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The Quandary of Infanticide in Kant's 'Doctrine of Right'

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Abstract: The aim of this paper is to settle the controversy around Kant's notorious discussion of maternal infanticide in the 'Doctrine of Right' of 1797. How should a state punish an unmarried mother who has killed her newborn infant? The text (at *DoR* VI 335–37) is obscure. Three readings have been defended in the literature: 1. Lenience. Maternal infanticide does not count as murder; so, capital punishment is inappropriate. On this view, the child does not enjoy the full recognition of the law (this is the standard view). 2. Temporary privilege. Lenience should prevail as long as social attitudes are barbaric and treating maternal infanticide like regular cases of murder is perceived to be unjust. The regular punishment for murder will be appropriate once sexual mores have changed. The child will then enjoy the full protection of the law (Hruschka, Varden). 3. No lenience. Capital punishment, though it appears to be unjust, is actually just and ought to be applied. Any child, whether born to married parents or not, enjoys the full protection of the law (Brandt, Uleman). Based on a close examination of the passage and the context of contemporary laws and attitudes, Kant is not, it will be argued, advocating lenience but certain legislative reforms, which are needed to dispel the perception that capital punishment is unjust. Progressive legislation will change social attitudes, not vice versa. Moreover, it will be shown that Kant does not, appearances notwithstanding, endorse the thesis that a child born out of wedlock has been smuggled into the state like 'prohibited goods' or 'contraband merchandise', which would deprive the child of the protection of the state; that is the view with which Kant saddles Cesare Beccaria.

1 Infanticide in Eighteenth-Century Germany

How should the state punish an unmarried mother who kills her newborn infant? Kant addresses this thorny question in the 'Doctrine of Right'; but his answer is notoriously unclear. Three incompatible readings have been defended in the literature. There is, first, the *standard reading* according to which maternal infan-

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ticide should, on Kant's account, be treated with lenience. Infanticide does not count as murder, which renders capital punishment inappropriate. The text has, secondly, been interpreted to say that Kant wants to grant mothers a *temporary privilege*. Lenience should prevail as long as social attitudes are barbaric and punishing maternal infanticide like regular cases of murder is therefore perceived to be unjust. After that, capital punishment will be appropriate. There is, thirdly, the view that Kant is *not arguing for lenience*. Capital punishment, though considered unjust by some, is actually just. Maternal infanticide should be punished like any other case of murder.

In what follows, the text will be shown to favour the third reading. On Kant's considered view, the full force of the law should be brought to bear on mothers who kill their newborns. However, the small number of scholars who defend this option do not adequately address the question of how to dispel the popular perception that capital punishment is inappropriate in these cases. We therefore need a better sense of the kind of legislative reform programme Kant would endorse.

The paper is divided into twelve sections. This section and Sections 2 to 4 set the stage by providing concise introductions to eighteenth-century public debates around the topic of infanticide, the twin problems of infanticide and duelling, the concept of the 'point of honour' and Kant's general theory of punishment. Section 5 turns to the three responses to the question of how the infanticide passage in the 'Doctrine of Right' should be read. Sections 6 and 7 will turn to the status children born out of wedlock are granted in Kant's legal philosophy. Appearances notwithstanding, he does not wish to say that they are born into the state of nature or that they do not deserve the care and protection of the state. In Section 8, it is argued that the so-called 'right of necessity' is irrelevant to the quandary of infanticide and thus cannot be used to show that the mother should be treated leniently. Section 9 refutes the 'temporary lenience view' by showing that the perception that capital punishment is unjust in these cases does not, for Kant, depend on public opinion as such but rather on barbaric and undeveloped laws, which leads to a discussion of requisite legislative reform in Sections 10 and 11. Finally, Section 12 concludes the paper.

Infanticide was no longer a particularly pressing social problem in late eighteenth-century Germany.[1] In the Holy Roman Empire, there were around 220 to 300 official cases of mothers killing their newborn children in any given year, around

1 Here and in what follows, I draw on Otto Ulbricht's and Richard van Dülmen's standard works on the topic (Ulbricht 1990, and van Dülmen 1991). For a concise overview see Ulbricht 1997.

one case per 100,000 population. If anything, numbers were falling. The majority of cases occurred among dependent labourers and in the lower middle to lower classes. In most cases, the mother knew the father well. Intercourse had been consensual and was often preceded by a promise of marriage ultimately not honoured.[2] More often than not, the parents of the child were romantically involved. But economic circumstances made it impossible for them to start a family. Unmarried mothers could not raise their offspring in the public eye; nor could they give up their babies for adoption. There were foundling homes, of course. But children were often raised in truly appalling conditions there. Many died in their care. It is not surprising, then, that women sought to conceal unwelcome pregnancies, and that they came to the desperate conclusion that killing the infant to which they had only just given birth was the only way out of their misery.

As so often, perception diverged from the facts. In the eyes of the educated public, the plight of unwed mothers was a most pressing social problem. The issue of infanticide seemed like a godsend to the poets of the *Sturm und Drang* period, who took it up in their stories and plays and transformed it according to their conception of idealised female virtue.[3] Heinrich Leopold Wagner made a start with his play "The Child Murderess" (*Die Kindermörderin*), published anonymously in 1776. Friedrich Schiller, Gottfried August Bürger, Jakob Michael Reinhold Lenz and others followed suit. The crime was represented as unnatural, cruel, unchristian or worse. It was contrasted with a contemporary ideal of womankind as gentle and caring. Yet the deed was largely blamed not on the mother but on social mores. The father of the child was now portrayed as belonging to a higher class, e. g. as an officer or nobleman who fails to stand by his promise of marriage or is prevented from honouring it by a dastardly comrade in arms. The mother's motive was deemed to be concern for her womanly honour (meant to lie in chastity), not the very real prospect of abject poverty.

The outstanding literary example of this genre is Johann Wolfgang Goethe's *Faust*. Faust persuades Mephistopheles to arrange an intimate encounter with Margarete. She kills the child, is tried and executed and, to Mephistopheles' chagrin, redeemed by the powers above right at the end of Part I. It is well known that Goethe based his character on Susanna Margaretha Brandt, decapitated in Frankfurt on 14 January 1772. Her fate sparked heated public debates. In 1783, as a privy councillor in Weimar, Goethe came to be involved in the case of Johanna

2 As van Dülmen notes, in such circumstances pre-marital intercourse was not unusual, and whatever stigma remained could be removed by marriage (van Dülmen 1991, 24).

3 See W. D. Wilson's recent survey article on infanticide in the *Sturm und Drang* period (Wilson 2017). Frank and Günther Häßler point out that the literary prominence of the topic is a German peculiarity (Häßler *et al*. 2008, 26).

Catharina Höhn, who was likewise executed by a stroke of the executioner's sword. Another sign of the times is the response Ferdinand Adrian von Lamezan, a senior civil servant in Mannheim, got to his 1780 essay competition – prize money: 100 ducats – on the topic of the best and most feasible means to stop infanticide.[4] There were 385 contributions, nearly ten times the regular number; three winning essays were published in one volume in 1784; others were published separately; and some authors even preferred publishing their contribution early to officially entering the competition. Kant's discussion of infanticide as a legal problem in the 1797 'Doctrine of Right' should be read as a late contribution to the contemporary debate. The passage in question concludes his discussion of criminal punishment. It is frequently seen as one of the most shocking in Kant's entire oeuvre. Annette Baier, for instance, calls what she takes to be his main argument "a pretty shocking and cruel bit of Kantian moral reasoning" in that it disregards "the fate of innocent victims" (Baier 1993, 446). So, what does Kant have to say about infanticide? Let us turn to the text.

2 Kant on the Twin Problems of Infanticide and Duelling

The final long paragraph (*DoR*, VI 335.36–338.7) of the General Remark's Section E, which deals with the right to punish and to pardon, concerns a juridical problem that almost seems like an afterthought: Kant asks how the state should punish "maternal infanticide" and "murdering a fellow serviceman [...], a duel" (*DoR*, VI 336.4–6, emphasis omitted). *Prima facie* both are cases of murder and therefore to be punished as such, i. e. by death. Yet both agents – the mother and the officer – have so much to lose that the justice of capital punishment is called into doubt. For a woman of the lower social orders, life as a disgraced single mother was well-nigh impossible. An officer had to challenge another, or accept a challenge when challenged, because he could not afford to be seen as a coward; he must seem to be above fear to command the respect of his men. Accordingly, both

4 *Welches sind die besten ausführbarsten Mittel dem Kindermorde abzuhelfen, ohne die Unzucht zu begünstigen?* The title (here quoted as it appears on the cover of the 1784 publication) pinpoints the obstacle that stood in the way of penal reform: Lenience was seen as an encouragement to immorality. (This was seen as a downside of Frederick's reforms, which were directed at improving the lives of unwed mothers.) Michael Niehaus provides a useful survey of a range of solutions proposed by various contributors (Niehaus, 2005, 25–32). We shall review some of them in the final section of this paper.

crimes are overwhelmingly motivated by a desire to preserve one's honour. That is why capital punishment, though objectively justified, is subjectively regarded as cruel, unjust and unfair.

In what follows, we shall focus on the mother's case. But let us first examine one eminent contribution to the debate about duelling: that of Frederick the Great, Kant's favourite Prussian monarch. Frederick wrote about the problem in his 1749 treatise on the reasons for introducing and abolishing laws:

> The directive against duelling [22 March 1717, which makes killing another in a duel punishable by death] is very just, very reasonable and very well composed; but it does not lead to the end that the princes had in mind when they published it. Prejudices older than this edict shamelessly disregard it, and the intended audience, full of misconceptions, seems to have reached a tacit agreement not to obey it. A misguided but generally accepted point of honour [*falsch verstandenes, aber allgemein angenommenes Point d'honneur*] defies the power of princes, and they can uphold the law only by means of a kind of cruelty. Whoever has the misfortune of being insulted by a brutal lout is taken to be a coward by all the world if he does not avenge the affront by killing the man who has insulted him. If it happens to a nobleman, he is regarded as unworthy of his nobility. If he is a soldier and does not put an end to the matter by a duel, he will be forced to leave his corps in shame and he will be unable to re-enter service anywhere in Europe. So, what is a man to do who finds himself in such a critical situation? Should he disgrace himself [*sich dadurch entehren*] by obeying the law, or should he not rather risk his life and his luck to safeguard his good name? (Frederick II. 1795: 205–206)

Frederick recommends a congress of all European princes, who are to declare duelling both shameful and punishable by death within their own jurisdictions. A duellist who kills another would not just be forced to leave his profession. He would have nowhere to go.[5]

Kant construes the unmarried mother's predicament as a parallel case. There are strong incentives for her to conceal her pregnancy and to rid herself of the child soon after birth. Reinhard Brandt suspects that the juxtaposition of infanticide and duelling is Kant's own doing because the topics were discussed separately at the time (Brandt 1999, 285). However, since Frederick sympathetically discusses the dire situation of unwed mothers and the problem of infanticide in

5 In addition, matters of honour need to be brought into the state's regular jurisdiction. Kant – who, after all, regarded an honourable reputation as a kind of rightful possession – suggests as much in his essay fragments. If it is an established practice, dragging the 'brutal lout' before a court of law would no longer be seen as an act of cowardice (which is Sussman's worry, see Sussman, 2008, 311). In fact, this is precisely how duelling was brought to an end in Germany in the nineteenth century.

the same treatise, the Great King may well have been a source of inspiration in this regard.[6]

After presenting pleas for lenience on behalf of both the officer and the mother, Kant raises the questions of what the law should say. He concedes that "penal justice runs into a great deal of trouble", namely either to have a law that imposes the death penalty invalidate notions of honour that Kant takes to be legitimate, or to impose a lesser punishment, which would be unfitting for the crime in question (cf. *DoR*, VI 336.33–35). We face the choice, it seems, to be "either cruel or indulgent" (*entweder grausam oder nachsichtig zu sein,* DoR, VI 336.35 f.). Kant concludes that the principle that murder must be punished by death remains valid, but that a barbarous state of affairs is responsible for the discrepancy between subjective incentives of honour and regulations that are objectively correct, "so that public justice arising from the state becomes an *injustice*" vis-à-vis the justice that arises "from the people" (*DoR*, VI 337.5–337.7). What Kant means by this rather obscure remark will be discussed in Section 9. For now, let us examine another essential element of the quandary of infanticide – the issue of the 'point of honour'.

3 The 'Point of Honour'

Volume XXIII of the Academy Edition contains fragments of an essay touching on the twin problems of infanticide and duelling that Kant worked on in the 1780s.[7] These notes are not, as is commonly assumed, drafts intended for publication in the 'Doctrine of Right' (see Brandt 1999, 284). But they unite the two problem areas under the heading of a 'point of honour', which – if properly explained – will help us understand Kant's published later view.

According to the Oxford English Dictionary, a point of honour is "a matter regarded as vitally affecting one's honour; (hence) an obligation to demand sat-

6 Kant apparently bought into the one-sided Romanticist representation of the woman's predicament. His reconstruction turns on the mother's and the officer's sense of honour, not on their financial situation, which must have been dire if a loving couple decide they cannot afford to get married to start a family.

7 In the notes, Kant for the most part focuses on pre-marital (and at times marital) female chastity (see Brandt 1999, 285). But there are obvious implications for the problem of infanticide, and it is difficult to believe that this problem was not at the back of Kant's mind when he composed them.

isfaction (originally and esp. by a duel) for a wrong or an insult".[8] So, the notion of a *point d'honneur* – to use the language in which it gained promience – was usually associated with the practice of duelling. In the earlier fragments, Kant modifies that notion in three significant ways. First, it is extended to the requirement of female chastity. Secondly, the notion is made more precise in that he sees the point of honour as the tipping point, i. e. the point at which a matter of honour becomes more important to the agent than his or her own life. That is why we have reason to doubt whether the threat of capital punishment can be effective. Thirdly, Kant suggests that there are two and only two such points of honour in late eighteenth-century Europe, one for (a subgroup of) either sex: unmarried women, whose reputation hinges on their sexual abstinence, and officers, whose reputation depends on their courage. In this critical matter, the failing of one member will bring the whole group into disrepute, presumably because then as now people have a tendency to generalise. They are prone to taking the failing of an individual as evidence that this is just how 'that kind of person' – an unmarried woman, an officer – behaves.[9]

With regard to women, there is a marginal note that helps us understand what kind of prejudice Kant had in mind:

> The point of honour of women [*der Weiber*] consists in not surrendering their virtue outside marriage, since it can always be presupposed of women [*von Frauenzimmern*] who have done this that they will stray even more when married; of men, however, who strayed before marriage it can be assumed that they will improve when married. (*R* 1342)

In broad terms, the idea seems to be this: Unchaste women will stray more when they are married because any child they give birth to will count as legitimate. Men who strayed before they got married will stray less in marriage for fear of upsetting their wives.[10] These musings do little to endear Kant to his twenty-first century readers. They do, however, help us understand his take on the situation of unmarried women in eighteenth-century Europe.

8 "point, note 1." *OED Online*, Oxford University Press, December 2021, www.oed.com/view/Entry/146609. Accessed 14 January 2022.

9 See *D*, XXIII 368.14–18. Kant explicitly aligns the two problems with gender roles in the published work, see *DoR*, VI 336.2–4. Also, he refers to the honour of the officer's "estate" at *DoR*, VI 336.23 and 27.

10 See e. g. A. Friedländer, XXV 714.13–18, and Bemerkungen, XX 124 and 127. (Thanks to Martin Brecher for pointing me to these passages.)

4 The Elements of Kant's Theory of Punishment

Before we turn to the various readings of the enigmatic paragraph that have been offered in the literature, let us briefly review the principles of Kant's philosophy of punishment. Sharon Byrd's 1989 paper is rightly regarded as a milestone in Kant scholarship. There are, according to her, three distinct elements within Kant's account. The first is the *threat* of punishment. It is contained in a law promulgated by the state. The purpose of issuing a credible threat is deterrence, i. e. the protection of the rights of citizens. The second element is the *execution* of punishment. The state can inflict punishment on its citizens only on the basis of a law valid at the time the crime was committed. The criminal is therefore punished because he *broke* the law.[11]

The third element is the sentencing standard, which is common to both threat and execution. Kant takes the only plausible candidate to be *ius talionis*, the law of retribution. Punishing like with like ensures proportionality; and it is a powerful illustration of the claim that the culprit brings the punishment upon his or her own shoulders. Voiced by the perpetrator, the claim that the state must not do to him what he did to the victim comes close to a practical contradiction.[12] That is why Kant, unequivocally if reluctantly, states that the death penalty is the only appropriate punishment for some crimes, e. g. murder.

Having said that, the legal quandary of infanticide can be discussed largely independently of the question whether the the death penalty is the correct punishment for murder. Whether or not we believe in capital punishment – and, unlike Kant, most of us do not – there remains a question whether the mother (or indeed the duellist) deserves the standard punishment for murder or whether she should be treated more leniently. As we shall soon see, this is borne out by the course of legal history in Germany.

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11 See Byrd 1989. This distinction is so obvious that it is painful to see how many textbooks still contrast 'forward-looking' and 'backward-looking' theories of punishment as if the word 'punishment' meant a single thing in the context of this discussion.

12 But the principle is not without its difficulties, and Kant knows this. The main body of the 'Doctrine of Right' contains several problematic cases, revolving around differences in social status and sensitivity to punishment. Others are discussed in the second edition's appendix, directed against Friedrich Bouterwek's anonymous review of the original work. Kant concludes that "the only time a criminal cannot complain that a wrong is done him is when he brings his misdeed back upon himself, and what is done to him in accordance with penal law is what he has perpetrated on others, if not in terms of its letter at least in terms of its spirit" (*DoR*, VI 363.16–20). There is also the problem of duress or 'necessity', which is often mentioned in the context of the infanticide passage; we shall return to it below.

5 Three Readings: Lenience, Temporary Privilege, no Lenience

What, then, is Kant's solution for the legal quandary of how to punish maternal infanticide? Three readings have been defended in the literature. There is, first, what one might call the 'standard' or 'lenience' view. Most interpreters assume that maternal infanticide does not count as murder for Kant and that mothers who kill their newborn infants should not face capital punishment. If so, a child not born to married parents does not enjoy the full recognition and protection of the law.[13]

Julius Ebbinghaus's short monograph marks the starting point for the German tradition (see Ebbinghaus, 1968). Its latest representative is Christoph Horn. In his book on Kant's political philosophy, Horn discusses infanticide as a case of non-ideal Kantian normativity (see Horn 2014, 91).[14] In English-language scholarship, the position that mothers who kill their newborn children deserve to be punished leniently is equally dominant. In an influential article on Kantian and Humean ethics originally published in 1993, Annette Baier sees Kant caught up in a conflict between his own categorical imperative and mores in contemporary Prussia. He is uncertain, Baier writes,

> that intentional killings done to defend the killer's "honor" really do deserve the death penalty. The cases he discusses are cases by military men engaged in duels and killings by women of their illegitimate newborn infants. I should think that Kant's current defenders and admirers must find the latter discussion particularly difficult to recast in a sympathetic way. Kant's reason for advocating leniency toward those unmarried mothers found guilty of infanticide is not a humane concern for the mothers' situation, faced as they were with social disgrace; but rather the legalistic point that the victim of the killing, in such cases, is not a person whom the law need protect. (Baier 1993, 445)[15]

Fifteen years later, David Sussman tells us that

> [w]hen murder is motivated by such concerns of honour, Kant thinks it is not properly punished with death, even though these killings are still punishable forms of homicide. He does not deny that the duellist and the unwed mother violate a moral right which their

13 I say "recognition *and* protection" because it is part of the argument here that the threat of the regular punishment for murder, though significant symbolically, is unlikely to protect the child effectively.

14 Authors of historical studies of the problem of infanticide in early modern Germany also tend to take the majority line (e. g. Wächtershäuser 1973, 31 f., or Wahl *et al.* 2004 442–50).

15 However, can Baier deny that it is sympathy for the mother's situation that prompts Kant to take the quandary seriously in the first instance?

> victims hold against them, the violation of which normally calls for execution as the sole appropriate punishment. [...] Yet while he thinks that these killings morally merit death, he denies that any political institution, no matter how well constituted, could be entitled to punish them thus. He does not condone such killings, and allows that the state is entitled to punish these malefactors in some less severe way which he leaves unspecified. (Sussman 2008, 303).

In a recent paper on emergencies in Kant's philosophy of punishment, Thomas Mertens notes:

> The second situation in which the intentional killing of a human being does not lead to capital punishment is the case of maternal infanticide: a woman has given birth to an illegitimate child, but because of the shame that this would cause her, she decides to kill the infant. Should the woman face capital punishment? According to Kant not, on the basis of the argument that the shame the woman would experience was so powerful that it rendered the deterrent effect of criminal law ineffective. (Mertens 2017, 461).

Crucially, these three authors – and defenders of the standard view generally[16] – take the thesis that the child has no legal standing in the Kantian state[17] to back up the claim that a mother who kills her newborn infant deserves to be treated more leniently than other murderers. Sussman calls Kant's position "bizarre" and rightly notes that this would mean that a foreigner "who accidentally or involuntarily enters the territory of another state (by inadvertently crossing an unmarked border, or by being kidnapped and transported there) is not entitled to the most basic legal protection from that state" (Sussman 2008, 306 f.). Now, as we know from *Perpetual Peace* and the 'Doctrine of Right', that is most decidedly not Kant's view. But that does not prevent defenders of the lenience reading from saddling Kant with the thesis that a child born to unmarried parents does not deserve the full protection of the law.[18]

The second or 'temporary privilege' interpretation departs from the standard reading by introducing a subtle twist. Its most outspoken defenders are Sharon Byrd and Joachim Hruschka (see Byrd/Hruschka 2010 and, especially, Hruschka 2015), but traces of this view can be found in writers such as Howard Williams

16 Other notable proponents include Thomas Hill and Jeffrie Murphy (see Hill 2002, 175, and Murphy 2015, 158 f., respectively).

17 The thesis is based on the 'contraband passage', *DoR*, VI 336.15–21, to be examined in the next section. It represents the view of an opponent, not Kant's own.

18 Also, if the child has illegally entered the state and does not deserve its protection, why should the mother be punished at all?

and Allen Wood as well.[19] Moreover, it has recently been defended by Helga Varden on independent grounds (Varden 2020, 233 f.). Lenience should prevail, these authors argue, as long as social attitudes are barbaric and treating maternal infanticide like other cases of murder is, or is perceived to be, unjust. The regular punishment for murder, whether capital punishment or life imprisonment, will be appropriate once society has changed. Only then will children born out of wedlock enjoy the full protection of the law.[20]

On the third view, mothers who kill their newborn offspring do not deserve to be treated leniently after all. The state should impose the appropriate punishment – in Kant's time, the death penalty – and discount the worry that it might be perceived as unjust by the people. The full protection of the law must be extended to children born to unmarried parents. At least in this respect, they are treated like all other children. A small minority of scholars favours this third reading. As early as 1798, Johann Heinrich Tieftrunk proposed it – without much ado – in his commentary on the 'Doctrine of Right'. He concedes that the mother and the duellist have a legitimate interest in preserving their honour. But he argues quite forcefully that honour once sacrificed cannot be restored by a dishonourable deed, i. e. by killing the infant or a fellow officer (see Tieftrunk 1798, 472–75).[21] Almost exactly two centuries later, two scholars revived the 'no lenience' view independently of

19 Although Williams is usually read as a straightforward advocate of lenience, his brief discussion of the case contains a hint that he might agree with Hruschka's 'temporary privilege' reading when he says Kant "suggests that it should not be possible *for a court in his time* to sentence to death a young woman who kills the illegitimate child to which she has given birth without, quite rightly, arousing strong public disapproval" (Williams 1983, 103, emphasis added). Similarly, Allen Wood blames the apparent harshness of the death penalty on "social attitudes" prevailing at the time. When these attitudes change, the death penalty will be the accepted punishment for a mother who has killed her newborn child (Wood 1999, 370 n31).

20 Byrd and Hruschka arrive at this view by interpreting Kant's text in the light of the historical development of the German StGB. When the new German penal code came into force in January 1872, and § 217 along with it, a mother who killed her child at birth or soon thereafter would in regular cases be condemned to at least three years of penal servitude (*Zuchthaus*) or to a minimum of two years in prison if mitigating circumstances obtained. (The standard punishment for murder at the time was, of course, the death penalty.) The law was amended in 1953 and 1969, the latter change reflecting the fact that the institution of penal servitude was abolished and replaced with standard prison sentences around that time. The wording was modified slightly in 1975. The privilege for infanticide was abolished in 1998, when finally shame was no longer associated with giving birth and raising a child out of wedlock. Interestingly, the new § 217 that replaced is a prohibition of assisted suicide. For an account of the history of § 217 StGB (old version) see Brambring, 2010; for an account of the legal situation in Germany since 1998 see Dölling, 2009.

21 Tieftrunk wants matters of military honour to be settled in a public court, which may well be an effective measure, particularly if it goes hand in hand with the criminalisation of duelling (see Tieftrunk, 1798: 474).

each other: Reinhard Brandt, who published his work in German, and Jennifer Uleman, who published hers in English (Brandt 1999 and Uleman 2000).[22]

In what follows, the first two readings will be shown to rest on a mistake. Advocates of either version of the lenience view are misattributing to Kant an argument that he advances on behalf of an opponent. Moreover, they draw on Kant's account of the so-called 'right of necessity', which, it turns out, is not relevant to the issues at hand. Only the third interpretation is tenable. The mother is punishable by death; the child deserves to enjoy the full recognition and protection of the state. Tieftrunk, Brandt and Uleman are grabbing the right horn of the trilemma. However, their readings need to be adjusted and amended to make sure that bringing the full force of the law to bear upon the mother (and the officer) is not perceived as unjust or cruel. To this end, we need a clear sense of the legislative changes Kant might propose. These measures will be the subject of the last three sections of this paper.

6 The Case for Lenience: the 'Contraband Passage'

It is time for us to turn to Kant's plea for lenience, which so many of his readers and interpreters take to be his own considered view. Here is the passage in full:

> Since legislation cannot remove the ignominy of a birth out of wedlock any more than it can wipe away the stain arising from the suspicion of cowardice that falls upon a subordinate military commander who fails to oppose a contemptuous encounter with a force of his own that elevates him above fear of death, it seems that in these cases human beings find themselves in the state of nature, and that *killing* (homicidium) – which should then not even be called murder (homocidium dolosum) – is indeed punishable in both cases, but could not be punished by death by the supreme authority. A child that comes into the world out of wedlock stands outside the law (for that is marriage), and hence also outside its protection. He has, as it were, crept into the commonwealth (like prohibited goods) so that it can ignore his existence (because it is not fit and proper that he should exist in this way), and hence can also ignore his annihilation; and no decree can lift the mother's shame if her delivery out of wedlock comes to be known. (*DoR*, VI 336.6–21)[23]

22 Brandt cites Tieftrunk as his source and inspiration (Brandt, 1999: 279); Uleman seems to be unaware of his early commentary. Brandt and Uleman may have another precursor in Arnulf Zweig, whose brief discussion of the case can be read as pointing in the same direction (see Zweig, 1993: 301).

23 Compare the parallel defence of the officer's deed: "A serviceman appointed as a subordinate commander who is insulted also sees himself constrained by the public opinion of the other

Commentators frequently applaud Kant's plea for lenience and in the same breath pour scorn on its absurdity. As we saw above, Annette Baier attributes Kant's alleged plea for lenience to "the legalistic point that the victim of the killing, in such cases, is not a person whom the law need protect" (Baier 1993, 445). Alan Soble's words are even more damning: "The old Kant is cruel, heartless about the plight of the illegitimate child, which he likens to a stash of marijuana." (Soble 2003, 55). Jordan Pascoe argues that "[Kant's] claim that mother and child merely find themselves in a 'state of nature' is startlingly *un*progressive", and that the view "is premised on [his] rigid designation of marriage and the domestic sphere as the institutions that make sexuality and child rearing possible" (Pascoe 2011, 5). And Jeffrie Murphy calls the above-quoted passage an "instance[] of unexampled feebleness and in no sense worthy of perhaps the greatest philosopher of the eighteenth century" (Murphy 2015, 158). The claim that a child born outside marriage is devoid of legal standing has, in fact, been more influential among his readers than any other aspect of this discussion. What shall we make of it?

The answer is that the 'contraband passage', as it will be called,[24] does *not* represent Kant's own view.[25] He does *not* wish to say that the mother is thrown back into the state of nature, that the authorities can ignore the child's existence, or that the mother should not be punished like any other murderer. Rather, he takes on the role of defence counsel, cobbling together an argument that – at least in the case of the mother[26] – is highly artificial. There are several clues in the text that support this reading. The first two sentences, in which the problem raised by the two cases is introduced, are followed by a long dash (*DoR*, VI 366.6), which is

members of his estate to obtain satisfaction for himself and, as in the state of nature, punishment of the offender, not by law, before a court of law, but by a *duel*, in which he exposes himself to death in order to prove his martial courage, which is that upon which the honour of his estate essentially rests, even if this should involve *killing* his opponent, which in this fight – which takes place in public and with mutual consent, and yet reluctantly – cannot actually be called *murder* (homocidium dolosum)." (*DoR*, VI 336.21–31)

24 The tag echoes Mary Gregor's influential translation of *verbotene Waare*, here more literally rendered "prohibited goods".

25 The only scholar who says this with the requisite clarity is Brandt: It is "not Kant's opinion, but an elaborate account of a mere illusion, of an artificial arrangement [*einer künstlichen Zurechtlegung*]" (Brandt 1999, 279). As Brandt notes, Tieftrunk may be of the same opinion – after all, he comes down on the same side of the interpretative divide. But he is much less explicit about it. Everyone else – including Uleman – takes the passage to represent Kant's actual view (see Uleman 2000, 175, 185–92).

26 The parallel argument in defence of the officer is perhaps a little more successful because Kant can plausibly draw on Beccaria's allegation that even in the juridical state parties under duress revert to the state of nature. We shall return to this point at the end of the present section.

followed by the long passage just quoted (and the corresponding analysis of the officer's quandary, here reprinted in a footnote. The dash marks a fresh start. The remaining 14 lines of the paragraph are separated off by two long dashes (*DoR*, VI 336.31), indicating that after the two pleas for mercy Kant resumes his own voice. He raises the decisive question of "what should count as lawful [*Rechtens*] in these two cases" of criminal justice (*DoR*, VI 336.31 f.), i. e. he does not assume that the two speeches for the defence have settled the matter conclusively. He then, finally, provides his own – admittedly opaque – answer (*DoR*, VI 336.32–337.7).

Philology aside, there is further evidence that the defence speeches do not contain Kant's considered view. First, Kant explicitly says that "*it seems that in these cases* human beings find themselves in the state of nature" and should therefore not be treated as cases of murder (*DoR*, VI 336.11 f., emphasis added, cf. Brandt 1999, 279).[27] Secondly, and more importantly, the argument contains a manifest contradiction. On the one hand, Kant appears to argue that maternal infanticide (and killing a fellow officer in duel) should count as manslaughter, rather than murder, and be punished accordingly. On the other hand, he seems to be prepared to say that mother and child, and the two duellists, have reverted to the state of nature. If so, it would be within the mother's rights to defend herself against the threat posed by the child, which would not be entitled to the law's protection at all (and, *mutatis mutandis*, the other officer).[28] This has been noted by Kant's interpreters; but they apparently do not regard it as a reason not to attribute such a feeble argument to him.[29]

27 Kant is not even wholeheartedly committed to the idea that legislation cannot lift the shame of the mother. There is an element of shame, he thinks, that will always attach to an illegitimate worth because it is the violation of a woman's true honour. But legislation can exacerbate matters unnecessarily, to the effect that a matter of honour becomes *the* point of honour in the sense discussed in the previous section. (Details will emerge in the final sections of this paper.) Similarly, the law cannot lift the suspicion of cowardice; but if the reform proposals outlined above – Frederick's congress of princes, in conjunction with courts of honour – were graced with success, duels would no longer be the honourable thing to do. So, legislation cannot remove the blame directly, but it can change the conditions in which agents are blamed.

28 So, Kant is trying to explain the apparent injustice of imposing capital punishment by arguing that in both cases violence is done to a party that is in no position to complain. In this he echoes his earlier, fragmentary reflections. This is obvious for the case of the duellist. When it comes to the child, his explanation is this: "What the *meretrix* abuses ought not to exist according to civil laws [*nach bürgerlichen Gesetzen*] so someone suffers violence [*Gewalt*] but not a citizen of the sate" (*D*, XXIII 365.7–10). This suggests that he was on the defence counsel's side in the later 1780s. By the time he returned to the problem in the 'Doctrine of Right' he had changed his mind.

29 Once again, Brandt is the only exception.

What, then, is Kant's motivation for presenting the view that mother and child are placed in the state of nature? There is a highly plausible explanation. In his famous *Dei delitti e delle pene*, at the end of his own chapter on honour, Cesare Beccaria notes that many people are prepared to risk their lives for the sake of their honour.[30] Crucially, he adds that the sentiment triggered by the imminent deprivation of honour is "a short-term return [*kurzdaurende Rükkehr*] to the state of nature and an instantaneous commitment to the idea [*augenblikliche Vorstellung*] of our former independence from the authority of the laws, which in certain cases do not sufficiently protect the citizen from the threat of abuse" (Beccaria 1766, 47, cf. Beccaria 1778, 51).[31] Now recall that the paragraph that precedes the two problem cases in the 'Doctrine of Right' was directed against Beccaria. So, why not assume that he continues to be Kant's target in the final paragraph of the section? Even though Beccaria does not mention the state of nature in the context of infanticide, duelling is the subject of the chapter that immediately follows (see Beccaria 1766, 48; cf. Beccaria 1778, 52).[32]

It has, in sum, been argued that Kant is playing devil's advocate at *DoR*, 336.6–31. That is why he is not worried that the argument – an argument he puts in Beccaria's mouth, not his own – is grotesquely inadequate. A little earlier, Kant attributes Beccaria's desire to abolish capital punishment to "the sentimentalism of sympathetic participation" (*theilnehmende Empfindeley*, *DoR*, VI 334.37). As he sees the same mawkish tendency at work in his discussion of honour, Kant naturally extends his dispute with Beccaria to the problem cases of infanticide and duelling.[33]

30 Brandt and Uleman both point to Beccaria as a plausible source of inspiration (see Brandt 1999, 279, and Uleman 2000, 191). Recall, however, that Uleman (but not Brandt) takes Kant to agree with Beccaria on this count. For her, Beccaria serves as Kant's inspiration.

31 The English translation echoes Karl Ferdinand Hommel's rather wordy German translation. Bellamy and Davis have "it represents an instantaneous return [*instantaneo ritorno*] to the state of nature and a temporary withdrawal [*sottrazione momentanea*] of oneself from the laws which do not sufficiently protect the citizen in such a matter" (Beccaria 1995, 27). Note also that Hommel switches around *instantaneo* and *momentanea*.

32 In addition, Hommel mentions duelling at the beginning of the chapter on honour (Beccaria 1778, 47 f.), alleging that honour is for the most part a 'delusion' (*Wahn)*. Kant's insistence that (true) honour is no delusion – that pre-marital sex (or cowardice) is inherently shameful – can be read as a response (cf. *DoR*, VI 336.33), which confirms our impression that he is targeting Beccaria.

33 As Brandt notes, the move is structurally similar to Kant's entertaining Beccaria's opposition to capital punishment a few lines earlier in the text (Brandt 1999, 279; cf. *DoR*, VI 334.37–335.7).

7 "Confirmed Bachelors of Either Sex": Kant on Foundling Homes

There is, moreover, direct evidence that taking care of illegitimate children does fall within the remit of the Kantian state – which is why it is so surprising that so many scholars versed in Kant's legal philosophy should take him to present the 'contraband argument' as his own considered view.[34] Just consider his discussion of social institutions a few pages further up in the 'Doctrine of Right':

> As for maintaining those children abandoned out of need or shame, or indeed murdered because of this, the state has a right to impose upon the people the duty of not knowingly letting them die, even though they are an unwelcome addition to the state. Whether this should be done by taxing confirmed bachelors of either sex (by which I mean *wealthy* unmarried people) as such, which after all are in part to blame for this, by means of establishing foundling homes for this purpose, or whether it can legitimately be done in another way (it would be hard to find another means for preventing this) is a problem which has not yet been solved in such a way that the solution offends against neither rights nor morality. (VI 326.33–327.6)

A few matters are worth noting. First, Kant's choice of words is unfortunate. The state can no longer save children who *have* been murdered out of need or shame. It would be more accurate to speak of children *at risk* of being murdered. Secondly, and more importantly, if in order to save the lives of abandoned children, the state can impose financial burdens on its citizens, it must surely also protect them, as far as possible, by the threat of penal legislation. Thirdly, Kant seems to be saying that unmarried people of a certain age – not all, but some – are causally responsible for the existence of children abandoned on the steps of churches, at foundling homes and in other public places. The reason is obvious. Some men who remain unmarried will have fathered children exposed by their mothers; some women who are apparently childless will have given birth to children nursed and educated at these charitable institutions.

Fourthly and finally, German history helps us understand Kant's somewhat surprising suggestion that the burden of taxation might fall upon "confirmed bachelors of either sex". The expression used – obscured by Gregor's rather less colourful translation "elderly unmarried people of both sexes" – is *Hagestolze beiderlei Geschlechts*. Like the English word 'bachelor', a *Hagestolz* is an unmarried man (though in some parts of the country it was also occasionally applied

34 Children are passive citizens, i. e. they enjoy the protection of the law without having an active share in making it (see *DoR*, VI 314.28).

to widowers who did not remarry and to unmarried females). Unlike the English word, however, it carries the connotation that the person in question is unlikely ever to get married because of his (or her) advanced age – hence the choice of the word 'confirmed' in the above translation.[35] Moreover, for purposes of taxation the word *Hagestolz* served as an official legal term in several German states. The age threshold varied, region by region, between 25 (in the Odenwald region) and 50 years, three months and three days (in Lower Saxony). In the fifteenth, sixteenth and seventeenth centuries, the estate of unmarried people above the threshold often fell to the local authorities when they died. In the eighteenth century, 'confirmed bachelors' were sometimes expected to contribute to pauper funds. On closer inspection, then, Kant's tentative proposal that wealthy unmarried people beyond a certain age should be asked to support foundling homes does not seem so outlandish after all.[36]

8 Necessity to the Rescue?

Many of those who have written on Kant's treatment of the two quandaries note their resemblance to the so-called 'right of necessity'[37] Kant discusses earlier in the text of the 'Doctrine of Right'.[38]

> This alleged right [the 'right' of necessity] is supposed to be an authorisation to take the life of another who is doing nothing to harm me, when I am in danger of losing my own life. It is obvious that were there such a right the doctrine of right would have to be in contradiction with itself. For the issue here is not that of an *unjust* assailant upon my life whom I forestall by depriving him of his life (ius inculpatae tutelae), in which case a recommendation to show moderation (moderamen) does not even belong to right but only to ethics; rather, it is a matter of violence being permitted against someone who has used no violence against me." (*DoR*, VI 235.15–23)

35 In that the word *Hagestolz* (confined to males) is a bit like the English 'spinster' in non-official, colloquial use (though the connotations of *Hagestolz* are somewhat less negative).

36 For a comprehensive study of this legal phenomenon see Stoll 1970.

37 Note that the 'right of necessity' is not a right but an 'alleged right', i. e. a pseudo-right. Kant makes it quite clear that it is always wrong to kill an innocent person, even to preserve one's own life. He merely argues that some killings will not be punished by the courts.

38 See Mertens 2017, Hruschka 2015, and even Uleman 2000 (who has reason to dismiss the apparent parallelism); Brandt 1999 (who rejects the 'lenience' reading) and Sussman 2008 (who defends 'lenience') are sceptical.

The move to use this passage to solve the twin dilemmas of infanticide and duelling is obviously quite attractive. At the same time, we have reason to believe it cannot be part of Kant's actual solution (and not just because the 'no lenience' reading favoured here renders the appeal to extenuating circumstances unnecessary). First of all, Kant argues that in cases of necessity the perpetrator cannot be punished at all because *no* just punishment could serve as a deterrent. With regard to infanticide and duelling, he entertains the idea that a *lesser* punishment might be appropriate (e. g. the punishment for manslaughter). Kant never indicates that these honour killings might be unpunishable.[39] The question is whether there is room for a halfway house. Secondly, Kant does not refer to his earlier discussion of necessity in the chapter on punishment or refer to infanticide (or duelling) in the preliminary section on equivocal right, where the question of a 'right' of necessity is examined.[40] Nor are the two case studies appended to the section on mercy, which begins a few lines further down (at *DoR*, VI 337.8). The discussion of the correct legal response to infanticide (and duelling) directly follows Kant's defence of capital punishment against Beccaria. These are indeed problem cases; but there is strong textual evidence that they are cases in which, upon reflection, the law remains in full force. Thirdly, and more importantly still, the question Kant raises about infanticide (and duelling) is different. The latter passage is about what the law – which specifies the penalty – should look like, whether some kind of legal privilege should be extended to the mother (and to the officer). It is a matter of legislation. By contrast, the earlier plea for unpunishability "is not to be understood objectively, in terms of what a law prescribes, but only subjectively, as the verdict that would be given by a court" (*DoR*, VI 235.24–26). In conclusion, the 'right of necessity', so called, has no relevance to the two legal quandaries.

9 The Missing Piece of the Puzzle: Changes in the Law

It has been argued so far that the passage most commentators take to contain Kant's argument for lenience is as un-Kantian as it is philosophically implausible. A child born outside marriage deserves the same legal recognition and protection

39 But he could, of course, have done so on the basis that mother and duellist have re-entered the state of nature.

40 Brandt goes further still, arguing that Kant would have discussed duelling and infanticide in the introduction had he thought of them as falling under the heading of equivocal right (Brandt 1999, 278).

as any other child; and a mother who after giving birth kills her newborn infant deserves to be punished by death. But we are not yet done. Let us have a look at the convoluted last sentence of the whole paragraph, here quoted in full:

> This knot is undone as follows: the categorical imperative of penal justice (the unlawful killing of another must be punished by death) remains, but legislation itself (and hence also the civil constitution), so long as it is barbaric and insufficiently developed, is to blame for the discrepancy between the incentives of honour in the people (subjectively) and the measures that (objectively) conform with its purpose, so that public justice arising from the state becomes an *injustice* with regard to that [arising] from the people. (*DoR*, VI 336.36–337.7)

Stripped to its bare bones, the sentence says that the mother must face capital punishment, "the measures that (objectively) conform with its purpose", despite the fact that what is objectively necessary is deemed unjust and even cruel in the subjective judgement of the people (cf. *DoR* VI 336.36).[41]

Do we have to infer that Kant advocates legislation the people deem cruel? This is a serious worry. What is worse, neither Johann Heinrich Tieftrunk nor Reinhard Brandt nor Jenny Uleman do much to dispel it. Tieftrunk bites the bullet, dismissing the popular perception of cruelty as delusional (Tieftrunk 1798, 474 f.). Brandt acknowledges the problem. Advocating for capital punishment, Kant is availing himself of what legal philosophers call the 'expressive' function of legislation. Treating the mother like any other murderer initially seems unjust. In the fulness of time, however, people will realise that the law is there for a reason: to protect the lives of newborn children. So, they will come to accept it as just (see Brandt, 1999, 282 f.).[42] But Brandt's solution does not rid the 'no lenience' view of the suspicion of cruelty. On the contrary, it amounts to the admission that, at least for a while, cruelty is inevitable.[43]

Uleman is more sensitive to the issue. She briefly addresses the charge of cruelty towards the end of her paper:

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41 Note that the very fact that the law appears unjust entails that it remains in place. Kant is not advocating lenience.

42 Brandt's interpretation can be read as a the mirror image of Hruschka's 'temporary privilege' proposal. It is not that the law must be lenient as long as strictness seems unjust, but rather that strictness is judged unjust as long as public opinion fails to unite behind the law. In other words, both Brandt and Hruschka are prepared to temporarily accommodate the tension between objective and subjective norms. They do not resolve it.

43 Recall, moreover, that Kant is arguing against humanitarian reform and for retaining the legal status quo (even if the strict law was not universally applied). The death penalty does not need to be introduced for the case of maternal infanticide, it is already in place. In that regard it is unlike, say, a law against driving under the influence of alcohol that may well help to change social attitudes towards the phenomenon.

> Kant is making the claim that it is up to law, law as a whole – a structure that is or should be designed to train and discipline a society in ways that bring it closer to a moral ideal – to close the gap between social and legal norms. (Uleman 2000, 194)[44]

Uleman goes on to advocate a two-pronged approach of insisting on capital punishment in conjunction with legal reforms. It is, she says, incumbent upon lawmakers to devise "general rules that do not place people in untenable situations" (Uleman 2000, 194) but she does not elaborate. We are left wondering what such measures would look like.

To see how Kant can evade the cruelty worry, we need to understand more fully *why* the people object to punishing infanticide by death. Scholars like Hruschka and Wood blame "social attitudes" (see, e. g., Wood 1999, 370 n31).[45] They argue for lenience, conceding that lenience will cease to be appropriate when attitudes change and allow the state to treat the killing of infants not born of married parents like any other murderous act. But – as duly emphasised by Uleman – Kant does *not* attribute the discrepancy between objective necessity and subjective injustice to social mores or the public perception of honour. He blames "legislation itself" (*die Gesetzgebung selber, DoR*, VI 337.1 f.) and "the civil constitution" (*die bürgerliche Verfassung, DoR*, VI 337.2). Kant also gives us a clue as to why he considers the law to be deficient. Legislation – and, consequently, the way a state is constituted – is to blame for the perception of cruelty because it is "barbaric and insufficiently developed" (*barbarisch und unausgebildet, DoR*, VI 337.3). Can we make sense of this?[46]

The first thing to realise is that, for Kant, it is not capital punishment as such that makes inflicting it on mothers who kill their newborn children seem unjust.

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44 The problem is particularly pressing for her because, unlike Brandt and (possibly) Tieftrunk, she takes Kant's case for the defence in general and the contraband passage in particular to reflect his own thoughts on the matter.

45 Byrd and Hruschka do mention the 'civil constitution', but they swiftly redirect their attention to public opinion (Byrd/Hruschka 2010, 230). They do not mention Kant's central point: The sad state of the civil constitution, and thus the balance of incentives within the agent, can be changed by means of progressive legislation.

46 Brandt also falls at this hurdle, since he fails to explain how *barbaric* and *insufficiently developed laws* should be responsible for the perception of injustice and cruelty. It would be strange if Kant used the word *unausgebildet* merely to indicate that the law was *too lenient*. Moreover, Brandt mentions the barbarism of – unduly lenient – public opinion (Brandt 1999, 283); but it is legislation, not public opinion, that Kant charges with barbarism. And even if we include the complicity of the state in the mother's crime (i. e. the complicity of unduly lenient legislation), this barely scratches the surface of relevant barbaric practices in the late eighteenth century (see Section 10).

The harshness of the penalty also results from aspects of women's lives that the state controls or condones. Positive law affects the means–ends rationality of the decision to kill one's child (or to challenge a fellow officer to a duel); and that in turn affects public opinion. It makes perfect sense, then, that the method by which Kant wanted to remove the semblance of cruelty was the law.

His essay fragments contain the missing piece of the puzzle. The *point d'honneur,* he says, is the threshold at which general public opinion says that preserving one's honour *should be more important to the agent than preserving his or her life* (cf. *D*, XXIII 367.30–32). In that case, the crime attracts "the semblance of reason and equity" (*den Schein von Vernunft und Billigkeit*, *D*, XXIII 368.1 f.). So, Kant is calling for legislative reform to wipe away that semblance. The law must ensure that chastity is no longer the *point d'honneur* of unmarried women (and, correspondingly, that duels are no longer the only feasible way out for officers who need to defend their honour. It must lift the scales of honour above the "mathematical point" at which they tip. Cf. *D*, XXIII 364.26).[47] The question is how that can be done.

In this regard, the text of the 'Doctrine of Right' and the fragmentary essay will be of limited use.[48] But we can instead draw on the rich contemporary reform tradition with which Kant would have been familiar. So, while Kant did not give the matter enough thought to put forward elaborate plans for legislative reform, it is clear *what kind* of proposals he must have had in mind when he complained that the state of legislation was 'barbaric' and 'insufficiently developed'. Let us discuss both failings in turn.

47 The state, one might hope, would also provide financial aid for mothers or young couples, since in the late eighteenth century poverty was at least as pressing a problem for many unwed mothers as social disgrace. (Of course, the two points cannot be separated entirely.) So, there is a Kantian case to be made for – means-tested? – child benefit.

48 Let us note, however, that Kant distinguishes two different kinds of honour in the fragmentary essay, the honour of the relevant group (*Standesehre*), e. g. unmarried women and officers, and the honour as a citizen (*bürgerliche Ehre*, cf. *D*, XXIII 367.18 f.). Arguably, Kant's reforms relate to the latter, not to the former. There is, for instance, no reason to believe that he wanted a woman (or a man) who has sexual intercourse out of wedlock not to feel shame. Pre-marital chastity is still honourable even if it ceases to be the distinctive *point d'honneur* for the female sex. Kant would not endorse the change of mores that took place in western societies and led to the repealing of § 217 in 1998. Also, as the matter has been deprived of its very special status, the 'misstep' of one group member would presumably no longer affect the reputation of all.

10 Barbarism

What was barbaric about eighteenth-century infanticide legislation during Kant's lifetime?[49] A prominent example is the practice of 'church penance' (*Kirchbuße*). The unmarried mother had to kneel by the altar and make public confession of her sins. Having received absolution, she would be allowed to receive communion again. But to perpetuate her shame she was often forced to go last. Moreover, secular authorities also punished what was called 'whoredom' or 'fornication' (*Hurenstrafen, Unzuchtsstrafen*). There were fines, which – if she could afford to pay – would make the financial position of an unwed mother even more precarious. Moreover, local authorites would subject unmarried mothers to public shame and ridicule, e. g. by dragging them around town on designated carts. In some regions, pillories were used for this purpose. Public disgrace would not, of course, be confined to the woman thus punished. It would also affect her family, whose livelihood would be put at risk by association.

Unsurprisingly, then, there was a strong abolitionist movement among Enlightenment intellectuals. Gustav Radbruch called infanticide the "key offence [*Schlüsseldelikt*] of all efforts to reform criminal law in the eighteenth century" (Radbruch *et al*. 1951, 241).[50] Such practices, ecclesiastical and secular alike, were widely blamed for putting pressure on women whose sexual encounters would have become public knowledge by having a child. In the various member states of the Holy Roman Empire, they were phased out only in the second half of the eighteenth century.[51]

Trial and execution were more barbaric still. Women who claimed that the child had been dead at birth or that the child's death was accidental were often tortured to extract a confession, which the court needed to pass a death sentence. As to the mode of punishment, the penal code of 1532, the *Constitutio Criminalis Carolina* of Emperor Charles V, ordained being buried alive or the the *poena cullei*, an especially cruel form of drowning, as the penalty appropriate for women[52] convicted of killing a close relative or 'parricide' – a crime considered so 'unchris-

49 See Radbruch *et al*. 1951, 244 f.

50 Recall that there was little or no separation of church and state. Protestant princes were also the heads of their regional churches. Vicars would be in the employment of the state.

51 The abolition of church penances was not without its critics. Justus Möser dismissed reforms as "newfangled philanthropy" and objected that the public shaming of unchaste behaviour was needed to uphold the honour of wives and the sanctity of marriage; Johann Gottfried Herder defended it as indispensable in Weimar, where they were abolished only in 1786 (van Dülmen 1991, 102 f.).

52 The corresponding punishment for men was the 'wheel'.

tian', 'inhumane' and 'bestial' that only the severest punishment seemed appropriate.[53] Again, states abandoned these methods in the course of the eighteenth century, when decapitation by the executioner's sword took their place (occasionally coupled, however, with first severing the 'guilty' hand that had done the deed).[54] Other measures that were meant to act as a deterrent were the public display of the executed woman's head or of her dead body, broken on a wheel. There are numerous reports that the harsh fate of convicted women evoked great sympathy. Moreover, an executed woman would not be buried in consecrated ground. Her shame thus continued even after her death.[55]

No stretch of the imagination is needed to see that this is the 'barbarism' of existing laws that Kant has in mind. The woman who dreads dishonour is not deluded about her cruel fate; and it is, at least in part, this fate that is judged disproportionate – and hence unjust – by the observing public. Kant is not, of course, endorsing pre-marital intercourse; but he would oppose archaic acts of public degradation. He wants to retain the death penalty; but he does not want infanticide to be punished more severely than any other case of murder. Recall that he explicitly rejects "punishments of public humiliation that dishonour humanity" (*schimpfliche, die Menschheit selbst entehrende Strafen*) in the 'Doctrine of Virtue' (*DoV*, VI 463.15 f.). When he published the *Metaphysics of Morals*, they had been discontinued in Prussia and were on their way out elsewhere in Germany, but they had not been abolished, let alone forgotten, in all German realms.

11 Progressive Legislation

What constructive legal developments did Kant have in mind? What might affect the lives of young women for the better and thus make it less likely that they will be tempted to kill their newborn children if born out of wedlock? Once again, surveying the contemporary debate – such as contributions to von Lamezan's 1780 essay competition – gives us a good general idea. As a matter of fact, we

53 See van Dülmen 1991, 21. The criminal was sown up in a sack with living animals such as snakes, dogs or monkeys and then drowned (van Dülmen 1991, 47). Another punishment occasionally used was impalement (see Niehaus 2005, 21 f.).

54 But it was not uncommon for the woman first to be sentenced to drowning and then to receive a 'pardon', i. e. for her sentence to be converted to decapitation.

55 For these and other gruesome details, and the relevant statistics for several German cities, see van Dülmen, 1991, 48–55.

have already seen that Kant sides with the reformers on the issue of state-funded foundling homes. Some essayists went even further, calling for these homes to be combined with confidential maternity wards where women would seek refuge and give birth anonymously. There is no direct evidence that Kant favoured such institutions specifically. He does, however, tell us "no decree can lift the mother's shame *if her delivery out of wedlock comes to be known*" (*DoR*, VI 336.19–21, emphasis added). Maternity shelters would, moreover, be entirely feasible. The majority of women accused of infanticide in eighteenth-century Germany were domestic servants or milkmaids who would leave employment when their pregnancy was discovered or about to be discovered, sometimes seeking new employment elsewhere. These women would now have a place to go to.

There is yet another hint in Kant's writings that suggests his alignment with other Enlightenment reformers. In the 1780s fragments, he tells us that the honour of the mother can be restored by marrying the father of the child (*D*, XXIII 365.3); some contributors to von Lamezan's competition call for the child's father to be part of the solution. After all, the man is also responsible for the woman's pregnancy and often guilty of her miserable prospects. One of the three winners of the prize, Jakob Christian Klipstein (or Klippstein), a high-ranking civil servant in the state of Hesse–Darmstadt, wants to *force* the father – if still unmarried – to marry the child's mother; if he escapes or is otherwise unavailable, the expectant mother would be entitled to using the father's surname and count as married to him for all official purposes. The child would also bear the father's name (Klipstein 1784, 86). Up to a point, marriage and birth certificates – measures that were patently a matter of state regulation – could be used to put things right.[56] The lower legal status of the infant, which exacerbates the mother's shame, is also due to legislation.[57] So, what if the laws of the land were changed to the effect that all children enjoy the same legal status and therefore share the same level of legal protection?[58]

56 Similarly, Count Waldemar von Schmettow expects the presumptive father (or fathers) to pay the expenses incurred when the child is born, as well as the baptism and education of the child (von Schmettow 1795).

57 Recall that in the 1787 essay fragments, Kant expressly names "civil laws" (*D*, XXIII 365.8) – laws that discriminate against illegitimate children (so called) – as the reason why the mother's crime does not amount to murder, a position he seems to endorse at the time.

58 Note that there is now another sense in which the mother's (and the soldier's) conception of honour is "no delusion" (*kein Wahn, DoR*, VI 336.33). The consequences they fear are very real. But that does not entail that legislation cannot change their prospects.

12 Conclusion

While it would be imprudent to assume Kant's outright support for any of the suggestions made in the previous section, they are the kind of measures he – like his Enlightenment colleagues[59] – is likely to have taken seriously. Furthermore, for the purposes of this essay, Kant's detailed proposals (if he has any) are immaterial anyway.[60] For the purpose of this paper, what counts is that they clarify why he took the regular punishment for murder, when applied to the mother, to be unjust in the judgement of the people as long as "legislation itself [...] is barbaric and insufficiently developed" (*DoR*, VI 337.2 f.). It is clear what effect he expects a concerted legislative effort to have: Progressive legislation must tip the scales to the effect that pre-marital chastity – manifestly negated by giving birth to a child out of wedlock – is no longer a 'point of honour' for womankind because it is only then that the law will act as an effective deterrent and capital punishment is no longer perceived to be unjust.[61]

What emerges is another disanalogy between cases of necessity – such as the plank of Carneades – and infanticide (and duelling) as problem(s) in Kant's theory of punishment. The two passages are different in that the harsh prospects faced by the unwed mother are due, at least in part, to rules and conventions that the state itself ordains or at least tolerates. A more enlightened constitution will lessen the mother's dishonour and thus make threatening the full force of the law less severe. But legislative change cannot make the fate of drowning any less

59 Some of those who contributed to the debate focused on preventative measures, i. e. they tried to devise schemes to prevent sexual relations between unmarried couples or to detect and report pregnancies well in time, making it much less likely that the mother would think her crime would go unnoticed. Niehaus tells us about plans to regulate dances, walks and picnics, chastity belts with little locks that were to be policed by midwives and the institution of public baths that were obligatory for all women aged 14 to 48 (see Niehaus 2005, 31, 29 and 27 respectively). Another measure mooted at the time was the certification of stillbirths (because many mothers accused of infanticide claimed that their children had been dead at birth).

60 The closeness of Kant's commitment to progressive legislation to Frederick's reforms further supports the reading suggested here. Frederick the Great abolished church penances and other forms of discriminating unwed mothers in 1765. The regular punishment for murder – death by decapitation – was to apply to women who had killed their infants and act as a deterrent. Furthermore, Frederick put in place supervisory measures to make sure that pregnancies would not go undetected.

61 Social attitudes will be shaped by progressive legislation, i. e. the law will take the lead. There is no room for Hruschka's 'temporary privilege' of lenience. It is not that attitudes need to change for the law to follow. Public opinion is changed by changes in the law. I should like to thank Martin Brecher for making me reconsider Hruschka's proposal, which I had been too ready to dismiss.

painful. No threat can save the person on the plank, but it might just save the life of the newborn child. Kant should, perhaps, have focused on the material plight of the pregnant woman, rather than on a heavily romanticised conception of a woman's honour. If he did, he would see that the state is well positioned to do something about that too.

In conclusion, we have every reason to believe that Kant would concur with a certain Dr Pfeil, another winner of von Lamezan's prize. In a well-ordered state, Pfeil says, a mother killing her newborn infant would not only be "the most loathsome of creatures" but also "the very rarest" (Pfeil 1784, 47). Now, imagine a world in which no extraneous shame attaches to unmarried motherhood and in which there are places where one can, with a good conscience, leave a newborn child in the care of others. It does not seem implausible that a mother who still decides to kill her baby should then be punished as severely as anyone who deliberately and intentionally takes the life of another. Kant's theory of punishment may still be strict, and his compassion for the mother (and the duellist) – though real – has no effect on what he wants the law to say. But it seems much closer to what a Kantian should say about the matter than the undue lenience ascribed to him by the vast majority of his readers and commentators to date.[62]

D *1787 drafts on infanticide and duelling*
DoR *Doctrine of Right*
DoV *Doctrine of Virtue*
R *Reflections*

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