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# Kant and Capital Punishment Today

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## 1.

Immanuel Kant was emphatically in favor of the death penalty for the crime of murder, as anyone who knows anything about Kant is likely to know. In support of his view, he made the following statement, sometimes quoted as an example of extremism in support of capital punishment:

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 the 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.<sup>1</sup>

This position on Kant's part would hardly seem surprising, for Kant's views on punishment are usually understood as a paradigm of retributivism, and retributivism has for a long time been thought to be an especially promising source of a rationale in favor of capital punishment.

In Kant's day, capital punishment was used for a variety of crimes throughout Europe and the new world, though Kant expressly argues in favor of it only for the crime of murder. There is also an approving mention of capital punishment for treason, where the crime is described as "attempting to destroy his fatherland – *parricida*," but Kant does not indicate that for any other crime the appropriate punishment would be death.<sup>2</sup> At the beginning of the twenty-first century there has been a certain evolution of views concerning capital punishment. It is now widely rejected, especially by the industrial democracies of the world, and its retention and use is now most often found among authoritarian states, countries such as China, Iran, Iraq, Nigeria, and Sudan. A notable exception to this general pattern is the United States, which is a powerful industrial democracy, and which retains and continues to use the death penalty; in the United States in 1999, for example, just under one hundred people were ex-

ecuted. It would be interesting to consider why the United States is exceptional in this way, but we will not consider that issue here. In any event, world-wide today, among the countries politically organized most like Kantian republics, there is a near-consensus that the death penalty is best abolished. The countries of western Europe, recently joined by the countries of eastern Europe, South American countries and North American countries such as Canada and Mexico are now all abolitionist. Another exception to this general pattern is Japan, which retains the death penalty, but does not use it often. Further, the United Nations has tried to move against the death penalty, and the Council of Europe has begun to put pressure on other countries it has relations with to cease use of capital punishment, most notably perhaps Turkey.<sup>3</sup>

We will consider alternative ways that Kant's philosophical views on ethics generally and on punishment more particularly could be brought into harmony with the present near consensus of opposition to the death penalty. We will make use of the notion of the contemporary consensus about certain issues, particularly equality of the sexes and the death penalty, found in widespread agreement, though not unanimity. Of course, it is always possible that some consensuses are wrong, or misguided, or mistaken. We should not put too much philosophical weight on the notion of a consensus here. If there is a consensus for the equality of women as citizens, and against the death penalty, this will simply suggest to us that we will want to reconsider Kant's views on such topics. In both instances mentioned, his views lie outside the current consensus. We will consider how to revise Kant's views to bring them into accord with these current consensuses, within a theory that is still, in as significant a sense as possible, Kantian. Since the use of the idea of a consensus is a sort of short-cut, there will not be much direct discussion of arguments for or against the equality of women as citizens, or for or against the advisability of using the death penalty. Yet the discussions of these issues will illuminate certain facts about the structure of Kant's moral and political theories, and about how the basic principles within those theories relate to particular moral applications or topics. If we can still end up with a thoroughly Kantian view on the death penalty, that also will tell us something about the relation of Kantian ethical and legal principles to the death penalty as that issue is discussed today. Opposition to the death penalty in present day circumstances is not at variance with the basic principles of Kantian ethical, political, and legal theory, including his retributivism in the justification of punishment. Indeed, there is a way of revising Kant's views to bring them into harmony with abolition.

## 2.

Let us begin our discussion of Kant's views today on the death penalty by considering another instance where there has been an even more decisive shift

of consensus away from views that Kant presented in the *Rechtslehre*: the equality and citizenship of women. There Kant discusses the rights and attributes of a citizen, and in that connection makes a distinction between active and passive citizens. Though Kant does not much develop this distinction, he appears to think that passive citizens possess fully such rights as rights not to be injured or killed, and to enter into ownership of property, but passive citizens are in particular lacking the right to vote, and otherwise to participate in the activities of government, for instance by serving as government officials or judges.<sup>4</sup> He gives the following as examples of passive citizens: an apprentice, a domestic servant, a minor, all women, and generally "anyone whose preservation in existence (his being fed and protected) depends not on his management of his own business but on arrangements made by another (except the state)."<sup>5</sup> Such individuals are lacking the "civil independence" which is a necessary attribute of any active citizen.<sup>6</sup> He adds as a requirement that anyone in a position of passive citizenship "can work his way up from this passive condition to an active one."<sup>7</sup>

Such a requirement makes sense in the cases of apprentices, servants, and minors, but it hardly makes sense in the case of women. It is almost as if Kant forgot his example of women as passive citizens when only a few lines later he offered this requirement for the classification of passive citizens. This proviso often makes sense, for in the case of apprentices and servants, it means that passive citizenship is a temporary status which they can leave behind by their own efforts, and it means that such individuals do not have the status of serfs or slaves, or any other such unchangeable status by birth, all of which Kant would reject, and thus the proviso is a response to a possible criticism of Kant's proposed status of passive citizens. However, women are women by birth, and it makes no sense to speak of working their way up from the status of being women. In the case of minors, their status as passive citizens is also only temporary, and if they do not work themselves up from it, they do in due course, and given their meeting various other requirements, achieve the status of full, active citizens. However, there is another group that Kant does not mention, that causes almost as much of a problem for this proviso as women. Also among the group of passive citizens would be various sorts of incompetent adults: the severely retarded, the severely mentally ill, the comatose, and the senile. Such individuals may have such a status from birth, or at least without personal fault or responsibility, and may also be unable to work their way up from such a status. However, if we add the qualification that Kant, when he mentions the proviso, has in mind otherwise competent adults, then the only problematic group that remains is women, who are in general otherwise competent adults, and who yet would lack the ability to work their way up from their status as passive citizens.

Today there is a new and for all practical purposes universal consensus on the status of women: they are to be accorded full status as active citizens. The same is

true of adult servants and apprentices: even if they lack some of the attributes of full citizen independency, all are to be accorded the right to vote. It can be mentioned in passing that one thing helpful in providing greater independency for voters is the institution of the secret ballot. Without such a protection a live-in servant, an apprentice, or a dependent spouse might be in an intolerable situation in the wake of having voted in the wrong way, and, anticipating such a development, such individuals would effectively lack the independency that is arguably a necessary attribute of a full citizen when voting. All of us, as finite and faulty human beings, are lacking independency to one degree or another, and some women are less dependent than some men.

Yet the distinction between active and passive citizen is not in itself objectionable, because we would wish to make such a distinction today, and to put certain groups of individuals into the group of passive citizens. Two such groups would include minors and adult incompetents. The development by children of adult independence is a slow, gradual process, and some individuals proceed along this course more quickly than others. There is some arbitrariness and a considerable amount of administrative convenience in recognizing some given age as the minimum age for such matters as driving a car, voting, making contracts, or drinking alcoholic beverages. But very young children, say those five or ten years old, are inevitably immature and dependent. The same is true of adult incompetents: there will always be difficult line drawing problems in determining the competency of adults, but there is a consensus, surely, that there are some individuals who would rightly be classified as legally incompetent.

If all this is correct, then it follows that the problem with Kant's distinction between active and passive citizens is not with the distinction itself being objectionable or invidious in some way, but with its application to the class of women. In this instance, then, it is relatively easy and uncontroversial to know how to revise Kant's views for acceptability today. We can retain and accept the distinction between active and passive citizens, but reject Kant's view that all women are to fall into the class of passive citizens. In doing so, we may revise the scope of classification of passive citizen. In fact, given the background of his republicanism, and his ringing assertion of the freedom, equality, and independence of all citizens, Kant's basic ethical and political position is one of the classic versions of liberal equality of the sexes, as in other respects.<sup>8</sup> His basic philosophical stance is different from that of someone like Aristotle, who argues for natural inequality among people, and for the basic metaphysical incorrectness of equality and democracy.<sup>9</sup>

In this case, it seems clear that Kant's conclusion that all women are to be regarded as passive citizens, though it must be rejected, does not at all lead us to conclude that the revisions in Kant's views that are needed because of this rejection implicate any of the elements of his basic ethical or political theory. The issue of women as passive citizens is one for which the determination of where and how Kant went wrong is relatively clear and uncontroversial, and the res-

olution does not implicate Kant's basic ethical and political views as being in need of revision.

### 3.

In accord with today's near consensus on the death penalty, let us assume that Kant's conclusions about the appropriateness of the death penalty for murder are incorrect, and there needs to be some revision of those views. Here the consensus against the death penalty is surely not as complete as the consensus for the full equality of women as citizens, though that difference will not concern us. But there will be another difficulty that will be greater in relation to the death penalty. There will be different alternative modern revisions of the Kantian theory of punishment that present themselves, and so arriving at a consensus about how to revise the Kantian theory to remove Kant's support of the death penalty will be more complicated. If Kant, following out his own ethical and political principles, has arrived at a false conclusion, where lies the mistake in his argument? Is the argument invalid? Are there false premises, and if so what are they? If there are false premises, how major a revision of Kant's ethical and political principles is required to escape the false conclusion?

One response to Kant's theory of punishment, or to retributive theories of the justification of punishment in general, is to criticize and reject retributivism. Among the many criticisms of retributive theories of the justification of punishment is one which is aimed against the revenge element of such punishment, its perceived excessive harshness, and teleological pointlessness. One of the best developments of this criticism, in specific relation to Kant, is in an essay by Thomas Auxter, "The World of Retribution."<sup>10</sup> Another classic and influential critique and rejection of retribution in relation to capital punishment with similar themes, but without specific reference to Kant, is the minority opinion of Justice Thurgood Marshall in the United States Supreme Court decision *Gregg v. Georgia*.<sup>11</sup> Auxter admits that Kant was a retributivist in his theory of punishment, but urges that this element of Kant's theory could be rejected without major implications for the rest of Kant's theory. He further finds the objectionable basis of Kant's favoring of the death penalty to lie precisely in Kant's retributivism. We will see that Kant's retributivism is compatible with a position opposing the death penalty, and hence that retributivism need not be implicated as we seek to revise the historical Kant's theory into a modern Kantian theory that opposes the death penalty. We might also argue that the process by which the state offers crime victims revenge against wrongdoers, assuming that that is a correct description of what retributivism comes to, is too personal a function to be appropriately served by the public, state institutions of punish-

ment; defenders of retributivism usually try carefully to distinguish between retribution and revenge.<sup>12</sup>

Auxter's revision of Kant's theory is more radical than the one we will consider. Any sort of non-deontological theory of punishment would be greatly opposed to the general spirit of Kantian ethics, which is generally deeply deontological. Kant seems to think that a teleological justification of punishment could mean that anything goes and could result in the so-called justification of radically inappropriate punishments.<sup>13</sup> The main things that recommend the *lex talionis* to Kant are the definiteness of the punishment it recommends, and the transparency of the rationale for that punishment to the person being punished.<sup>14</sup> The lack of such definiteness and transparency within alternative views would be a Kantian objection to any other rationale for punishment.

In the work of Herbert Morris, there is a justification of punishment which takes it that at least some versions of retributivism respect the humanity of the person being punished, whereas other rationales do not. The alternative rationales for punishment that Auxter recommends are either thoroughly teleological, involving isolation of violent offenders, deterrence, rehabilitation, or at least partially so, involving restitution, and thus may raise the possibility of the person being punished being used for social purposes.<sup>15</sup> Meanwhile, teleological justifications of punishment, in certain circumstances, may themselves serve to justify capital punishment. Famously the classic defender of utilitarianism, J.S. Mill, was in favor of capital punishment on just such grounds.

While there is an emerging or partial consensus against capital punishment today, there is no such consensus, even in prospect, in opposition to retributivism. Thus Auxter's proposed revision of Kant has the disadvantage of critiquing Kant's conclusions concerning capital punishment, on which critique there is some consensus, by critiquing retributive rationales for punishment, on which critique there is very little consensus. This seems to be not a promising approach.

#### 4.

Let us put Kant's views on capital punishment in historical perspective. Kant proposes the use of the death penalty to be limited, primarily as a punishment for the crime of murder. But the laws in force for much of Kant's life, the *Constitution Carolina Criminalis* of the German states, imposed the death penalty for a much wider range of crimes, including sin and possession by the devil, and further vested enforcement of the code in aristocrats who were free to use their powers for their own purposes.<sup>16</sup> From this perspective, Kant's views represent a limiting of the use of the death penalty, and therefore a sort of progress, still assuming



the correctness of the contemporary consensus against the death penalty. Analogously, if the practice during wars among Greek city states had been to put to the sword all adult males in a defeated city, it would be a beneficial change merely to enslave all such males, even though we might also wish to insist at some more abstract level that slavery is wrong. In somewhat the same way, Kant's rejection of torture-executions represents a protest against and progress upon the status quo of his day.<sup>17</sup> Thus Kant's views may be progressive in the context of their time, even if contrary to present day consensus.

It is sometimes claimed that carrying out the death penalty has a brutalizing effect on people who become aware of the executions, or, as in earlier days, witness public executions. The idea that capital punishment has a deterrent effect presupposes that would-be murderers identify themselves with the person executed, and say, "I do not want that to happen to me." But it is perhaps equally likely that would-be murderers identify themselves with the executioner, and say, "I know someone who deserves a similar fate," perhaps an ex-lover, or a rival for a lover, or someone viewed as an unfair competitor. When this happens, executions may encourage rather than discourage potential murderers to proceed with their plans, and the deterrence of crime may actually be weakened. It surely goes against Kant's grain to seek to maximize deterrence; maximization is more characteristically a utilitarian idea. We are perhaps talking about something more troubling here, punishments that may have the effect of inciting further crimes, something that arguably would have been of concern to Kant. A Kantian could be urged to be concerned about such harmful possible consequences, without undermining Kant's general retributivist approach to punishment.

Another related point that has to do as much to the symbolism of the death penalty as to actual effects of carrying it out is the concern that governments should not have such extreme power against their citizens, the power exemplified in the relation of annihilation that exists as the executioner terminates the life of the person executed. It might be urged that such relations of one person to another are all too representative of totalitarian states such as those run by Fascists or Leninists, or authoritarian states, or the relation of absolute power or control that some individuals seek to wield over others in private life that too often produce crimes of violence among those intimate with one another. All species of such complete dominance of one individual by another are morally objectionable, and should be rejected and eliminated as far as possible: slavery, concubinage, rape, and the relation that a controlling male seeks with a female are other such instances. But peaceful and democratic, or Kantian-republican, societies should arguably never exemplify or encourage such wrongful relations among people.<sup>18</sup> Such reasons were significant in causing western Europeans to move away from the death penalty after the violence of World War II and its aftermath. Europeans had had all too much experience with tyrannical use of the death penalty to feel equanimity about continuing its use in their so-



cieties. Today the continuing use of the death penalty has often been carried out in such contexts, including Iran, Iraq, the People's Republic of China, South Africa, and Chile.

As another instance of such thinking about actual harmful effects, or symbolic aspects of certain forms of punishment, it may be observed that Kant, though recommending the *lex talionis* in certain instances, also seeks out "symbolically equivalent" punishments in certain cases. Rather than rape the rapist, he proposes the rapist be castrated; rather than give back exactly the same kind of treatment to the person who engages in bestiality, he proposes excluding such a person from human society.<sup>19</sup> Without endorsing these proposed symbolic alternative punitive retaliations, they show that Kant is willing to adjust the punishment when a literally like punishment is either impossible or morally objectionable. In like fashion, if it should be shown that the death penalty ought to be regarded as morally unavailable for use in contemporary society, a contemporary Kantian should be willing to settle for the alternative of a long prison sentence, even though Kant himself argued forcefully that life in prison is much different from death, too different to be an appropriate punishment for murder.<sup>20</sup> Analogously, if a torture-execution or a punishment consisting of raping the rapist is morally unavailable, a Kantian will have to settle for some less precisely matching symbolically equivalent punishment.

In a general statement, Kant says that all murderers should be executed. But then he proceeds to discuss a variety of examples that constitute empirical exceptions to this abstract statement, including cases of young women who kill their babies born out of wedlock, soldiers killing one another in a duel, and a murder where "the number of accomplices to such a deed is so great that the state, in order to have no such criminals in it, could soon find itself without subjects."<sup>21</sup> He also gives other cases where appropriate punishment should be adjusted according to the social status of the wrongdoer, again suggesting that the abstract *lex talionis* in actual application must have a variety of exceptions and appropriate adjustments.

There are a variety of concerns about the death penalty today in the United States that might call for various sorts of empirical adjustments in the abstract law of executions for murder. Concerns about the risk of executing the innocent, due to defective or at least inadequate legal procedures for determining guilt and imposing punishment, and about the discriminatory effects of race and class in imposing the death penalty are often mentioned. When we pay closer attention to the role of the executioner, we find another related problem with capital punishment. There is anecdotal testimony about the harmful effects of executions on those who must carry them out. Such experiences may lead to alcoholism, mental breakdowns, or emotional breakdowns at the time or later. For some individuals the effects may be different though equally undesirable. They may get to like participating in such events. We could argue that the actions of an executioner would violate his duty to himself, analogous to the way that Kant argues that act-

ing cruelly towards animals would violate our duty to ourselves.<sup>22</sup> In both cases, the action undertaken, when considered without reference to the moral selfhood of the agent, is morally indifferent, because in Kant's view we have no direct obligations to animals in the first instance, and because the execution as carried out on the criminal convicted of murder is legally and morally justifiable in the second. Yet such actions are arguably damaging to the moral selfhood of the agent, and are hence a violation of her duty to herself.

## 5.

Let us turn to the preferred revision of the Kantian theory of punishment to bring it into accord with the contemporary consensus against capital punishment. When Kant is arguing in favor of capital punishment as the only appropriate punishment for murder, he adds a qualification that we will need to attend to closely. Death is the punishment that must be carried out on the wrongdoer, "although it must still be freed from any mistreatment that could make the humanity in the person suffering it into something abominable."<sup>23</sup> This statement seems intended to rule out various forms of torture-execution that were still occasionally practiced within Kant's century, practices such as drawing and quartering, and breaking on the wheel. Analogously, and at almost the same time, the Eighth Amendment to the United States Constitution, part of the Bill of Rights of 1789, forbade cruel and unusual punishment, presumably with similar meaning and intent: this phrase could hardly be read as forbidding capital punishment in general at the time, since capital punishment was practiced throughout the thirteen states, and its existence as a judicial practice is in many other passages in the Constitution assumed as existing.

In a later passage Kant expands on the above quoted statement.

Nonetheless I cannot deny all respect to even a vicious person as a person; I cannot withdraw at least the respect that belongs to him in his quality as a person, even though by his deeds he makes himself unworthy of it. So there can be disgraceful punishments that dishonor humanity itself, such as quartering someone, having him torn by dogs, cutting off his nose and ears. Not only are such punishments more painful than loss of possessions and life to those who love honor, who claim the respect of others, as everyone must; they also make a spectator blush with shame as belonging to a species that can be treated that way.<sup>24</sup>

In 1972 the United States Supreme Court considered the constitutionality of the death penalty and, in a badly split five to four decision, ruled capital punishment as it then existed in the United States, unconstitutional.<sup>25</sup> It was un-

clear whether the court at that point wished to say that capital punishment in any form would remain unconstitutional. Only two out of the nine justices, William Brennan and Thurgood Marshal, made clear in their concurring opinions that the death penalty in any form ought to be regarded as unconstitutional. The other justices who made up the majority of five, William O. Douglas, Potter Stewart, and Byron White, left open the possibility that in later cases a death penalty law in some different form might pass constitutional muster. The two justices who remained on the court in 1976, Stewart and White, joined the majority in *Gregg v. Georgia*, with Stewart writing for the majority, in deciding that the death penalty was not *per se* unconstitutional, and that the newly proposed law from Georgia in particular was constitutionally acceptable.<sup>26</sup>

Brennan's opinion in *Furman* is particularly interesting because its central argument is so Kantian. The central point of the constitutional prohibition on "cruel and unusual" punishment, he urges, is "that a punishment must not by its severity be degrading to human dignity," and his criteria for such punishments are indicated as follows:

If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.<sup>27</sup>

Brennan's entire discussion of these four principles has a certain Kantian flavor and undertone, for example, when he urges, in connection with the fourth principle that "if the deliberate extinguishment of human life has any effect at all, it more likely tends to lower our respect for life and brutalize our values. That, after all, is why we no longer carry out public executions," but the most intensely Kantian part of Brennan's opinion, his discussion of the severity of the death penalty, is worth quoting at some length:

Death is a truly awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. An individual in prison does not lose "the right to have rights." A prisoner retains, for example, the constitutional rights to the free exercise of religion, to be free of cruel and unusual punishments, and to treatment as a "person" for purposes of due process of law and the equal protection of the laws. The contrast with the plight of a person punished by imprisonment is evident. A prisoner remains a member of the human family. Moreover, he retains the right of access to the courts. His punish-

ment is not irrevocable. . . . As one 19th century proponent of punishing criminals by death declared, "When a man is hung, there is an end of our relations with him. His execution is a way of saying, 'You are not fit for this world, take your chance elsewhere'."28

Brennan immediately draws the conclusion: "In comparison to all other punishments today, then, the deliberate extinguishment of human life by the State is uniquely degrading to human dignity."

One of the cases that lay in the background of *Furman*, and was referred to and discussed by the justice's opinions, was *Trop v. Dulles*.29 In this case the court ruled out as unconstitutional, because of its violation of the prohibition on cruel and unusual punishment, the punishment of expatriation, loss of citizenship. Arguably, however, and Brennan does make the point in his *Furman* opinion, although expatriation may seem a terrible and degrading punishment, death is even more degrading.

But there is another element of the influence of *Trop*: a much quoted phrase that comes from the opinion of Chief Justice Earl Warren writing for the plurality speaks of "the evolving standards of decency that mark the progress of a maturing society."<sup>30</sup> This phrase is used to justify departures from practices and understandings current at the time the Bill of Rights was first adopted. It implies that there can sometimes be an evolution of societal opinion, so that practices accepted at one time, such as corporal punishment, or laws forbidding miscegenation, come to be judged unacceptable at a later time, and legal decisions must reflect such evolution.

It may well be that the original intent of the Eighth Amendment, in forbidding cruel and unusual punishments, did not extend far beyond forbidding torture-executions. In the same vein, as we have seen, Kant rejected torture-executions while accepting capital punishment for murder. We can see Brennan using almost the same argument, but extending what it excludes to capital punishment in general.

Here we have what may seem to be a straightforward disagreement. The arguments of Kant and Brennan are similar in their rationales for excluding certain forms of punishment, but Kant and Brennan disagree about the scope of the application of the arguments for exclusion. The Kantian considerations that Brennan invokes he extends beyond their Kantian base to be an argument against capital punishment in general. Without being able to conclude easily or clearly that one is wrong, the other right, we can at least mention some considerations that bear on the question of who is closer to being correct. First are some considerations that are perhaps in the background of the thinking of both authors.

Brennan and Kant may have different conceptions of death. Kant famously argued for the immortality of the soul, and at one point he uses a sort of euphemism to describe the death penalty, when he writes that "a person can

never be treated merely as a means to the purposes of another or be put among the objects of rights to things: His innate personality protects him from this, even though he can be condemned to lose his civil personality."<sup>31</sup> The German here, more clearly than this translation, expresses a difference in his innate personality, which can never be lost, and his civil personality, which can be taken from him. In contrast, as the extended quote from Brennan indicates, to die is to be annihilated, to lose everything there is to lose. It is not clear that there are different conceptions here, since Kant would agree with Brennan that a person who has been executed has, civilly speaking, lost everything, and Brennan is simply not addressing any aspect of personality that might be extra civil. Still, there may be some differences here that make a difference. Furthermore, the correctional institution, to which individuals with criminal convictions may be sentenced for extended periods of time, is an institution that did not exist in Kant's day as it does in ours. We have a much clearer sense that there is an alternative to the death penalty. Long prison sentences, up to life without parole, are, whether morally or jurisprudentially defensible or not, a real possibility, and an alternative to death. Since Kant explicitly rejects the alternative of life, we cannot say counterfactually that if there had been an alternative of professional corrections available in Kant's day, it would have affected his views, but it might have done so, even unconsciously, by affecting his sense of what the practically available alternatives for punishment were.<sup>32</sup>

Let us consider what might have been the basis for Kant's view that torture-executions cause the humanity of the person being executed to be regarded as abominable. The operative word in the German is *Scheusal*, whose literal translation is "monster." Mary Gregor translates the word with the adjective "abominable."<sup>33</sup> Translations of the related abstract noun, "*Scheusslichkeit*" are "atrocious, horrible deed, hideousness." There are many thoughts that might be carried by this word. When a torture-execution is carried out, the victim's death is slow and painful. There may be great screams or roars of pain that erupt from the person. The person may lose control of his bodily functions, and involuntarily vomit, urinate, or defecate. In some forms of execution there is one or another form of bodily mutilation, as when a person's limbs are torn away. One of the reasons that the guillotine is not proposed as a means of execution in the United States, is because of the mutilation of bodily form that it effects, and because of its extreme bloodiness, even though medical opinion has long considered it to be one of the quickest and most painless forms of death. The disembowelment that is a part of some torture-executions, would be terrible for the spectators to see, and terrible for the still conscious person being executed to see. The *Personlichkeit* of the person being executed is here being seen at its worst: completely lacking in dignity and self-control. The quote from the later passage above suggests that Kant's point is that the activities involved in a torture-execution are themselves shameful, indeed, sufficient to cause the spectator to blush. Why

would we blush in shame at a torture-execution? One explanation is that such an execution, even in a monarchy and more so in a republic, is closer to being done in our name, closer than the perhaps equally horrible deeds of a murderer. Analogously, when we receive accounts of atrocities carried out in wartime, we would be closer to blushing in shame if it was our side alleged to have committed them, rather than the other side. As suggested earlier, the effects on spectators and executioners may be either horror and long-term mental harm, or the beginning of an acquisition of a taste for and pleasure in such cruelty. Either outcome is a bad outcome.

When the reaction of a spectator or participant is horror and self-damage, there is presumably some underlying pity for the person being executed. In such a case the observer maintains some sense of the humanity of the person executed, and the stark contrast between the humanity and the treatment being undergone is too much for the observer to bear. When the reaction is instead the beginnings of pleasure, then the person executed has become entirely an object, totally lacking in humanity or dignity, and wholly the appropriate object of any form of hard treatment. Such individuals may be described as animals, vermin, or scum. The executioner or passive observer would be beginning to believe that there are certain classes of individuals for whom such terms are appropriate, and for whom such treatment is appropriate, as in the case of despised individuals such as serial killers Ted Bundy, Wayne Gacy, Jeffrey Dahmer, or despised groups such as Jews, Gypsies, or homosexuals. Alternatively, there may be the beginnings of a general objectification of all people with whom an individual comes into contact, the conceiving of all other persons as individuals to be manipulated for the controller's own advantage, in such ways as are said to be characteristic of people described as sociopaths or psychopaths, or in such ways as are said to occur when people, especially men, come to conceive of the objects of their sexual desires, especially women, as purely sexual objects.

The differences between a torture-execution and a regular execution would seem to be a matter of degree. Successful regular executions, to say nothing of the all too common botched executions, have some of the characteristics of torture-executions for participants and spectators, though to a lesser degree, and perhaps only in unintentional ways. The assumption here would be that in approved methods of execution that are intended to produce, so far as possible, quick death with a minimum of physical pain, any actual physical suffering is purely unintentional. When we speak of the pain connected with the most clinical means of execution, we have so far been limiting ourselves to the question of physical pain during the execution process, and have been saying nothing about the considerable psychological pain of anticipating our own death by execution.

When we witness, or participate in, any form of torture-execution, it must be difficult to maintain our belief, as Kant has said, that the innate *Personlich-*



*keit* of the person executed endures unscathed, with the only loss being a loss of his civil personality. It may be difficult for the executioner to maintain his own self-respect intact, given the activities he has engaged in; and it must be difficult for others to maintain such respect for such individuals. This helps to explain why there exists a common practice of keeping the identity of the executioner secret.

Given these unpleasant facts about executions, we might feel some doubt about Kant's belief that the execution of the guilty individual is compatible with his human dignity or that of his executioners. If the problems with torture-executions are also problems with regular executions, and the differences are a matter of degree, it becomes more difficult to draw a line between the two, rating one as acceptable, the other as unacceptable. But this is hardly a conclusive argument against Kant's position favoring capital punishment for murder.

Let us turn to Brennan's discussion of the penalty of death. As he argues that executions are incompatible with the human dignity of the person executed, his main theme is the totality of the fact of death which entirely destroys the subject, leaving nothing left over. There are not even any rights to have rights. The theme is that an execution is an annihilation, a total elimination of an individual. This is the fact that makes executions extremely severe punishments, and that makes them incompatible with the dignity of the human subject. If the person executed is reduced to nothingness, then how can we say that his human dignity survives, or that his execution is compatible with his dignity as a human being?

## 6.

It appears that we can maintain most of the elements of Kant's general theory of punishment while being opposed to capital punishment. Or to put the point in a different way, Kant himself could have taken a position of general opposition to capital punishment and still have presented a recognizably Kantian and retributivist position on the justification of punishment.

It seems that Kant saw women as invariably and inevitably totally dependent upon males, and hence inevitably lacking the independence requisite for proper functioning as active citizens. His views were in accord with the consensus, though not the unanimous opinion, of his day.<sup>34</sup> That consensus has changed, and women are viewed as human beings who have and ought to be regarded as having as much of citizen-independency as any man.

The consensus has also changed with respect to capital punishment. Here it is harder to specify what has changed, though capital punishment seems less necessary and inevitable today. Perhaps especially western Europeans in the wake



of World War II have had a livelier appreciation of the abuses that are either inevitable or are at least the frequent accompaniments of the practice. Perhaps the conception of death has altered. In addition to mentioning the theological background of Kant's idea that human personality survives death, we might note another case he mentions where the man of honor would prefer death to life, and the scoundrel the reverse.<sup>35</sup> Surely the idea of death as honorable in some sense to be sought after has, happily, faded. We have perhaps also come to have a livelier appreciation of what is after all a deeply Kantian point that all punishment must respect the humanity of the person who undergoes it, and we have, many of us, moved closer to Brennan's views about where the line is to be drawn between punishments that are acceptable on this basis and those that are not.

The suggestion that there is a near or emerging consensus of opposition to the death penalty is no reason for complacency. This consensus is manifestly not to be found in the United States, where most states execute people. Public opinion is still seemingly strongly in favor of the death penalty, and political leaders regard it as imprudent in the extreme to oppose it. Arguments for and against the death penalty are still live arguments in the United States.

Kant does not come out so badly in this discussion. In the face of the emerging consensus against the death penalty, most of his theory of punishment can be preserved, and he may have pointed us to the most basic, principled and important reason for opposing the death penalty in general, even as he failed to arrive at this conclusion himself. The death penalty is wrong because its use is incompatible with the dignity of being human which is present even in the worst and most deserving subject of punishment.

## Notes

1. Kant, *The Metaphysics of Morals*, trans. Mary Gregor (Cambridge, England: Cambridge University Press, 1996), and Kant *Kants gesammelte Schriften*, ed. Preussischen Akademie der Wissenschaften (Berlin: Walter de Gruyter, 1902-), vol. 6, p. 333, abr. Ak 6: 333.
2. *Ibid.*, Ak 6: 320.
3. See Hugo Adam Bedau, ed., *The Death Penalty in America: Current Controversies* (New York: Oxford University Press, 1997), pp. 246-248.
4. See Kant, *The Metaphysics of Morals*, Ak 6: 314-315.
5. *Ibid.*, Ak 6: 314.
6. *Ibid.*, Ak 6: 315.
7. *Ibid.*
8. *Ibid.*, Ak 6: 314.
9. See Aristotle, *Politics*, Book I.
10. Thomas Auxter, "The World of Retribution," in Jane Kneller and Sidney Axinn, eds., *Autonomy and Community* (Albany: State University of New York Press, 1998), pp. 191-211.

11. 428 U.S. 153, 1976.
12. See Robert Nozick, *Philosophical Explanations* (Cambridge, Mass.: Harvard University Press, 1981).
13. See Kant, *The Metaphysics of Morals*, Ak 6: 331.
14. See Nelson T. Potter, Jr., "The Principle of Punishment is a Categorical Imperative," in Kneller and Axinn, eds., *Autonomy and Community*.
15. Auxter, op. cit., p. 200.
16. See Bedau, op. cit., pp. 193–194.
17. Kant, *The Metaphysics of Morals*, Ak 6: 333.
18. See Jeffrey Reiman, "Justice, Civilization, and the Death Penalty: Answering van den Haag," *Philosophy and Public Affairs* 14 (1985), pp. 141–147.
19. Kant, *The Metaphysics of Morals*, Ak 6: 363.
20. Ibid., Ak 6: 333.
21. Ibid., Ak 6: 334, 336.
22. Ibid., Ak 6: 333.
23. Ibid., Ak 6: 333.
24. Ibid., Ak 6: 463.
25. *Furman v. Georgia*, 408 U.S. 238, 1972.
26. 428 U.S. 153, 1976.
27. *Furman v. Georgia*, 408 U.S. 238, 1972.
28. James F. Stephen, *A History of Criminal Law in England*, vol. 2 (London, 1883), pp. 81f.
29. 356 U.S. 86, 1958.
30. 356 U.S. 101, 1958.
31. Kant, *The Metaphysics of Morals*, Ak 6: 331.
32. Ibid., Ak 6: 333.
33. Ibid.
34. See Hannelore Schroeder, "Kant's Patriarchal Order," in Robin May Schott, ed., *Feminist Interpretations of Immanuel Kant* (University Park, Pa.: The Pennsylvania State University Press, 1997), pp. 275–296.
35. Kant, *The Metaphysics of Morals*, Ak 6: 333–334.