

## Punishment and Retribution

*What is punishment?*

Punishment is a harm inflicted on a person by an appropriate authority because the authority ostensibly believes the person is guilty of doing something wrong or illegal.

1. *What is the justification for having an institution of punishment at all?*

*Kant's Retributivist Answer: The Intrinsic Desert Thesis*

2. *What is the nature of the reason (the 'because') that justifies the authority in inflicting harm on a person because the person has done something wrong or illegal?*

*Kant's Retributivist Answer: The Directness Thesis*

3. *What are the standards that make a punishment 'too severe' or 'too lenient' and how are these standards to be justified?*

*Kant's Retributivist Answer: Ius Talionis.*

*Law of punishment: Whoever commits a crime must be punished.*

A. "Punishment by a court (*poena forensis*) ... can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society. It must always be inflicted on him only *because he has committed a crime*....He must previously have been found *punishable* before any thought can be given to drawing from his punishment something of use for himself or his fellow citizens. The law of punishment is a categorical imperative" (*Metaphysics of Morals* 6:331).

B. "In punishments, a physical evil is coupled to moral badness. That this link is a necessary one, and physical evil a direct consequence of moral badness, or that the latter consists in a *malum physicum, quod moraliter necessarium est*, cannot be discerned through reason, nor proved either, and yet it is contained in the concept of punishment that it is an immediately necessary consequence of breaking the law. The judicial office, by virtue of its law-giving power, is called upon by reason to repay, to visit a proportionate evil upon the transgression of moral laws...Now from this it is evident that an essential *requisitum* of any punishment is that it be just, i.e. that it is an immediately necessary consequence of the morally bad act; and this, indeed, is what its quality consists in, that it is an *actus iustitiae*, that the physical evil is imparted on account of the moral badness" (*Metaphysics of Morals Vigilantius*) 27:552-553).

C. "But what kind and what amount of punishment is it that public justice makes its principle and measure? None other than the principle of equality (in the position of the needle on the scale of justice), to incline no more to one side than the other. Accordingly, whatever undeserved evil you inflict on another within the people, that you inflict on yourself. If you insult him, you insult yourself; if you steal from him, you steal from yourself; if you strike him, you strike yourself; if you kill him, you kill yourself. But only the law of retribution (*ius talionis*) – it being understood, of course, that this is applied by a court (not by your private judgment) – can specify definitely the quality and quantity of punishment; all other principles are fluctuating and unsuited for a sentence of pure and strict justice because extraneous considerations are mixed into them" (*Metaphysics of Morals* 6:332).

D. "Although he who punishes can at the same time have the kindly intention of directing the punishment to [the end of happiness] as well, yet it must first be justified in itself as punishment, that is, as mere harm, so that he who is punished, if it stopped there and he could see no kindness hidden behind the harshness, must himself admit that justice was done to him and that what was allotted him was perfectly suited to his conduct" (*Critique of Practical Reason* 5:37).

E. "Woe unto him who crawls through the windings of eudaimonism in order to discover something that releases the criminal from punishment" (*Metaphysics of Morals* 6:331).

F. “A *state*, Kant says, “is a union of a multitude of human beings under laws of right, insofar as these are *a priori* necessary as laws, that is, insofar as they follow of themselves from concepts of external right as such (are not statutory), its form is the form of a state as such, that is, of *the state in idea*, as it ought to be in accordance with pure principles of right” (*Metaphysics of Morals* 6:313).

G. “In general, all evils that are inflicted on the other under the law of coercion, he inflicts, by a universal law of freedom, on himself; for he can only offend the other to just the extent that the other can compel him to desist from the offense, or not to use his right; but this, by universal laws of freedom, is equal and unconditioned for everyone” (*Metaphysics of Morals Vigilantius* 27:555).

H. “All means of punishment, therefore, which merely aim at protecting the person and property of men are but means and signs of the punishment itself” (*Metaphysics of Morals Vigilantius* 27:556).

I. “We show, exhibit, wrongness [in the criminal’s maxim] by taking it at face value. If the criminal has adopted it, he is claiming that it can be universalized. But if it is universalized, it warrants the same treatment of the criminal as he has accorded to his victim. So if he murders, he must be executed: if he steals, we must ‘steal’ from him... To justify the punishment to the criminal is to show him that the compulsion we use on him proceeds according to the same rule by which he acts. This is how ‘he draws the punishment on himself.’ In punishing we are not adopting his maxim but demonstrating its logical consequences of universalized” (Edmund Pincoffs, *The Rationale of Legal Punishment* [New York: Humanities Press, 1966], p. 9).

J. “Retributive punishment serves a moral function for Kant by making the criminal live under the law he implicitly sets up in his criminal act. The criminal acts on a maxim that he would not will as a universal law; we apply the law of that maxim to him, as though he had willed it universally... We are merely following out the rational interpretation of his irrational act, and he should have no reason to complain” (Samuel Fleischacker, “Kant’s Theory of Punishment,” *Kant-Studien* 79, no. 4 (1988), p. 442).

K. “For it is no punishment if what is done to someone is what he wills, and it is impossible to *will* to be punished” (*Metaphysics of Morals* 6:335).

L. “No one suffers punishment because he has willed *it*, but because he has willed a *punishable action*” (*Metaphysics of Morals* 6:335).

M. “The feeling of freedom in the choice of the final end is what makes [God’s] legislation worthy of love. – Thus although the teacher of this end [Christ] also announces punishments, that is not to be understood – or at least it is not suited to the proper nature of Christianity to explain it – as though these should become the incentives for performing what follows from its commands; for to that extent it would cease to be worthy of love” (*The End of All Things* 8:338).

N. “The religion of Zoroaster had these three divine persons, Ormuzd, Mithra and Ahriman, the Hindu religion had Brahma, Vishnu and Shiva...The Goths revered their Odin (father of all), their Freya (also Freyer, goodness) and Thor, the judging (punishing) god... The religion of Egypt had its Ptha, Kneph and Neith, of whom, so far as the obscurity of the reports from those ancient times permit us to surmise, the first was to represent spirit,... as the world *creator*, the second, a generosity which sustains and *rules*, the third a wisdom which limits this generosity, i.e. *justice*... It is hard to give a reason why so many ancient peoples hit upon this idea, unless it is that the idea lies in human reason universally whenever we want to think of the governance of a people and (on the analogy with this) of world governance” (*Religion within the Boundaries of Mere Reason* 6:140-141).

“But the expression *poenae vindicativae*, like the expression *iustitia ultrix* [both expressions used by Baumgarten] is really too hard. For vengeance cannot be thought in God...So it is better to regard the punishments inflicted by divine justice on sins in general as an *actus of iustitiae distributivae*, that is, a justice limiting the apportionment of benevolence by the laws of holiness... God’s justice must limit benevolence so that it distributes good only *according to the subject’s worthiness*” (*Lectures on the Philosophical Doctrine of Religion* 28:1086-1087).

