

## 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.<sup>1</sup>

### 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).<sup>2</sup> That which is actual must be given in some way, and Kant's account de-

1 I do not share Kant's view of the necessity of the death penalty.

2 English translations are from *Critique of Practical Reason*, ed. and trans. by Mary Gregor, *The Cambridge Edition of the Works of Immanuel Kant: Practical Philosophy* (Cambridge: Cambridge University Press, 1996).

scribes one modality of the givenness of the self-giving of the moral law, the moral law given as a feeling [*Gefühl*].<sup>3</sup>

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.<sup>4</sup>

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.

4 GMS, AA 04: 402 n. English translations are from *Groundwork of the Metaphysics of Morals*, trans. by H. J. Paton (San Francisco: Harper and Row, 1964).

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 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 over may be. He would perhaps not venture not, but he must admit without hesitation (KpV, AA 05: 30, emphases mine)

On the basis of this passage, I would person is to adopt a 'free relation' to cation to death' has two aspects, which and positive aspects of respect. In that away from an attachment to life; one preservation determine the will (e.g. save my baby brother). This is a freedom of life. This freedom is the capacity determinate situation.

More radically, one gives up happiness that happiness is "a rational being of life *uninterruptedly* accompanying I 22, emphasis mine). The pursuit of happiness affirms human life – death things as desirable, and act upon human being would want to have. No happiness is to give value to one's pursuing happiness, one renounces the atten

5 MS, AA 06: 211. English translations : and trans. by Mary J. Gregor (Cambrid

of the self-giving of the moral law, *ihl*).<sup>3</sup>

ed in the *Critique of Practical Reason* the effect of respect is the feeling of elevation of happiness to the status of a determined being feels that, relative to the value of happiness; this feeling in turn leads to a relative feeling of the value of the moral law. This relative feeling is an internal relativity, this feeling is a feeling of oneself. Humiliation is a feeling of being struck down by a practical reason striking down self-conceit that one is not determined solely by practical reason as belonging to one's

positive effect of respect, the feeling of elevation, one feels elevated *above* oneself, or one's subjection to the moral law, one feels elevated *to* one's *proper* self-conceit to the law that one gives oneself to practical reason. Subjection to law is felt as

responds to the giving up of happiness for mere humanity, in which one *lives* and *acts* on the basis of the pursuit of happiness, "everything has its value in comparison with which all values are measured" (GMS, AA 04: 449–450). I respond from humanity to personality by giving up *life*. Kant says that a person who adopts as his goal something other than *his life*, and [of] sacrificing all

of it (KpV, AA 05: 73). The *Critique of Practical Reason* is an intellectual givenness of the moral law. I refer to this matter to another paper. The following are from *Groundwork of the Metaphysics of Morals* (San Francisco: Harper and Row, 1964).

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, emphases 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 *uninterruptedly* 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 desires<sup>5</sup> – 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: one 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.<sup>6</sup> In Kant's words, a person proper lives "only from duty, not because he has the least taste for living" (KpV, AA 05: 88).<sup>7</sup>

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.

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).

7 Since 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.

So the suicidal individual measures t of happiness. Somewhat paradoxical death because he or she is caught up the suicidal person's acceptance of de of practical contradiction. In a free r if duty demands (like the man con knows that duty otherwise deman when life is unbearable (KpV, AA 0:

To put it in the language of the death. What differentiates the free r self-sacrifice is manifestly *not* a mean: mandated unconditionally. And since g can only be legislated by *Wille*. (I wo sible to *know* whether a particular sel act of honor. Nor would the free rela whereby one would be certain of one' in the passage above is not that he *wor* be possible for him.)

### The Necessity of tl

To make my 'juridical argument', I f lawgiving has a practical priority over, giving governs juridical lawgiving. Thi fact that moral principles govern posi must, in setting duties and punishment it must respect their "original" right ( 237), which citizens have merely by vi ity. A legal system that did not respect ing them, would treat them as mean the bounds of right.

Second, if human beings did not they would be unable to cognize u moral and political sense).<sup>8</sup> Such beings

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

in the first tearing-away, but total: sure in existence as such.

Autonomy in this relation to death. Our propensity to avoid death distress that roots us in a heteronomous, extremely difficult, and overcoming it. When one becomes oneself as a person, it is no longer a prospect that fills one's mind. *Accepting death*, by seeing death as a duty, acting autonomously.<sup>6</sup> In Kant's view, it is not duty, not because he has the right to die (MS, AA 06: 238).<sup>7</sup>

When one gives up on life determines the will to die. It is not active, willing on the basis of the 'duty to die'. This death is not biological. The gradual elimination of the cause of death, the gradual annihilation of one's unconditional death could also be described as a distinction between humanity and autonomy, can be restated as a distinction between humanity and autonomy. When one becomes oneself as a person, one gives up an improper duty. In the next part of this section, I will argue that the necessity of the death penalty is grounded in the law.

To make an important clarification. To 'choose death'. There is a proper view of death. Suicidal individuals accept death, in my view, they sacrifice themselves because of the point of being unbearable.

When one speaks of the "single and unalterable death of his or her personality in the religious sense" (MS, AA 06: 47–48). English translation: *Mere Reason*, ed. and trans. by Allen W. Wood, *Works of Immanuel Kant: Religion and Philosophy* (University Press, 1996).

When one makes death one's own, one has an unconditional relation. The same logic is at work in the unconditional value of autonomy and the law.

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 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 *willkürlich* 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 impossible 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 lawgiving 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 punishing 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).<sup>8</sup> 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 imperative*, [...] 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 “subject[ing] 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 “uncon-

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universal criterion is by which one could recognize right as well as wrong [...], this would remain hidden from him unless he leaves those empirical principles for a while and seeks the sources of such judgments in reason alone, so as to establish the basis for any possible giving of positive laws” (MS, AA 06: 229–230).

ditioned and incomparable worth” is a rightful condition of civil society.<sup>9</sup>

In other words, there is a certain becoming.<sup>10</sup> Both entail a lawgiving, there is a recognition of evil or violence (radical) followed by submission to the recognized as having unconditional worth here. Insofar as civil society recognizes freedom from human beings but from some pure practical reason (MS, AA 06: 313), we have called the practical priority of internal lawgiving is grounded on internal lawgiving or autonomy, gains public recognition.

This recognition is a *reconciliatio* that would hinder their freedom. Civil society reflects on its own rationality; citizens reflect on the law. Absent this reconciliation, citizens would hate positive law’s coercion but only with bitterness in their hearts. “the letter of the law (legality) would be contrary to it in our dispositions (morality)” (MS, AA 05: 152, emphasis mine). (Of course, such demands. In a strict sense, there is no hate the law. But this is not a complete analysis of this recognition and reconciliation argument for the importance of the law. The law 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 is composed of three authorities: executive authority carries out the law, legislative authority determines the law, and judicial authority applies the law to whom or to what situation the law applies. The reverse relation also holds. Both *practical Reason* are shot through with descent of legal metaphors. For more on this point of Moral Sensibility: Respect for the Law”, *Kant-Studien* 80.3 (1989), p. 296

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rightful condition of civil society.<sup>9</sup>

In other words, there is a certain parallelism between moral and civil  
becoming.<sup>10</sup> 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 ju-  
ridical) followed by submission to the law (moral or juridical) that is rec-  
ognized as having unconditional worth. But there is more than a parallel-  
ism 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 law-  
giving 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 re-  
flection of its own rationality; citizens recognize themselves as co-legisla-  
tors 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 *spi-  
rit* 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 anal-  
ysis 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 au-  
thorities correspond to the faculties of *Wille*, *Willkür*, and *Urteil*, respectively.  
The reverse relation also holds. Both the *Groundwork* and the *Critique of Prac-  
tical 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 Inclina-  
tion”, *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.<sup>11</sup> (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 public law and recognizes it as such. In the public respects the citizen as a unity of those who have given up their life to a value higher than their own. The public law ideally encompasses every citizen as a unity of those who have given up their life to a value higher than their own who recognize a value higher than their own.

In other words, the public can recognize a principle because they know that a rational being is to accept his or her share of punishment as a sound outrageous unless we remember that the law is the authority and the citizen is the one who wills the place of punishment with away to the law that just is his or her life. It makes this point about death very clearly to send its citizens to their possible punishment. Citizens give it this right (MS, AA 06: 319). The law draws up a penal law against myself (homo noumenon), legislating with someone capable of crime and so on. The law, together with all others in a civil society, individual citizens achieve a proper public law, the public must, in principle, give this death back, the public must give its own death. If, as Kant says, crime is a public law, in his or her rational aspect only at the cost of his or her life.

(With this talk of debt, one might object that I am talking back into my interpretation of the concept of right to say that the law must repay certain debts. It is not contrary to the concept of right to say that the citizen must give his or her life to the law in the way mentioned above. 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 when discussing historical events, but the *Metaphysics* is not concerned with the facts of history but with the *idea* of a civil society, the "idea of a civil society, the "



their unity as a civil society in a fully

n being must give up his or her life to be a citizen is to be subject to an external demand such a sacrifice. Indeed, as for a human being in the state of nature, the citizen must give up his or her life, for the law must have ultimate sovereignty and holden to its subjects' maxims of law did not have sovereignty over rational value.<sup>11</sup> (The citizen's giving up while citizens must potentially give up some measure of their happiness please, they do not have to give up and can act in accordance with maxims to not commit a crime.)

The death penalty is necessary because the citizen's recognition of a value in this subjection is an a priori dejection entails juridical law's ultimate authority to take the life of a citizen. The complicated, reason for the necessity of that for Kant, if juridical law pre-empted it would violate its duty to respect the citizen. I must turn to the public recognition and must examine civil society in its

For unity, civil society becomes itself. The individual citizen has given his or her life to the law in the same way that B and D have also given their lives to the law. Since external law is the unity of the citizens B, C, and D recognize that

citizen A has given up her life to the law.<sup>12</sup> The 'private' self-sacrifice of the individual citizen becomes a public offering to a public that accepts it 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 punishing 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 explicitly 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 citizens 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 noumenon*, 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 *ius talionis* back into my interpretation of Kant's argument for the death penalty. 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 citizen 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-

as persons – and this is the most consistent with the death penalty on Kantian grounds is not absolutely a 'right to life'. Nor would the death penalty, insofar as one's dignity as a person is not to be treated merely as a means, be in accordance with the moral law.

12 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.<sup>13</sup> 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.<sup>14</sup> 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.

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).

Sekt

Kants