

## EMERGENCIES AND CRIMINAL LAW IN KANT'S LEGAL PHILOSOPHY

THOMAS MERTENS<sup>1</sup>

*(Radboud University Nijmegen/ Netherlands)*

### ABSTRACT

Despite Kant's explicit statement that every murderer must suffer death, there are at least four situations to be found in Kant's work in which the killing of a human being should not lead to the death penalty: when too many murderers are involved; when a mother kills her illegitimate child; when one duellist kills the other; when one person pushes another off a plank in order to save his life. This paper discusses these situations and concentrates on the last situation - Kant's interpretation of the plank of Carneades – with an eye to what they teach us about Kant's understanding of the law. Does Kant acknowledge a legal vacuum? In order to come to a conclusion, Kant's 'solution' of the plank is compared with those suggested by other authors, such as Cicero, Pufendorf and Lon Fuller in his famous 'speluncean explorers' case.

**Keywords::** Kant; legal theory; plank of Carneades; criminal law; excuses; state of nature

### 1. Introduction

Within the philosophy of criminal law, Kant<sup>2</sup> does not have a particularly good name. He represents a theoretical position which is nowadays seldom defended, namely the understanding of criminal punishment as exclusively justified by the principle of retribution. The aim of punishing a criminal does not lie in the well-being of society, let alone in the rehabilitation of the criminal or his reintegration into society. According to Kant, punishment must always be inflicted on a person because he has committed a crime, and from this law of punishment no deviation is permitted: 'the law of punishment' is a categorical imperative (MdSR, VI, 331).

With regard not only to the question of who should be punished, but also with regard to the penalty a particular criminal should receive, Kant subscribes to the principle of retribution. The kind and the amount of punishment should be determined by the law of retribution: like for like. Every criminal should experience what he deserves in light of his criminal act: the how of the penalty is derived from the how of the crime, even if a similarity is not always literally possible. Therefore, Kant recommends (only?) castration as the punishment for rape and pederasty and permanent expulsion from human society for bestiality (MdSR, VI, 363). For the same reason, Kant holds the death penalty for legitimate, because there is no similarity between

life, however wretched as e.g. in life imprisonment, and death. Therefore: whoever has committed murder must die and no substitute will satisfy justice (MdSR, VI, 333). Against this background we have to read Kant's notorious remark that even if a civil society decides to dissolve, it must first before doing so execute the last murderer remaining in prison. Surprisingly, Kant adds here a rather odd forward looking argument: without executing this last murderer, blood guilt would cling to the members of this then former civil society (MdSR, VI, 333). In any case, clemency instead of punishment does not figure prominently in Kant's criminal theory.

## 2. Exceptions to capital punishment

However, as we will see, there are at least four situations in which it is according to Kant permitted to let the killing of another human being go unpunished, at least in the sense that the death penalty should not be applied. The similarity between these four situations, or so I hold, resides in the fact that they transcend the realm of law. I will be relatively brief on the first three situations and concentrate on the last and most interesting one. Kant's theory of criminal law will turn out to be more complex than often assumed.

The first of these situations occurs when there are simply too many persons involved in a particular murder. In principle, Kant holds that every murderer, i.e. not only the person who committed the actual crime but also those who ordered it and the murderer's accomplices, should face the death penalty. It might however turn out in a particular case that the number of persons involved in a murder is so large that the state would be endangered by executing them all as justice would require. In such circumstances, the state is confronted with a case of necessity in which the sovereign of the state is permitted to adopt the role of judge and to pronounce another sentence than capital punishment in order to preserve the state's population (MdSR, VI, 334).

For a variety of reasons, this is remarkable. First, there is obviously Kant's apparent denial of the categorical character of the criminal law. Whereas on the one hand every murder deserves capital punishment, it should on the other hand not always be applied. Astonishing is, secondly, that this not-so-categorical imperative is trumped by a forward looking argument, i.e. the continued existence of the state, as preferable to a return to the state of nature. Apparently, for this the price of not executing all the murderers must be paid. Thirdly, it is remarkable that it resides according to Kant within the prerogative of the sovereign to assume the role of judge – not based on a (public) law but on a decree - and to grant clemency in a crime of quite some

proportion. This seems at odds with Kant's 'official' view on clemency as a very limited right: the sovereign is permitted to pardon only a crime which constitutes a wrong against himself, as in a *crimen laesae maiestatis* (MdSR, VI, 337). Yet, in a case with a large number of criminals the sovereign seems to have pardoning power as well. Finally, it is worth noting that Kant accepts this situation as a case of necessity, although he generally seems to be quite reluctant, as we will see, to accept 'necessity' as an exculpating or mitigating factor in assessing crime.<sup>3</sup> In short, under normal circumstances the death penalty must be applied to murderers, except in a situation in which the state is at risk.

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 (MdSR, VI, 366). This is remarkable, firstly, because of Kant's acknowledgement (again) of the forward looking, deterrent aspect of criminal law - which he seems to deny elsewhere (MdSR, VI, 331) - which is apparently absent in this case. If only retribution mattered, the woman should be punished. It also seems quite possible to devise a system of criminal sanctions and public oversight which would 'nudge' unmarried women away from killing their new-borns.

Second, the state surely has an interest in protecting the right to life of all its inhabitants; it is therefore strange that Kant cruelly defends that the state can ignore the annihilation of this life because it was not the right way for a child to come into existence. Is it only by being born within wedlock that one obtains the entry ticket – citizenship - to the state and the protection of the law? Apparently, we find here a situation outside the law, caused by illegal sex and by shame as the fear for societal contempt (A, VII, 255),<sup>4</sup> which should explain why the law does not apply and why the killing of the illegitimate child does not have legal significance.<sup>5</sup>

The third situation is the killing of a soldier by a fellow soldier in a duel. Just as in the infanticide case, shame and honour play an important role. The suggestion is that no legal means is available for a soldier to wipe off the stain of the suspicion of cowardice. He can only confront this humiliation and regain his honour by raising himself above the fear of death by demanding a duel. Here, too, some eyebrows need to be raised. First, why does Kant call the killing of a fellow soldier in a duel 'murder' (*commilitonicidium*)? Surely, the fact that both sides have consented to settle their disagreement by means of a duel must change the way in which a possible killing has to be assessed, as Kant hesitantly admits (MdSR, VI, 336)? Whereas murder

is typically characterised by a moral asymmetry between attacker and defender, the duel is a situation of symmetry: both duellists equally accept the risk of being killed and becoming a killer. There seems to be an element of fairness involved in a duel, as it follows a highly stylized, ritualistic procedure which provides for each side an equal chance of survival. To a large extent, fortune decides the outcome. Kant even suggest another understanding of a duel, namely as something similar to self-defence, because what is defended is one's standing in a military environment (A, VII, 259).<sup>6</sup> But killing in self-defence cannot simply be equated with murder.

Secondly, consenting to a duel means accepting the risk of being killed in return for the 'permission' to kill.<sup>7</sup> But can the voluntary taking of the risk of being killed not be understood as a violation of the strict prohibition of suicide? Kant's thinking on suicide is complex and does not render every self-imposed mortal risk immoral, as is testified by Kant's admiration for the Scottish rebel Balmerino who choose the death penalty over convict labour (MdSR, VI 333: only a scoundrel would choose life, whereas a man of honour would choose death). The preservation of the mere biological life is for Kant not the ultimate value. But if that is the case, there might perhaps also be room within Kant's thinking for deciding on one's own moment of death, as in euthanasia, in order to prevent the loss of honour (nowadays often called: dignity). A strict prohibition of suicide would then not apply in situations in which one's biological life is incompatible with what one could perhaps call one's moral integrity. Thirdly, as with infanticide, it must certainly be possible to invent a system of public oversight and sanctions in order to prevent soldiers from trying to restore their honour through a duel. History has proven that this is indeed possible.

It must be admitted that Kant's formulations on the duel and on the killing of the child contain some ambivalence: 'it still remains doubtful whether legislation is authorized to impose the death penalty'; 'it seems that people find themselves in the state of nature'. It could be that Kant is trying to accommodate his moral views with those practices still dominant in his 'barbarous and undeveloped' (MdSR, VI, 336-337) days. However, it is equally true that Kant's ambivalent recognition of the duel as an exception to the application of capital punishment (in case of unlawful killing) and as a 'realm' that transcends positive law already contradicted the views of many of his contemporaries. Many already then held the (well-established) view that the duel is un-Christian and that the law is deficient, as Adam Smith put it, if it does not protect men from the affronts to honour that lead to duels. In other words, Kant's statement that 'legislation *cannot* .. wipe away the stain of suspicion of cowardice' (MdSR, VI, 336) was already rejected by some of his contemporaries and it was proven empirically wrong by the

later successful outlawing of duel. It has been argued that the rise of the administrative state gave the death blow to this practice.<sup>8</sup>

These are clear instances of intentional killings which should not be punished according to Kant with the death penalty. Kant seems aware that this contradicts his dictum that whoever has committed a murder must die (MdSR, VI, 333). He seeks to explain this tension by invoking either necessity, as in the first case, or the state of nature, as in the last two cases. This raises several interesting questions with regard to Kant's conception of the law. How are these cases to be reconciled with Kant's postulate of public law, according to which the duty to leave the state of nature and to enter into a state of law is a categorical one (MdSR, VI, 307; TuP, VIII, 289; Rel VI, 97)? Do we have to conclude that the realm of law is unable to cover all human encounters? And if this is the case, who is to decide which situation applies? In the first case, Kant argues that the sovereign decides. But if indeed the sovereign can nullify the criminal law on murder if the state is at stake, why is it not permitted for the people - whose united will forms the ultimate basis for all legislative authority (MdSR, VI, 313) - to revolt against the ruler of the state if he imperils the state? In the two other cases, the basis of the decision not to punish the murderer is less clear. If the emergency situation of the mother or the insulted soldier is decisive, the question arises why honour could trump the right to life? Further, it is easy to imagine other situations of tension between honour and criminal law. Why would only unmarried mothers and insulted soldiers be 'entitled' to invoke honour? Still today, many killings motivated by honour take place. It is also quite possible that the state imposes on me a duty that contradicts my sense of honour; do I then have the right to disobey?

Even if we restrict ourselves to Kant's examples, the further question arises whether only the honour of the unmarried woman can trump the right to life of the new-born; would Kant also accept other considerations, such as a poor life prospect of the new born, as is the case with a baby born with severe bodily defects or born during a draught or a famine? Could the balancing of loss of honour against the right to life of the new-born be interpreted as an assertion of the mother's right to self-determination? This might appear as a particular modern way of interpreting the situation, but it is suggested by Kant himself. He compares the illegitimate child with contraband, smuggled into the state, thereby conceiving of the child as the illegitimate property of the mother. This is close to the manner in which Kant conceives of legitimate children: they too belong to their parents as what is theirs ('like a thing', MdSR, VI, 282), although Kant immediately adds that children cannot really be considered 'property', because they are persons endowed with freedom; they can thus not be understood as a (mere) product made by their parents. As a result, parents have the duty to preserve their offspring. Still, this

merely adds to the confusion. Why would the mere fact that the child is or is not born out of wedlock change the woman's legal position vis-à-vis the child, as either something which can be disposed of or as a person 'akin to a thing' that needs to be protected?<sup>9</sup>

If it makes sense to conceive of the relationship between the woman and her illegitimate child in terms of self-determination, even further questions arise. If the woman is unpunishable when she kills her new born, it must certainly be possible for her to abort the baby during pregnancy without punishment. But if abortion is permissible, why then not something comparably innocent such as organ donation? Of course, Kant would almost certainly oppose abortion and organ donation,<sup>10</sup> but it is not so difficult to see these cases as compatible with the killing of an illegitimate child.

### 3. The plank of Carneades

We have seen that Kant's apparent 'acceptance' of *infanticidium maternale* and *commilitonicidium* raises interesting questions regarding matters of life and death. Something similar can certainly be said with regard to the fourth situation in which Kant makes an exception to the 'categorical' rule that whoever kills another person shall receive the death penalty. This situation needs to be discussed extensively. Whereas the earlier examples may have been discussed by Kant for contemporary reasons, this is not the case for the last situation. Kant here discusses a classical *topos* in moral philosophy, known as Carneades' plank, which remains relevant today. The question here is whether it is ever excusable or justifiable<sup>11</sup> for me to kill another person in order to save my life when that other person has done nothing to harm or threaten me. This situation of intentional killing is different from the previous ones, as there are no other 'murderers' involved,<sup>12</sup> as in the first situation, and no (apparent) considerations of property, honour or consent as in situations two and three. The plank situation is also different from self-defence, where the other person by attacking me has so to speak lost his right to life. In self-defence the two persons involved are in a moral sense asymmetrically placed, whereas the plank case is one of moral symmetry: the two persons form a threat to each other's life but only unintentionally so. In such a situation, the person whose life I intend to take has done nothing to deserve my taking of his life. Whereas asymmetrical situations are morally speaking unproblematic – obviously, interpretations differ across legal systems as to what counts as an illegitimate lethal attack and as to what constitutes an imminent threat –, plank situations are morally highly problematic. It is generally strongly prohibited to kill the innocent.

Kant's question thus is whether it is ever permissible to kill a person who unintentionally and involuntarily threatens my life, as when that person occupies a plank on which he is trying to save his life after a shipwreck thereby (inadvertently) preventing me from saving my life; can I push him off? if I grab hold of that plank, this has the consequence that the other person would perish. Obviously, this is a situation of extreme scarcity: the only available plank can carry only one person and two persons are in mortal danger. Kant's answer to the question whether a person has the authority to take the life of the other person in order to save his own life, is negative. The duty to respect the life of someone else 'who has done nothing to harm me' remains in place even in such a situation of emergency.

Nonetheless, Kant's understanding of the situation and the reasoning for his negative answer is complex; it is the result of the two legal aspects that play a role here according to Kant: one pertaining to why there is no such right and another for why a killing should nonetheless remain unpunished. On the first aspect, namely that there is not a right to kill an innocent person in an emergency situation, Kant is very short: it would, he says, lead to a contradiction in the doctrine of law. Kant does not explain wherein the contradiction would lie, but it seems to me that the reasoning must be as follows:<sup>13</sup> if the person in the water would have the claim right to survival even if it would involve pushing the other (innocent) person off the plank, then this person would have the duty to comply. But this person is attacked without any justifying reason for the attack and therefore does not have such duty. Rather, he has the right to defend himself. In other words, if such right existed, the person attacked would have at the same time the duty to comply and the right to defend himself, which is a contradiction. Conversely, since an innocent person has the right to defend himself against any attack, the attacker cannot have the right to save his life at the cost of (attacking) an innocent person. Granting persons the right to do whatever it takes to save their lives, even attacking an innocent person, would thus indeed lead to a contradiction. No person can be permitted and prohibited to attack at the same time. This leads to the conclusion that it is impossible to reconcile the (legitimate) claims of both persons to survival, in such a situation of extreme scarcity.<sup>14</sup>

So far so good. On the basis of this first element, it seems clear that the situation of the two men and the plank does not constitute a problem: there is simply no right to attack the innocent threat. Still, Kant discusses this case as one of two cases under the heading of 'ambiguous law' (the other case being equity), i.e. cases in the wider sense of law that do not belong properly to the doctrine of law. In another sense, therefore, it must be a problematic case. This is the result of Kant's second legal consideration. Although the situation is clear in theory: a person who kills an innocent person in order to save his life commits a criminal offence

and is guilty of murder, this person should in practice remain unpunished. Even though the plank situation is covered, so to speak, by the law prohibiting the taking of an innocent life, this law cannot be considered effective or deterrent in this situation.<sup>15</sup> Kant explains: the fear of an ill that is uncertain, namely capital punishment, cannot outweigh the fear of an ill that is certain, namely drowning.<sup>16</sup> Therefore, this deed of killing should be considered ‘unpunishable’, even though the person must still be considered ‘culpable’.

The combination of these two legal aspects is remarkable. Kant refuses to accept the suggestion that this situation is not covered by law at all, by rigorously rejecting a right to attack (which would constitute a wrong), but this finding is undermined, so to speak, by his insistence that the criminal law cannot be considered ‘in force’ in this situation of supreme emergency. This leads to the conclusion that the person is at the same time culpable and unpunishable: what is objectively criminal, is subjectively unpunishable.

Despite the fact that the plank case belongs to law in the wider sense and the other cases discussed to law in the narrow sense, the similarity of the plank case with the other three cases discussed is striking. Every murderer must face the death penalty, but if the number involved is too large and applying the appropriate punishment would endanger the state, the sovereign can make use of his pardoning powers: these murderers remain culpable but cannot be punished. The same is true for the murderous mother and duellist: in theory they have violated criminal law by their killings but subjectively they cannot be punished: honour and shame neutralised the deterrent effect of the criminal law. Something similar is the case in the plank situation. In neither of the four cases, Kant argues in favour of impunity: the crimes are unpunishable because of the lack of the force of the law.

Of these four situations the plank, a classical problem, is by far the most interesting one, as it occurs whenever a situation of extreme scarcity puts persons in a morally symmetrical position with regard to their claim to survival. According to Kant, such situations are often falsely dealt with under the heading of ‘*ius necessitatis*’ - ‘necessity has no law’ – presuming that the law cannot decide whose claim to life should have priority. Kant argues that even such a situation is covered by law and that the subjective impunity does not lead to objective impunity. Pushing a person of the plank constitutes an objective wrong, even if it cannot be adjudicated.

What to think of Kant’s ‘solution’ of the plank conundrum by his combining of these two aspects? Perhaps the best way forward here is to look at other cases in which the problem of ‘killing the innocent’ out of a (claimed) necessity arose, especially at sea,<sup>17</sup> and which sometimes haunted the courts. This is indeed possible because cases that resemble the plank



situation occur less rarely than one might perhaps presume. A well-known situation in which a group of persons were trapped on a much larger but still quite insufficient plank, was the ‘raft of Medusa’, famously depicted in the painting of Géricault.<sup>18</sup> The most famous legal case, still important in our days, is *R. v. Dudley and Stephens*,<sup>19</sup> which concerned killing and cannibalism after a shipwreck. Here, the court rejected the defence of necessity against the charge of murder, because it argued that there is no absolute duty to preserve one’s life. The two accused persons, Dudley and Stephens, were convicted for murder, but their convictions were soon overturned by a pardon based on the royal prerogative. The probably foreseen prospect of this pardon made it easier for the court to decide in favour of a conviction.<sup>20</sup>

This particular case may have inspired Lon Fuller’s famous fictional case of the speluncean explorers, a classic in legal philosophy:<sup>21</sup> a small group of explorers got trapped in a spelunk and could only survive by killing and eating one of them; should the survivors after their rescue be convicted for murder? How should the situation in the spelunk be understood, as a state of nature in which positive law counted for nothing, or as a remote place but still within the reach of law’s empire? Obviously, the specifics of the case matter a lot for the judgment of each of the fictional five justices when Fuller formulates their fictitious judgements, as well as the particular view of these justices on what the law tells us.

In the reasoning of the courts that had to deal with these real or fictional cases, various arguments play a role and they are often derived from ancient sources. It is believed, as earlier noted, that Kant may have become acquainted with the plank via Cicero, who is perhaps the first to discuss the plank and attributes it to Carneades. His *De Officiis*, which Kant knew well, suggests a solution which only partly coincides with that of Kant. According to Cicero, it is indeed not permitted to harm another person in order to seek one’s own advantage.<sup>22</sup> If after a shipwreck the only available plank can carry only one person and two persons would need that plank to survive, then the person whose life has less value should give up his claim in favour of the more valuable person; if their value seems equal, they shall agree on their fate by drawing lots.<sup>23</sup> Many centuries later, Grotius presents us with a similar solution.<sup>24</sup> He argues that in times of necessity the laws protecting private property lose their validity, so that in case of a fire I may demolish my neighbour’s house if that is needed to save my own house. But this privilege of necessity does not include the taking of a life. It is not permitted to push a person off his plank for the preservation of one’s life. The reason for this is not difficult to understand: the institution of private property is, as Thomas Aquinas already put it, not a matter of natural law, but merely of human law, as the best way to make use of the earth which was originally given by God to mankind as a whole. In case of necessity, everything returns to the original status as

belonging to mankind.<sup>25</sup> This argument however cannot be extended to the life of innocent persons.<sup>26</sup> In general it is held that the human life and the human body do not belong to what was originally owned by mankind; if a choice has to be made between the taking of someone else's life or giving up one's own life, the latter is the morally preferred option. There is no absolute duty to preserve one's life.<sup>27</sup>

The opposite position is perhaps most prominently defended by Pufendorf, in *De officio hominis et civis*. He argues that self-preservation is such a strong urge that it may even overrule all other considerations. This is both true in cases of self-defence against an unjustified attacker as well as in the case of an imminent lethal danger caused by an innocent threat. In either case, a person is permitted to do whatever is needed in order to save his life. I, a skilled swimmer, am thus allowed to shake off an unskilled swimmer who holds on to me, or to push a person off the plank with which I hope to save my life. According to Pufendorf, it is even permitted to harm a third person who himself poses no threat to me but who stands in my way when trying to escape from a mortal danger. When this person, say a lame person, is physically unable to step aside, I would be still excused to push him aside even when thereby seriously hurting him.<sup>28</sup> Blackstone, the famous commentator on the English laws, holds a similar view: the one person who 'thrusts the other' from the plank because it is not able to save them both, finds himself in a situation which is similar to self-defence. Therefore his act should be considered excusable.<sup>29</sup> It seems that for these authors the situation of the plank resembles that of a legal vacuum and that indeed necessity has no law. Whenever a person's life is in danger and the aid of a magistrate is not at hand, he may do whatever it takes to preserve his life, says Pufendorf. It would seem that the question of whether this act of killing is justifiable or excusable does not even arise because these qualifications only arise against the background of legal norms, but these are absent.<sup>30</sup>

We have seen that Kant seems to side with Grotius and Aquinas, not with Pufendorf and Blackstone: there cannot be a right to kill the innocent threat and the killer is thus culpable. However, since the criminal law is without force, the culprit cannot be punished. This makes Kant's position ambivalent. Criminal law needs to stipulate which actions are prohibited and punishable on the basis of the legal interests that the law seeks to protect. By promulgating the law, citizens are able to choose between the immediate advantage of a criminal act and the costs that they have to pay in case of criminal conviction. In theory, criminal law is so organised that the rational choice leads each citizen towards choosing non-criminal acts. In practice however situations such as the plank occur in which a rational choice does not steer away from criminal behaviour: when faced with a choice between two evils, an immediate death by drowning or a

distant but uncertain death as the consequence of criminal conviction, a choice is easily made in favour of averting the immediate evil by pushing the innocent man off the plank and accepting the risk of a distant evil of capital punishment. Since this is the case, capital punishment should not be applied, according to Kant.

#### 4. Conclusion

When we try to summarize Kant's view on the categorical character of criminal law in connection with the four emergencies discussed, where does he leave us? On the one hand, it is understandable that Kant does not accept a position like that of Pufendorf, because it entails the acknowledgment of legal vacuums. This would make the imperative to leave the state of nature for good impossible. It would also mean that one of the prime values of Kant's legal philosophy, legal certainty, is endangered: it would become possible for human beings to authoritatively determine for themselves what is right and good under certain circumstances. For legal certainty, positive law has to be all-encompassing. This is the reason why Kant's position despite his arguing to the contrary (TuP, VIII, 289) resembles that of Hobbes: the state of law requires a strong sovereign who brings an end to the uncertainty of the state of nature and who decides what is 'mine and dine' on the basis of positive laws. For this reason, some commentators would call Kant a legal positivist.<sup>31</sup> Accordingly, Kant defines criminal law as the authority of the sovereign – alone - to inflict a sanction on a citizen because of having committed a crime. Recognizing situations in which the (criminal) law is absent, would indeed make any transition to the state of law merely provisional: given the contagious nature of emergencies, who would decide whether a particular situation still belongs to the realm of the law or moves into the realm of 'nature'?

On the other hand, Kant clearly accepts that situations occur in which the law is either too harsh and must be softened, as in the case of multiple murderers, or too inconsiderate to acknowledge the importance of passions such as honour and self-preservation. Kant acknowledges possible claims by unmarried mothers, surviving duellists and survivors from shipwrecks who argue that they had no choice but to disobey the law in order to protect their honour or to save their lives. The argument, mentioned earlier, that Kant is perhaps seeking to accommodate the demands of the categorical imperative of criminal justice with some prejudicial practices of his time, cannot be valid for the plank situation. This is a timeless issue, which is literally far removed from the realm of ordinary law as it takes place at the high sea. This might explain why Kant discusses the first three emergency situations within the context

of his discussion of criminal law, i.e. law in the narrow sense, and the plank situation within the context of law in the wider sense, in which according to Kant no judge can be appointed to render a decision (MdSR, VI, 234).

However, Kant cannot have his cake and eat it. If no judge has jurisdiction in plank situations where criminal law lacks deterrent force, his understanding comes dangerously close to conceiving it as a legal vacuum. Kant may well insist that no one has the authority to take an innocent life and that the agent is still culpable, but this carries little or no legal weight. The difference between Kant and authors such as Pufendorf could then be reduced to either arguing with Pufendorf that the agent has a justification (in the light of the authority he is presumed to have to defend his life at any cost) or with Kant that he (merely) has an excuse. Although Kant refuses the dictum that necessity has no law, he nonetheless accepts that excusable killings out of necessity happen and should not be prosecuted.

If it is true Kant is ambivalent - insisting in theory that all situations are covered by law, but admitting in practice that the law has in some situations a mere symbolic significance -, the question arises whether he could have opted for another solution to the plank case. The answer is yes. Just like justice Keen, one of Fuller's fictional judges in the speluncean explorers case, Kant could have argued that perpetrators of killings in plank situations should be prosecuted and convicted, irrespective of the pressure to which they were exposed: *lex dura sed lex*. A conviction of such an 'involuntary' murderer would strongly underline the importance of the respect for the right to life of others: no one has an absolute duty to preserve his own life, certainly not when this would require the taking of an innocent life. On top of this, such a conviction could perhaps also have a deterrent effect for persons in future similar situations. This would be the true alternative to Pufendorf's position; it would make clear that both Kant's and Pufendorf's presumption that everyone faced with an imminent death would (be permitted to) do whatever it takes to save his life, is false, both empirically – not all persons are willing to push the other off the plank in order to save their life - and morally.

Fortunately, this alternative Kantian position is not so far removed from what Kant defended elsewhere, e.g. in the example of the man who is asked by his prince – on the pain of immediate execution – to give a false testimony against an honourable man (KprV, V 30). The right thing to do here would be the refusal to give such a testimony and to accept the consequences; it violates the moral law to save one's life at the cost of letting the honourable man down. Had Kant followed up on this argument, he could have stayed much closer to Cicero who recommends not to do harm to another person for the sake of one's own advantage.

In general, the plank situation gives us much to think about, even when similar cases occasioned by maritime disasters occur less regularly nowadays than in Kant's days. The importance of the case does not depend on two persons struggling over a plank in order to survive; it can stand as a metaphor for all those situations in which a plurality of human persons are confronted with extreme scarcity. Indeed, more than two persons are often involved, as in the real example of *R. v. Dudley and Stephens* and in the fictitious case of the speluncean explorers. One can also think of 'trolley problems', very popular among philosophers today, or of disaster scenes where emergency services have to make immediate decisions on how to distribute most efficiently the scarce medical resources. Even problems of global justice can be understood in terms of the plank: on the basis of the right of necessity the wretched of this earth would have the right to take whatever is needed for their own and for their offspring's survival; and those who are leading a wealthy life based on the mere fact of being born in a lucky part of this world, would simply be obliged to give up their luxury. Indeed, is there a significant moral difference between the situation of two people struggling over a plank in order to survive – a situation of extreme scarcity for both -, and that of a nation, living say on one of the Salomon islands - threatened by climate change – and seeking a new place to live but finding only territories that are already inhabited by other nations?

## Notes

<sup>1</sup> Professor of Legal Philosophy at the University of Nijmegen, Netherlands. Email: t.mertens@jur.ru.nl.

<sup>2</sup> References to Kant's writings are given in brackets. The numbers refer to volume and page number of the Prussian Academy Edition (= AA) 1968, Berlin: De Gruyter. I make use (and sometimes alter) the translations in: Immanuel Kant, *Practical Philosophy* (Cambridge Edition of the Works of Immanuel Kant), Cambridge 1996; translated and edited by Mary J. Gregor or to Hans S. Reiss, *Kant's Political Writings*, Cambridge 1970; Ed. with int. and notes H. Reiss. Transl. by H. B. Nisbet. The following abbreviations are used: TuP = *Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis* (AA, VIII); KprV = *Kritik der praktischen Vernunft* (AA, V); ZeF = *Zum ewigen Frieden* (AA, VIII); Rel = *Die Religion innerhalb der Grenzen der bloßen Vernunft* (AA, VI); MdSR = *Die Metaphysik der Sitten, Rechtslehre* (AA, VI); MdST = *Die Metaphysik der Sitten, Tugendlehre* (AA, VI); A = *Anthropologie in pragmatischer Hinsicht* (AA, VII).

<sup>3</sup> If someone out of commitment for a family member, does not alert the state of traitorous plans of this person, he cannot later, after the treason has been averted, claim necessity in order to escape punishment (TuP, VIII, 300 n.).

<sup>4</sup> Shame is connected with honour (MdSR, VI, 336), because honour is striving to maintain a good name.

<sup>5</sup> According to Kant, no decree can remove the shame of the woman. This is certainly not true: the law can simply deny, as many legal systems now do, any legal relevance to the distinction between children born within or outside marriage. This would certainly remove the basis for the woman's shame. A different, more benevolent interpretation of this puzzling passage – on the basis of the fact that Kant calls these practices typical for a 'barbarous and undeveloped' age (MdSR, VI, 337) - is given in: R. Brandt, *Kants Forderung der Todesstrafe bei Duell- und Kindesmord*, in: H. Brunkhorst, P. Niessen (eds.), *Das Recht der Republik*, Frankfurt am Main 1999, pp. 268-287; a more extensive discussion of the right to life see: Th. Mertens, *On Kant's duty to speak the truth*, in: *Kantian Review*, 2016 (21), esp. pp. 38-41.

<sup>6</sup> It is interesting to note the difference between Kant's reasoning in the *Metaphysics of Morals*, where Kant simply writes that the deterrent power of the law is unable to prevent the duel, and *Anthropology*, which presents us with a pragmatic argument why it would be better for government not to tolerate the practice of duelling any longer. It attracts the wrong people, namely those who put their lives at risk in order to gain some societal standing. Here it is unclear whether Kant would object to a duel between truly 'honourable' persons.

<sup>7</sup> If this is indeed part of the argument, then Kant would perhaps also be committed to accept practices such as free fighting or dwarf throwing, as long as the persons involved sincerely consent to these activities. In any case: the possible harm involved in these activities do not include death. Still, the acceptance by modern liberal legal systems of the principle 'volenti non fit iniuria' does not stand in the way of them prohibiting some of its applications, just like Kant argues. (MdST, VI, 422)

<sup>8</sup> I rely here on: K.A. Appiah, *The Honor Code. How Moral Revolutions Happen*, New York 2010, 36-40.

<sup>9</sup> See also: MdSR, VI, 360. Parents have *vis-à-vis* their children not only a *ius ad rem*, but also a *ius in re*.

<sup>10</sup> MdST, VI, 423: depriving oneself of an organ (Kant uses the example of selling a tooth) is a way of partially murdering oneself.

<sup>11</sup> I do accept that Kant's criminal law does not contain a detailed discussion of excuses and justifications, but this distinction is in my view implicitly present in Kant's dealing with the plank.

<sup>12</sup> At least in the case that Kant presents us with; other instances of innocent threats may involve a plurality of persons, as we will see.

<sup>13</sup> I am much helped here by: C.O. Finkelstein, *Two Men and a Plank*, in: *Legal Theory* 7 (2001), 279-306.

<sup>14</sup> It is remarkable that Kant does not consider the fact that the person attacked is already holding on to the plank; it could be argued that he has a right to the plank as a result of his 'prior apprehensio' (MdSR, VI, 263). On the basis of this, Kant could have argued against moral symmetry, because the other person has a legitimate claim to the plank as its first owner.

<sup>15</sup> This is a remarkable statement for those who consider Kant's theory of criminal law as justified exclusively by considerations of retribution. Kant accepts the deterrent effect as a constitutive part of criminal law.

<sup>16</sup> Interestingly Hobbes writes (*Leviathan* (ed. J. Tully), Cambridge 1996: Bk 2, Ch. 27: ' .. no Law can oblige a man to abandon his preservation. And supposing such a Law were obligatory; yet a man would reason thus, *If I do it not, I die presently; if I do it, I die afterwards; therefore by doing it, there is time of life gained*'.

<sup>17</sup> Shipwrecks occurred on a regular basis; Around 1800 some 5000 British seamen perished on a yearly basis, see: C. Offermans, *Schipbreuk*, Amsterdam 2008, 22.

<sup>18</sup> See e.g. J. Barnes, *A History of the World in 10½ Chapters*, London 1989, 113-139.

<sup>19</sup> R. v. Dudley and Stephens (1884), 14 QBD 273.

<sup>20</sup> J.A. Cohan, Homicide by Necessity, in: *Chapham Law Review* 10 (2006), 120-185, esp. 160-70.

<sup>21</sup> L.L. Fuller, The Case of the Speluncean Explorers, in: *Harvard Law Review* 62 (1949), 616-645.

<sup>22</sup> Cicero, *On Duties* (ed. M. Griffin; E. Atkins), Cambridge 1991, III, 23.

<sup>23</sup> Cicero, *On Duties*, Cambridge 1991, III, 90.

<sup>24</sup> Hugo Grotius, *De Iure Belli ac Pacis*, Book II, Chapter II, VI-VIII.

<sup>25</sup> Thomas Aquinas, *Summa Theologica*, II-II qu. 66, art. 7.

<sup>26</sup> Thomas Aquinas, *Summa Theologica*, II-II qu. 64, art. 6.

<sup>27</sup> This is also the outcome of another famous case: U.S. v. Holmes (1842), 25 Fed. Cas. 360.

<sup>28</sup> S. Pufendorf, *Of the Duty of Man and Citizen* (ed. J. Tully), Cambridge 1991, Bk 1. Ch. 5.

<sup>29</sup> W. Blackstone, *Commentaries on the Laws of England* (1765-69), Bk IV, Ch. 14.

<sup>30</sup> This is the position of Justice Foster in: L.L. Fuller, The Case of the Speluncean Explorers.

<sup>31</sup> J. Waldron, Kant's Legal Positivism, in: *Harvard Law Review*, 1996, 109, pp. 1535-1566. Th. Mertens, Kant's Metaphysics of Morals: a conversation with my student, in: *Studi Kantiani* 2016, 29, 21-40, esp. 24-27.

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