
Why Should We Accept Capital Punishment: A Defence to Kant's Retributivism

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Abstract

The Kant's defense of the capital punishment and its contemporary significance is an important topic in the field of legal philosophy. In his philosophy of right, Kant explicitly supports the retention of the capital punishment from a retributive standpoint, arguing that for extreme crimes such as deliberate murder and subversion of state authority, the capital punishment is the only punishment that aligns with the principles of equality and proportionality, reflecting an absolute commitment to justice. He opposes the consequentialist approach that justifies the capital punishment based on social outcomes, emphasizing that punishment should respect rational persons rather than be used as a mere tool. Although Kant advocates for the sanctity of the right to life in his moral philosophy, he believes that within the realm of legal rights, the community has the authority to exact retribution on offenders who violate others' right to life, and this retribution does not violate the social contract or the self-legislation of rational beings. In response to contemporary criticisms regarding the inconsistency of the principle of equality, the risk of wrongful convictions, and objections based on contract theory, Kant's theories provide effective counterarguments. Ultimately, Kant's views on the capital punishment offer contemporary criminal policy a third path that transcends both radical abolitionism and harsh penalism, suggesting that while the capital punishment should be retained as a last resort for upholding justice, its application must be strictly limited and adhere to humanitarian principles.

Keywords

capital punishment, retention, abolition, Kant, retributivism

1 Introduction

As the highest form of punishment in the existing criminal law, the judgment and execution of the capital punishment concern the fundamental interests of the people and social fairness and justice. In recent years, there has been extensive discussion in academia regarding the issue of the retention or abolition of the capital punishment. Among all discussions supporting and opposing the capital punishment, Kant's understanding of the capital punishment has always been a focal point in academic discourse. On one hand, Kant explicitly supports the retention of the capital punishment in his philosophy of legal rights, asserting that it is the highest level of punishment that the state can impose. On the other hand, Kant's moral philosophy adheres to an absolutist moral view, recognizing the supreme right and dignity of human life, which has often been used in later years to advocate for the abolition of the capital punishment. In fact, Kant's support for the capital punishment and his respect for the right to life are not in conflict; Kant can defend the capital punishment within his philosophical framework. This article studies Kant's understanding of the capital punishment, points out that Kant

adheres to a retributive view of the capital punishment, responds to related objections, and ultimately indicates that Kant's view on the capital punishment still holds theoretical and practical significance today.

2 Kant's Understanding of The Capital Punishment

Scholars defenses of the capital punishment can be categorized into two strategies: utilitarianism and retributivism. Utilitarianism posits that the capital punishment contributes to the overall good of society. By imposing the capital punishment on heinous criminals, it can potentially deter potential offenders, thus reducing crime rates. Retributivism, on the other hand, holds that the capital punishment is a retribution for serious violations of the law by offenders. According to the principles of equivalence and proportionality, the criminal actions of offenders must be met with equal punishment in response, and for serious crimes such as intentional murder, the capital punishment is the retribution and consequence they ought to endure.

There has been a long-standing debate in the academic community about whether Kant's theory of punishment is retributive. The mainstream view holds that Kant is a retributivist. This perspective argues that the punishment for a crime is merely a response to the crime itself, rather than a means of deterring potential criminals or preventing crime from occurring.ⁱ Thomas Hill refers to this viewpoint as "intrinsic desert theory," which posits that punishment for wrongdoers is deserved; punishing criminals for their wrongful actions is, in itself, a good.[1] Some perspectives suggest that Kant is a hybrid theorist who reconciles both teleological and retributive elements. For example, according to Sharon Byrd, Kant believes that the purpose of punishment is to prevent crime while the means of doing so is to take retributive action against the offender.[2] Mark Tunick argues that Kant adheres to retributivism in moral philosophy but does not exclude teleological considerations in his theory of legal rights.[3]

These viewpoints indicate that the effects of the law are not excluded from Kant's legal system; however, they do not demonstrate that retributivism is not the fundamental principle that Kant upholds. For Kant, administering punishment to an offender is primarily an act of retribution for the crime committed, which determines the type of punishment. For example, a murderer receives the capital punishment, while a thief may face the deprivation of property or imprisonment. However, judges must still consider factors such as the circumstances of the crime, its harmfulness, and the degree of malice when delivering specific judgments. For instance, Kant pointed out that the degree of imputability (*imputabilitas*) can be assessed based on the magnitude of the obstacles that must be overcome at the time ([4]MS228).ⁱⁱ When a criminal commits an offense, their actions are hindered by both natural and moral factors. The lesser the natural obstacles and the greater the moral impediments, the greater their moral and legal accountability. For instance, between an impulsive offender and a premeditated offender, the latter should bear greater responsibility.ⁱⁱⁱ

However, with regard to the capital punishment, Kant denies any right to mitigate or exempt punishment.

ⁱ A classic discussion of this view can be found in: [18]

ⁱⁱ According to academic convention, the page numbers for Kant's works in the notes of this article refer to the German (Prussian) Academy of Sciences edition of the Collected Works of Kant (Akademie Ausgabe, AA), while the English translations are based and revised on the Cambridge edition of the Collected Works of Kant, in: Immanuel Kant and Allen W. Wood, *Practical Philosophy*, ed. Mary J. Gregor, The Cambridge Edition of the Works of Immanuel Kant (Cambridge: Cambridge University Press, 1996).GMS: The Groundwork of the Metaphysics of Moral (AA 4). MS: The Metaphysics of Moral (AA 6).

ⁱⁱⁱ For discussions on the degree of imputability, see: Claudia Blöser.[19] Blöser correctly distinguishes between accountability and responsibility, the former being a threshold concept without degrees, while the latter possesses degrees, allowing for exemptions or reductions.



Because the capital punishment applies only to serious crimes such as murder and subversion of the state, some situations that might mitigate responsibility are insufficient to exempt an offender from the capital punishment's sanctions. In Kant's view, the judgment for the capital punishment is entirely a retributive action against the offender's conduct and does not require consideration of other factors.

2.1 Opposition to Utilitarianism

Utilitarians argue that imposing the capital punishment on heinous criminals can enhance the overall good of society. Utilitarians base the legitimacy of punishment on the expected social consequences: reducing overall harm, preventing crime, protecting the public, saving social costs, enhancing safety, etc. Therefore, the attitude toward the capital punishment is conditional: if the net benefit of the capital punishment in reality is positive (more effective than alternative punishments in reducing serious crimes with fewer side effects), it may be supported; if evidence shows the net benefit is negative (no additional deterrence, high risks of wrongful convictions and discrimination, higher costs, social violence spillover, etc.), there is a tendency to oppose the capital punishment. Different utilitarians have varying views on the consequences of the capital punishment.¹ For example, Bentham believes that punishment is only legitimate when it can prevent more crimes. In most cases, the capital punishment is not the best means of preventing crime, thus Bentham advocates for cautious application of the capital punishment.^[5] In contrast, Mill argues that for serious crimes such as intentional murder, the capital punishment is more effective than life imprisonment in promoting the overall good of society.^[6] On one hand, compared to the long and endless deprivation of freedom and labor imposed by life imprisonment, the capital punishment, which can quickly take away life, can actually bring less suffering to the offender. On the other hand, the capital punishment can completely prevent the possibility of the offender committing crimes again after being released, which is most beneficial for maintaining social safety and stability. The problem with the utilitarian argument is that it entirely transforms the legitimacy of the capital punishment into a calculation of total utility, so based on different calculation results, the principle of utility can be used both to support and to oppose the capital punishment. This ambiguity is unacceptable to Kant. Kant believes that criminal law is a categorical imperative, which has unconditional validity, and any attempt to escape punishment through utility and happiness undermines justice.

In response, Kant proposed a thought experiment. A death row inmate agrees to allow a doctor to conduct a dangerous experiment on him, with the condition that if the experiment succeeds, his death sentence will be revoked ([4]MS332). Since conducting experiments on death row inmates can yield socially beneficial results, according to the principle of utility, we should replace the capital punishment with medical experiments. However, in Kant's view, this is unacceptable because such an action equates justice with some measurable value, which undermines the sanctity of justice. As a primary value, justice is not reflected in how much utility it can bring to society, but rather manifests as unconditional respect for personality and human purpose. The punishment of an offender is not because the offender's actions undermine the good as utility, but solely because of his criminal behavior, which constitutes an evil in itself. Kant pointed out that "a per-

ⁱ In contemporary discussions among consequentialists, Michael L. Radelet and Ronald L. Akers, through empirical research, argue that the capital punishment helps reduce crime.^[20] Cass R. Sunstein and Adrian Vermeule contend that the government, as a special moral agent, has the authority to make trade-offs between the lives of offenders and victims, and therefore advocate for the retention of the capital punishment.^[21]

son must never merely be used as a means to another's ends, confused with the object of property rights; his inherent personality protects him from such treatment, even though he may very well be judged to lose his civic personality ([4]MS331)." Here, "the object of property rights" refers to anything that can be owned and controlled as property, which serves as a means to an end and therefore lacks personality. Personality and objectivity are relative; they refer to the attribute of a subject being regarded as an end in itself rather than merely as a means due to its rationality ([4]GMS428). This attribute is inherently possessed due to human rationality and does not change because of one's actions or the consequences of those actions. Even if an offender is subject to the state's legal deprivation of civic rights, he still retains a personality that cannot be objectified or purely instrumentalized as a bottom line; punishment and state coercion must operate within this bottom line.

2.2 Support for Retributivism

Because of the inherent personality of the offender; his punishment (including the capital punishment) not only does not undermine his personality but rather is a respect for his personality. Because when an offender commits a crime, he does so as a principle of his own, and wishes for this behavior to become a universal law. Although his behavior is pathological and irrational due to the influence of emotions on his will, but he still has limited rationality after all, and can use reason to regulate his will to avoid criminal behavior, thus he still has to take responsibility for his criminal acts. His punishment should follow the principle of equality, which means inflicting the same crime he committed back upon him. In other words, if a criminal expects the universalization of his criminal behavior, then his punishment is precisely the result of that unjust universalization. The universal principle is objectively valid, meaning it applies to every rational being, which is the moral law. The principle that the criminal follows when committing a crime only has subjective validity and lacks objective validity. Therefore, when this principle is effective, it only applies to him. Kant's reasoning can be represented in the following steps:

Criminal A acts according to maxim M (a criminal believes it is permissible to kill)

Principle M violates moral law G (killing is immoral)

Therefore, maxim M is only valid for criminal A, and invalid for all others (only for the criminal himself is killing permissible)

Conclusion: The behavior required by maxim M should be applied to criminal A (applying the capital punishment to the criminal)

This is why Kant said: "Whatever innocent calamity you inflict on another among the people, you inflict it upon yourself. If you insult him, you insult yourself; if you steal from him, you steal from yourself; if you hit him, you hit yourself; if you kill him, you kill yourself ([4]MS333)." Through the law, imposing retaliation on a certain criminal according to the criminal's actions is the right of retribution (*ius talionis* [the right of equal punishment]). That is to say, only courts representing the law have the right to retaliate; no individual may take revenge on a criminal. Forms of punishment as retribution include fines, imprisonment, and the capital punishment. For example, for a thief, he infringes upon the property rights of others, making



everyone's property unsafe; therefore, according to the principle of equality, his punishment is the deprivation of his property, which is a fine. If his property is insufficient to pay the corresponding fine, he should be imprisoned, selling his labor to the state for a certain period. If the criminal kills someone, he should be sentenced to death, because the victim's life cannot be restored, and the criminal cannot make amends for his crime through any action; he can only be subjected to the same retribution to deprive him of his life according to the principle of equality.

Although Kant supports the retention of the capital punishment, he strictly limits its applicability. The capital punishment can only be applied to the crimes of intentional murder and subversion of state power. Intentional murder should be punished with death because it is the result derived from the principle of retribution. The subversion of state power can be punished with death, on one hand because during a rebellion, people are likely to execute the monarch to prevent him from retaliating against the rebels, and on the other hand because such actions mean systematically destroying the entire legitimate constitutional order, which would bring about contradictions. Although Kant strictly limits actions of subversion of state power, this is only applicable to legally constituted states. For states formed on illegal grounds (such as dictatorial regimes), their legitimacy does not exist from the beginning, and the people's resistance to the government cannot be a question of legality.¹ It is evident that the scope of the capital punishment must strictly adhere to the principle of equality; any attempts to expand the scope of the capital punishment are an expansion of the scope of retribution and lack legitimacy.

2.3 Discussion of Sentencing and Execution of the Capital Punishment

Regarding the sentencing of the capital punishment, Kant insists on the principle of legality of crimes, only judges can declare the capital punishment, anyone cannot take personal revenge against criminals. For the execution of the capital punishment, Kant supports that it must be carried out in a humane manner, without abusing the criminal. Kant's reasoning is that abuse would make humanity detestable ([4]MS333). Once any punishment has been judged, it must be enforced; Kant opposes the monarch's pardon of criminals. Although a pardon would demonstrate the monarch's mercy, it would weaken the authority of the law, thereby affecting social justice. Only in the case of a criminal committing treason, where the monarch himself is harmed during the crime, does he have the right to decide whether to pardon the offender. Kant refers to this as "the only right that can be called the royal prerogative ([4]MS337)."

Furthermore, Kant discusses two specific cases of killing, where the act does not constitute murder, and the offender should not be sentenced to death: a mother killing her infant and a duel between comrades, where the former preserves family honor and the latter maintains the honor of war. The mother killing the infant refers to a mother killing an infant born out of wedlock. Kant believes that since the infant is born outside the protection of the law, it is as if it sneaked into the community, which affects the honor of the

¹ Kant argues that the state is a civic society composed of citizens. The rights of the state are divided into legislative, executive, and judicial powers. The legislative power must represent the united will of the people, the executive power belongs to the state's regent, and the people exercise judicial power by electing judges. Kant believes that this structure of "separation of powers" best aligns with the principles of rationality and is most beneficial for the well-being and happiness of citizens. In the case of a despotic state, where the rulers have deprived the people of their legislative power, the existence of such a state lacks legitimacy. A "revolution" against this state is seen as a process of establishing a constitutional order rather than overthrowing it. Therefore, Kant does not defend despotic states.

family, thus the mother can kill the infant ([4]MS336). The duel between comrades refers to soldiers being allowed to propose a duel when insulted, to prove their courage in battle. Since the duel is agreed upon by both parties and both face the danger of death during the duel, the resulting death does not constitute murder. However, Kant's views on this matter are now outdated, and this article will not address that aspect.

3 Critiques and Responses to Kant's Argument

Since Kant proposed his argument supporting the capital punishment, it has received much criticism from the academic community. Critiques of Kant can be summarized into three main categories.ⁱ

The first critique questions Kant's retributive view, arguing that Kant's argument is inconsistent. For example, Vernon Sarver believes that Kant's understanding of the principle of equality is inconsistent.[7] For theft, he requires equivalence between the damage caused by the offender and the punishment, while for murder, he requires equivalence between the crime and the punishment itself. Sarver argues that if Kant consistently applies the principle of equality, then just as a thief should be sentenced to imprisonment, a murderer should also be sentenced to imprisonment, rather than receiving the capital punishment.

The second critique argues that Kant's viewpoint of sentencing murderers to death does not align with the retributive principle he proposed, because the reasons for a murderer killing are influenced not only by themselves but also by multiple factors such as innate genetics and environmental conditions; the responsibility for killing cannot be entirely borne by the murderer. For instance, Carol Steiker believes that Kant's retributive principle is based on the principle of proportionality, meaning that the desert of the offender and culpability must correspond strictly. In reality, death row inmates often have limited intelligence, suffer from mental illnesses, are under the influence of drugs or alcohol, or are victims of childhood abuse and severe social deprivation (such as poverty and racial discrimination).[8] In such cases, it is difficult to argue that these defendants should bear full blame for their actions. If society is responsible for creating the conditions that lead to these tragedies, imposing the capital punishment on criminals creates a retributive gap.

The third critique argues that Kant's support for the capital punishment violates his commitment to the sacred and inviolable right to life. Nelson Potter believes that the capital punishment is an infringement on human dignity, which contradicts Kant's philosophical demands the dignity of a person is incompatible. [9] For example, Jean-Christophe Merle argues that Kant understands the capital punishment as a form of homomorphic revenge, but does not provide justification for the rationality of homomorphic revenge.[10] Merle believes that individuals possess inherent personality and rights; after a criminal kills someone, they lose only their civil personality, but still retain their innate personality, thus their right to life remains sacred and inviolable. The purpose of punishment is not to retaliate by depriving them of life, but to deter recidivism and promote the rehabilitation of the criminal's personality.

These three viewpoints fail to correctly understand Kant's theory. From Kant's perspective, these criticisms can be defended. The first criticism argues that Kant believes the purpose of punishment for theft is to compensate for the property loss caused by the theft, while for murder, the purpose of punishment is

i A review of the existing academic critiques of Kant's arguments on the capital punishment can be found in [17].



revenge for the act of killing, creating an inconsistency. However, in fact, Kant does not simply understand the punishment for theft as compensation for the consequences of theft; the punishment for theft is still a punishment for the criminal act itself, not for the consequences. The consequence of theft is the victim's property loss; if the punishment for theft were merely to compensate for the consequences of the crime, then the punishment should be to order the thief to compensate the victim's losses, rather than imposing a fine or imprisonment. However, the property dispute between the thief and the victim falls under civil disputes, which Kant refers to as private law rights.ⁱ The act of theft itself constitutes an infringement of the rights of the entire community, which Kant refers to as public rights. Regarding theft, since it puts the property of the entire community in an unsafe state, according to the principle of equality, the punishment for the criminal is the deprivation of all their property.ⁱⁱ However, thieves often have no property to be deprived of, in which case they should be imprisoned to perform unpaid labor for the state for a certain period.ⁱⁱⁱ The same applies to murderers; according to the principle of retribution, since a murderer has deprived another of life, their own life should also be deprived. Since the value of life is greater than any property, nothing can compensate for the crime committed by the murderer. Therefore, Kant does not have an inconsistency when applying the principle of equality.

The second criticism argues that the reasons for a murderer committing murder are not entirely within themselves, but are also influenced by other factors. According to the principle of retribution, it seems we should also retaliate against these other factors (such as society). This viewpoint has three problems. First, this viewpoint only explains that some murderers are influenced by other factors when committing crimes, but it cannot explain that all murderers are influenced by these factors; there are still cases where murder is committed entirely out of one's own intention. For such cases, Kant's retributive theory remains valid. For those exceptional cases, such as children or mentally ill individuals who completely lack rationality, Kant does not advocate for punishment. Second, although criminals often share common characteristics in terms of property, ethnicity, experiences, etc., which collectively lead to certain groups having higher crime rates than others, these factors do not necessarily lead to crime. In a criminal act, the will of the criminal remains the primary cause. Finally, if we acknowledge that human life has the highest value and cannot be compared with other goods, then intentionally depriving someone of life should receive the highest punishment (capital punishment), with no justification for any defense or disparity in retribution. Using other factors (such as poverty, childhood bullying) in the murderer's background as reasons to exempt from the capital punishment effectively treats life as a comparable value. According to this theory, the more tragic the murderer's circumstances and the more disadvantaged their identity, the lighter the punishment for their killing should

i The distinction between private rights and public rights, see: [4]MS242.

ii Pong, Wenberg (2024) argues that Kant's retributive theory is too harsh on thieves; he believes that a thief should be fined according to the amount stolen, whereas Kant advocates for the confiscation of all their property. This viewpoint misunderstands the content of Kant's retributivism. For Kant, retribution is directed at the criminal act itself, not the consequences. The action of the thief is the illegal acquisition of someone else's property, and their retribution means that others can also illegally acquire their property. As a punishment, the state can "steal" their property on behalf of everyone in society. In reality, a thief does not take all property because of their own limitations, rather than the motivation behind their actions. When the state enacts punishment, there are no limitations in this regard; therefore, it can confiscate all of the thief's property.

iii According to Kant's retributive theory, it seems that a wealthy thief would be punished by the confiscation of property, rather than imprisonment. However, in most cases, the reason people steal is due to lack of property; for the majority of thieves, imprisonment remains the only possible form of punishment they could face.

be. This not only fails to reflect the highest value of life, but may even indirectly encourage the occurrence of crime. Under normal circumstances, we cannot accept such a theory.

The third criticism argues that the capital punishment is an infringement of the right to life, and therefore unjust. Kant indeed believes that human life has supreme value and acknowledges that the right to life is sacred and inviolable. However, this principle merely states that no one's life can be violated; it does not prove that after a person commits murder, the community cannot take revenge on him. In moral philosophy, Kant agrees that there exists the categorical imperative 'you must not kill,' asserting that a person should never kill under any circumstances. However, moral philosophy deals with how individuals as rational beings should act. But when Kant discusses the issue of the capital punishment, he is addressing it within the realm of legal philosophy. Legal philosophy deals with the relationship between individuals and the community (the state). The categorical imperative in moral philosophy cannot be directly transferred to legal philosophy. Furthermore, for a murderer after committing murder, the victim's family cannot take revenge by killing the murderer, because the relationship between the murderer and the victim's family pertains to moral philosophy. According to moral law, the victim's family is obligated not to harm the murderer's life. However, as members of the same community, the community has the necessity to take measures to uphold justice for the victim. In the process of imposing the capital punishment on the murderer, it is not an individual who deprives him of life, but the entire community. In summary, Kant acknowledges that everyone has the right to life, but for murderers who have violated others' right to life, the community can deprive them of their life as retribution.

4 The Deprivation of the Right by the Community

In Kant's view, rights only have meaning within a community and cannot be discussed outside of it. In Kant's context, rights, law, and legal rights are synonymous. Kant believes that rights are 'the totality of conditions under which a person's will of choice can coexist with the will of choice of another according to a universal law of freedom ([4]MS230).' Here, "will of choice"(Willkür) refers to the ability to act according to principles desired by your rational will, and "universal law of freedom" includes moral laws and legal laws. The moral law is "to act according to a maxim that can be willed as a universal law ([4]MS226)." The legal law is "to act in such a way that your freedom of choice can coexist with the freedom of choice of everyone according to a universal law ([4]MS231)." The moral law requires a positive duty, which is to act according to moral law, while the legal law requires a negative duty, which is to act according to laws that do not hinder the freedom of others. The implementation of moral and legal laws requires a form of coercion, meaning that when a person acts improperly according to the law, there should be a force to hinder his actions. The coercion of moral law is the respect that arises from the recognition of moral law, meaning that when a person does not act according to moral law, he will be condemned by his own conscience. The coercion of legal law is "the coercive infringement on the legal right holder," which means to stop and retaliate against someone who violates the law by infringing upon their rights ([4]MS231). The right to life is determined by both moral law and legal law. The moral law requires us to respect others' right to life, while the legal law more specifically tells us that if we do not respect others' right to life, we will face legal



punishment. Kant emphasizes that the authority of rights and coercion is the same, and the two are similar to a relationship of the force of action and the force of reaction ([4]MS232). If there is no coercion, we cannot guarantee the implementation of rights; rights become mere a concept written on the paper. When a person infringes on another's right to life, their actions should be punished by legal coercion, which in turn deprives them of their own right to life. Only the community to which the offender belongs has the right to deprive them of their right to life, but the actual execution of this process can only be carried out by individuals, specifically the judge who enacts the deprivation of their right to life. When the judge issues a capital punishment verdict, they do not decide to deprive the offender of life on a personal basis, but rather on behalf of the entire community. At this moment, the judge embodies the judicial authority of the community.

The above discussion raises a new question: the community's deprivation of a murderer's life equates to depriving them of their right to life. Kant needs to further explain why the community has the right to deprive the offender of their rights. Those who advocate that the right to life is sacred and inviolable would argue that the right to life is inherent in every individual, and thus no individual or organization, including the state, can deprive them of their life.ⁱ This principle itself brings about contradictions. Because apart from the right to life, we also acknowledge that individuals have property rights and personal freedoms, which are also considered sacred and inviolable. If the community cannot deprive criminals of these rights, it means that under no circumstances can the community punish a criminal's behavior, since any punishment would necessarily deprive them of their rights. Fully implementing the theory of rights would only lead to the state being unable to fulfill its functions normally, resulting in the disintegration of the community and a return to a "state of nature." Moreover, from the perspective of contract theory, Kant would argue that the formation of the community relies on a contract based on rational laws, which any rational being can recognize and necessarily agree to. Therefore, they must be members of this community, bound by its laws. As long as a person is rational, they will want those who violate the law to be punished, and when they themselves violate the law, they will necessarily wish to be punished as well. Thus, Kant wrote, "It has never been heard that someone sentenced to death for murder would complain that it is excessive and therefore unjust; if they did, everyone would laugh at them ([4]MS334)".

The community has the right to deprive a murderer of life because Kant understands the community as a union of rational beings under the principles of right, and its actions are derived from the universal consent of its rational members.([4]MS313) The will of the community is the will of each rational member. However, this does not mean that the community can be personified as a specific rational being. Kant distinguishes between the state of nature and the state governed by right. Moral laws are effective for individuals in both the state of nature and the state governed by right, while legal laws are only effective for those in the state governed by right. For individuals in the community, they are bound by both moral and legal laws; thus, murder is immoral for them, and they cannot carry out retribution against a murderer based on the principle of retribution. However, the state, as the governing machine of the community, is not bound by moral laws but solely by legal laws.ⁱⁱ Therefore, when a murderer commits murder, only the state can enact retribution

ⁱ For this kind of view, see: Kevin Barry (2019).

ⁱⁱ There is a debate in academia regarding whether the state is determined by moral laws. The key to resolving this issue lies in distinguishing between the relation between states and the relation between the state and its citizens. In the context of relations between states, the state is personified as a rational agent, and its actions resemble those of individuals in a state of nature, being subject to moral laws. However, in the relation between the state and its citizens, the two do not

against him according to the principle of law.ⁱ

5 The Criticism from the Contract Theory

Regarding the capital punishment, social contract theorists often criticize it, arguing that the capital punishment cannot be universally accepted as Kant suggested and cannot become part of a social contract. This viewpoint can be traced back to Beccaria's support for the abolition of the capital punishment. Beccaria argued that a primitive contract cannot include support for the capital punishment, as it implies that if a person who agrees to the contract does commit murder, they would lose their life for it, and no one is willing to lose their life, so no one would agree to include the capital punishment in the social contract.[11] Many contemporary scholars also provide support for the abolition of the capital punishment from the perspective of contract theory through universal consent. For example, Jeffrey Reiman believes that although retributive theory can provide some justification for the capital punishment, it does not mean we must enforce it. In a civilized society, people's tolerance for punishment decreases, and forms of punishment become milder; the capital punishment, like torture, is no longer accepted.[12] The abolition of the capital punishment itself is a manifestation of civilizational progress. Claire Finkelstein borrowed from John Rawls' theory of justice, arguing that agreeing to include the capital punishment in the social contract would require individuals to agree that they must live under the threat of the capital punishment.[13] Compared to the benefits of accepting the capital punishment, this would pose a greater risk to everyone. In the choice of the basic structure of society, rational contractors will understand this with a conservative 'no gambling' decision rule. As a result, the parties to the contract will reject any penal system that includes the capital punishment. Li Hon Lam applies Thomas Scanlon's contractualism, arguing that a policy or law must be defensible to all affected individuals to be considered morally permissible. In criminal trials, it is inevitable that there may be wrongful death sentences, meaning the execution of innocent people.[15] As long as there is a risk of wrongful conviction, the capital punishment cannot pass Scanlon's test of "defending to everyone," because one cannot explain to an innocent person (People who have been wrongfully judged to death) why they must be executed. The above points collectively illustrate how contractualism argues against the acceptability of the capital punishment from the perspective of universal consent.

Kant is also a contractualist, believing that the legitimacy of a community must appeal to the universal consent of rational beings, but he disagrees that the capital punishment cannot be included in the social contract or cannot receive universal consent from rational beings. Kant criticized Beccaria's views, arguing that Beccaria is "all sophistry and distortion of legal rights ([4]MS335)." Kant believes that Beccaria confuses "wanting" and "deserving." A murderer should be sentenced to death, not because he wants to be sentenced to death, but because the capital punishment is the outcome he deserves. Humans are limited rational beings, possessing both sensuous and rational parts. When reason alone dictates the will, a person can discover the laws of reason and act according to them. Since both moral laws and legal rights are laws of reason, for a fully rational being, these laws are their own laws, and therefore their actions and the demands of the

constitute relations of equal moral agents; the state's coercive power over citizens has a normative structure that differs from that of individuals.

ⁱ In Kant's view, citizens are the basic components of society and the state. Society is an assembly of citizens formed by legislation, while the state is an assembly of citizens formed by law, encompassing the powers of legislation, enforcement, and adjudication.



laws are not different; the laws do not express a form of coercion. But for a limited rational being, their will is determined by both reason and sensibility. When reason determines the will, they act according to the laws of reason. When sensibility determines the will, they act according to the laws of preference. For limited rational beings, the activity of the will manifests as a kind of will of choice. Thus, Kant metaphorically distinguishes between two types of people: those as a noumenon (*homo noumenon*) and those as a phenomenon (*homo phaenomenon*).ⁱ The term “*homo*” here does not refer to humans in the physical sense, but rather to the concept of personality. Personality (*persona*) is contrasted with things (*Sache*) and refers, in the context of Roman law, to individuals capable of bearing rights and duties. Kant explicitly states that only rational beings can be called persons because reason allows individuals to exist as ends in themselves, rather than merely as means ([4]GMS428). This applies equally to finite rational beings; the rational part of their mind enables them to be persons, thereby possessing associated rights and duties.] The noumenal person legislates through reason (recognition of laws) and thus regards themselves as a member of the kingdom of rational purposes. Due to the legislation of rational beings, the law is effective against them. ⁱThe phenomenal person is the one who executes and bears the consequences of the law in real life. The law in reality is the law recognized and legislated by rational beings, thus when a person violates the law, they also violate their own laws of reason. The judge’s judgment against them according to the law seems to be a judgment from another, but in reality, it is a judgment from themselves against themselves. When a murderer is sentenced to death by a judge, it is the rational personality within the murderer that judges themselves to death, because they have violated their own laws. Therefore, Kant believes that the social contract fundamentally does not include a commitment to punish oneself and one’s life ([4]MS 335).

Regarding Kant’s critique of Beccaria, Sarver offers a differing opinion. Sarver argues that as long as there is a continuity of personality between the contract-makers and the contract-keepers, such accusations are meaningless.^[7] If Kant truly wanted to claim that there is no continuity of personality between the contract-makers and the contract-keepers, then he is actually undermining any contractualist position, including his own stance taken to refute Beccaria. But Kant would not think that the person who formulates a contract and the person who adheres to it are two different individuals. On the contrary, this is merely a manifestation of two personalities (or traits) within the same person.ⁱⁱ For the same individual, the laws formulated and recognized by the rational part of his mind are, of course, valid for his entirety. The reason the laws of reason are effective for finite rational beings is that their finiteness does not manifest as a limitation of reason, but rather as their will being simultaneously governed by both reason and sensibility, thus limiting their ability to always follow the laws of reason in action.

Regarding Reiman’s viewpoint, Kant would not deny that as civilization progresses, the means of punishment have become milder. However, Kant would not agree that with the advancement of civilization, the principle of retribution is no longer valid. The execution of the capital punishment for murderers is still

i Legislation is not an arbitrary creation of rules but rather a recognition that “the laws of cognition” are the “laws of objects.” “Understanding legislate for the nature” means that the laws of the intellect correspond to the laws of natural beings. “Reason legislate for the freedom” means that the laws of reason correspond to the laws of free beings. So legislation is a part of the free activity. Kant’s theory of legislation can be found in [24].

ii The term “person” (*Person*) originally meant a mask and has since evolved to refer to a specific identity. Contemporary psychology or medicine suggests that a person typically has a stable personality, and when an individual exhibits multiple personalities, it is often characterized as a pathological condition, leading to issues such as identity disturbance. However, Kant clearly does not use the term “person” in this sense.

derived from the retributive principle; it is just that the means of execution will be more humane. Although Kant defends the capital punishment from the perspective of retribution, he does not advocate for retaliation against murderers in the same manner they committed their crimes. This is because the methods employed by murderers are often extremely cruel, and retaliating in the same way, such as through public executions or torture, would only lead to the cruelty of spectators and executors, which is detrimental to the advancement of social civilization. Moreover, no matter how cruelly the capital punishment is executed, the victim killed by the murderer cannot be resurrected, and the outcome of the murderer being deprived of life cannot be changed. In order to achieve the goal of executing murderers, the suffering involved should be kept to a minimum. Furthermore, Reiman's view that civilized societies no longer accept the capital punishment is also problematic. In many countries that have abolished the capital punishment, public support for it remains high, especially during instances of heinous crimes. Therefore, the abolition of the capital punishment is not an appropriate criterion for judging whether a country is civilized.

Regarding Finkelstein's viewpoint, the assertion that individuals in the original state would choose to forgo the capital punishment due to the risk of being sentenced to it does not conform to the assumptions of the "veil of ignorance." Under the assumptions of the "veil of ignorance,"ⁱ the contracting parties should make decisions in an environment completely devoid of social background information. At this point, they do not know whether the law will be fairly enforced, nor do they know if they themselves are the criminals. If, according to Finkelstein's viewpoint, one rejects the capital punishment for conservative reasons, then when they are killed by others, the community will be unable to seek justice for them by executing the murderer, which also seems unacceptable. As for cases where individuals are wrongfully sentenced to death due to miscarriages of justice, people in the original state would view such situations as unjust and would seek to prevent them through the first principle of justice (protecting basic human rights and freedoms). There is also the viewpoint that the capital punishment does not benefit the most vulnerable groups in society (and may even be harmful), thus making it unjust. However, Rawls' theory of justice aims to derive the principles that should govern social operation, without considering the difficulties these principles may encounter in actual enforcement. For example, in the enforcement of law, individuals of lower social status are more likely to encounter unjust treatment than those of higher social status, but this does not imply that due to the existence of injustice, the law should become lenient. On the contrary, issues of unjust treatment should be addressed through the second principle of justice (promoting the interests of the most vulnerable groups in society), thus enhancing social justice through legal assistance and other means.

Regarding Li Hon Lam's viewpoint, it seems that considering the higher crime rates among socially vulnerable groups in reality and their disadvantaged position within the judicial system, we should not agree to the capital punishment. This viewpoint has three issues. First, the establishment of legal principles and the execution of laws are two separate matters. For someone who has been wrongly convicted, they certainly would oppose the capital punishment being carried out against them, but this does not imply that they universally oppose all death penalties. Furthermore, any argument against the capital punishment based on the possibility of wrongful convictions faces a common problem: any punishment has the potential for misjudgment. If the existence of any possibility of misjudgment necessitates the rejection of a particular

ⁱ Rawls theory of the veil of ignorance and the justice as fairness can be found in [14].



punishment, then all punishments should be rejected.ⁱ Secondly, Scanlon's contractualism requires that the law be justifiable to everyone, effectively deriving a universal will from the will of the most disadvantaged.ⁱⁱ However, since any law can potentially harm the interests of some individuals, if we were to abandon a law solely due to the opposition of the most vulnerable, it would make all state actions impossible.ⁱⁱⁱ Finally, this viewpoint fails to explain what reasons vulnerable groups would have to reject the capital punishment. If the reason is out of self-interest, although the crime rate among vulnerable groups is higher than average, making them more likely to be sentenced to death or suffer from wrongful convictions, this same group is also more likely to be victims of violent crimes. They need the protective deterrent of law even more.^{iv} If the reason is rational, according to Kant's understanding of reason, as reason is the capacity to derive principles through reasoning, vulnerable groups in legal contexts, including those who have been wrongfully convicted, can still rationally recognize that imposing the capital punishment on murderers should become a universal rule, and thus they would not reject the institutionalization of the capital punishment.

6 Conclusions

This article systematically sorts out Kant's logic of defense for the capital punishment through an in-depth textual analysis of Kant's philosophy of legal rights and moral philosophy, responding to possible criticisms. Kant's support for the capital punishment is not simply based on the impulse for revenge, but is established on an absolute respect for rational persons and a strict adherence to the principles of justice. Although Kant's view on the capital punishment originated more than two centuries ago, it still has significant theoretical reference value for reflecting on contemporary reforms of the capital punishment system. Currently, many countries are in the transitional period from a capital punishment retention country to one that strictly limits the application of the capital punishment. Based on the perspective of Kant's philosophy, we should adhere to the criminal policy of "retaining the capital punishment, but strictly limiting and cautiously applying it," rather than blindly pursuing immediate abolition of the capital punishment. First, retaining the capital punishment is a necessary requirement to maintain the bottom line of judicial justice. In Kant's view, for serious crimes that deliberately deprive others of life, no other punishment can achieve a balanced justice on the principle of equivalence; only the capital punishment can confirm the sacred and inviolable nature of the right to life. In the current social ethical views, retaining the capital punishment for heinous crimes that severely endanger public safety aligns with the public's most basic expectations for fairness

ⁱ The only possible justification for exercising restraint in the use of the capital punishment from a practical perspective is that other forms of punishment allow for the possibility of remedy after the fact, whereas the capital punishment offers no possibility of remedy whatsoever. However, in cases where the evidence is conclusive and the law has been applied correctly, we cannot completely exclude the capital punishment from sentencing options simply because there is a theoretical possibility of wrongful convictions. This article does not intend to discuss the institutional design or feasibility of the capital punishment in the field of jurisprudence, but merely seeks to defend the legitimacy of the capital punishment from the perspective of Kantian philosophy.

ⁱⁱ According to Scanlon, an action is moral only if the principle allowing that action is one that those who might be affected by it cannot reasonably reject. Therefore, the judgment of right and wrong is a judgment about whether the reasons for accepting or rejecting a principle under specific conditions are sufficient.^[16]

ⁱⁱⁱ Similar criticisms can be found in [27]. Ashford argues that, because it rejects all interpersonal trade-offs, Scanlon's theory commits to extremely demanding principles applicable to any situation where someone could be harmed by activities involving even the slightest risk, a situation that exists in any realistically achievable state of the world.

^{iv} Not only are the victims and perpetrators of violent crime from the same group, but many perpetrators even have experiences of being victims themselves. Research on the similarities between violent crime offenders and victims can be found in [25][26].

and justice, and also reflects the state's exercise of retributive legal rights to maintain the authority of the law. Second, we should vigorously reduce the crimes punishable by death and strictly limit their scope of application. Although Kant supports the capital punishment, he strictly limits its application to the very few crimes violence, opposing the expansion of the capital punishment. This idea is highly consistent with the direction of recent amendments to the trend that gradually abolish the capital punishment for non-violent crimes. We should draw on Kant's principle of proportionality, ensuring that the severity of punishment strictly corresponds to the degree of harm caused by the criminal behavior, avoiding excessive punishment. Finally, the judgment and execution of the capital punishment must embody humanitarian spirit. Kant emphasizes that even for death row inmates, their status as persons must be respected, opposing any form of abuse and humiliating execution. This means that in judicial practice, we must prevent wrongful convictions through strict procedural justice, improve the review process for death penalties, and ensure that every capital punishment judgment withstands scrutiny from reason and law.

In summary, Kant's theory of the capital punishment provides us with a third path that transcends radical abolition and the abuse of heavy punishment. In the process of building the justice society, we should uphold a rational attitude, retaining the capital punishment as the ultimate means of defending justice while striving to limit its scope of application through institutional design, ultimately achieving the unity of punishing crime and safeguarding human rights.

References

- [1] Hill, Thomas E., Jr. *Human Welfare and Moral Worth: Kantian Perspectives*; Oxford University Press: Oxford, UK, 2002. <https://doi.org/10.1093/0199252637.001.0001>.
- [2] Byrd, S. Kant's Theory of Punishment: Deterrence in Its Threat, Retribution in Its Execution. *Law and Philosophy* 8 (1989): 151-200. <https://doi.org/10.1007/BF00160010>.
- [3] Tunick, M. Is Kant a Retributivist? *History and Political Thought* 17 (1996): 60-78. <http://www.jstor.org/stable/26217122>.
- [4] Kant, I., and A.W. Wood. *Practical Philosophy*; Gregor, M.J., Ed.; The Cambridge Edition of the Works of Immanuel Kant; Cambridge University Press: Cambridge, UK, 1996.
- [5] Bentham, J. *An Introduction to the Principles of Morals and Legislation*; Batoche Books: Kitchener, Canada, 2004, 314.
- [6] Mill, J.S. *Speech in Favor of Capital Punishment, 1868*; Robson, J.M., and Kinzer, B., Eds.; *The Collected Works of John Stuart Mill, Vol. XXVIII: Public and Parliamentary Speeches*; University of Toronto Press: Toronto, Canada, 1988, 266-273.
- [7] Sarver, V.T. Kant's Purported Social Contract and the Capital Punishment. *The Journal of Value Inquiry* 31 (1997): 455-472. <https://doi.org/10.1023/A:1004201120831>.
- [8] Steiker, C.S. No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Capital Punishment. *Stanford Law Review* 58 (2005): 751-789. <http://www.jstor.org/stable/40040280>.
- [9] Potter, N.T. Kant and Capital Punishment Today. *Journal of Value Inquiry* 36 (2002): 267-282. <https://doi.org/10.1023/A:1016104603564>.



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- [10]Merle, J.-C. A Kantian Critique of Kant's Theory of Punishment. *Law and Philosophy* 19 (2000): 311-338. <https://doi.org/10.1023/A:1006497631400>.
- [11]Beccaria, C. *Beccaria: On Crimes and Punishments and Other Writings*; Bellamy, R., Ed.; Davies, R., Trans.; Cambridge Texts in the History of Political Thought; Cambridge University Press: Cambridge, UK, 1995, 66.
- [12]Reiman, J.H. Justice, Civilization, and the Capital Punishment: Answering van den Haag. *Philosophy & Public Affairs* 14 (1985): 115-148. <http://www.jstor.org/stable/2265453>.
- [13]Finkelstein, C.O. A Contractarian Argument Against the Capital Punishment. *New York University Law Review* 81 (2006): 1283-1330. https://scholarship.law.upenn.edu/faculty_scholarship/997.
- [14]Rawls, J. *A Theory of Justice: Revised Edition*; Harvard University Press: Cambridge, MA, USA, 1999, 10-15.
- [15]Li, H.-L. Contractualism and the Capital Punishment. *Criminal Justice Ethics* 36 (2017): 152-182. <https://doi.org/10.1080/0731129X.2017.1358912>.
- [16]Scanlon, T.M. *What We Owe to Each Other*; Belknap Press of Harvard University Press: Cambridge, MA, USA, 1998, 3.
- [17]Yost, B.S. Kant's Justification of the Capital Punishment Reconsidered. *Kantian Review* 15 (2010): 1-27. <https://doi.org/10.1017/S1369415400002417>.
- [18]Wood, A. *Kantian Ethics*; Cambridge University Press: Cambridge, UK, 2008, 208-209.
- [19]Blöser, C. Degrees of Responsibility in Kant's Practical Philosophy. *Kantian Review* 20, no. 2 (2015): 183–209. <https://doi.org/10.1017/S1369415415000011>.
- [20]Radelet, M.L., and R.L. Akers. Deterrence and the Capital Punishment: The Views of the Experts. *The Journal of Criminal Law and Criminology* 87 (1996): 1-16. <https://doi.org/10.2307/1143970>.
- [21]Sunstein, C.R., and A. Vermeule. Is Capital Punishment Morally Required? - Acts, Omissions, and Life-Life Tradeoffs Ethics and Empirics of Capital Punishment. *Stanford Law Review* 58 (2005): 703-750. <http://dx.doi.org/10.2139/ssrn.691447>.
- [22]Pong, W. The Normativity of Retributivism in Kant's Theory of Punishment. *Philosophy and Culture* 51, no. 8 (2024): 65-84. <https://www.airitilibrary.com/Article/Detail?DocID=10158383-N202409060001-00005>.
- [23]Barry, K.M. The Capital Punishment & The Fundamental Right to Life. *Boston College Law Review* 60 (2019): 1545. <http://dx.doi.org/10.2139/ssrn.3287213>.
- [24]Eckert-Kuang, B. Kant on Self-Legislation as the Foundation of Duty. *European Journal of Philosophy* 33, no. 3 (2025): 910–926. <https://doi.org/10.1111/ejop.13026>.
- [25]DeLong, C., and J. Reichert. *The Victim-Offender Overlap: Examining the Relationship Between Victimization and Offending*; Illinois Criminal Justice Information Authority: Chicago, IL, USA, 2019. <https://icjia.illinois.gov/researchhub/articles/the-victim-offender-overlap-examining-the-relationship-between-victimization-and-offending>.
- [26]Jennings, W.G., A.R. Piquero, and J.M. Reingle. On the Overlap Between Victimization and Offending: A Review of the Literature. *Aggression and Violent Behavior* 17, no. 1 (2012): 16-26. <https://doi.org/10.1016/j.avb.2011.09.003>.
- [27]Ashford, E. The Demandingness of Scanlon's Contractualism. *Ethics* 113, no. 2 (2003): 273-302. <https://doi.org/10.1086/342853>.
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