Freedom and Death

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Introduction

In this paper, I will explore the necessity of the death penalty in Kant's moral and legal philosophy. In my view, although I can only assert it here, Kant's explicit argument for the death penalty in the Metaphysics fails. However, I will claim that the death penalty is a necessary component of Kant's philosophy of right because he thinks that if a civil society lacked the death penalty, it would be unable to recognize itself as a just civil society, and would be incapable of actualizing a just system of laws.

I will begin not with the question of juridical lawgiving, but with an analysis of moral lawgiving. I argue that Kant's justification of the death penalty is grounded in his concept of the person, or more specifically, in the relation to death that is correlative to becoming a person. Once I outline this 'moral argument', I will be able to make my 'juridical argument' for the necessity of the death penalty in Kant's philosophy of law.

What Does the Moral Law Have to Do with Death?

Kant's moral writings are, to a large degree, concerned with analyzing what it means to become autonomous, or to become a person. Kant's account of respect concretely describes what it means when one becomes oneself as a person, for it is an account of the actuality [Wirklichkeit], as opposed to the possibility, of moral lawgiving (KpV, AA 05: 47). That which is actual must be given in some way, and Kant's account de-

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1 I do not share Kant's view of the necessity of the death penalty.  
scribes one modality of the givenness of the self-giving of the moral law, the moral law given as a feeling [Gefühl].

The feeling of respect, as articulated in the Critique of Practical Reason, has a twofold structure. The negative effect of respect is the feeling of the humiliation of self-satisfaction's elevation of happiness to the status of principle (KpV, AA 05: 74). A humiliated being feels that, relative to the moral law, his or her happiness has no worth; this feeling in turn leads to a recognition of the absolute superiority of the value of the moral law (KpV, AA 05: 75). But since this relativity is an internal relativity, this feeling for the moral law is a feeling of oneself. Humiliation is a feeling of the "activity" of one's own pure practical reason striking down self-conceit (KpV, AA 05: 79). It is a recognition that one is not determined solely by self-conceit, a recognition of practical reason as belonging to one's essence.

This recognition gives rise to the positive effect of respect, the feeling of self-approbation. In self-approbation, one feels elevated above oneself, because one glimpses one's "holiness", or one's subjection to the moral law (KpV, AA 05: 131–132), and one feels elevated to one's proper self because one recognizes that one is subject to the law that one gives oneself as a being endowed with pure practical reason. Subjection to law is felt as self-subjection.

The negative aspect of respect corresponds to the giving up of happiness. For Kant, happiness characterizes mere humanity, in which one compares and calculates various pleasures and acts on the basis of the comparison. For a being subject to happiness, "everything has its price". But in becoming a person, one recognizes that one's dignity is a value that has no price, a value that is unsubstitutable and "beyond all comparison" (GMS, AA 04: 399, 434). A person proper finds within him or herself an absolute value in comparison with which all values attributed to happiness "count as nothing" (GMS, AA 04: 449–450). I want to emphasize that the transition from humanity to personality entails not only giving up happiness, but giving up life. Kant says that a person "should be capable of possessing and adopting as his goal something [...] which he values more highly still than his life, and of sacrificing all

3 Respect is a non-empirical, or pure, feeling (KpV, AA 05: 73). The Critique of Practical Reason also seems to point to an intellectual givenness of the moral law, but I will have to leave a discussion of this matter to another paper.


Freedom a self-interest to it [...]" (RGV, AA 06 oneself just is this sacrifice of the value of dignity.

So, we become persons in recognition as having a value higher than the va value of life. This suggests that we bear relationship with death. And her discussion bears on the death penalty. I Critique of Practical Reason in which case of a man whose prince has asked an honorable man. In the example, the potential liar unless he lies. This

[...] would consider it possible to owe may be. He would perhaps not vent not, but he must admit without hesit (KpV, AA 05: 30, emphases mine)

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happiness is to give value to one's pow ing happiness, one renounces the atte
of the self-giving of the moral law, self-interest to it [...]" (RGV, AA 06: 33 n, emphasis mine). To respect oneself just is this sacrifice of the value of life to a higher value, the value of dignity.

So, we become persons in recognizing ourselves as having personality, as having a value higher than the value of life, as having sacrificed the value of life. This suggests that we become ourselves by achieving a certain relationship with death. And here we will begin to see how this discussion bears on the death penalty. Recall the famous passage from the Critique of Practical Reason in which Kant considers the hypothetical case of a man whose prince has asked him to give false testimony against an honorable man. In the example, the prince has threatened to execute the potential liar unless he lies. This man, Kant says,

[...] would consider it possible to overcome his love of life, however great it may be. He would perhaps not venture to assert whether he would do it or not, but he must admit without hesitation that it would be possible for him.

(KpV, AA 05: 30, emphasise mine)

On the basis of this passage, I would suggest that to become oneself as a person is to adopt a 'free relation' to one's death. What I call a 'free relation to death' has two aspects, which roughly correspond to the negative and positive aspects of respect. In the negative sense, one tears oneself away from an attachment to life; one resists letting the instinct for self-preservation determine the will (e.g., I run into a burning house to save my baby brother). This is a freedom from an attachment to biological life. This freedom is the capacity to face one's death in this or that determinate situation.

More radically, one gives up happiness altogether. To clarify, Kant says that happiness is "a rational being's consciousness of the agreeableness of life uninterrupted accompanying his whole existence" (KpV, AA 05: 22, emphasis mine). The pursuit of happiness appropriates, or 'humanizes', biological life, which is often nasty, brutish, and short. The pursuit of happiness affirms human life – defined as the capacity to represent things as desirable, and act upon those desires⁵ – as something a human being would want to have. Now, to give value to the pursuit of happiness is to give value to one's power to please oneself. So in renouncing happiness, one renounces the attempt to appropriate life for oneself.

⁵ MS, AA 06: 211. English translations are from The Metaphysics of Morals, ed. and trans. by Mary J. Gregor (Cambridge: Cambridge University Press, 1997).
This renunciation is not occasional, as in the first tearing-away, but total: it gives up one’s power to take pleasure in existence as such.

Positively speaking, one achieves autonomy in this relation to death. Mortal beings often fear death, and our propensity to avoid death displays an attachment to life and happiness that roots us in a heteronomous existence. To overcome this fear is extremely difficult, and overcoming it is perhaps the greatest test of our will. When one becomes oneself as a person, when one gives up life, death is no longer a prospect that fills one with dread. A person ‘lives’ by accepting death, by seeing death as a test of the will, as the occasion for acting autonomously. In Kant’s words, a person proper lives “only from duty, not because he has the least taste for living” (KpV, AA 05: 88).

A final comment: insofar as holding on to life determines the will heteronomously, and is thus self-destructive, willing on the basis of the fear of death could be seen as a ‘spiritual death’. This death is not biological, the destruction of the body, but the gradual elimination of the capacity to be autonomous, the progressive annihilation of one’s unconditional value. Since the free relation to death could also be described as a ‘spiritual death’, Kant’s analysis of the distinction between humanity and personality, between heteronomy and autonomy, can be restated as a distinction between two spiritual deaths. When one becomes oneself as a person, one chooses between modes of dying; one gives up an improper relation to death and embraces a proper one. In the next part of this paper, I will argue that this distinction grounds the necessity of the death penalty in Kant’s philosophy of law.

But before continuing, I want to make an important clarification. To adopt a free relation to death is not to ‘choose death’. There is a proper and an improper acceptance of death. Suicidal individuals accept death, but on improper grounds. In Kant’s view, they sacrifice themselves because their life has become unpleasant to the point of being unbearable.

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6 This fact is perhaps what leads Kant to speak of the “single and unalterable decision” in which a human being recognizes his or her personality in the religious language of “rebirth” and “new creation”. RGV, AA 06: 47-48. English translations are from Religion Within the Bounds of Mere Reason, ed. and trans. by Allen W. Wood, The Cambridge Edition of the Works of Immanuel Kant: Religion and Rational Theology (Cambridge: Cambridge University Press, 1996).

7Since one gains unconditional worth in making death one’s own, one has an incentive [Bewegungsgrund] to achieve this relation. The same logic is at work in Kant’s explicit discussion of respect, where the unconditional value of autonomy functions as an incentive to become ourselves.

8 “We know our own freedom (from which as duties proceed)”, Kant writes, “only the concept of a right can a 239). Also: "whether what [positive law
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selves. 

So the suicidal individual measures the value of existence by the standard 

of happiness. Somewhat paradoxically, the suicidal individual embraces 

death because he or she is caught up in happiness. Conceptually speaking, 

the suicidal person's acceptance of death is a species of the spiritual death 

d death of practical contradiction. In a free relation to death, one can give up life 

if duty demands (like the man confronted with the gallows), but also 

 knows that duty otherwise demands perseverance in existence, even 

when life is unbearable (KpV, AA 05: 88). 

To put it in the language of the will, suicide is a willkurlich physical 

death. What differentiates the free relation to death from suicide is that 

self-sacrifice is manifestly not a means to an end set by happiness, but 

demanded unconditionally. And since giving up life is to give up pleasure, it 

can only be legislated by Wille. (I would agree, however, that it is impos- 

ible to know whether a particular self-sacrifice is an act of suicide or an 

act of honor. Nor would the free relation to death refer to an experience 

whereby one would be certain of one's personality – what the man asserts 

in the passage above is not that he would give up his life, but that it would 

be possible for him.) 

The Necessity of the Death Penalty 

To make my 'juridical argument', I first want to emphasize that moral 

lawgiving has a practical priority over juridical lawgiving, i.e., moral law- 
giving governs juridical lawgiving. This practical priority first refers to the 

fact that moral principles govern positive legal systems. A system of law 

must, in setting duties and punishments, recognize the dignity of citizens; 

it must respect their "original" right of "innate freedom" (MS, AA 06: 

237), which citizens have merely by virtue of their capacity for personality. 

A legal system that did not respect citizens' autonomy, even in punish- 

ishing them, would treat them as means to an end, thereby overstepping 

the bounds of right. 

Second, if human beings did not have the capacity for personality, 

they would be unable to cognize universal lawfulness (in both the 

moral and political sense). Such beings would be incapable of organizing 

8 "We know our own freedom (from which all moral laws, and so all rights as well 
as duties proceed)", Kant writes, "only through the moral imperatives [...] from 

which [...] the concept of a right can afterwards be explicated" (MS, AA 06: 

239). Also: "whether what [positive law] prescribed is also right, and what the
themselves into a civil society – a society subject to a legal system in accordance with the universal principle of right – and would forever remain in a state of nature (MS, AA 06: 306). Here the practical priority is the fact that reason originally combats the violence of the state of nature by issuing a command that holds for all human beings who come into commerce: “you ought to enter into civil society” (MS, AA 06: 306, 372). As provisionally rational, even societies in a state of nature have the capacity to follow this unconditional, a priori command.

Provisional civil societies become actual civil societies, they become “externally free”, when they heed this command. Then a society heteronomously ruled by happiness becomes a society subject to juridical law, a society in accordance with the universal principle of right. The chaos of subjectively determined agents turns into “the concurring and united will of all, insofar as each decides the same thing for all and all for each” (MS, AA 06: 313–314). Here, external freedom gains practical objectivity.

I want to emphasize that this transition is also correlative to a moment of recognition: civil society becomes itself, Kant says, in “subjecting itself to a public lawful external coercion, and so entering into a condition in which what is to be recognized as belonging to it is determined by law” (MS, AA 06: 312, emphasis omitted). In the actualization of external lawgiving, in the giving of juridical law (the instituting of positive law), there is a shared, public recognition of the essence of civil society (MS, AA 06: 306, 311, 312).

In the sphere of civil society, this recognition entails a recognition of the propensity of beings in a state of nature to unlawful coercion. In recognizing this violence, civil society recognizes the proper value of juridical law. It recognizes that “if justice goes, there is no longer any value in human beings’ living on the earth […] [and that] justice ceases to be justice if it can be bought for any price whatsoever” (MS, AA 06: 332). Civil society sees that the idea that law has a price – the idea that laws should be prescribed according to the measure of happiness they provide – belongs to the realm of humanity rather than personality. In the proper giving of external law, what is “exalted above all price”, what has an “unconditional and incomparable worth” is rightful condition of civil society.

In other words, there is a certain becoming. Both entail a lawgiving, there is a recognition of evil or violent radical) followed by submission to the organized as having unconditional worth here. Insofar as civil society reco from human beings but from some pure practical reason (MS, AA 06: 3 have called the practical priority of int giving is grounded on internal lawgiv or autonomy, gains public recognition.

This recognition is a reconciliatio would hinder their freedom. Civil soc reflection of its own rationality; citizens of the law. Absent this reconciliation, citizens would hate positive law’s coe but only with bitterness in their heart “the letter of the law (legality) would re of it in our dispositions (morality) AA 05: 152, emphasis mine). (Of cou such demands. In a strict sense, there hate the law. But this is not a complet ysis of this recognition and reconcilia argument for the importance of the e will be divided into two parts, one de

9 These phrases come from the Groundwork (GMS, AA 04: 434, 436).
10 In the Metaphysics, Kant says that the state A state is composed of three authorities: executive authority carries out the law whom or to what situation the law app authorities correspond to the faculties of The reverse relation also holds. Both th nical Reason are shot through with desc of legal metaphors. For more on this po of Moral Sensibility: Respect for the Motion”, Kant-Studien 80.3 (1989), p. 296
dioned and incomparable worth" is, of course, the law of freedom, the rightful condition of civil society.

In other words, there is a certain parallelism between moral and civil becoming. Both entail a lawgiving. In both moral and civil lawgiving, there is a recognition of evil or violence on the basis of law (moral or juridical) followed by submission to the law (moral or juridical) that is recognized as having unconditional worth. But there is more than a parallelism here. Insofar as civil society recognizes that juridical law arises "not from human beings but from some highest, flawless lawgiver", from pure practical reason (MS, AA 06: 319), civil society recognizes what I have called the practical priority of internal law, the fact that external lawgiving is grounded on internal lawgiving. In this way, internal lawgiving, or autonomy, gains public recognition in the form of external law.

This recognition is a reconciliation of the citizens with the law that would hinder their freedom. Civil society recognizes external law as a reflection of its own rationality; citizens recognize themselves as co-legislators of the law. Absent this reconciliation of internal and external law, citizens would hate positive law's coercion. They might follow the law, but only with bitterness in their hearts. In such a situation, Kant writes, "the letter of the law (legality) would be found in our actions, but the spirit of it in our dispositions (morality) would not be found at all" (KpV, AA 05: 152, emphasis mine). (Of course, this is all that juridical law as such demands. In a strict sense, there can be civil society when citizens hate the law. But this is not a completely rational civil society.) My analysis of this recognition and reconciliation — which constitutes my main argument for the importance of the death penalty in Kant's thinking — will be divided into two parts, one dealing with citizens as individual be-

9 These phrases come from the Groundwork, but they are applicable to external law (GMS, AA 04: 434, 436).

10 In the Metaphysics, Kant says that the state is a "moral person" (MS, AA 06: 333). A state is composed of three authorities: the legislative authority sets the law, the executive authority carries out the law, and the judicial authority decides to whom or to what situation the law applies (MS, AA 06: 313). These three authorities correspond to the faculties of Wille, Willkür, and Urteil, respectively. The reverse relation also holds. Both the Groundwork and the Critique of Practical Reason are shot through with descriptions of moral phenomena in terms of legal metaphors. For more on this point, see Andrews Reath, "Kant's Theory of Moral Sensibility: Respect for the Moral Law and the Influence of Inclination", Kant-Studien 80.3 (1989), p. 296.
ings, the other dealing with them in their unity as a civil society in a fully rational sense.

First, to become a citizen, a human being must give up his or her life to juridical law, in recognizing that to be a citizen is to be subject to an external law that has the authority to demand such a sacrifice. Indeed, this giving up of life is what it means for a human being in the state of nature to become a citizen. The citizen must give up his or her life, because as an unconditional value, the law must have ultimate sovereignty (MS, AA 06: 319). If the law were beholden to its subjects’ maxims of happiness or self-preservation, if the law did not have sovereignty over life and death, it would have a conditional value.11 (The citizen’s giving up of life differs from the person’s. While citizens must potentially give up their biological lives, and must give up some measure of their happiness, i.e., they cannot do whatever they please, they do not have to give up all thought of happiness. Citizens can act in accordance with maxims of happiness so long as they do not commit a crime.)

So from this perspective, the death penalty is necessary because the citizen’s subjection to external law – the citizens’ recognition of a value higher than life – is necessary, because this subjection is an a priori demand of pure practical reason. This subjection entails juridical law’s ultimate authority over life and death, its authority to take the life of a citizen. But there is a second, more complicated, reason for the necessity of capital punishment. I want to suggest that for Kant, if juridical law precluded the death penalty in principle, it would violate its duty to respect the dignity of the citizen. To explain, I must turn to the public recognition achieved in juridical lawgiving. We must examine civil society in its most rational form.

With respect to the citizens in their unity, civil society becomes itself in a public recognition that each individual citizen has given his or her life to external law. That is, citizen A gives her life to the law in the way mentioned above. Citizens B, C, and D have also given their lives to the law in the way mentioned above. Since external law is the unity of every citizen’s legislative reason, citizens B, C, and D recognize that citizen A has given up her life to the individual citizen becomes a part and recognizes it as such. In reality the public respects the citizen as an ideally encompasses every citizen as a unity of those who have given who recognize a value higher than this point about death to send its citizens to their possible it give this right (MS, AA 06: draw up a penal law against myself (homo noumenon), legislating with someone capable of crime and so a law, together with all others in an individual citizens achieve a proper juridical law, the public must, in non, give this death back, the public own death. If, as Kant says, crime i citizen, in his or her rational aspect only at the cost of his or her life.

With this talk of debt, one might be back into my interpretation alty. What I am trying to argue, however, the concept of right to say that the repay certain debts. It is not constrained must give his or her life to the giving to take place. In other words

11 While the law must respect human beings as persons – and this is the most common argument of those who argue against the death penalty on Kantian grounds – this does not mean that it must respect absolutely a ‘right to life’. Nor would respecting human dignity preclude the death penalty, insofar as one’s dignity as a person is the fact that one can give up one’s life in accordance with the moral law.

12 Many of these claims sound ludicrous discussing historical events, but the Metaphysics is not concerned with the idea of a civil society, the
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citizen A has given up her life to the law.\footnote{The ‘private’ self-sacrifice of
the individual citizen becomes a public offering to a public that accepts
and recognizes it as such. In recognizing his or her giving up of life,
the public respects the citizen as citizen. And insofar as this recognition
ideally encompasses every citizen, the public comes to recognize itself
as a unity of those who have given up their lives to the law, of those
who recognize a value higher than life.}

In other words, the public cannot forego the death penalty (at least in
principle) because they know that part of what it is to respect a citizen as
a rational being is to accept his or her free relation to death. This will
sound outrageous unless we remember that the relation between the pun-
ishing authority and the citizen is not heteronomous. The citizen freely
wills the place of punishment within positive law, giving his or her life
away to the law that just is his or her own legislative reason. (Kant explic-
itly makes this point about death when he argues that a state has the right
to send its citizens to their possible doom in times of war because its ci-
zizens give it this right (MS, AA 06: 345–346).) Now Kant writes, “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 crime and so as […] homo phenomenon, to the penal
law, together with all others in a civil union” (MS, AA 06: 335). While
individual citizens achieve a proper relation to death in giving their life to
juridical law, the public must, in respecting the citizen as a homo nou-
menon, give this death back, the public must let the citizen ‘have’ his or her
own death. If, as Kant says, crime is a “debt”, there will be cases when the
citizen, in his or her rational aspect, knows his or her debt can be paid off
only at the cost of his or her life.

(With this talk of debt, one might object that I am smuggling the jus-
talioris back into my interpretation of Kant’s argument for the death pen-
alty. What I am trying to argue, however, is that it is not contradictory to
the concept of right to say that the citizen must give up his or her life to
repay certain debts. It is not contradictory, I would argue, because a ci-
zien must give his or her life to the law, and the public must allow for this
giving to take place. In other words, the particular logic of death as a pay-

\footnote{Many of these claims sound ludicrous unless one keeps in mind that Kant is not
discussing historical events, but the relation of a priori concepts of morality. The
Metaphysics is not concerned with the empirical formation of civil society, but
with the idea of a civil society, the “form of a state as such” (MS, AA 06: 313).}
ing-off of a debt, the *ius talionis*, is justified by the more fundamental logic of death I have been describing.)

If public justice would *refuse* criminals the possibility of paying off their debts, it would disrespect them, severing them from their rationality, and locking them in their mere humanity. To respect the criminal, public justice must give him or her the possibility of a proper death in the sphere of civil society, a death that accords with external law.\(^{13}\) This possibility is the death penalty, which, I would argue, is made salient by the same spirit that distinguishes between proper and improper modes of death, between personality and humanity.

To put what I think is Kant’s claim in a more general way, if a legal system lacked the death penalty, three disastrous consequences (at least in his view) would follow. First, external law would be conditioned by an undue attention to its subjects’ happiness and attachment to life. Such a system of law would desecrate the holiness of legislation, practically contradicting itself and destroying itself as law.\(^{14}\) Second, juridical law would be disrespectful of the personality of its subjects, which would also be a practical contradiction. The third follows from the first two: if citizens had to recognize themselves in an external law lacking the death penalty, they would find themselves subject to a law bereft of spirit. Since civil society becomes civil society in its most rational form by recognizing itself as subject to law, a society lacking capital punishment would remain mired in an attenuated form of social existence. In short, since pure practical reason demands that a society enter into civil society and that human beings become persons, pure practical reason also demands the death penalty.

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13 One might even argue that without the death penalty, public justice would leave the wrongdoer with only one option — suicide — which, if carried out, would compound the original wrongdoing.

14 If a state undoes the sovereignty of its laws, Kant says, “it is as if the state commits suicide” (MS, AA 06: 320 n).