Kant on Capital Punishment

Kant offers perhaps the purest (though not necessarily the clearest) statement of the retributive theory of punishment. The idea in brief is simple: it is wrong to punish people for utilitarian reasons. Legal punishment must always be a response to guilt. If the core motive in punishing someone is to deter others, or to protect society, or to set an example, then the person punished is wronged; their humanity has not been respected. So punishment must always be in response to guilt, but Kant in effect goes further: the suggestion that seems to come through this reading is not only that guilt is a necessary condition for punishment, but that the guilty must be punished or else justice and equality, the only proper foundations for the law, will not have been served. Equality is the principle that must be used in selecting a punishment. Kant uses a metaphor. He refers to the principle of equality as the one by which the pointer of the scale of justice is made to incline no more to one side than to the other.

There are two ideas involved in Kant's explanation of this. One is the familiar idea of "an eye for an eye." The evil that a wrongdoer inflicts is the measure of how severely s/he should be punished. Kant points out: we do not need to require that people who are assaulted should be assaulted, for example. What is required is that the pain inflicted on the criminal should be equivalent to the pain inflicted on the victim. That is one part of the jus talionis - the right of retaliation. The other part is the puzzle embodied in a statement like: 'if you steal from another, you steal from yourself'.

The point here is that by stealing, criminals make property insecure in general. They act on a motive that, if it were universalized, would make their own property insecure. Similarly, people who slander others make their own good names insecure in the sense that they operate from a maxim that, if it were made universal, would make it acceptable for anyone to slander anyone, themselves included.

The connection between this and the right of retaliation seems to be this: it shows that the wrong of stealing, for example, is the sort that the thief would suffer himself if his maxim were generalized. That shows how it is particularly appropriate that he should be punished by being derived of his property. It makes the right kind of moral connection between crime and punishment. What is less clear is how it leads to the conclusion that we must extract a punishment proportional to the crime. For this we seem to fall back on metaphor: if we don't punish the wrongdoer, something is out of balance; justice has not been served. When we come to the particular case of capital punishment, we see that Kant thinks it is both permissible and obligatory in the case of murder. The only thing that is proportional to the crime of killing another person is the execution of the murderer. And in fact, he tells us, if a society were abut to dissolve itself, but it had murderers awaiting execution, "the last murder lying in prison ought to be executed" before the society dissolves itself. Why? Two reasons: (1) "that everyone may realize the desert of his deeds (Query: what does this mean in plain English?) and "that bloodguiltiness may not remain upon the people." Kant goes further: "for otherwise they might all be regarded as participators in the murder as a public violation of justice." (Further Query: what, in plain English is Kant saying? Do you agree of disagree? Why? What might you say in response to someone who took the opposite view from you?)
One can wonder just how far the principle of retaliation goes. Suppose that a murderer tortures his victim painfully before killing him. If we take the jus talionis seriously, we would seem to be led to the conclusion that the murderer should be tortured before being executed. Some people believe this, in fact. But these are people whom I would prefer not to see in power, let alone have in the proximity of my children. People who are serious about such a principle may be able to hold it with consistency. But one suspects them of lacking an appropriate sense of horror. Torture is inhuman. Those who torture others are showing us their inhumanity. But by doing as they do, even in retaliation, we stoop to their level; we become morally contaminated by the very evil that we respond to. It is interesting to note that Kant in effect recognize this general point. He insists that murderers should be executed. But he writes (speaking of the condemned person)

His death... must be kept free from all maltreatment that would make the humanity suffering in his person loathsome or abominable.

Exactly what Kant means here is not entirely clear. But the general idea seems clear enough: even a person guilty of murder is to be treated with a certain sort of dignity, because even the murderer is still a person - still an end in himself. Punishments that don't respect the humanity of the criminal are outside the pale of morality. They are not justice, they are pure, unadulterated revenge. And it would be a mistake to confuse what Kant means by "retribution" with revenge. The instinct for revenge is a natural one; so is the instinct to take things we want that don't belong to us, as anyone who has spent time around young children will testify. But morality requires us to rise above our mere instincts. That's what makes it hard to be a virtuous person. And in the sphere of punishment, morality requires that we respect the humanity of the person we are punishing. Naively, it might seem that this is impossible. When I punish someone, I do something that is, in most cases, against their will. I don't respect his wishes and I don't respect his freedom. There is a reply to this. Morality does not entitle us to have all our wishes respected. That is so obvious that it needs no comment. Furthermore, in punishing a wrongdoer, we do respect her freedom: we take seriously the idea that she is responsible for what she did, and was free to do otherwise. In punishing the person, we are showing them a certain kind of respect. In fact, we might go further. Someone who really wishes, as a general principle, that he or she should be able to do bad things and not be punished is someone who hasn't gotten it as far as morality is concerned. We can't both will that wrongdoers should be punished and also will that we be exempt from punishment. So punishing a wrongdoer amounts to respecting his or her "rational will." (Compare: I might be in a self-loathing frame of mind and wish that someone would treat me badly. But if anyone obliges me, they aren't really respecting my humanity; they aren't really treating me as an end in myself.)
Notice where this leaves us: on the one hand, punishing a person may be a way of respecting his or her humanity. On the other hand, some forms of punishment violate the humanity of the person being punished, and in the process debase us. But now an interesting question arises. Most is us agree: punishing a torturer by torture is not acceptable. A person in the throes of torture is a person who has, at least for the time being, had their humanity expunged. But the opponent of capital punishment will ask: isn't murder like torture in this respect? After all, a murderer robs his victim entirely of her humanity. But now we must ask: if we execute murderers, might this not be one of those very cases, like torture, in which the jus talionis goes too far? Take a different case. Suppose a particularly savage criminal left his victims alive, but performed some sort of surgery on them that destroyed their mental capacities - that left them virtually sub-human. Kant would (or should, in all consistency) insist that it would not be appropriate to punish the wrongdoer by subjecting him to the same procedure. The fact that the criminal did not respect the humanity of his victims does not entitle us to rob him of his humanity. But if this is so, one can wonder: how could capital punishment be justified? In killing a murderer, the state takes it upon itself to extract his humanity from him in the most final way. So it is fair to ask: can a system of punishment that really takes the categorical imperative seriously really permit the death penalty? If torture and psychosurgery are not acceptable forms of punishment, why is it that execution still is?

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