from the state becomes injustice relatively to that which is upheld among the people themselves.

Immanuel Kant. *The Science of Right*. Trans. W. Hastie. Edinburgh, 1887.

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