

*Immanuel Kant*PENAL LAW AND THE UNIVERSAL
PRINCIPLE OF JUSTICE*OF THE SUBDIVISION OF A
METAPHYSICS OF MORALS

All legislation (whether it prescribes internal or external actions, and these either a priori through mere reason or through another person's will) consists of two elements: first, a law that objectively represents the action that is to be done as necessary, that is, that makes the action a duty; second, an incentive that subjectively links the ground determining will to this action with the representation of the law. So this second element amounts to this, that the law makes duty the incentive. Through the former element, the action is represented as a duty; as such, it is mere theoretical knowledge of the possible determination of will, that is, a knowledge of practical rules. Through the latter element, the obligation so to act is combined in the subject with a determining ground of will in general.

Therefore (even though one legislation may agree with another with regard to actions that are required as duties; for example, the actions might in all cases be external ones) all legislation can nevertheless be differentiated with regard to the incentives. If legislation makes an action a duty and at the same time makes this duty the incentive, it is *ethical*. If it does not include the latter condition in the law and therefore admits an incentive other than the Idea of duty itself, it is *juridical*. As regards juridical legislation, it is easily seen that the incentive here, being different from the Idea of duty, must be derived from pathological grounds determining will, that is, from inclinations and disinclinations and, among these, specifically

from disinclinations, since it is supposed to be the kind of legislation that constrains, not an allurements that invites.

The mere agreement or disagreement of an action with the law, without regard to the incentive of the action, is called *legality*; but, when the Idea of duty arising from the law is at the same time the incentive of the action, then the agreement is called the *moral-ity* of the action.

Duties in accordance with juridical legislation can be only external duties because such legislation does not require that the Idea of this duty, which is internal, be of itself the ground determining the will of the agent. Because such legislation still requires a suitable incentive for the law, it can combine only external incentives with the law. On the other hand, ethical legislation also makes internal actions duties, but does not, however, exclude external actions; rather, it applies generally to everything that is a duty. But, for the very reason that ethical legislation includes in its law the internal incentive of the action (the Idea of duty), which is a determination that must by no means be mixed with external legislation, ethical legislation cannot be external (not even the external legislation of a divine Will), although it may adopt duties that rest on external legislation and take them, insofar as they are duties, as incentives in its own legislation.

From this it can be seen that all duties, simply because they are duties, belong to Ethics.¹² But their legislation is not therefore always included under Ethics; in the case of many duties, it is quite outside Ethics. Thus, Ethics commands me to fulfill my pledge

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¹²[*Ethik* is translated "Ethics," with a capital E; "ethics" is the translation of *Tugendlehre*. For the most part, Kant uses these terms interchangeably.]

given in a contract, even though the other party could not compel me to do so; but the law (*pacta sunt servanda*¹³) and the duty corresponding to it are taken by Ethics from jurisprudence. Accordingly, the legislation that promises must be kept is contained in *jus*,¹⁴ and not in Ethics. Ethics teaches only that, if the incentive that juridical legislation combines with that duty, namely, external coercion, were absent, the Idea of duty alone would still be sufficient as an incentive. If this were not so and if the legislation itself were not juridical and the duty arising from it thus not properly a duty of justice (in contradistinction to a duty of virtue), then keeping faith (in accordance with one's promise in a contract) would be put in the same class with actions of benevolence and the manner in which we are bound to perform them as a duty, and this certainly must not happen. It is not a duty of virtue to keep one's promise, but a duty of justice, one that we can be coerced to perform. Nevertheless, it is a virtuous action (proof of virtue) to do so where no coercion is to be feared. Jurisprudence and ethics [*Rechtslehre* and *Tugendlehre*] are distinguished, therefore, not so much by their differing duties as by the difference in the legislation that combines one or the other incentive with the law.

Ethical legislation is that which cannot be external (though the duties may be external); juridical legislation is that which can also be external. Thus, to keep one's promise in a contract is an external duty; but the command to do so merely because it is a duty, without regard to any other incentive, belongs only to internal legislation. Accordingly, this obligation is reckoned as belonging to Ethics, not as being a special kind of duty (a special kind of action to which one is bound)—for it is an external

duty in Ethics as well as in justice¹⁵—but because the legislation in this case is internal and cannot have an external legislator. For the same reason, duties of benevolence, though they are external duties (obligations to external actions), are reckoned as belonging to Ethics because their legislation can only be internal.

To be sure, Ethics also has duties peculiar to itself (for example, duties to oneself); but it also has duties in common with justice, though the manner of being bound to such duties differs. The peculiarity of ethical legislation is that it requires actions to be performed simply because they are duties and makes the basic principles of duty itself, no matter whence the duty arises, into the sufficient incentive of will. Hence, though there are many directly ethical duties, internal legislation also makes all the rest indirectly ethical. . . .

§ C. UNIVERSAL PRINCIPLE OF JUSTICE

"Every action is just [right] that in itself or in its maxim is such that the freedom of the will of each can coexist together with the freedom of everyone in accordance with a universal law."

If, therefore, my action or my condition in general can coexist with the freedom of everyone in accordance with a universal law, then anyone who hinders me in performing the action or in maintaining the condition does me an injustice, inasmuch as this hindrance (this opposition) cannot coexist with freedom in accordance with universal laws.

It also follows that I cannot be required to adopt as one of my maxims this principle of all maxims, that is, to make this principle a

¹³["Agreements ought to be kept."]

¹⁴["Right," "Law," "justice." This is the word that Kant translates *Rechtslehre* ("jurisprudence"). He uses *jus* here and *Recht* ("justice") later in the paragraph instead of *Rechtslehre* because these two nouns are of neuter gender, and, in his typical style, Kant wants to draw the distinction grammatically as well.]

¹⁵[See note 14.]

maxim of my action. For anyone can still be free, even though I am quite indifferent to his freedom or even though I might in my heart wish to infringe on his freedom, as long as I do not through an external action violate his freedom. That I adopt as a maxim the maxim of acting justly is a requirement that Ethics [rather than jurisprudence] imposes on me.

Hence the universal law of justice is: act externally in such a way that the free use of your will is compatible with the freedom of everyone according to a universal law. Admittedly, this law imposes an obligation on me, but I am not at all expected, much less required, to restrict my freedom to these conditions for the sake of this obligation itself. Rather, reason says only that, in its very Idea, freedom is restricted in this way and may be so restricted by others in practice. Moreover, it states this as a postulate not susceptible of further proof. Given that we do not intend to teach virtue, but only to give an account of what is just, we may not and ought not to represent this law of justice as being itself an incentive.

§D. JUSTICE IS UNITED WITH THE AUTHORIZATION TO USE COERCION

Any opposition that counteracts the hindrance of an effect promotes that effect and is consistent with it. Now, everything that is unjust is a hindrance to freedom according to universal laws. Coercion, however, is a hindrance or opposition to freedom. Consequently, if a certain use of freedom is itself a hindrance to freedom according to universal laws (that is, is unjust), then the use of coercion to counteract it, inasmuch as it is the prevention of a hindrance to freedom, is consistent with freedom according to universal laws; in other words, this use of coercion is just. It follows by the law of contradiction that justice [a right] is united with the autho-

rization to use coercion against anyone who violates justice [or a right]. . . .

E. The Penal Law and the Law of Pardon

I [THE RIGHT TO PUNISH] The right to punish contained in the penal law [*das Strafrecht*] is the right that the magistrate has to inflict pain on a subject in consequence of his having committed a crime. It follows that the suzerain of the state cannot himself be punished; we can only remove ourselves from his jurisdiction. A transgression of the public law that makes him who commits it unfit to be a citizen is called either simply a crime (*crimen*) or a public crime (*crimen publicum*). [If, however, we call it a public crime, then we can use the term "crime" generically to include both private and public crimes.]¹¹ The first (a private crime) is brought before a civil court, and the second (a public crime), before a criminal, court. Embezzlement, that is, misappropriation of money or wares entrusted in commerce, and fraud in buying and selling, if perpetrated before the eyes of the party who suffers, are private crimes. On the other hand, counterfeiting money or bills of exchange, theft, robbery, and similar acts are public crimes, because through them the commonwealth and not just a single individual is exposed to danger. These crimes may be divided into those of a base character (*indolis abjectae*) and those of a violent character (*indolis violentae*).

Judicial punishment (*poena forensis*) is entirely distinct from natural punishment (*poena naturalis*). In natural punishment, vice punishes itself, and this fact is not taken into consideration by the legislator. Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society but instead it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be manipulated merely as a

¹¹[Natorp and Cassirer agree that there is something wrong with the sentence following this one. Either a sentence has been omitted or the sentence in question has been misplaced. Kant's meaning is, however, perfectly clear, and I have inserted a sentence to provide the transition.]

means to the purposes of someone else and can never be confused with the objects of the Law of things [*Sachenrecht*]. His innate personality [that is, his right as a person] protects him against such treatment, even though he may indeed be condemned to lose his civil personality. He must first be found to be deserving of punishment before any consideration is given to the utility of this punishment for himself or for his fellow citizens. The law concerning punishment is a categorical imperative, and woe to him who rummages around in the winding paths of a theory of happiness looking for some advantage to be gained by releasing the criminal from punishment or by reducing the amount of it—in keeping with the Pharisaic motto: "It is better that one man should die than that the whole people should perish." If legal justice perishes, then it is no longer worth while for men to remain alive on this earth. If this is so, what should one think of the proposal to permit a criminal who has been condemned to death to remain alive, if, after consenting to allow dangerous experiments to be made on him, he happily survives such experiments and if doctors thereby obtain new information that benefits the community? Any court of justice would repudiate such a proposal with scorn if it were suggested by a medical college, for [legal] justice ceases to be justice if it can be bought for a price.

What kind and what degree of punishment does public legal justice adopt as its principle and standard? None other than the principle of equality (illustrated by the pointer on the scales of justice), that is, the principle of not treating one side more favorably than the other. Accordingly, any undeserved evil that you inflict on someone else among the people is one that you do to yourself. If you vilify him, you vilify yourself; if you steal from him, you steal from yourself; if you kill him, you kill yourself. Only the Law of retribution (*jus talionis*) can determine exactly the kind and degree of punishment; it must be well understood, however, that this determination [must be made] in the chambers of a

court of justice (and not in your private judgment). All other standards fluctuate back and forth and, because extraneous considerations are mixed with them, they cannot be compatible with the principle of pure and strict legal justice.

Now it might seem that the existence of class distinctions would not allow for the [application of the] retributive principle of returning like for like. Nevertheless, even though these class distinctions may not make it possible to apply this principle to the letter, it can still always remain applicable in its effects if regard is had to the special sensibilities of the higher classes. Thus, for example, the imposition of a fine for a verbal injury has no proportionality to the original injury, for someone who has a good deal of money can easily afford to make insults whenever he wishes. On the other hand, the humiliation of the pride of such an offender comes much closer to equaling an injury done to the honor of the person offended; thus the judgment and Law might require the offender, not only to make a public apology to the offended person, but also at the same time to kiss his hand, even though he be socially inferior. Similarly, if a man of a higher class has violently attacked an innocent citizen who is socially inferior to him, he may be condemned, not only to apologize but to undergo solitary and painful confinement, because by this means, in addition to the discomfort suffered, the pride of the offender will be painfully affected, and thus his humiliation will compensate for the offense as like for like.

But what is meant by the statement: "If you steal from him, you steal from yourself"? Inasmuch as someone steals, he makes the ownership of everyone else insecure, and hence he robs himself (in accordance with the Law of retribution) of the security of any possible ownership. He has nothing and can also acquire nothing, but he still wants to live, and this is not possible unless others provide him with nourishment. But, because the state will not support him gratis, he must let the state have his labor at any kind of work it may

wish to use him for (convict labor), and so he becomes a slave, either for a certain period of time or indefinitely, as the case may be.

If, however, he has committed a murder, he must die. In this case, there is no substitute that will satisfy the requirements of legal justice. There is no sameness of kind between death and remaining alive even under the most miserable conditions, and consequently there is also no equality between the crime and the retribution unless the criminal is judicially condemned and put to death. But the death of the criminal must be kept entirely free of any maltreatment that would make an abomination of the humanity residing in the person suffering it. Even if a civil society were to dissolve itself by common agreement of all its members (for example, if the people inhabiting an island decided to separate and disperse themselves around the world), the last murderer remaining in prison must first be executed, so that everyone will duly receive what his actions are worth and so that the bloodguilt thereof will not be fixed on the people because they failed to insist on carrying out the punishment; for if they fail to do so, they may be regarded as accomplices in this public violation of legal justice.

Furthermore, it is possible for punishment to be equal in accordance with the strict Law of retribution only if the judge pronounces the death sentence. This is clear because only in this way will the death sentence be pronounced on all criminals in proportion to their inner viciousness (even if the crime involved is not murder, but some other crime against the state that can be expiated only by death). To illustrate this point, let us consider a situation, like the last Scottish rebellion, in

which the participants are motivated by varying purposes, just as in that rebellion some believed that they were only fulfilling their obligations to the house of Stuart (like Balmerino and others),¹² and others, in contrast, were pursuing their own private interests. Suppose that the highest court were to pronounce as follows: Each person shall have the freedom to choose between death and penal servitude. I say that a man of honor would choose death and that the knave would choose servitude. This is implied by the nature of human character, because the first recognizes something that he prizes more highly than life itself, namely, honor whereas the second thinks that a life covered with disgrace is still better than not being alive at all (*animam praeferre pudori*).¹³ The first is without doubt less deserving of punishment than the other, and so, if they are both condemned to die, they will be punished exactly in proportion [to their inner viciousness]; the first will be punished mildly in terms of his kind of sensibility, and the second will be punished severely in terms of his kind of sensibility. On the other hand, if both were condemned to penal servitude, the first would be punished too severely and the second too mildly for their baseness. Thus, even in sentences imposed on a number of criminals united in a plot, the best equalizer before the bar of public legal justice is death.

It may also be pointed out that no one has ever heard of anyone condemned to death on account of murder who complained that he was getting too much [punishment] and therefore was being treated unjustly; everyone would laugh in his face if he were to make such a statement. Indeed, otherwise we would have to

¹²[Arthur Elphinstone, Sixth Baron Balmerino (1688–1746), participated in the Jacobite rebellion that attempted to put Prince Charles Edward Stuart on the British throne. He was captured, tried, found guilty, and beheaded. He is said to have acted throughout with great constancy and courage.]

¹³["To prefer life to honor"—Juvenal, *Satire* 8. 83. The complete text, lines 79–84, is quoted by Kant in the *Critique of Practical Reason*, Part II: "Be a stout soldier, a faithful guardian, and an incorruptible judge; if summoned to bear witness in some dubious and uncertain cause, though Phalaris himself should command you to tell lies and bring up his bull and dictate to you a perjury, count it the greatest of all sins to prefer life to honour, and to lose, for the sake of living, all that makes life worth having." Trans. G. G. Ramsey, "Loeb classical Library." (Phalaris, tyrant of Agrigentum, had criminals burned to death in a brass ox.)]

assume that, although the treatment accorded the criminal is not unjust according to the law, the legislative authority still is not authorized to decree this kind of punishment and that, if it does so, it comes into contradiction with itself.

Anyone who is a murderer—that is, has committed a murder, commanded one, or taken part in one—must suffer death. This is what [legal] justice as the Idea of the judicial authority wills in accordance with universal laws that are grounded a priori. The number of accomplices (*correi*) in such a deed might, however, be so large that the state would soon approach the condition of having no more subjects if it were to rid itself of these criminals, and this would lead to its dissolution and a return to the state of nature, which is much worse, because it would be a state of affairs without any external legal justice whatsoever. Since a sovereign will want to avoid such consequences and above all, will want to avoid adversely affecting the feelings of the people by the spectacle of such butchery, he must have it within his power in case of necessity (*casus necessitatis*) to assume the role of judge and to pronounce a judgment that, instead of imposing the death penalty on the criminals, assigns some other punishment that will make the preservation of the mass of the people possible, such as, for example, deportation. Such a course of action would not come under a public law, but would be an executive decree [*Machtspruch*], that is, an act based on the right of majesty, which, as an act of reprieve, can be exercised only in individual cases.

In opposition to this view, the Marquis of Beccaria,¹⁴ moved by sympathetic sentimentality and an affectation of humanitarianism, has asserted that all capital punishment is illegitimate. He argues that it could not be contained in the original civil contract, inasmuch as this would imply that every one of the people has agreed to forfeit his life if he

murders another (of the people); but such an agreement would be impossible, for no one can dispose of his own life.

No one suffers punishment because he has willed the punishment, but because he has willed a punishable action. If what happens to someone is also willed by him, it cannot be a punishment. Accordingly, it is impossible to will to be punished. To say, "I will to be punished if I murder someone," can mean nothing more than, "I submit myself along with everyone else to those laws which, if there are any criminals among the people, will naturally include penal laws." In my role as colegislator making the penal law, I cannot be the same person who, as subject, is punished by the law; for, as a subject who is also a criminal, I cannot have a voice in legislation. (The legislator is holy.) When, therefore, I enact a penal law against myself as a criminal it is the pure juridical legislative reason (*homo noumenon*) in me that submits myself to the penal law as a person capable of committing a crime, that is, as another person (*homo phaenomenon*) along with all the others in the civil union who submit themselves to this law. In other words, it is not the people (considered as individuals) who dictate the death penalty, but the court (public legal justice); that is, someone other than the criminal. The social contract does not include the promise to permit oneself to be punished and thus to dispose of oneself and of one's life, because, if the only ground that authorizes the punishment of an evildoer were a promise that expresses his willingness to be punished, then it would have to be left up to him to find himself liable to punishment, and the criminal would be his own judge. The chief error contained in this sophistry (*πρωτον ψευδος*) consists in the confusion of the criminal's own judgment (which one must necessarily attribute to his reason) that he must forfeit

¹⁴[Cesare Bonesana, Marquis di Beccaria (1738-1794), Italian publicist. His *Dei delitti e delle pene* (1764) (*On Crimes and Punishments*, trans. Henry Paolucci, "The Library of Liberal Arts," No. 107 [New York: "The Liberal Arts press, 1963]) was widely read and had great influence on the reform of the penal codes of various European states.]

his life with a resolution of the Will to take his own life. The result is that the execution of the Law and the adjudication thereof are represented as united in the same person.

There remain, however, two crimes deserving of death with regard to which it still remains doubtful whether legislation is authorized to impose the death penalty. In both cases, the crimes are due to the sense of honor. One involves the honor of womanhood; the other, military honor. Both kinds of honor are genuine, and duty requires that they be sought after by every individual in each of these two classes. The first crime is infanticide at the hands of the mother (*infanticidium maternale*); the other is the murder of a fellow soldier (*commilitonicidium*) in a duel.

Now, legislation cannot take away the disgrace of an illegitimate child, nor can it wipe away the stain of suspicion of cowardice from a junior officer who fails to react to a humiliating affront with action that would show that he has the strength to overcome the fear of death. Accordingly, it seems that, in such circumstances, the individuals concerned find themselves in a state of nature, in which killing another (*homicidium*) can never be called murder (*homicidium dolosum*); in both cases, they are indeed deserving of punishment, but they cannot be punished with death by the supreme power. A child born into the world outside marriage is outside the law (for this is [implied by the concept of] marriage), and consequently it is also outside the protection of the law. The child has crept surreptitiously into the commonwealth (much like prohibited wares), so that its existence as well as its destruction can be ignored (because by right it ought not to have come into existence in this way); and the mother's disgrace if the illegitimate birth becomes known cannot be wiped out by any official decree.

Similarly, a military man who has been commissioned a junior officer may suffer an insult and as a result feel obliged by the opinions of his comrades in arms to seek satisfaction and to punish the person who insulted him, not by appealing to the law and taking him to court, but instead, as would be done in a state of nature, by challenging him to a duel; for even though in doing so he will be risking his life, he will thereby be able to demonstrate his military valor, on which the honor of his profession rests. If, under such circumstances his opponent should be killed, this cannot properly be called a murder (*homicidium dolosum*), inasmuch as it takes place in a combat openly fought with the consent of both parties, even though they may have participated in it only reluctantly.

What then, is the actual Law of the land with regard to these two cases (which come under criminal justice)? This question presents penal justice with a dilemma: either it must declare that the concept of honor (which is no delusion in these cases) is null and void in the eyes of the law and that these acts should be punished by death or it must abstain from imposing the death penalty for these crimes, which merit it; thus it must be either too cruel or too lenient. The solution to this dilemma is as follows: the categorical imperative involved in the legal justice of punishment remains valid (that is, the unlawful killing of another person must be punished by death), but legislation itself (including also the civil constitution), as long as it remains barbaric and undeveloped, is responsible for the fact that incentives of honor among the people do not accord (subjectively) with the standards that are (objectively) appropriate to their purpose, with the result that public legal justice as administered by the state is injustice from the point of view of the people.¹⁵

¹⁵[See Appendix, §5. In the *Critique of Pure Reason*, trans. Kemp Smith, B 373, Kant writes: "The more legislation and government are brought into harmony with the . . . idea . . . (of a constitution allowing the *greatest possible human freedom* in accordance with laws by which the *freedom of each is made to be consistent with that of all others*) . . . the rarer would punishments become, and it is therefore quite rational to maintain, as Plato does, that in a perfect state no punishments whatsoever would be required." The order of the sentence has been changed.]

II [THE RIGHT TO PARDON] The right to pardon a criminal (*jus aggratiandi*), either by mitigating or by entirely remitting the punishment, is certainly the most slippery of all the rights of the sovereign. By exercising it he can demonstrate the splendor of his majesty and yet thereby wreak injustice (*unrecht*) to a high degree. With respect to a crime of one subject against another, he absolutely cannot exercise this right, for in such cases exemption from

punishment (*impunitas criminis*) constitutes the greatest injustice toward his subjects. Consequently, he can make use of this right of pardon only in connection with an injury committed against himself (*crimen laesae majestatis*). But, even in these cases, he cannot allow a crime to go unpunished if the safety of the people might be endangered thereby. The right to pardon is the only one that deserves the name of a "right of majesty." . . .

QUESTIONS

1. In explaining the claim that, in stealing from someone, you steal from yourself, Kant says that someone who steals "makes the ownership of everyone else insecure. . . ." Does Kant mean that any single instance of theft, no matter how small or done in secret, threatens the security of ownership? Explain.
2. Kant says: "If what happens to someone is also willed by him, it cannot be a punishment." In what sense or senses, then, does Kant believe that punishment respects the will of the person being punished, and how is his view consistent with the quotation?
3. It is sometimes said that "You can't legislate morality." Explain, using Kant's distinction between the morality and the legality of an action, at least one thing that might be meant by this statement.
4. When addressing the question of the kind and amount of punishment required for a crime, Kant says that it is "None other than the principle of equality. . . , that is, the principle of not treating one side more favorable than the other". Using the various comments Kant makes on this subject, construct, as best you can, some helpful practical criteria to guide legislators and judges in assigning punishments according to the Kantian principle.
5. Kant says, "a human being can never be manipulated merely as a means to the purposes of someone else and can never be confused with the objects of the Law of things." Would a utilitarian theory of punishment like Bentham's satisfy this demand? Explain why or why not.