

Mark Tunick, "Is Kant a Retributivist?"

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[60] I.

Philosophers of punishment typically point to two prominent but competing justifications for the practice. The utilitarian gives a consequentialist or forward-looking argument that justifies punishment by appealing to the benefits of the practice, among which are the deterrence of future crime, and the incapacitation or rehabilitation of dangerous criminals. The retributivist, in contrast, is said to justify the practice not by appealing to such future benefits, but rather, by arguing that punishment is required by justice: we must punish, not because doing so necessarily will make society better off, but because the criminal deserves punishment, society needs to express condemnation of the criminal's actions, or right needs to be vindicated. Perhaps the most striking illustration of a retributivist position, in this case one that appears to be entirely backward-looking and oblivious to consequences, is found in a passage written by Immanuel Kant:

Even if a civil society were to be dissolved by the 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.¹

In his recent article on punishment, David Dolinko characterizes retributivism as a "pernicious" and "potentially dangerous" theory that of late has been "born-again."² The theory of retributivism Dolinko attacks claims that to mete out just deserts is a good enough reason legally to punish at all. According to this theory, which Dolinko calls "bold retributivism," "giving lawbreakers their just deserts is the only point or purpose of punishment," (542) and that a person deserves to be punished is "a good or sufficient reason," or a "rational justification," for

1. Immanuel Kant, *Metaphysics of Morals*, tr. Mary Gregor (Cambridge: Cambridge University Press, 1991)[hereafter MM], p. 142, 333. When citing this work, the first number refers to the page in Gregor's edition; the second number to the page in volume 6 of the Prussian Academy of the Sciences edition of Kant's works (Paul Natorp, ed., 1907).

2. David Dolinko, "Some Thoughts About Retributivism," *Ethics*, vol. 101, no. 3 (April, 1991), pp. 537-539, 559.

[61] having the practice of punishment.(542) Dolinko attributes this view to Kant, who he describes as "one of the most prominent and influential of retributivists."(543) Dolinko echoes the conventional understanding of Kant, an understanding that the passage about "blood guilt" surely encourages, that Kant is a retributivist who opposes all utilitarian or other consequentialist justifications of punishment. Kant is said to give a deontological justification of the practice.

Deontological theories differ from their teleological counterparts. As Mary MacKenzie explains,

A teleological theory would consider the punishment as the means to some good, either general or individual. But the obligation laid upon us by 'This is a just punishment' asserts the independent moral value of the punishment itself, considered apart from, and even to the frustration of, some prudential value to be derived from its effects In a teleological theory we may ask of each action in a sequence 'why?' until we reach an answer that is considered prudentially sufficient In a deontological theory, on the other hand, 'why?' questions terminate in a judgment which is considered to be morally sufficient-- maybe from an intuitionist point of view.³

MacKenzie, who characterizes retributivism as a deontological theory, thinks Kant's is the paradigmatic deontological theory of punishment. Both MacKenzie and Dolinko, among others, understand Kant to argue that we punish not for any consequences, such as to deter future crimes, or to reform or incapacitate the criminal, but rather, for the sake of punishing, because punishing in itself is just, or right-- regardless of the good it yields.⁴ We might understand this argument to be rooted in desert--people who do bad things [62] deserve and ought to suffer;⁵ or

3. Mary MacKenzie, Plato on Punishment (Berkeley: University of California Press, 1981), p. 29.

4. MacKenzie, p. 29, note 39. Cf. Mitchell Franklin, who says that in Kant's view it is not justified to punish in order to deter, in "The Contribution of Hegel, Beccaria, Holbach and Livingston to General Theory of Criminal Responsibility," in Philosophical Perspectives on Punishment, ed. Edward H. Madden et.al. (Springfield: Charles C. Thomas), p. 102; also, Stanley Brubaker, "Can Liberals Punish?" in American Political Science Review vol. 82, no. 3, September, 1988, p. 826; S. I. Benn, "Punishment," in The Encyclopedia of Philosophy, ed. Paul Edwards (New York: Free Press, 1967), vol. 7, p. 30. Edmund Pincoffs writes that "Kant believes that consequences have nothing to do with the justification of punishment." (Edmund L. Pincoffs, The Rationale of Legal Punishment [New York: Humanities Press, 1966], p. 6) Jeffrie Murphy, originally viewing Kant as the paradigmatic retributivist, recently changed his position, in "Does Kant Have a Theory of Punishment?" in Columbia Law Review, vol. 87 (1987), pp. 509, 516-517.

5. Don Scheid mentions this as a possible retributivist argument, but does not think this is Kant's position, as I discuss below. See Don E. Scheid, "Kant's Retributivism," Ethics, vol. 93 (January

in some metaphysical conception of reciprocity, as Hans Saner suggests;⁶ or in a theory of fairness, as Jeffrie Murphy argues.⁷

On all of these views, Kant is said to justify the practice of legal punishment not on any consequential grounds but purely with retributive reasons; Kant's position, it is said, is that the point of having the practice is to provide retribution. In this article I shall argue that this understanding gets Kant wrong. Kant, it is true, rejects consequentialism in thinking about moral actions; but Kant also thinks law and morality are separate spheres. For Kant, that an action produces desirable results speaks nothing for the moral worth of the action; but in the sphere of law, we are not guided solely by what has moral worth, and an action we take or policy we adopt can be justified by appealing to the good it yields. Kant's theory of legal punishment is not deontological. I proceed to argue that retributivism need not be understood exclusively as a deontological theory, and that we can characterize Kant's theory of legal punishment, consequentialist though it is, nevertheless as retributive in some sense. In the final section I consider whether the passages in Kant suggesting that he is a retributivist in some sense taken together with the passages suggesting his theory of punishment is not deontological amount to a coherent theory of legal punishment. II. In his Lectures on Ethics, Kant distinguishes moral from pragmatic laws; the latter refer to statute and common law. Pragmatic laws constrain actions related to other people, and demand compliance regardless of one's moral disposition. Pragmatic laws are made by governments and ordain actions; nobody authors moral laws.⁸ Kant then makes the following distinction, so often ignored: the punishment imposed by a being who is guided by moral standards is retributive; but punishment for the violation of (pragmatic) law is imposed to reform or [63] deter:

1983), p. 263.

6. "Kant projects a metaphysical idea of reciprocity that he used to justify Newtonian science upon the metaphysics of law," according to which "every criminal action metaphysically deserves 'an equal and opposite reaction', in the shape of punishment." Hans Saner, Kant's Political Thought, tr. E. B. Ashton (Chicago, 1973), cited in Samuel Fleischacker, "Kant's Theory of Punishment," in Howard Williams, ed., Essays on Kant's Political Philosophy (Chicago: University of Chicago Press, 1992), p. 204.

7. Jeffrie Murphy, Kant: The Philosophy of Right (London: Macmillan, 1970), p. 142: "Kant offers a theory of punishment which is based on his general view that political obligation is to be analysed in terms of reciprocity. If the law is to remain just, it is important to guarantee that those who disobey it will not gain an unfair advantage over those who do obey voluntarily. Criminal punishment attempts to guarantee this, and, in its retribution, it attempts to restore the proper balance between benefit and obedience."

8. Immanuel Kant, Lectures on Ethics, tr. Louis Infield (New York: Harper Torchbooks, 1963)[hereafter LE], pp. 48-52.

All punishments imposed by sovereigns and governments are pragmatic. They are designed either to correct or to make an example.(LE 55)

Ruling authorities do not punish because a crime has been committed, but in order that crimes should not be committed.(LE 56)

Contrary to what Dolinko suggests, Kant does not think we legally punish for the sake of giving lawbreakers their just deserts. Legal punishment is not an end in itself; rather, on Kant's view, legal punishment is justified as a useful social practice. One way the practice is useful is by deterring actions which would upset a society of ordered liberty.⁹ For Kant, we legally punish to preserve and enforce rights we have by nature. In his "Doctrine of Right," part of the Metaphysics of Morals, Kant argues that we have an innate right to freedom (MM 63, 238). Reason dictates we leave the state of nature to protect the rightful condition into which we are born (MM 121-22, 307). We have an obligation to leave the state of nature (MM 85, 264) and legal punishment is a means to satisfy this obligation to protect our innate right to freedom.¹⁰ Kant refers to this underlying purpose of punishment of preserving a society of ordered liberty in his discussion of capital punishment in the "Doctrine of Right." In establishing the punishment of accomplices of a murder, he says, the state may take into account the effect of the punishment on the security of the state. If the number of accomplices is so great that giving them their deserved sentence of death could leave the state "without subjects"; and if the state does not want "to pass over into the state of nature, which is far worse because there is no external justice at all in it," then the sovereign can decree, in this case of necessity, a sentence other than capital punishment.(MM 143, 335)¹¹ [64] Kant appeals again to this practical reason for punishing

9. Cf. Murphy, "Does Kant Have a Theory of Punishment?", pp. 516, 517, on the views Kant gives in works other than the Rechtslehre. Of course, that Kant takes this position does not mean Kant is a utilitarian. To be a utilitarian one must consistently apply a principle of utility, and Kant does not do this in justifying why we punish. Scheid, who recognizes how for Kant the point of having the practice of legal punishment is to maintain a society of ordered liberty, also distinguishes this consequentialist argument from utilitarianism: "Kant's basic good is individual freedom, while the basic good for utilitarians is usually pleasure or happiness."(Scheid, p. 270)

10. See also B. Sharon Byrd, "Kant's Theory of Punishment: Deterrence in its Threat, Retribution in its Execution," Law and Philosophy, vol. 8 (1989), pp. 153-54, and 156-62. Don Scheid, pp. 268-271, esp. p. 271: "the institution of punishment is justified as part of the legal system because it tends to secure each person's freedom...through its deterrent effect"; and Bruce Aune, Kant's Theory of Morals (Princeton, NJ: Princeton University Press, 1979), p. 164: "the penal law is, for [Kant], just part of public law, which is needed to establish and maintain a state of lawful freedom in a community of people."

11. This passage, which on its face contradicts the passage about "blood guilt," has been virtually ignored by all but Scheid, whose treatment of this passage I discuss below. Byrd seems aware of it (p. 196, n. 144) but says little about its significance. Fleischacker, who discounts the role of consequentialist reasons in Kant's theory of punishment, unfortunately does not discuss this

when he says that the sovereign's power to grant clemency is limited where failure to punish a criminal "could endanger the people's security." (MM 145, 337)

In his essay "On the Old Saw: That May Be Right in Theory, But it Won't Work in Practice," Kant gives a hypothetical example in which he again appeals to deterrence as the justification for legal (but not moral) punishment.¹² Kant supposes that one man on a life raft pushes the other off to save his own life. Kant says this man did not have a duty to save his own life; rather, he had an unconditional duty not to take the life of someone else who is not causing the danger threatening his life. (Kant does not consider the objection that the other man is indirectly causing a danger to his life by consuming what food and drink are available.) But in a footnote, Kant defends "law professors" as

quite consistent in making legal allowance for such emergency acts. For the authorities can't attach any punishment to this injunction, because that punishment would have to be death, and it would be an absurd law that threatened death to one who refuses to die voluntarily in a dangerous situation.¹³

Kant's reasoning is that state laws are intended to prevent us from acting in certain ways by threatening us with a sanction. The point of these laws is to deter. Consequently, a law that imposes a punishment that could not deter the action the law proscribes lacks sense, is absurd. Some might object that this passage, from the Lectures on Ethics, is from a work whose publication Kant did not supervise. However, in his Metaphysics of Morals Kant repeats the lifeboat example and makes the further distinction that the rescued person's killing is not inculpable (unstraflich) but is impunable (unstrafbar). (MM 60, 235-6) Kant again draws his crucial distinction between law (Legalitaet) and morality (Moralitaet). Legal duty is external duty, while ethical or moral duty is internal duty. (MM 46-7, 219-20) Legal duty binds by force or coercion (Zwang).¹⁴ In the lifeboat example [65] there is a moral not a legal duty not to kill the other person. The rescued person is to be morally condemned but not legally punished.¹⁵

passage, a passage which of course suggests that Kant's theory is forward-looking.

12. Immanuel Kant, "On the Old Saw: that May be Right in Theory, But it Won't Work in Practice," tr. E.B. Ashton (Philadelphia: University of Pennsylvania Press, 1974).

13. Ibid., p. 68 note.

14. Ibid. Kant also makes the distinction between recht and gerecht (right and justice). He says that legal action is either gerecht or ungerecht, moral action is either recht or unrecht. (MM 50, 223-4) Kant's distinction is not unlike Hobbes' distinction between injustice and iniquity: Hobbes writes in Leviathan that the sovereign can do no injustice, but he may commit iniquity. (ch. 18)

15. I read this passage differently than does Fleischacker. He argues that "the man who pushes another off a plank enjoys a 'subjective immunity from punishment', but acquires an 'objective

In passages virtually ignored in recent discussions of his theory of punishment, Kant discusses two other cases in which a "crime" occurs that is "certainly punishable but cannot be punished with death by the supreme power [by legislation]"--a mother's murder of her illegitimate infant, and the murdering of a fellow soldier in a duel:

Legislation cannot remove the disgrace of an illegitimate birth any more than it can wipe away the stain of suspicion of cowardice from a subordinate officer who fails to respond to a humiliating affront with a force of his own rising above fear of death.(MM 144, 336)¹⁶

Kant's reason for why the state cannot mete out legal punishment appropriate to the "crime" in these cases is similar to that he gives in explaining why the state may not legally punish the man on a liferaft who kills his companion. In all three cases, the person committing the "crime" could not be expected to be deterred by the threat of legal punishment. Kant writes, "no decree can remove the mother's shame when it becomes known that she gave birth without being married."(MM 145, 336) So too, an insulted junior officer "sees himself constrained by the public opinion of the other members of his Estate to obtain satisfaction for himself."(*Ibid.*) In the case of infanticide and murdering a fellow soldier in a duel, there is punishment, but not legal punishment. In the latter case Kant implies that punishment is inflicted not by a court, but by the duel itself, "in which the offender exposes [66] himself to death in order to prove his military

(legal)' immunity only 'through a strange confusion among jurists'. [K]ant does not hold that the impossibility of deterring someone morally justifies not punishing him; on the contrary, he stresses the fact that deterrence concerns only the subjective (empirical), not the objective value of punishment." (Fleischacker, p. 194) I read the passage to say, rather, that the man who pushes the other off a plank is not to be legally punished, and that to decide not to punish him is not to be confused. On my reading, Kant does not mean to say that a judge who punishes the man who killed another is deciding subjectively (i.e. erroneously, in contrast to what an objectively correct judgment should be), and that objectively the man should be punished--which is how Fleischacker seems to construe the passage. The part of the passage from Metaphysics of Morals in which the terms 'objective' and 'subjective' are used reads, "It is clear that this assertion is not to be understood objectively, in terms of what a law prescribes, but only subjectively, as the verdict that would be given by a court." (MM 235) On my reading of this part of the passage all Kant means to say in writing that a verdict of legal innocence is not to be understood objectively is that the law does not prescribe that the one man kill the other (for if it did the law would be in contradiction with itself (MM 235). But it is not against the law to kill in the liferaft case and so it is proper, and not a confusion, for a judge to note this in not punishing the killer. What he did on the liferaft is no (legal) crime.

16. Byrd mentions these two examples without discussing their significance (Byrd, p. 196); Scheid does not discuss them. These passages play a significant role in part of my criticism of Byrd's and Scheid's positions, see below.

courage."(MM 145, 337) To see the form punishment takes in the former case we might turn a few pages back in the Metaphysics of Morals to a passage in which Kant distinguishes "punishment by a court" from "natural punishment (poena naturalis), in which vice punishes itself and which the legislator does not take into account."(MM 140, 331) Perhaps it is this natural punishment, the only punishment we have in a state of nature, that is inflicted on the mother, who, Kant says, finds herself in "the state of nature," presumably because her child was born outside of marriage, and therefore "outside the law (for the law is marriage) and therefore outside the protection of the law."(MM 144-45, 336) Much of what Kant says about these two cases is puzzling and difficult to agree with; but the cases do illustrate how for Kant there is a sharp distinction between moral punishment and the legal punishment a state metes out. In both cases Kant implies that where a person could not be deterred by legal punishment from committing a crime, the state should not punish. In both cases Kant invokes a consequentialist theory of why we have the practice of legal punishment.

In addition to its deterrence purpose, Kant points also to another beneficial consequence of the practice of legal punishment. He notes that by punishing lawbreakers man can acquire the habit of doing good deeds.(LE 57) Kant thinks that a moral person will not avoid evil deeds merely to avoid punishment, just as he thinks a moral person does her duty for the sake of duty and not to obtain some promised reward. Kant says that we resort to rewards and punishments in order to make up for our lack of morality (LE 56), not to inspire moral action. While the threat of punishment or promise of reward cannot inspire moral action, since moral action must be done for the sake of duty, still, Kant thinks, through rewards and punishments man can acquire the habit of doing good deeds.

III.

Kant's account of why we have the practice of legal punishment is not deontological. This does not necessarily mean the theory is not retributive. A retributive justification of the practice of punishment need not be deontological. For example, G.W.F. Hegel argues that one reason we punish is to vindicate right. On Hegel's view, crime is a flouting of right, and we punish to vindicate the law: if crime is not 'negated' through punishment, its positive existence would remain and replace what is right. "To leave crime unpunished would let [67] it be seen as right."¹⁷ On Hegel's view, if the state fails persistently to punish crimes, its citizens are likely no longer to regard crimes as wrongs. Hegel's retributivism, then, is forward-looking: we punish to avoid a future where crimes no longer are regarded as wrong.¹⁸ Joel Feinberg gives a similarly

17. G. W. F. Hegel, Vorlesungen ueber Rechtsphilosophie, ed. Karl-Heinz Ilting (Stuttgart-Bad Canstatt: Friedrich Fromann, 1973), vol. 3, pp. 310, 662. Cf. vol. 4, p. 549: "If crime goes unpunished, it would count as valid To leave it unpunished would make crime seem justified to others."

18. But it would be mistaken to conclude, with C.K. Benn ("An Approach to the Problems of Punishment," Philosophy, vol. 33 [October, 1958], p. 330) that Hegel's retributivism is a "disguised

forward-looking, that is, non-deontic, retributive justification for legal punishment when he notes that by punishing we vindicate the law and absolve others of the crime.¹⁹

Kant does not give even a non-deontic retributive justification of the practice of legal punishment. On his view, the reason we have the practice of legal punishment is not to give lawbreakers their just deserts, or to vindicate right, or absolve others, but, rather, to secure a peaceful society of ordered liberty, both by deterring would-be violators of rights, and by instilling in man the habit of doing good deeds. I therefore disagree with those who read Kant, either explicitly or implicitly, as providing a forward-looking retributive justification for the practice.²⁰ Yet a theory of punishment still can be characterized as 'retributive' even if it does not hold that the justification of the practice as a whole is retributive.

There is some confusion about precisely what it is to be a retributivist. One of today's leading retributivists himself does not think "retribution" is a helpful term. Andrew von Hirsch notes that the O.E.D. definition of "retribution" as "return of evil," and the 1972 Model Sentencing Act's declaration that "sentencing should not be based upon revenge and retribution" illustrate how retribution is [68] often confused with vindictiveness.²¹ The Report of the Royal Commission on Capital Punishment clarifies how retribution can be differently understood:

utilitarianism." For Hegel, the reason we want to avoid having crimes no longer regarded as wrong is that we should want right upheld, because it is right; and not that by vindicating right we augment social utility.

19. Joel Feinberg, "The Expressive Function of Punishment," in Hyman Gross and Andrew von Hirsch, eds. Sentencing (Oxford: Oxford University Press, 1981), p. 28.

20. Samuel Fleischacker takes Kant's view to be that the point of the practice is to provide retribution: "Retributive punishment serves a moral function for Kant by making the criminal live under the law he implicitly sets up in his criminal act." (Fleischacker, "Kant's Theory of Punishment," p. 200; cf. p. 193: "Kant rejects both rehabilitation and deterrence as moral grounds for punishment.") However Fleischacker phrases Kant's retributivism in teleological terms, as when he characterizes Kantian punishment as promoting the improvement of citizens (p. 206), and as encouraging them "to deal with other human beings through rational means only." (p. 207) Edmund Pincoffs, who earlier we saw characterize Kant's theory in deontological terms, also slips into consequentialist language when he says that on Kant's view punishment is meant to show the criminal the consequences of what he has willed. (Pincoffs, The Rationale of Legal Punishment, p. 9) Don Scheid argues that Pincoffs' interpretation "boils down to a kind of deterrence rationale." (Scheid, "Kant's Retributivism," p. 277 n. 43).

21. Andrew von Hirsch, Doing Justice (Westford, MA: Northeastern University Press, 1986), pp. 45-46.

Discussion of the principle of retribution is apt to be confused because the word is not always used in the same sense. Sometimes it is intended to mean vengeance, sometimes reprobation. In the first sense the idea is that of satisfaction by the State of a wronged individual's desire to be avenged; in the second it is that of the State's marking its disapproval of the breaking of its laws by a punishment proportionate to the gravity of the offense.²²

Kant does not think we punish to avenge: "to insist on one's right beyond what is necessary for its defence is to become revengeful... such desire for vengeance is vicious." (LE 214) If by retributivism we mean only the theory that declares we punish for the sake of revenge, Kant is no retributivist.

There are other reasons, though, why we call Kant a retributivist. One reason is that Kant insists that a person may be punished only because he has committed a crime, and not for any other reason:

[Punishment by a court] must always be inflicted upon [the criminal] only because he has committed a crime... He must previously have been found punishable (strafbar), before any thought can be given to drawing from his punishment something of use for himself or his fellow citizens. (MM 140-1, 331-2)

This position, that we may punish only those who have committed crimes, is sometimes referred to as a "negative retributive" principle. It insists, not that a criminal must be punished (a "positive retributive" principle), only that if we punish, we may punish only criminals.²³ This is a weak form of retributivism, something to which even utilitarians have committed.²⁴ Rule-utilitarians argue that while the practice of legal punishment is justified on utilitarian grounds, the practice itself is constituted in part by a rule that we may punish only the guilty. A practice which allowed punishment of the innocent would not be socially useful. Once we accept the rule-constituted practice on utilitarian [69] grounds, then when we are within the practice we are

22. Report of the Royal Commission on Capital Punishment (London, 1953), pp. 17-18; cited in Feinberg, "The Expressive Function of Punishment."

23. See J.L. Mackie, Persons and Values (Oxford: Clarendon Press, 1985), pp. 207-208; C.L. Ten, "Positive Retributivism," Social Philosophy and Policy, vol. 7, no. 2 (Spring, 1990); and

24. Cf. Murphy, Kant: The Philosophy of Right, p. 141: "That guilt is a necessary condition for legitimate infliction of criminal punishment will be accepted by most people--even, I should suppose, by all but the most fanatical utilitarians."

bound by its rules, which, in the case of legal punishment, commit us to the negative retributive principle.²⁵

While Kant holds to the negative retributive principle, his retributivism is stronger still. In an important passage from the Metaphysics of Morals Kant opposes a proposal to mitigate the deserved punishment of a person on death-row if he participates in dangerous experiments that could yield beneficial results:

What, therefore, should one think of the proposal to preserve the life of a criminal sentenced to death if he agrees to let dangerous experiments be made on him and is lucky enough to survive them, so that in this way physicians learn something new of benefit to the commonwealth? A court would reject with contempt such a proposal from a medical college, for justice ceases to be justice if it can be bought for any price whatsoever. (MM 141, 332)

This passage expresses a stronger retributivism than arises with commitment merely to the negative retributive principle. Kant is saying here, not just that we may punish only the guilty, but that when we punish the guilty we must give them exactly the punishment they deserve, no more and no less.²⁶ I shall call this the "strong negative retributive principle." Kant takes this position in part because he believes that human beings should not be treated only as a means for some end:

Now I say that man, and in general every rational being, exists as an end in himself, not merely as a means for arbitrary use by this or that will: he must in all his actions, whether they are directed to himself or to other rational beings, always be viewed at the same time as an end.²⁷

But Kant's objection to mitigating the punishment of a prisoner upon whom useful experiments are conducted is based not solely on humanitarian concerns of this sort. It is based also on a commitment to a principle of just deserts: a criminal deserves a certain amount of punishment,

25. John Rawls, "Two Concepts of Rules," Philosophical Review, vol. 64 (1955). Since my purpose is to discuss Kant's views, I shall not take up the debate about whether rule-utilitarianism is a coherent form of utilitarianism.

26. This is not the same as committing to the positive retributive principle that demands that we punish all who are guilty of crimes. The passage cited earlier and to be taken up again, on "blood guilt" (MM 142, 333), does imply that Kant commits to the positive retributive principle.

27. Immanuel Kant, Groundwork of the Metaphysic of Morals, tr. H.J. Paton (New York: Harper Torchbooks, 1964), p. 95; cf. pp. 95-103.

and it would be an injustice not to mete out what justice requires. Retributivists, in seeing punishment not as a socially useful tool, but as a demand of justice, emphasize the importance of the principle of proportionality in punishing. The utilitarian has a difficult time justifying adherence to this principle.²⁸ One can imagine cases where [70] punishment effectively deters (and is thereby justified on utilitarian grounds) precisely because it is wildly out of proportion with the crime. The retributivist, in contrast, provides a compelling account of why disproportional punishments are unacceptable. If the point of punishment is to mete out justice, then a particular punishment must satisfy the demands of justice, and proportionality between crime and punishment is one measure of what justice demands. Although Kant does not think the purpose of legal punishment is to mete out justice, he does insist, apart from rare exceptions to be discussed below, that a punishment fit the crime.²⁹

Kant's theory of legal punishment is not deontological, since for him it is not justified to punish people who commit certain acts unless those acts are the sort they and others reasonably could be thereby deterred from committing again. But the theory is retributive, inasmuch as Kant insists both that the amount of punishment a criminal receives be proportional to the seriousness of the crime so as to provide just deserts; and that we must punish a particular person for no other reason than that that person committed a wrong--we cannot practice punishment on innocent people even if doing so greatly benefitted society.

In two recent discussions of Kant's theory of punishment that have emphasized the role deterrence plays in Kant's view, both B. Susan Byrd and Don Scheid acknowledge Kant's commitment to the negative retributive principle, and to the stronger version of that principle, that when we punish the guilty we must give them exactly the punishment they deserve, no more and no less. Both Byrd and Scheid understand Kant's retributivism to be a constraint or limitation on a practice that exists for the sake of deterring violence or preventing society from slipping back into a state of nature. For Byrd, punishment, on Kant's view, is "a threat, used to secure

28. Jeremy Bentham attempts to justify a principle that punishment should share the characteristic of the offense, by arguing that in this way punishment will be an "analogy" and therefore a more efficacious deterrent. (Bentham, An Introduction to the Principles of Morals and Legislation [New York: Hafner Press, 1948], ch. 15, section 7) Not only does this seem an inadequate account of why we demand proportionality; it only justifies punishments that physically resemble the crime (an eye for an eye) and does not account for why, for example, a murderer should receive 100 years in prison while someone vandalising a public busstop should receive, say, a year or less in prison.

29. See MM 141-3, 332-4. My concern in this article is not with Kant's justification of the principle of equality in the amount of punishment. For accounts of Kant's views on this see Bruce Aune, Kant's Theory of Morals, ch. 5, sec. 7; Susan Meld Shell, The Right of Reason: A study of Kant's philosophy and politics (Toronto: University of Toronto Press, 1988), pp. 160-62; and Edmund Pincoffs, The Rationale of Legal Punishment, ch. 5.

society";³⁰ and retribution is "not a goal or reason for punishment but rather a limitation on the state's right to inflict punishment."³¹ For Scheid, on Kant's view the general justifying aim of punishment is crime [71] control, and retribution is a constraint on how we may use the useful tool of punishment to achieve that objective: "If the general justifying aim of punishment is crime control, this goal must nevertheless be pursued in a morally acceptable way, that is, in a way which gives full moral respect to the persons to whom the penal system is applied." "Kant, in effect, makes [retributive] principles function as absolute constraints upon any use of punishment to promote some goal of the state."³² On Scheid's view the retributive principle requires that "all and only those who commit legal offenses may justly receive punishment so long as the punishments are in proportion to the seriousness of the respective crimes."³³ According to Byrd and Scheid, Kant's retributivism consists in commitment to the strong negative retributive principle, which is a constraint or limitation on a practice justified on deterrence grounds, just as to the rule-utilitarian the rules about punishing only the guilty are constraints on how we may implement the utilitarian-justified practice. But Kant's retributivism is more extensive than Byrd's and Scheid's "retribution as constraint" accounts suggest. For Kant, a criminal's guilt establishes not merely that we may punish him, but that we must.³⁴

30. B. Susan Byrd, "Kant's Theory of Punishment," p. 154; cf. pp. 183-93.

31. *Ibid.* pp. 152-3; cf. p. 155: "Retribution...limits society in its range of possible reactions toward the individual"; p. 156: "the state is limited in its execution of this punishment through the principle of retribution."

32. Don Scheid, "Kant's Retributivism," pp. 272, 275.

33. *Ibid.*, p. 263, my emphasis. See also Murphy, *Kant: The Philosophy of Right*, p. 141: guilt is "a sufficient condition" for punishment.

34. Byrd at one point writes that on Kant's view if a criminal is guilty the punishment must be executed as threatened (pp. 195-96), and at another point, that "not punishing the guilty" is "suspect" (p. 197). But she does not note the distinction between this view and adherence to the strong negative retributive principle, nor defend her claim that Kant holds the former view in light of conflicting passages, nor adequately consider the tension between commitment to either view and Kant's deterrence justification. It should be noted that Byrd does persuasively dissolve one apparent contradiction, that between Kant's deterrence argument and his insistence that one not be treated as a means: "In threatening punishment, the addressee of the threat is general. An individual need feel 'restricted' only if he is considering violating the law...The mere threat of punishment...cannot be a form of 'using' an individual as a means, although it could be effective in persuading an individual not to violate another's rights."(p. 184) But as I argue, there are other tensions in Kant's account. Edmund Pincoffs recognizes the extent of Kant's retributivism; he writes of Kant's view, "whoever commits a crime must be punished in accordance with his desert."(*The Rationale of Legal Punishment*, p. 4) Pincoffs, however, does not acknowledge the role deterrence

The passage about "blood guilt" points to this other sense in which Kant is a retributivist. In that passage Kant says that where all the people were to depart the next day, forever dissolving and dispersing the community, the last murderer in jail would have to have his execution carried out before the diaspora, because justice demands this. Justice must prevail, writes Kant, else "there is no longer [72] any value in men's living on earth." (MM 141, 332) The passage reveals Kant's commitment to the positive retributive principle. It declares, not merely that if we decide to punish we must inflict the exact punishment justice deserves and no less or no more (which is required by what I have called the strong negative retributive principle);³⁵ but that we must punish this person, that "each has done to him what his deeds deserve."

IV.

Kant does not give a retributive justification for why we have the practice of legal punishment, though his commitment to punishing only the guilty and only with a severity exactly proportional to what their crime deserves, no more and no less, and to punishing all who are guilty, does warrant our calling him a retributivist. On Kant's view, we have the practice of legal punishment to deter certain objectionable actions and preserve a well-ordered society that respects individual rights. We should not confuse Kant's claim that we must punish when the rules of the practice declare we must, with the 'bold retributivist' claim Dolinko and others mistakenly impute to him, that the reason we have the practice is because we must mete out just deserts.

There is some tension in Kant's account, precisely because on the one hand he argues that the point of legal punishment is not to mete out just deserts but rather to deter violators of rights and instill habits of good behavior in citizens; and on the other hand he insists that the punishment the state metes out satisfy the demands of justice. How can Kant insist both that the point of legal punishment is to deter, and also that in punishing we are bound by considerations of justice? How can Kant insist that we always punish the guilty and only the guilty and only with exactly the just amount of punishment, yet hold that the point of punishment is to deter and that where an act could not be deterred by punishment we should not punish someone who commits that act?

plays in Kant's theory (doing so is one of the many merits of Byrd's article).

35. The passage prohibiting mitigation of the punishment of a criminal who agrees to let dangerous experiments be made on him (MM 141, 332) is intended to illustrate Kant's commitment to this strong negative retributive principle. That passage does not support (nor does it deny) the positive retributive principle.

One effort to reconcile the deterrent and retributive aspects of Kant's views draws on a familiar distinction between the general justification of the practice of punishment (why punish?) and the justification of the distribution of punishment (why punish this person? how much should we punish this person?).³⁶ Both Scheid and Byrd argue that Kant can claim that we punish to deter, and also that if a person is guilty of a crime he should be punished in proportion to [73] the severity of the crime regardless of whether the punishment will deter future violations of rights, because these claims are in response to two different questions.³⁷ Put another way, it is no contradiction to hold both that the reason we have the practice of punishment is to deter crime, and also that we may invoke this useful practice only in accordance with principles of justice that require we punish only the guilty (the negative retributive principle) and only with the exact severity required by justice, no more and no less (the strong negative retributive principle). Kant believes legal punishment is a useful social practice. He also believes that every human being must "never be treated merely as a means to the purposes of another." (MM 140, 331) This requires that legal punishment never be inflicted upon a non-criminal; and justice demands that punishment be in proportion to the severity of the crime.

While this distinction between justifying the practice of punishment and justifying particular acts within the practice goes far in resolving apparent contradictions in Kant's theory, without further development it does not go far enough. Tensions remain, which neither Scheid nor Byrd adequately explore, tensions between Kant's consequentialist justification of the practice and his view that punishment must be distributed in accordance with retributive principles.

One such tension is between Kant's commitment to the positive retributive principle (requiring that all who are guilty must be punished), and his deterrence rationale for the practice of legal punishment. If Kant thinks the purpose of legal punishment is to deter future violations of right, or otherwise to secure society, why should he insist on the punishment of the murderer on deathrow on the soon-to-be-deserted island society, when such punishment would not

36. See H.L.A. Hart, "Prolegomenon to the Principles of Punishment," Proceedings of the Aristotelian Society (1959-60); John Rawls, "Two Concepts of Rules"; and

37. Byrd at one point acknowledges that the difference between her main argument and Scheid's is essentially terminological: "Scheid relies on H.L.A. Hart's distinction between the general justifying aim of punishment and the distribution of punishment. He argues that Kant is only a 'partial' as opposed to a 'thoroughgoing' retributivist since although distribution should proceed according to a retributivist principle, the general justifying aim is deterrence. [My] distinction between the threat of punishment [i.e., that the reason we have the practice is to deter] and the execution of punishment [i.e., that in punishing we are bound by retributive constraints] seems more satisfactory since it has historical roots in Kant's time and since 'threat' and 'execution' seem to fit better in Kant's system." (p. 183, n. 105)

advance this purpose? As Byrd and Scheid argue, Kant thinks the point of the practice of legal punishment is deterrence, and that retribution is a constraint on how we can implement the useful practice. But the point of the blood guilt passage is not just to show that we must not punish the innocent, or punish with an unjust amount; it is to declare that we must punish the guilty.

[74] Two responses might be made to this question.³⁸ In the first, we might interpret the problematic passage about the murderer on deathrow (the "blood guilt" passage, MM 142, 333) in a way that removes the difficulty. The passage creates a problem insofar as it suggests that the state should use the machinery of legal punishment even when doing so would be of no use; this conflicts with the teleological account of Kant's theory for which I have argued. To avoid this difficulty, we need somehow to interpret the passage to say that really punishing "the last murderer remaining in prison" does promote the purposes for which we have the practice. Kant's phrasing arguably allows for this interpretation. Kant says the execution must be carried out "for otherwise the people can be regarded as collaborators in this public violation of justice." Perhaps Kant thinks that failure to punish this murderer, while it will not undermine the murderer's well-ordered society (for in the example it disperses), will undermine the idea that rights must be protected. If this murderer goes unpunished, others will be more likely to violate rights and thereby return us to the state of nature we have an obligation to avoid. If we interpret the passage in this way, than Kant does not in principle commit himself to the positive retributive principle; he would consistently maintain that legal punishment should occur only when it will preserve rights for the protection of which we enter society.³⁹

We should feel uneasy with this interpretation of the "blood guilt" passage, however. Kant's use of the fantastic example of a society that disperses likely is intended to deflect us from

38. A third response would be that in the deathrow (or "blood guilt") passage Kant refers to moral not legal punishment. Kant's reference in the passage to a "prison" rules out this response.

39. This is Byrd's reading of the blood guilt passage. Byrd finds it crucial that "the island society is not returning to the state of nature." Rather, she says, the people are dispersing to other societies. Consequently, Byrd finds a deterrence rationale for punishing the person on deathrow. (Byrd, "Kant's Theory of Punishment," pp. 198-200) One problem with this reading is that Kant prefaces the suggestion that the members disperse to other societies with "for example"; so he does not think it essential to his argument that they do indeed disperse to other societies, as opposed to reverting to a state of nature. Scheid finds the blood guilt passage "difficult to reconcile" with his deterrence reading. (Scheid, "Kant's Retributivism," p. 281; cf. p. 266, "with one exception") He does suggest two reasons for punishing in this case, one based on fairness, the other, on deterrence: "a failure to punish the last murderer is tantamount to saying that murder is permissible if it is committed near the end of a particular society's existence" (p. 281). The latter suggestion seems to contradict Scheid's argument that in questions of distribution of punishment Kant thinks we should be bound by retributive considerations. Scheid concludes, in any case, by saying the passage may be a lone anomaly (p. 281). Yet it is the most famous and striking of Kant's passages.

thinking that the murderer is to be punished to maintain order or for other future benefits. The passage itself explicitly points us to other reasons: we should punish "so that each has done to him what his deeds deserve and blood guilt does not cling to the people for not having insisted [75] upon this punishment." So suppose we take the passage to be incontrovertible evidence of Kant's commitment to the positive retributive principle. Even so, such a commitment need not be taken as in contradiction with a consequential account of the justification of legal punishment. Kant can think that the reason we have the practice is to preserve a well-ordered society, but also that once we establish the practice, principles of justice require that the practice be applied uniformly and consistently, and not arbitrarily. This demand for uniformity would require even particular punishments that do nothing to promote the purpose of the practice as a whole. When Kant writes in the "blood guilt" passage that the murderer must be punished else justice is violated, we need not take him to deny that the reason we have the practice of legal punishment is to preserve a well-ordered society.

At this point we might still be puzzled by Kant's views, for the "blood guilt" passage is difficult to reconcile with three other examples, the points of which seem to be that for Kant legal punishment must deter: the lifeboat example, a mother's murder of her illegitimate infant, and the murdering of a fellow soldier in a duel. In the blood guilt passage Kant claims that desert is a necessary and sufficient condition for punishment and requires punishment. Kant chose this example precisely because it presents a case where we must punish even though there is no obvious basis in utility for doing so. How could Kant claim that the one person on the lifeboat, who kills the other, need not be punished, because doing so would not provide any deterrent benefit, and that the mother and the soldier should not be punished by the state, while also holding that a murderer who could pose no possible future threat to his society must nevertheless be punished? The blood guilt passage suggests Kant holds to the positive retributive principle, while the three other examples seem incompatible with that principle; they seem to be evidence that Kant does not always think a criminal should be punished. Are Kant's views on punishment contradictory, so much so that we should want to wonder even if he has a coherent 'theory' of punishment?⁴⁰

I think we can reconcile Kant's examples. With his lifeboat example we can understand Kant to mean not that we should not punish a wrong where doing so would be ineffective, but rather, that the killing should not be regarded as a crime, or legal wrong. Kant can with consistency hold both that we should not call a crime any action which could not be deterred by the threat of legal punishment, and that we must punish crimes even where doing so in a particular case would not preserve a well-ordered society. The same argument can be made to

40. A position suggested by Jeffrie Murphy, in "Does Kant Have a Theory of Punishment?", p. 509: "I am not even sure that Kant develops anything that deserves to be called a theory of punishment at all. I genuinely wonder if he has done much more than leave us with a random (and not entirely consistent) set of remarks."

reconcile Kant's commitment to the positive retributive principle with the passages in which he says the mother who commits infanticide and the soldier [76] who kills another soldier in a duel should not be punished by the state (MM 144-45, 336-7). According to my reading, Kant would say their actions should not be regarded as crimes. This solution to the problem of reconciling the deterrence passages with the blood guilt passage differs distinctly from Byrd's effort to reconcile the one deterrence passage she discusses (regarding the lifeboat) with Kant's commitment to the positive retributive principle (which Byrd briefly acknowledges, see note 34). Byrd says Kant's reason for not punishing the one man who pushes the other off the plank is that "society is necessarily ineffective in its duty to guarantee security and, therefore, cannot execute the threat employed."⁴¹ Byrd thus reads Kant as adhering to a principle that when an act of punishment would not be effective it should not be carried out. But this principle contradicts both the positive retributive principle and the strong negative retributive principle and Byrd does not resolve this contradiction. The contradiction disappears once we read the lifeboat example as showing that acts which could not be deterred should not be regarded as crimes. "Crime," here, refers to legally punishable offenses. Kant might still say these actions were morally wrong.

There remain two passages that we have discussed that seem difficult to reconcile. In one passage Kant argues that the state may diminish the sentences of accomplices to a murder if necessary to preserve the state (MM 143, 335); yet in another passage, Kant argues that we cannot mitigate the punishment of a person who voluntarily agrees to undertake useful experiments.(MM 141, 332) It seems that the former passage allows an exception to the strong negative retributive principle (that requires that if we punish we punish in the exact measure that justice requires, no more and no less) that the latter passage rules out. However, Kant makes emphatic that mitigating the deserved sentence of accomplices to a murder when their numbers are so large that executing them all would dissolve the state would be justified only by necessity. This situation could arise only in the most extraordinary of circumstances (as when the entire people plotted against a tyrannical king). A charitable reading of the passage is that it presents, not a contradiction, but a justified exception to the strong negative retributive principle.⁴² We usually do not think of Kant as allowing for such exceptions; but the [77] primary point of this article has been to show that Kant's theory of legal punishment is not deontic and unbending as is

41. Byrd, "Kant's Theory of Punishment," pp. 190-91.

42. Scheid takes this view: "Kant is not saying that outside considerations are relevant in determining what is justly due criminals in such cases. Rather, he is simply recognizing that to apply punishments strictly in accordance with retributivist principles, in this case, would undermine the very purpose of the legal system itself. Here, then, is a case in which Kant allows the requirements of the institution of punishment (embodying retributivist principles) to be overridden by external, consequentialist considerations."(Scheid, "Kant's Retributivism," p. 280) These "external consequentialist considerations" are extremely rare, limited, says Kant, to a casus necessitatis.

Kant's moral philosophy.

V.

Kant's position is that the reason we have the practice of legal punishment is to deter conduct that would threaten a society of ordered liberty; that when we punish we may punish only the guilty (negative retributive principle), and only in the exact amount required by justice, no more nor less (strong negative retributive principle); and that we must punish the guilty (positive retributive principle). I have argued that three striking passages in Kant that allow for withholding of legal punishment of actions that would not be deterred by the threat of punishment can be reconciled with Kant's commitment to the positive retributive principle once we realize that the examples argue not for the withholding of punishment of the guilty, in violation of the positive retributive principle, but rather, for the view that non-deterrable actions should not be regarded as crimes. I also have argued that the passage where Kant says that the punishment required by justice can be mitigated in extreme cases of necessity where the very existence of civil society is at stake does not necessarily contradict Kant's commitment to the strong negative retributive principle. Kant is just acknowledging that we will never be able to do justice if we cannot sustain civil society and the very practice of legal punishment that lets us do justice.

But there remains a deep tension in Kant's position, a tension inadequately explored by commentators who have attempted to reconcile Kant's deterrence argument for the practice with his commitment to retribution in carrying out particular punishments. On Kant's view, the reason the state legally punishes is to secure a peaceful society of ordered liberty, both by deterring would-be violators of rights, and by instilling in man the habit of doing good deeds. Of course the state could refrain from punishing the errant thief or drug user without having to worry much about destroying the state and slipping back into a state of nature. Kant's insistence that we punish every criminal and with the exact punishment justice demands seems motivated less by a concern with preserving society than by a commitment to justice. Punishing every criminal might help to instill good habits but punishing in the exact amount required by justice is not needed for that end, and the just amount of punishment is not necessarily an effective deterrent. Kant holds to retributive principles out of a commitment to the ideals of just deserts and fairness, and because he is unwilling to sacrifice justice to achieve some greater good.

We have examined passages concerning the deterrence function of punishment which show that for Kant only actions that could be deterred should be regarded as legal crimes and subject to legal punishment. As we have seen, there is a disjunction for Kant between law and morality. But if deterrence and not morality is the guiding consideration in determining what is a crime, it is hard to see why justice is at stake when we legally punish, apart from the merely [78] procedural justice of implementing a practice fairly. And we might wonder whether securing procedural justice, by which the criminal offender "can never complain of unfairness" (Byrd, p. 153), is a sufficient reason to support executing a human being. Kant would insist that we punish Smith even if doing so has no deterrent value because it would be unfair not to punish Smith when we punished Jones for committing the same offense. If the crime Smith committed merits death, then, the argument is, we should kill Smith out of fairness--fairness perhaps to Jones, to others like Jones who were executed for the same crime, and to people who were tempted to but refrained from committing that crime. Not only will this seem to many a weak argument for harsh punishment; but it makes no sense of another argument Kant makes: that we must punish to avoid "blood guilt." Whatever this might mean exactly, it suggests some moral necessity to punishment beyond the need fairly to adhere to institutional rules, a moral necessity of a sort that may be inconsistent with Kant's deterrence rationale for the practice. If Kant's reason for punishing Smith is that he deserves to die, that suggests a different reason for having the practice of legal punishment than to preserve a society of ordered liberty. It may be that we need not be restricted in our reasons for carrying out an action of a practice to the reason for having the practice: our reason for punishing Smith might be that he is evil, even though our reason for having the practice of punishment is not to mete out justice or inflict pain on evil people. But if we think that there should be a connection between our reasons for having a practice and our reasons for carrying out an action of the practice, then Kant's theory of punishment may strike us as less than coherent.

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The label "retributive" has been sloppily attached to Kant. Kant is wrongly said to give a deontological theory of legal punishment, or to be a paradigmatic "bold retributivist." By exploring precisely in what sense we can speak of Kant as a retributivist I hope at the very least to have promoted a more accurate understanding of his theory of legal punishment, an understanding that is not obfuscated by a loose label.

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