

# Interpretation

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- 3 John C. Kohl, Jr. The Fabric of the Longer Repeated Passages in the *Odyssey*
- 41 John R. Pottenger The Sage and the Sophist: A Commentary on Plato's *Lesser Hippias*
- 61 Gary B. Herbert Immanuel Kant: Punishment and the Political Preconditions of Moral Existence
- Discussion*
- 77 Harry Neumann Political Theology? An Interpretation of Genesis (3:5, 22)
- Review Essays*
- 89 Will Morrisey Thirty-nine Reasons for Reading Benardete on the *Republic*, Review Essay on *Socrates' Second Sailing*, by Seth Benardete
- 101 Maureen Feder-Marcus Gendered Origins: Some Reflections, Review Essay on *Fear of Diversity*, by Arlene Saxonhouse
- 111 David Clinton Statesmanship for a New Era, Review Essay on *Traditions and Values in Politics and Diplomacy*, by Kenneth Thompson
- Book Reviews*
- 117 Ken Masugi *The Public and the Private in Aristotle's Political Philosophy*, by Judith A. Swanson
- 121 Alexander L. Harvey *Black Holes & Time Warps*, by Kip S. Thorne

# Interpretation

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# Immanuel Kant:

## Punishment and the Political Preconditions of Moral Existence

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There is nothing that has risked victimizing our understanding of Immanuel Kant's political philosophy more than the almost irresistible temptation to filter it through the principles of Kantian morality. The truth of this remark is not lessened by the fact that Kant said, "[t]rue politics can never take a step without rendering homage to morality."<sup>1</sup> Admittedly, for Kant, political philosophy *is* in some sense intended to reflect the principles of moral philosophy, and even to nurture them. Nevertheless, when the principles of Kantian morality are made to serve as *the* moral preconditions of political existence, a political philosophy is produced that is unlike anything one finds in Kant's political writings. More than one writer has observed that making politics answerable to the principles of morality makes the legitimacy of states and governments dependent on the politically debilitating moral autonomy of their citizens. We are told,

"[t]he Kantian notion of autonomy has the effect of delegitimizing all social and political institutions that do not flow from our own free will. The result is . . . a revolutionary or terroristic morality that preaches liberation from all contexts or situations. Such a morality obliges the Kantian to reject as dehumanizing, alienating, and oppressive everything that does not immediately express man's essential humanity or dignity."<sup>2</sup>

The irony of these remarks is that, although they do no more than make explicit what follows from the subordination of politics to the principles of Kantian morality, there is, in Kant's political writings, no call for the delegitimization of social and political institutions that a *political* emphasis on moral autonomy would seem to require. On the contrary, Kant's political writings reveal him to be a proponent of political authority that rivals the political absolutism ordinarily attributed to the writings of, say, Thomas Hobbes.

One could argue that, in theory, there need not be any conflict between Kant's moral and political philosophy. Political theory is restricted by Kant to the external relations of wills without considering the morality of their intentions. Its objective is coexistent freedom, i.e., "independence from being constrained by another's choice, insofar as it can coexist with the freedom of every

other in accordance with a universal law.”<sup>3</sup> Kantian moral theory, on the other hand, is concerned exclusively with moral autonomy of motives, independent of any external relationships, i.e., the ability of the will to act purely out of respect for moral law without weighing what it wills against consequences. Theoretically, the two could exist in perfect harmony. In practice, the issue is more complicated.

There is no place in Kant’s political writings where this tension between the demands of morality and the prerequisites of political existence is more evident than in his account of punishment. Punishment is defined by Kant as “the right a ruler has against a subject to inflict pain upon him because of his having committed a crime” (*MM*, p. 140). If, as Kant says, politics must pay homage to morality, that demand must be reflected in the way punishments are carried out. Criminals must be treated with dignity, as ends-in-themselves. The homage politics must pay to morality requires that the punishment of a criminal not be justified on the basis of the benefits derived, whether for the victim (his compensation for damages), for the miscreant himself (in the liberating value of his rehabilitation), or by arguing for its value to society (as a deterrent to other criminal activity). These approaches to punishment would all involve the morally destructive reduction of the criminal to “a means to promote some other good” (*MM*, p. 140) rather than giving him room to exist as an autonomous (self-legislating) end-in-himself.

Patrick Riley has argued, “Kant often wants to be able to say that punishment must be deserved or merited; if it were not deserved, and deserved because of bad will, then one might punish people—even the innocent and the good-willing—in order to maximize utility or to appease divinities. So deserving punishment matters.”<sup>4</sup> Riley says that Kant “wants to be able to say” that punishment must be deserved; he does not say that Kant *actually* says this. If Kant himself does not appear to be concerned with legitimizing punishment by showing that it is deserved, it is in part because he does not consider punishment the type of thing for which *moral justification* is possible. A genuine moral justification of punishment would require knowledge of the inner motives of those who appear to deserve punishment. We have no access to motives. They are, Kant says, entirely hidden from us. Kant explains,

The real morality of actions, their merit or guilt, even that of our own conduct, thus remains entirely hidden from us. Our imputations can refer only to the empirical character. How much of this character is ascribable to the pure effect of freedom, how much to mere nature, that is, to faults of temperament for which there is no responsibility, or to its happy constitution, can never be determined; and upon it therefore no perfectly just judgments can be passed.<sup>5</sup>

The problem, then, is that punishments must never be inflicted in such a way that they reduce the criminal to a means to some other good, and they must be inflicted without getting caught up in the troublesome task of weighing

the inaccessible motives of the criminal. That is, they must not be compromised by superimposing on them an unsatisfiable demand for justification, either moral or utilitarian. Kant satisfies both these demands by describing and defending punishment as straightforward, uncompromising retribution.<sup>6</sup> Punishment should be inflicted upon the miscreant, Kant says, solely because he has committed a crime, not because he did so with a condemnable motive, and not because of any benefits to be derived from punishing him. Boldly, Kant draws support from the wisdom of ancient philosophical poets to whom he attributes the claim, “Blood innocently shed cries out for vengeance. Crime cannot remain unavenged. . . . *Guilt for sins* must be expiated, even if a completely innocent person should have to offer himself to atone for it” (*MM*, p. 278).

Kant knows that, occasionally, innocent people will be punished and the punishments inflicted upon the guilty will occasionally be too severe. This does not deter him from maintaining the necessity—and rightness—of punishment. Perhaps the most severe of his remarks regarding punishment are his conclusions concerning a government’s obligation to carry out punishments, especially capital punishment, even when no benefit to society can conceivably be derived from it. In the *Rechtslehre*, Kant writes,

Even if a civil society were to be dissolved by consent of all its members (e.g., if a people inhabiting an island decided to separate and disperse throughout the world), the last murderer remaining in prison would first have to be executed, so that each has done to him what his deeds deserve and blood guilt does not cling to the people for not having insisted upon this punishment; for otherwise the people can be regarded as collaborators in this public violation of justice. (*MM*, p. 142)

By presenting punishment as retribution, Kant permits politics to pay homage to morality without breaching the separation that must be maintained between them. Punishment (and, in fact, the whole system of political, or external, relations), one might argue, is instrumentally helpful in encouraging people to be moral, whether they act morally out of moral motivation or not. Or we can argue that punishment contributes to enforcement of the ends of morality, even though morality is not its primary objective. Morality, on the other hand, could be conceived as a “limiting condition” (*Perpetual Peace*, p. 35) to what is politically permissible, without subordinating itself to the more practical objectives of political existence. Supporting this interpretation, Patrick Riley portrays Kant’s politics as either the enforcement of moral *behavior*, with or without moral motivation (Riley refers to this as the “strong sense of instrumental politics”) or the enhancement of moral *motives* by creating conditions politically conducive to them (which he calls the “weak sense”).

The strong sense of instrumental politics, or legality, sees to it that some of the ends of morality get enforced, even where *motiva moralia* are absent; the weak sense of instrumental politics, or politics as context, creates a state of affairs in

which those *motiva moralia* themselves have a better chance to operate. On either view, public legal justice is “for” morality, is morality’s instrument.<sup>7</sup>

As appealing as Riley’s approach to Kant’s theory is, it does not work. If one is forced by the threat of punishment (strong sense) to treat another as an end, one’s treatment of the other as an end becomes a means to one’s own well-being (i.e., avoiding punishment). No homage is rendered to morality by that. The ends of politics and morality are only made to seem to be in harmony by this maneuver. And moral motivation is not made more likely (weak sense) simply because the coercive threat of punishment has created order. Self-interest remains the motive of those upon whom the force of the law is asserted. The miscreant is not expected to respond to his punishment as an autonomous (self-legislating) end-in-himself.<sup>8</sup>

When Kant says politics must pay homage to morality, he must mean that morality must manifest itself publicly, at least by exhibiting itself in the homage paid by politics. Morality is not intended to remain an unreachable ideal of reason, but must become politically manifest. It must enter into existence—political existence—but without breaching the important gap that separates and preserves the integrity of both morality and politics. Seeing how this is made possible, in part, though a retributive account of punishment requires that we rethink how, according to Kant, the will enters into external—i.e., political—relations, that is, into the condition Kant refers to as “coexistent freedom.”

Crucial to Kant’s political theory is his acknowledgment that a human will cannot manifest itself unilaterally. Will, in its public manifestation as *personality*, emerges *only* as the product and precondition of *external* relationships, that is, in the encounter of will with will. This means that the moral will can manifest itself publicly only within political existence and then only insofar as it can define itself in and through *coexistent freedom* and, therefore, through all the preconditions of *coexistent freedom*. The human will, conceived in its public form as *personality*, first manifests itself in external relations, according to Kant, in what can best be described as a Hobbesian confrontation with others competing for possession and ownership of goods (*MM*, pp. 74–75). The possession and the transformation of objects into property arises through an act of labor, specifically, through “a labor of consciousness,”<sup>9</sup> by which one merges his own will with the object. Kant writes, “the way to have something external as what is mine consists in a merely rightful connection of the subject’s will with that object in accordance with the concept of intelligible possession . . .” (*MM*, p. 75). It is a reflexive act of ownership, similar to this, by which one transforms oneself into a person.<sup>10</sup> Through a reflexive act of will, one *imputes* his own actions to himself. He acknowledges his own actions to be the products of his own will. His act of imputation establishes his responsibility and, through this assumption of responsibility, transforms him externally into a moral personality. Kant writes,

A *person* is a subject whose actions can be *imputed* to him. *Moral* personality is therefore nothing other than the freedom of a rational being under moral laws (whereas psychological personality is merely the capacity for being conscious of one's identity in different conditions of one's existence). From this it follows that a person is subject to no other laws than those he gives to himself (either alone or at least along with others). A *thing* is that to which nothing can be imputed. Any object of free choice which itself lacks freedom is therefore called a thing (*res corporalis*).<sup>11</sup>

The will's act of self-ownership, or self-imputation, sets man apart from the natural world of things and animals. Things and animals never acquire ownership over themselves; they never *own up*. Furthermore, and most importantly for Kant's political theory, the act of self-imputation is not something that can be undertaken in solitude. It is not an action that can be performed unilaterally. According to Kant, nothing can belong to a person or be imputed to him, himself included, except externally, through the sustaining recognition given by others. This characteristic of the will—that it acquires its freedom coexistently, only through the mediating recognition given by another—is an essential part of Kant's concept of a right. He defines a *right* as “the capacity for putting others under obligation” (*MM*, p. 64). One person's rights exist only to the extent that they are sustained by the obligations others have to him, and only to the extent that the possessor of rights has the capacity to obligate those others.<sup>12</sup> One can obligate others only to the extent that he is recognized by those others as someone to whom an obligation can be owed. The obligations others have to a person become *the mediating precondition of his rights*. However, those others cannot be obligated unless they, too, are recognized as persons, that is, subjects to whom actions can be imputed and, therefore, who can be held responsible. It is the act of recognition that is the precondition of their practical, political existence as persons. Recognition of another as a person who can be held responsible for his actions is inseparable from recognition of him as a person possessing rights of his own.

Withholding recognition is as easy as it is dehumanizing. Simply by using another person for one's own benefit (e.g., stealing from him or borrowing with no intention of repaying), one reduces the other to the status of a thing. By stealing from him we withhold recognition of him as the kind of being who is capable of owning something. Using the other releases him from obligations, since things cannot be obligated. Things do not claim ownership of—and responsibility for—their own actions. Consequently, treating the other as an object not only destroys his freedom; it also demolishes the ground of one's own rights and, therefore, *the grounding precondition of one's own personality*. A maxim advocating the use of another would annul itself; it could never become a law.

It follows by implication from Kant's theory that one who lacks the capacity to obligate others can have no rights. The fact that a person is in need—even

desperate need—is not sufficient to establish his rights or, by implication, one’s obligation to him.

The concept of Right, insofar as it is related to an obligation corresponding to it (i.e., the moral concept of Right) has to do, *first*, only with the external and indeed practical relation of one person to another, insofar as their actions, as facts, can have (direct or indirect) influence on each other. But, *second*, it does not signify the relation of one’s choice to the mere wish (hence also to the mere need) of the other, as in actions of beneficence or callousness, but only a relation to the other’s *choice*.<sup>13</sup>

Neither rights nor obligations can exist unilaterally; they manifest themselves only in the reciprocal relationship of persons. It is this interpersonal relationship that allows Kant to write, “Freedom (independence from being constrained by another’s choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity” (*MM*, p. 63). When Kant says this, he is not giving vent to a moral ideal to which he believes we all ought aspire. The original right that belongs to every human being by virtue of his humanity is not presented by Kant as a minimum standard of treatment that every human being *deserves* as his human right. Rather, it is offered as a recognition of the preconditions of political existence and coexistent freedom.

We must assert *the right of humanity in our own person* as the foundation of external relations within which coexistent freedom is possible. When we assert the right of humanity in our own person, we thereby assert our capacity to obligate another moral personality, as well as our own capacity to be obligated. When one asserts the right of humanity in his own person against a miscreant, e.g., one who has injured him in some way, he acknowledges the miscreant’s responsibility for what he did. The miscreant did what he did to a *person*, not to a mere *thing*. Accusing the miscreant of having injured a *person* means recognizing the miscreant, too, *as* a person, as a being who is defined by his relationship with persons rather than with mere things. By implication, the person who asserts the right of humanity in his own person acknowledges his freedom, his humanity, his rights, his capacity to obligate others, and, coincidentally, but not unimportantly, the legitimacy of his punishment when he fails to act according to the law. Failure to punish would be to recognize him as nothing more than an animal will whose responsibility for what he does is precluded by the fact that he is a mere creature of inclinations to which he is bound, and of which he is not the author. He must be held responsible. Therefore, I must hold myself up to him as a *person*, a being to whom he can relate only to the extent that he, too, is a *person*. This takes us to Kant’s remark:

*Rightful honor (honestas iuridica)* consists in asserting one’s worth as a man in relation to others, a duty expressed by the saying, “Do not make yourself a mere

means for others but be at the same time an end for them.” This duty will be explained later as obligation from the *Right* of humanity in our own person (*Lex iusti*). (*MM*, p. 62)

A person gives the appropriate respect due the humanity in a fellow person, regardless of whom it may be, by asserting the right of humanity in his *own* person. One doesn't demand respect from cows, trees, or any of the other *things* that fill up the world. Demanding respect is, in effect, an acknowledgment of the other's humanity and, by implication, his capacity to obligate others, oneself included. A civil society in which all citizens give equal recognition to one another, Kant says, would be a society in which a condition of “coexistent freedom” prevails. The law governing such a society would be, “[a]ny action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law” (*MM*, p. 56). The precondition of coexistent freedom is that each be conceived as the author of his actions, responsible for what he does. Were one not recognized as responsible for what he does, he would be denied the dignity that belongs to a free and responsible being. This is especially true of the person facing the possibility of punishment. The following passage from the *Rechtslehre* makes this clear.

*Punishment by a court (poena forensis)*—this is distinct from *natural punishment (poena naturalis)*, in which vice punishes itself and which the legislator does not take into account—can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society. It must always be inflicted upon him only *because he has committed a crime*. For a man can never be treated merely as a means to the purposes of another or be put among the objects of rights to things: His innate personality protects him from this, even though he can be condemned to lose his civil personality. (*MM*, p. 140)

To treat another as an object could conceivably be to treat him as an object of our pity, our concern, and our good intentions, not simply as an object to be used and/or abused for our own benefit. It is not obvious that people in general would object to their being treated as objects so long as their treatment were benevolent. Such treatment could be considered *humane*, part of what is meant when we concern ourselves with what is today called *human rights*. Our concern for the *human rights* of those who are to be punished causes us to prefer rehabilitation and reform over retribution. We, theoretically, prefer to turn miscreants over to correctional institutions. The miscreant, of course, is only the passive recipient of his rehabilitation. He does not initiate it and is not responsible for it.

Kant's theory of punishment is a subtle but unequivocal reversal of what we today would regard as a moral, or *humane*, approach to punishment, i.e., pun-

ishment conceived as passive rehabilitation and reform. One *protects* the humanity of a miscreant, and thereby his freedom and his rights, by acknowledging his (the miscreant's) responsibility, that is, by punishing him for his transgressions of the law, even where such punishment might be considered by sympathetic people to be *inhumane*, even a violation of his *human rights*. We need not know the miscreant's motives for doing what he did; in fact, since we have no reliable access to his motives, it is inevitable that we will make mistakes. Kant is under no moral delusions; he admits, ". . . [n]o perfectly just judgments can be passed." And he is not particularly troubled by this fact. We must assume the motives of the miscreant were those of a fully rational being. Anything less would justify our removing the miscreant as one would an irritant, much as one removes ants, rodents, etc., who have made pests of themselves. Mistaken punishment, on the other hand, does not dehumanize the one who is punished, according to Kant. On the contrary, punishment can be inflicted, even mistakenly, only to the extent that the one who is punished is recognized to be a person, one who can be held responsible, one who owns his own actions and is to that extent free.

Patrick Riley is correct to suggest that we interpret Kant's account of punishment in the light of what Riley calls "a proto-Hegelian 'negation of negation'" (Riley, p. 108). He writes,

Might it not be better—or at least more Kantian—to say that murder, from a political-legal viewpoint, is not consistent with the external freedom of all under a universal law, and that one correctly punishes murder by negating the negation (crime) and thus affirming the positive value of liberty-preserving law? (Riley, p. 109)

Riley cites a passage from the *Rechtslehre* in which Kant does appear to anticipate the Hegelian negation of negation. In that passage, Kant writes,

Resistance that counteracts the hindering of an effect promotes this effect and is consistent with it. Now whatever is wrong is a hindrance to freedom in accordance with universal laws. But coercion is a hindrance or resistance to freedom. Therefore, if a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e., wrong), coercion that is opposed to this (as a *hindering of a hindrance to freedom*) is consistent with freedom in accordance with universal laws, that is, it is right. (*MM*, p. 57)

This interpretation of Kant's account of punishment has the advantage of making punishment "external," neither dependent on an evaluation of motives nor concerned with practical consequences. Nevertheless, Riley says, it does not make Kant's theory of punishment wholly satisfactory.

The main problem with punishment as a negation of negation is that it is *designed* not to take motives (such as deserving) into account; its strength is its weakness. It

must treat all murder (for example) simply as the negation of life and punishment as negation negated. (Riley, p. 109)

As helpful as Riley's suggestion is, it becomes sidetracked and unhelpful when it understands Kant to have conceived punishment as a negation of "life." In the passage from Kant's *Rechtslehre*, it is *freedom*, not life, that is negated. The negation that takes place when one person takes the life of another is not the other person's life. The miscreant has *killed* the other person—taken his life, to be sure—but he has also, not incidentally, *negated* the other in the process, by treating the other as a thing, denying his existence as a free-self-owning will. The reflexive result of the miscreant's act is that he has also negated his own will, his own moral personality. By acknowledging another as nothing more than an object, he has thingified *himself*. If he thingifys the other, he thingifys himself, since, to a thing, one can be nothing more than another thing. To punish the miscreant is not simply to negate his life, though death may be his punishment. For Kant, it is to hold him responsible, thereby restoring his freedom by recognizing him as a person, thereby negating his own self-negating thingification.

For just this reason, Kant rejects all consequentialist and utilitarian theories of punishment which are concerned with the *justifying* punishment by pointing to its good results, whether for society as a whole or for the miscreant himself. Strictly speaking, punishment must be conceived as retribution. Neither the rehabilitation of the miscreant nor the benefit of society as a whole can ever serve as the justification of punishment since, however humanitarian they may appear, such interests treat the miscreant as a thing needing repair, thereby denying his humanity and, in the process, negate the fundamental precondition of coexistent freedom.

This aspect of Kant's theory has brought down harsh criticism on him. C. L. Ten has argued that a retributive theory of punishment must disregard consequences, and that would result in disaster.

On this view, punishment is justified in the sense that it is required or obligatory. Such a very strong retributive theory is not plausible because, if indeed the legal authority has an absolute duty to punish, then it follows that punishment is required even when disastrous consequences will come about, even 'when the skies will fall'. For example, suppose that the punishment of an offender will lead to a vast increase in violent crime which will terrorize law-abiding citizens who would all much prefer that the punishment not be meted out. The theory would still insist on punishment. It is a strange notion of justice whose demands benefit nobody, and whose execution will keep even the virtuous and innocent awake with fear and trembling. (Ten, p. 75)

Ten's criticism of Kant's theory of punishment, of course, holds Kant precisely to those principles which he has rejected. This is a practical inevitability

when one conceives punishment in terms of the fair treatment of individuals rather than as the necessary precondition of the politically practical possibility of coexistent freedom. The fact is, the morality of punishment, i.e., its justification in individual cases, is not Kant's concern. It is not his concern to show, as Tom Sorell suggests, "that people are *entitled* to certain forms of treatment on account of their humanity."<sup>14</sup> Much more important that justifying the moral correctness of punishments and the basic treatment to which people are entitled is establishing the necessary preconditions of *coexistent freedom* that make such concerns meaningful in the first place. It is only in some such sense as this that we can understand effectively Kant's remark that, "The principle of punishment is a categorical imperative . . ." (*MM*, p. 141). The question for Kant is, not how we are to justify the punishments we inflict but, rather, how we are to sustain external relationships—the relationship of will to will—and, thereby, the externalized structures of consciousness without which political existence—i.e., coexistent freedom—cannot exist. If external relationships cannot sustain coexistent freedom, morality is destined to remain little more than an unrealized ideal of reason. The principal of punishment is a categorical imperative, Kant says, and the categorical imperative is a *synthetic a priori*. But it does not operate on consciousness and influence our moral judgments the way that space and time, the a priori forms of outer and inner sensuous intuition, order our judgments of perception. It is not possible to sense objects nonspatially. It is *conspicuously* possible, on the other hand, to relate to another being impersonally, that is, to relate to him or her as a thing there for one's use.

The necessity governing such relationships is political. It is not the *justification* of punishment so much as the *willingness* to punish that is politically important. Willingness to punish is a necessary part of the structure of political consciousness that serves as the precondition of coexistent freedom, which is to say, genuine political existence. For the sake of political consciousness and the preconditions of coexistent freedom, we need to act toward others *as if* their motives were those of a moral personality, a person who owns and is, therefore, responsible for his actions. Our making an occasional mistake may be regrettable, Kant might say, but that does not jeopardize the fact that—our mistake notwithstanding—the preconditions of coexistent freedom have thoroughly impregnated external relations, and political existence (and with it *coexistent freedom*) is thereby sustained, making possible the political manifestation of moral will.

Punishment is presented by Kant as part of the rational, self-legislative manifestation of coexistent freedom. The rather harsh but practical corollary to this conclusion is that citizens must be held responsible for what they do. This means they must be punished for failure to act according to the law. According to Kant, "Consequently, when I draw up a penal law against myself as a criminal, it is pure reason in me (*homo noumenon*), legislating with regard to rights,

which subjects me, as someone capable of a crime and so as another person (*homo phaenomenon*), to the penal law, together with all others in a civil union" (*MM*, p. 144). Kant is not making Thomas Hobbes's argument here. It is not that I consented to be punished when I entered civil association, so have no complaints when it happens. One's submission of himself to law is not an incidental accompaniment to rational self-legislation; rather, it is the mediating condition that makes rational self-legislation a practical political possibility. That means he is also *not* making the argument attributed to him by Howard Williams, that "[t]he individual participates in the social contract as a moral individual—in his capacity as an intelligent, noumenal being, possessing a free will, whereas he is subject to punishment in his capacity as an empirical, sensuous being, possessing an animal will" (Williams, p. 107). It is not as a unilaterally acting-legislating moral will but, rather, as a political will, a will that manifests itself in external relations, whose freedom is subject to—and dependent upon—the conditions of coexistence, that he submits himself to the law and the possibility of punishment.

Only persons hold themselves to the laws that they, as rational wills, have legislated to themselves. Only persons claim ownership of and, hence, responsibility for, their own actions. If it were true that punishment deprives the criminal of his freedom, that could only mean that it reduces him to the status of a thing, an animal will, incapable of being obligated, and, therefore, incapable of being judged guilty of neglecting or violating his obligations. In that case, what we do to it is not punishment. On the basis of Kant's theory, we can conclude that one can train an animal will, but one can never, never obligate it; likewise, one can harm an animal—beat it, shoot it perhaps, even eat it—but one can never, never punish it. At least, as Kantians we cannot. But that means that we cannot argue, as Jeffrie Murphy has, that "since [criminal punishment] goes against the wishes of the criminal in depriving him of his freedom, [it] is *prima facie* wrong."<sup>15</sup>

Because the miscreant denies the rights—and hence the freedom and humanity—of the person whom he wrongs, he destroys the grounding precondition of the same in himself. Kant explains, "[a]ccordingly, whatever undeserved 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" (*MM*, p. 141). Kant argued that miscreants must be brought to suffer in proportion to the suffering they have caused and, with only occasional exception, in the same way they have injured them (*MM*, p. 142). Anything conspicuously more would be abuse; anything significantly less would involve at least partial absolution. In either case, the person suffers a reduction. No doubt there will be mistakes; innocent people will occasionally be judged guilty, simply because we have no empirical access to motives. For Kant, that is a small and, more importantly, an unavoidable price to pay for the *coexistent*

*freedom* that accompanies our recognition of the responsibility—and, hence, the political personality—of the other. It is only through the political manifestation of personality that the moral personality can, in any meaningful sense, enter into genuine existence.

Kant's retributive treatment of punishment reveals, ironically perhaps, a point of agreement with the most vituperous critic of his moral philosophy, Friedrich Nietzsche. He shares with Nietzsche " . . . the idea that every injury has somewhere or other its *equivalent* price, and can really be paid off, even though it be by means of pain to the author."<sup>16</sup> It is an absolutely necessary precondition of a healthy morality, according to Nietzsche, that its agents have the power to *requite*.<sup>17</sup> For Kant, this is not to *describe* a power the agent has but, rather, to explain how we must conceive him if coexistent freedom is to be a practical possibility. Consciousness becomes a clearing within which coexistent freedom can occur, but only if each is held fully responsible for his actions. For Kant, this means, "anyone who commits murder, orders it, or is an accomplice in it—must suffer death" (*MM*, p. 143).

It is not so much that the execution itself is called for but, rather, that the *willingness to execute* must be part of the consciousness of those whose civil associations have not already dissolved. Without that *willingness*, Kant might say, their associations most assuredly will dissolve, at least insofar as sustaining the preconditions of coexistent freedom is concerned. That *willingness* is a necessary part of the structure of political consciousness. It must be made a law. Its necessity, i.e., its status as law, can only be found in its having been willed.

Some of Kant's more recent interpreters have protested his conclusions, arguing capital punishment cannot be justified by appeal to the principle of retribution because the punishment is too severe. Leslie Mulholland has argued that it deprives the murderer of more than his life; it destroys all his rights as well. Consequently, it fails to achieve the reciprocity, the proportionality, that is essential to punishment. Mulholland writes,

while Kant is correct in claiming that no murderer would . . . have the right to complain if he is to be put to death, we can question whether the state has the right to kill a citizen even if he is guilty of murder. The problem is that to the extent that civil society is justified as a condition of securing one's rights, it is difficult to understand how it could be conceived to have the right to remove all the rights of a person by killing the murderer. Here, it seems, is a case of where the counteraction of the hindrance might itself be wrong because it extends beyond the allowable limits of coercion (by destroying all rights).<sup>18</sup>

There is something ironically misdirected in this criticism of Kant, because it is the *willingness* to hold another responsible—to assert the right of humanity in oneself, against another and, by implication, to acknowledge that the other "can requite"—that, for Kant, identifies the other as a being capable of pos-

sessing rights. And it is only by possessing rights that the other exhibits the capacity to obligate anyone at all. A too earnest concern for his welfare or for the justification of his punishments has, in Kant's theory, the negative effect of neutralizing his capacity for coexistent freedom. Released from his obligations by our thingifying concern for him as a being whose punishments are not justified, he falls outside the sphere of coexistent freedom.

Kant could well have argued that the rights of the miscreant are not destroyed when he is executed; it is the miscreant himself who is destroyed. His rights are not only *not* destroyed; they are recognized, defended, and preserved by the act of punishment, even by capital punishment. We have thereby acknowledged his ability to requite. Were a murderer absolved, his execution canceled, out of pity perhaps, we would have suspended recognition of him as a person responsible for his actions. We would have stripped from consciousness the willingness to execute that defines our relationship to him as a being capable of possessing rights. He would have become a thing to be *saved*. Ironically, then, there would no longer be any reason why we have to concern ourselves with the possibility that we might violate his rights. There would be nothing to violate! We would have acknowledged in him nothing more than an animal will, and no mere animal will can obligate anybody. The act of absolution for the murderer, for all the mercy it involves, is, from the Kantian vantage point dehumanizing (whether we agree with it or not).

Kant does allow exceptions to the demand that murderers must die. Sovereigns, he says, must have the right to pardon criminals when "the number of accomplices is so large that their execution would create a spectacle of butchery capable of adversely affecting the feelings of the people (*MM*, p. 143). For this, Kant's critics accuse him of inconsistency. Howard Williams has argued that, "in allowing this element of contingency into the exercise of justice and the exacting of punishment Kant appears to weaken his own argument" (Williams, p. 143). More recently, J. Angelo Corlett has argued,

I see no way out of this problem for Kant. Nor do I understand what might have motivated him to hold what might be referred to as 'Kant's pardon postulate.' It seems to have been an afterthought, one which haunts his otherwise mostly plausible view of punishment. . . . Kant is faced with a dilemma: either he must give up his idea that criminal punishment is not a categorical imperative, or he must sacrifice his pardon postulate.<sup>19</sup>

Presumably, if Kant permits the sovereign to absolve anyone, he violates his own rules. He suspends a categorical imperative! Corlett's criticism here misses the point. The obligation to punish is not so much a moral event as it is the practical precondition of the possibility of coexistent freedom, that is, the precondition of the political appearance of moral existence. No sovereign can execute thousands, or even hundreds, without it becoming an extermination rather than a punishment. It is not persons who are destroyed in mass executions; it is

social classes, nationalities, etc. Individuals are thereby reduced to things, and the reciprocal act of recognition that sustains each of us externally as a moral personality is annulled. Making exception to the law of retribution when the miscreants to be punished are too numerous to avoid the spectacle of butchery is not an inconsistency; it is a rational precondition of Kant's theory and the *coexistent freedom* it is intended to produce and sustain.

We can conclude, then, that for Kant, a too liberal interest in leniency is dehumanizing. Punishment is a categorical imperative! Does this make Kant's theory of punishment primitive, unenlightened, and barbaric? Not if Kant is correct that punishment is an absolutely essential act of recognition, a necessary precondition to the insinuation of moral personality into political existence. This may be a conclusion that is too harsh for our own understanding of moral existence. It makes demands and sets levels of responsibility that are impossible. If the criticism is correct, then it only serves to show the ironic inhumanity of recognizing and treating humans as humans, i.e., as self-conscious beings to whom their own actions can be imputed and for which they must be held responsible. It makes the morally less demanding theory of, say, Thomas Hobbes, appear morally more enlightened.

#### NOTES

1. Immanuel Kant, *Perpetual Peace*, ed. Lewis White Beck (Indianapolis: The Bobbs-Merrill Company, 1980), p. 46.

2. Steven B. Smith, *Hegel's Critique of Liberalism* (Chicago: University of Chicago Press, 1989), p. 79; cf. also Bernard Yack, *The Longing for Total Revolution* (Princeton: Princeton University Press, 1986), pp. 89–133.

3. Immanuel Kant, *The Metaphysics of Morals*, trans. Mary Gregor (Cambridge: Cambridge University Press, 1991), p. 63. Abbreviated in text citations as *MM*.

4. Patrick Riley, *Kant's Political Philosophy* (Totowa, NJ: Rowman and Littlefield, 1983), p. 109.

5. *Critique of Pure Reason*, trans. Norman Kemp Smith (New York: St. Martin's Press, 1965), p. 475.

6. *The Metaphysics of Morals*, p. 141. It is sometimes referred to as a "strong" theory of retribution, according to which there is not merely a right to punish. Punishment is conceived as obligatory. Cf. C. L. Ten, *Crime, Guilt, and Punishment* (Oxford: Oxford University Press, 1987), p. 75.

7. Riley, p. 4. Cf. Howard Williams, *Kant's Political Philosophy* (New York: St. Martin's Press, 1983), pp. 49, 61, 65.

8. Howard Williams attempts to rescue Kant by attributing to him two separate and distinct views of punishment. He writes, "Thus, although the *moral view of punishment* that Kant defends is a *retributive* one, from the *empirical point of view* he embraces a *utilitarian* justification of it" (p. 106). Presumably, retributive punishment is justified because it is deserved, and utilitarian punishment is legitimized by its capacity for encouraging moral motivation. The problem is, both of these accounts of punishment are avoided by Kant himself! Retribution cannot be *moral* without being a measurement of motives (which Kant says is impossible), and it cannot be utilitarian without surrendering forever the possibility of its rendering homage to morality.

9. Cf. Gary Herbert, "The Labor of Consciousness and the Worlding of Natural Right in Hobbes and Locke," in *American Catholic Philosophical Quarterly*, 64 (1990): 229.

10. The philosophical antecedent of Kant's idea is found in John Locke, who argued that "personality is annexed to consciousness" (*The Correspondence of John Locke*, ed. E. S. De Beer [Oxford: Clarendon Press, 1979], vol. 4, [Letters 1242–1701]. Cf. Locke's letter to Molyneaux, January 19, 1694, p. 785). Locke distinguishes between *man* and *person*, anticipating Kant's distinction between the animal will and the human will, by describing the reflexive character of self-consciousness, a reflexivity which Locke describes as an imputation of self to self. In more straightforward terms, a *person* is one who owns *himself*. "Every man has a property in his own person," he writes; "this nobody has any right to but himself" (Locke, *The Second Treatise* [New York: The Bobbs-Merrill Company, 1952], par. 27).

11. *The Metaphysics of Morals*, p. 50. Fichte argued that Kant derived his conception of rights—as Fichte himself did—from an analysis of the concept of personality, not simply from moral or humanitarian principles. Fichte also describes the person as the product of an act of self-imputation or self-ascribing. "The first question is: Which is the true subject? Evidently that which is active purely in and upon itself; that which determines itself to think an object or to will an end; the Spiritual, the pure Egohood. To this is opposed a limited, but exclusively its own sphere of its possible free acts. By *ascribing* this sphere to itself, it limits itself, and changes from the absolute formal to a determined material Ego or to a person" (J. G. Fichte, *The Science of Rights* [London: Routledge & Kegan Paul, 1970], book 2, sec. 5, p. 88; p. 22).

12. In this, Kant breaks dramatically with Thomas Hobbes's theory of rights. For Hobbes, rights do not depend for their existence on the obligations of others, i.e., on being given recognition. In fact, the Hobbesian condition of war is a condition in which the rights of men exist without being recognized. Hobbesian natural rights generate no obligations and are not generated by anyone's obligations.

13. *The Metaphysics of Morals*, p. 56. In spite of his being called upon as the philosophical author of those concepts central to current theories of rights, there is no acknowledgment in Kant's political writings of anything similar to what we today often refer to as *universal human rights*. Whatever sympathy one may have for those whose needs are great and whose misfortunes are tragic, Kant's theory does not allow us to conclude that their needs constitute rights. Kant goes so far as to deny that there is any such thing as a right of necessity to which one may appeal when one's life is in danger. ("This alleged right is supposed to be an authorization to take the life of another who is doing nothing to harm me, when I am in danger of losing my own life. It is evident that were there such a right the doctrine of Right would have to be in contradiction with itself" [MM, p. 60]. In this, his theory of rights differs dramatically from that of Thomas Hobbes and John Locke. At most, Kantian rights serve only as demands for a freedom from interference or, what amounts to the same, a demand for recognition of oneself as a human will.

14. Tom Sorell, *Moral Theory and Capital Punishment* (Oxford: Basil Blackwell, 1987), p. 70. Italics supplied.

15. Jeffrie G. Murphy, *Kant: The Philosophy of Right* (London: Macmillan and Co., 1970), p. 163.

16. *The Genealogy of Morals, Second Essay*, sec. 5 in *The Philosophy of Nietzsche* (New York: Modern Library, 1927; reprinted 1954), p. 676.

17. Cf. Friedrich Nietzsche, *Human, All Too Human*, sec. 45.

18. Leslie Mulholland, *Kant's System of Rights* (New York: Columbia University Press, 1990), p. 189.

19. J. Angelo Corlett. "Foundations of a Kantian Theory of Punishment," *The Southern Journal of Philosophy*, 31, no. 3 (Fall, 1993): 277.