

Chapter One: Introduction to an Ideal Justification of Punishment

The Problem – The Dilemma of Justifying Punishment

Legal punishment is in many senses taken for granted as an essential component of our judicial system and in fact of the functioning of society more broadly, yet in spite of holding such a crucial position it is a practice commonly regarded as lacking a secure philosophical justification. There is simply no agreement amongst philosophers over which theory of those most frequently espoused (utilitarianism or retributivism) holds the greatest promise in efforts to justify punishment, nor is there even consensus over what form such a justification should take. The absence of a satisfactory justification is not, it should be noted, the product of confusion in the literature or a lack of rigour or clarity. Rather the problem runs much deeper than this. There is just an entrenched dilemma offered up by the orthodox accounts such that while utilitarianism appears to give a good justification to explain the institution of punishment to society, it is entirely inadequate when it comes to trying to legitimate his fate to the criminal, and in the case of retributivism the situation is reversed. The retributivist is on firm ground when dealing with the criminal but at a loss insofar as a broader justification of the practice of punishment is sought. Thus attempting to somehow overcome this dilemma and furnish a justification of punishment provides the central motivation of this thesis. But this is by no means the only shortcoming in the philosophical literature that the thesis will address, as will be observed below.

In the early stages of examining possible solutions to the justification of punishment (i.e. towards the end of Chapter Two) retributivism will be recognized as the most promising candidate theory, so that attention will turn to two prominent retributivists and significant figures in the German idealist tradition (Kant and Hegel). Now perhaps not surprisingly these two philosophers bring with them their own set of interpretative problems with respect to punishment, and these too will need to be dealt with by this thesis. In the case of Kant, his characterization as merely the paradigmatic retributivist will need to be challenged if something worthwhile is to be drawn from his legal theory in the service of a justification of punishment, since otherwise his position is susceptible to all the shortcomings of traditional retributivist accounts. In the case of Hegel there is no real consensus in the literature as to what his theory of punishment involves, so that the task in fact will be to formulate a viable Hegelian account of punishment with which to address the problem of justifying legal punishment. So while this thesis is primarily about the problem of

punishment's justification using the resources of the philosophy of both Kant and Hegel, this is not all that it will address. In the thesis' Conclusion a number of other broader issues will also be touched on regarding, for instance, the place and potential of idealist philosophy in future philosophical work and research.

The Thesis

The thesis ultimately put forward here is that a successful resolution of the outstanding problem of justifying legal punishment can be reached by interrogating the views of Kant and Hegel. However rather than simply appealing to their commonly cited retributivism, it is actually their idealism where the real strength of their positions are to be found. Punishment will, it is argued, be justified by showing that it is essential at a conceptual level to conceiving of justice and the state in Kant's case, and rights and the state on Hegel's view.

Now that the main purpose of this thesis and the thesis proposition itself have been set down, a summary of the Chapters, their main points and arguments will conclude this Introduction.

Chapter Overview

Outlining the central problem of this thesis, namely what the dilemma of justifying legal punishment actually involves, is the main purpose of *Chapter Two*. The Chapter begins by motivating the question of why such a justification is actually required, observing that no such satisfactory philosophical justification currently exists, and yet that punishment is both an institution that human society chooses to construct and one that involves some form of harm. The discussion then moves to what form a philosophical justification of punishment should take and two types of approach are identified. One looks to different aspects of the process of punishment to structure a justification and the other to different reasons which can be offered up to substantiate punishment. With the former approach it is generally thought that a distinction exists between justifying the institution of punishment and justifying instances of punishment, or to employ the language of H. L. A. Hart there is a difference between punishment's general justifying aim and its distribution. The latter approach (which advocates looking to different reasons) is put forward by David Dolinko, who nominates two kinds of reasons (moral and rational) which can be given for punishment. Following this discussion the approach to be

adopted in this thesis is nominated, namely that any satisfactory justification of punishment will need to offer up good reasons for the practice to three different audiences or addressees – the criminal, the victim and society more broadly.¹

Having dispensed with the preliminaries, the Chapter moves on to consider the standard views put forward in the literature which aspire to justify punishment. The utilitarian and retributivist accounts are given some detailed consideration and then a brief treatment of the so-called “mixed solution” to the problem of justifying punishment is furnished. The discussion of utilitarianism reveals that although this theory is generally thought to provide a successful justification of punishment to society in terms of achieving some greater good regarding the deterrence and prevention of crime, when this proposition is explored in depth it starts to fall apart. There are in the first instance shortcomings revealed in the claim that punishment deters crime, because this claim simply cannot be substantiated by way of empirical testing. A further problem also emerges in that the psychological theory which utilitarianism appears to be grounded in is insufficiently sophisticated to deal with the complexities of voluntary human behaviour. But the most widely acknowledged problem with utilitarianism emerges in response to the manner in which the theory treats the punished individual. Real issues arise as to whether there can be justice for an individual being used as an instrument of social goals, with charges that utilitarianism can sanction over-punishment, under-punishment and even punishment of the innocent. Various responses can be fashioned to these charges including using the so-called “definitional stop argument” or the retort that such measures undermine utilitarian goals for society more generally. Nonetheless regardless of the responses the utilitarian can give here, it is argued that the charge that the criminal is used as part of a broader social agenda prevails.

Following this discussion of the standard utilitarian position, the equivalent rendering of the orthodox retributivist view is given. Retributivism prioritizes what utilitarianism does not, namely the individual and their autonomy over the whole or greater good, thus putting retributivists in a strong position to justify to the criminal his punishment. However it is widely acknowledged that

¹ This may be a pertinent time to note how gender will be ascribed to the various roles within this thesis. It was deemed useful for ease of understanding, that the criminal and victim should have different genders assigned to them. Initially it was decided to treat the criminal as female and the victim as male. However given that the two philosophers primarily referred to, Kant and Hegel, wrote when issues of gender neutrality in language use were not considered, this proved very clunky and meant that quotations were overburdened with gender based amendments, particularly in the case of the criminal to whom they made frequent reference. So given that their references to the victim were quite limited, the gender assignment was reversed so that the criminal will be regarded in this thesis as male and the victim female.

retributivism fails to give a good account of the very existence of the institution of punishment itself. The central retributivist notion of desert lacks a solid intellectual grounding, though two approaches to attempting to furnish such a grounding are identified and discussed. The first revolves around the notion of criminal desert being some kind of direct intuition; the second invokes a just distribution theory of the state in order to account for desert. On this latter view society is construed as a system of burdens and benefits, which is upset by the criminal and must be righted by punishment. Neither of these approaches however is satisfactory to the task of grounding desert, in the first case the supposedly intuitive nature of desert is contentious while on the latter approach the manner in which crime is characterized is problematic. Thus the dilemma of punishment emerges when we consider utilitarianism and retributivism together, and recognize that one has strengths where the other falls down and vice versa. Spelt out more explicitly, while utilitarianism is thought successfully to justify punishment to society, it fails to give a good account to the criminal, while the story is reversed in the case of retributivism.

Finally, in an attempt to capture the strengths and overcome the weaknesses of the two major theoretical positions on punishment, a mixed solution to justifying punishment was formulated in jurisprudence and is briefly dealt with toward the Chapter's end. On this view utilitarianism answers punishment's general justifying aim and retributivism deals with the question of how punishment should be legitimately distributed. There are however shortcomings on this view too, since it in fact seems to bring out rather than resolve the point of tension between utilitarianism and retributivism.

Chapter Two concludes by noting that it is retributivism which is regarded as the most promising avenue for further exploration, with the philosophies of Kant and Hegel those to be taken up in ensuing chapters.

Chapter Three deals with Kant's position on punishment and is divided into two main sections. The Chapter begins with a discussion of the traditional view of Kant from the literature and then explores how a revised reading of his theory can be formulated. Kant's standard rendering as the paradigmatic retributivist is the starting point of this first section, in which it is noted that for many philosophers Kant is regarded as merely this, a retributivist whose account of punishment has no real grounding beyond its assertion of retributivism. The three main claims that constitute this view are then outlined; namely that for Kant the reason to punish is drawn from looking back to the crime, that the type and amount of punishment are similarly derived from this source following a principle of equity, and that there is for Kant an obligation to mete out punishment to those who have committed crimes. Thus it is observed at this point that Kant's view conforms to the standard retributivist one, meaning that he is in a good position to justify to the criminal his

treatment, but at a serious disadvantage in trying to establish to society why the institution of punishment should exist in the first place.

A sketch of an alternate reading of Kant follows this standard one, where the claim that he is a partial or limited retributivist is explored. Proponents of this view argue that while Kant is clearly a retributivist in considerations of punishment's distribution, he is in fact a consequentialist when it comes to its general justifying aim. There are four main points offered to substantiate this position – that for Kant punishment aims to deter, to protect citizen rights, to reform and to promote good habits. These final two points are not emphasized in the literature but the first two are given solid consideration and this is reflected in the treatment accorded to them in this Chapter.

The claim that punishment aspires to deter crime is supported by textual evidence from a range of Kantian sources and principally derives from a number of special cases Kant considers in these sources. Kant maintains that the strictly appropriate retributivist penalty of capital punishment should not be handed down in the cases of a survivor who kills another to secure his life, a mother guilty of infanticide and a soldier who kills another in a duel. This is said to be evidence for thinking that the motivation of punishment is deterrence, since these acts are not punished precisely because their punishment could not deter the act. The argument then given for why punishment aims to protect citizen rights is quite straightforward. The state comes about to secure the right to freedom of its citizens, and punishment is simply essential to supporting this right.

In addition to this alternate reading of Kant which takes issue with the standard one, there are other criticisms run against Kant's account of punishment so that a discussion of the apparent conflict between Kantian ethics and legal theory is also undertaken. Two basic points of conflict are identified on this view, in the first instance there is a conflict between how the state ought to act given Kantian ethics and how it is required to act in punishment. The categorical imperative, with its injunction to treat people as ends in themselves and unite under a kingdom of ends, is allegedly defied by the coercive institution that is punishment. There are also those who argue that it should be the case that punishment is a hypothetical rather than a categorical imperative, since it is directed to achieving as its goal a free society, yet Kant clearly claims that punishment is a categorical imperative. Further, there is a suggestion that the legitimate scope of law should not include reference to ethical phenomena like moral wickedness, but that this is precisely the concern of punishment. Beyond these discrepancies between the Kantian state in ethics versus law, the second major cause of conflict revolves around our epistemological and metaphysical limitations as human beings which are, it is said, effectively ignored by what Kant's account of punishment actually requires of people.

After setting down the traditional view of Kant on punishment the Chapter moves on to consider how a revised reading of Kant can be formulated. The reading is based around the notion of a construction of justice, identified as a promising avenue for investigation of Kant on punishment by Susan Meld Shell. In order properly to understand the construction of justice space is devoted to exploring Kant's views on real negation, community and finally construction itself. Real negation is explained by virtue of its contrast to logical negation. It is regarded as the kind of relation which holds between two positive predicates, where one is merely construed as negative due to its being opposed to another. The nature of real negation is further developed by addressing how mathematicians deploy plus and minus signs and via a vast array of instances of real negation furnished by Kant. Reference is also made in this section to Leibniz and his failure to appreciate the notion of real negation, resulting in his inability to deal with evil and incongruent counterparts. Finally it is observed that the distinction Kant draws in his early work between logical and real negation maps onto the critical division between concepts and intuitions.

The concept of community or reciprocity receives scant attention in the literature but is significant to grasping the construction of justice and so is discussed in some depth in this Chapter. The concept has many instantiations but the basic relationship represented by all these instantiations is between parts and a whole such that the interaction of the parts describes their limits and co-ordinates the whole. The first rendering of community discussed pertains to epistemology, where community's reciprocal interaction is demonstrated to be essential to the perception of coexistence. In the absence of community objects and our perceptions would be radically isolated so that Kant is clearly developing his account here in opposition to Leibniz's monadology where the causal interaction between monads is only apparent rather than genuine. In the *Metaphysical Foundations of Natural Science* community crops up in the guise of the law of the reaction of matters. Kant gives here a dynamist account of matter which stands in contrast to mechanist accounts where matter is inert and moved by external forces. One of Kant's more unusual and debated instantiations relates to his nomination of the disjunctive judgment form as belonging in this category of community. Kant argues that the propositions which comprise a disjunctive judgment are logically opposed in scope but in community when regarded together, that is, they cover the field of possibilities. Community also makes an appearance in Kant's ethics so that the categorical imperative can actually be seen to involve community. This is because the categorical imperative requires individuals to make decisions with regard to the whole comprised of all other individuals. In *Religion Within the Limits of Reason Alone* Kant discusses the notion of an ethical community, one in which individuals are drawn together under the banner of common principles. Political community is also discussed in this book and is similar to ethical community in

that it involves individuals coming together under laws, although in this case it is obviously their coming together under legal rather than ethical laws.

The next major topic treated is construction, which like real negation and community receives attention in a number of different contexts. In mathematics and particularly geometry, construction of a concept brings out what that concept essentially involves. But isn't the construction of concepts like justice something expressly forbidden by the *Critique of Pure Reason*? This section acknowledges this point and seeks to address how Kant slips the charge that he had levelled against dogmatic metaphysicians in the first *Critique*. It is argued that Kant avoids the problem by identifying different kinds of concepts and differences in what can legitimately be obtained from constructing these different concepts. So in the case of a practical concept like justice, its construction issues in a symbolic representation which can aid in our understanding of the concept by analogy – that is, the construction is regulative not constitutive.

Armed with an outline of real negation, community and construction, the next undertaking in the Chapter is to illustrate how these notions come together in the construction of justice. In order to do this a sketch is first provided of the nature of the state in which the construction of justice is set. The state is comprised of three authorities (the legislator, the ruler and the judge) held together in community. The importance of keeping these functions separate for Kant is reinforced by analogy with the structure of a practical syllogism, where the major premise containing the law remains separate from the minor premise containing the command to follow the law and from the syllogism's conclusion. This separation supports Kant's objection to Beccaria's point that those entering into a social contract would not condone their own death by capital punishment. Kant responds to the point by noting that citizens have different roles qua legislator and criminal, and that they cannot be their own judges. The special role of the judge within the state is also described in this section, where it is observed that it is the judge who must do the retributivist calculations to determine punishment, the judge who must have that special skill of knowing not just the law but how to apply the law, and the judge who must enunciate the sentence so that justice can be seen to be done. Not only are the three authorities in the state held together in community but its citizens should also exist in community. Thus right acts are simply defined as those acts which can co-exist with the freedom of other citizens and wrong acts are opposed to this, that is, they are acts which impede the freedom of others. Attention is drawn here to the fact that Kant's account is importantly different to that offered up by Leibniz, who must construe wrong in terms of deprivation.

With the background sketch of the Kantian state and notions of right and wrong furnished, consideration turns to what the construction of justice actually means in this context. The

construction of justice can be seen to bring out the fundamental connection between justice or right and punishment, since punishment is essential to cancel the impediment to right wrought by wrong. The analogy with Newton's third law of motion (that for every action there is an equal and opposite reaction, all be it as given a dynamist rendering by Kant) helps illustrate this point and to further support the basic retributivist notion of equality between crime and its punishment.

Having outlined a revised reading of Kant on punishment the Chapter turns to considering how such a reading can address his critics. In the first instance the view that Kant is merely the paradigmatic retributivist receives short shrift in light of the construction of justice. Attention then moves to consideration of the claim that Kant is a partial retributivist, which is also rejected by attacking each of the planks on which it is based, the first being that punishment deters crime. The deterrence reading is shown up as flawed given its dependence on various cases which do not prove the points suggested by those who champion such an interpretation. This consequentialist rendering of Kant makes the further claim that Kant is concerned, via punishment, to support citizen rights and to substantiate this point appeal is made to further cases. Again, however, these cases fail to provide the required support.

The final criticisms dealt with in the Chapter concern the conflict between law and ethics. The charge that punishment requires citizens to act in a way contrary to Kantian ethics is dealt with by appealing to the distinction between the ethical and legal realms. However this division is not as clear-cut as it seems Kant would like to make it, so that some of the criticism levelled against him holds sway.

The Chapter concludes with a Kantian justification of legal punishment tailored to the three audiences identified earlier as crucial. Kant, it is argued, not only has the resources of standard retributivism at his disposal when it comes to addressing the criminal, but he can appeal to the notion of what crime means in a society grounded in mutuality – punishment is required to restore right in the face of its disruption by crime. Although Kant does not specifically address the victim, a justification of punishment can be fashioned to her as a recognition that what she has suffered matters and has been dealt with appropriately by punishment. Finally the great weakness of retributivism is traditionally thought to lie in its inability to ground desert and give an adequate justification to society more broadly. Kant however has an answer here in that punishment is grounded in the conceptual existence of justice, fundamental to his notion of the state.

Chapter Four is about Hegel on punishment and given the relatively scant treatment of this subject in the literature, and the fact that there is no settled picture of his view which emerges, the Chapter must take a different form to the one on Kant. There are two main sections, one which

attempts a first blush reading of Hegel on crime and punishment to get some sense of his view as well as the difficulties it entails. This is then followed by a section giving a more developed reading of Hegel. In order to give a first blush rendering of his account of punishment it is important to come to terms with his view of crime, as the two are intertwined and dependent on each other. Crime is one of the three forms of wrongdoing Hegel identifies, the other two being civil wrong and fraud. Gaining an understanding of these latter two helps support an appreciation of crime and so they are briefly discussed. Civil wrong for Hegel involves some kind of mistaken claim over rights which is nonetheless decided within the framework of rights. Such wrong represents an instance of a simple negative judgment, in which it is only the particular which is negated. Fraud on the other hand provides an instantiation of a positive infinite judgment which is, in a sense, entirely dubious as a form of judgment. Fraud involves deception so that there is a semblance of right which fails to capture the reality of right. Finally crime concerns a threefold negation of right – of the right of the victim, law and society more broadly, and also the right of the criminal. In the case of the victim the infringement of right is quite straightforward, whereas the negation tied up with law and society is perhaps less obvious but more significant for Hegel. As is explained, what makes crime particularly heinous for Hegel (and ultimately deserving of punishment) is its infringement of right as right. In this capacity it is like a negative infinite judgment, where the act makes no sense since it goes against the very foundations of right. The negation by the criminal of his own right may be the least intuitively obvious of the negations invoked by crime, yet it is no doubt significant and again it is what licenses punishment, since by his act the criminal undermines his own capacity for rights. This first blush rendering of Hegel's account of crime is sufficient to tease out a number of the controversial issues here – what does it mean to describe an event as a negation and to involve a contradiction? What is the theory of rights to which Hegel is appealing? What is it to say that wrongdoing is akin to a form of judgment? This thesis suggests that the only way to resolve questions such as these is by looking to Hegel's theory of recognition and his logic, but prior to doing this a discussion of his view of punishment is undertaken.

Punishment for Hegel aims to overturn the negations of right listed above, so in the first case it serves to restore the victim to her proper place as a right-bearing individual, since she was treated by the criminal as a being without rights. Crucially the whole system of right itself must also be addressed through punishment. The threats to the system created by crime must be overturned so that right is rehabilitated to its proper place in society, otherwise in the absence of punitive action wrong is effectively treated as if right. But punishment must be retributive for Hegel rather than vengeful. This is because retributive punishment is objective, universal and mediated, whereas revenge is subjective, particular and immediate. In fact revenge is such that it could lead to an ongoing series of wrongs rather than the reestablishment of right. Through punishment the

negation of the criminal's right also receives attention, and he can regain his standing within society as a right bearing individual. At various points Hegel describes the criminal's punishment as his right, something he consents to, something he wills and as an annulment. And these are precisely the kind of claims, as the Chapter notes, which have led many to dismiss Hegel's view of punishment as far fetched or perverse. One further interpretation of Hegel noted in the Chapter stands outside the usual retributivist ones and construes Hegel as some sort of closet consequentialist, for whom punishment is motivated by the attainment of social goods.

The notion of recognition (though frequently overlooked in the literature) is central to Hegel's account of crime and punishment and to the reading of him entertained in this thesis, so that there is some discussion of recognition prior to further developing his account of punishment. There are two key instantiations of recognition considered pertinent, the first is from the *Phenomenology's* master-slave dialectic. The dialectic deals with the struggle between two players who reach a tacit agreement to deal with their situation by assuming the roles of master and slave. The master takes on the role of a lawgiver and the slave accepts being subject to the master's law but their relationship is not as straightforward as it might first seem, they are in fact co-dependent. Although it might appear that the master is independent, in fact he can be seen to be dependent on the slave for recognition, while the slave in subjugating himself in the manner he does learns what it would be to be a lawgiver. In the master-slave dialectic we see how social life is mediated by the roles assumed and that these roles are normative, that we recognize both ourselves and others through such roles. The second significant instantiation of recognition discussed comes from the *Philosophy of Right* where property and contract require recognition for their proper comprehension. Property on Hegel's view has three different forms the first of which is taking possession, and this most immediate form of ownership has itself three variants – physical seizure, giving form and designating ownership. Physical seizure involves directly claiming something and represents a relatively unsophisticated account of property. Giving form is, in turn, more developed and construes ownership as the imposition of structure on the world. But it is the last form, making a mark, where recognition is important. In this form ownership is designated by some mark or sign which signifies that the relationship of property exists between the object and the owner's will. This relationship is dependent on recognition, its legitimacy hinges on acknowledgement extending beyond just the owner. Thus it is argued that property is critical for how we understand ourselves in society. For Hegel it exists both in terms of the world of objects and of wills, and it is this latter point of reference which is particularly significant in the context of the Chapter. Property is about a broader circle of wills operating in the realm of contract, where contract mediates between parties over some common goal. In the relationship between buyer and seller we have another instantiation of recognition, so that each player must acknowledge the other as holding a legitimate place within the transaction. Interestingly the

transaction is driven instrumentally, with both parties agreeing about their common will, but for their own particular reasons.

Thus it is suggested that from the renderings of recognition in both the *Phenomenology* and the *Philosophy of Right* we begin to get a sense of the kind of recognitive loop which underpins civil society for Hegel, where individuals mutually acknowledge each other as intentional beings with rights. In fact the situation is such that an individual can only recognize themselves in another's recognition of them. Rights only exist as recognized. Given this sketch of recognition we can surely begin to appreciate the significance of crime to the whole structure of society.

The Chapter then turns to unpacking Hegel on negation and contradiction, in order further to comprehend his account of crime and punishment. In the first instance some background issues are canvassed from Hegel's logic. In his logic Hegel is concerned to make form and content inseparable and in doing so he not only gives himself a platform on which to attack what he considers to be Kant's overly formalistic philosophy, but the possibility of developing an account of what negation and contradiction involve very different to that held in mainstream logic today. The Chapter also notes how Hegel rejects Leibniz's view of contradiction as a lack of determination or as a limitation, and instead embraces the notion that we in fact rely on negations to determine phenomena. Hegel's treatment of negation parallels Kant's account of real negation, since for both philosophers the two sides of the opposition are positive, it is only via what amounts to an arbitrary decision, that one side comes to be regarded as negative. When it comes to contradiction, however, there are significant differences between Kant and Hegel. Contradiction for Hegel is a special type of negation, it is a higher level opposition than standard negation which exists between one of two opposed determinations and what those determinations are grounded in.

Following this discussion of both recognition and negation and contradiction, the Chapter returns to consideration of how a coherent account of Hegel on crime and punishment can be formulated. The negations of crime can be explained not as some bizarre non-act or an act which did not occur but simply as the denial of right. At this point the issue of the criminal's right to knowledge is also discussed, the fact that for crime genuinely to amount to crime the criminal must be able to identify with a criminal description of his act. The contradiction involved in crime is also clarified, again it does not amount to some perverse non-act or an inconsistency between the intent and behaviour of the criminal, but as an opposition between the particular will of the criminal and the universal notion of right on which he depends.

After this revised treatment of Hegel on crime, his view of punishment is then revisited. The notion that punishment “annuls” crime is explored and it is observed that the English translation of the German here is inadequate. Punishment as it applies to the victim is addressed before moving on to consider the question of how punishment restores right in society. In the first instance it is noted that the restoration comes at the level of description, it is in terms of the criminal act’s broader meaning and implications. But objections have been raised to the whole notion that punishment restores right, and one of these hinges around the question of how it is in fact possible to restore right. The objection is addressed by looking to the nature of rights. Rights only exist via their recognition, so that if a criminal illegitimately ignores right the appropriate response is to re-acknowledge right. Rights are damaged by the criminal’s behaviour toward the victim and remedial action must be taken to show that the rights are not pseudo rights which can be ignored, but genuine rights which must be taken seriously. To the criticism that the whole notion of restoration of rights is simply consequentialist, it can be replied that it is not undertaken as a goal-directed activity but is conceptually essential to reject crime. Certain punitive behaviour is simply required to support the conceptual distinction at issue between right and wrong. When it comes to the criminal himself, the annulment offered up by punishment enables him (assisted by the judge) to see the error of his ways and to re-engage in society as an individual with rights. But a number of the ways in which Hegel casts the criminal’s situation here have been considered problematic. These include his regarding punishment as the criminal’s right, something he consents to or wills and as something for which he himself has established the rule under which he is treated. The first observation made in addressing these supposedly problematic notions is that for Hegel these claims are not intended as descriptive of the criminal’s mindset, but rather how the criminal should construe matters given his status as a rational agent. The criminal’s right is also specifically to retributivist punishment in acknowledgement again of his rationality. That the criminal consents to or wills his own punishment is (as noted above) not about his psychological intent, rather it is his will made manifest through his act. Further, there are complaints by those who ridicule the notion that the criminal sets up the rule under which he is treated. Such critics wonder why a criminal would set up a rule so clearly adverse to his self-interest. But it is by his action not his intent that the criminal invokes this rule. These critics also complain that the state should not adopt in punishment any rule established by a criminal, however the retort is made by this thesis that the state doesn’t simply follow the criminal, it offers up the perspective of society.

The final part of the Chapter deals with formulating an Hegelian justification of punishment and begins by noting that Hegel would probably object to the way contemporary appeals for justification are set up as the need to account for the infliction of harm on an individual by the state. In such a framing the individual is regarded as separate to society and the important question of righting wrong is mislaid in favour of focussing on the harm of punishment. Hegel’s

philosophy does however seem well directed to framing a justification of punishment in terms of the three audiences identified. To the criminal Hegel can say, “you have abandoned (through your criminal act) the system of right on which you depend for your status and so your punishment is justified by the fact that it facilitates your re-entry as a right bearing participant in society.” To the victim it can be put that her abuse at the hands of the criminal has been acknowledged and dealt with so the false claim that she has no rights has been rejected. And in the case of a justification of punishment to society (the traditional sticking point for retributivists) it is just the case that punishment is essential to the viable existence of right within society.

Finally the Conclusion begins with a brief overview of the direction the thesis has taken before turning to how an ideal justification of punishment, appealing to the ideas of both Kant and Hegel, can be formulated. A number of interpretative implications of the thesis are then discussed, including why an expanded treatment of the philosophy of Kant and Hegel is warranted; regarding shortcomings in the analytic understanding of Kant and Hegel; how re-reading Kant in the light of Hegel can bring out the former’s idealism; and how the two philosophers have much more to offer philosophically, than just historical insight or points of interest internal to their own systems.

Conclusion

Now that the problem this thesis is to deal with, the thesis proposition itself and an overview of the arguments have been put, it is time to turn to the substantive work of the thesis and firstly the explication of its central problem – the dilemma of punishment.

Chapter Two: Punishment – The Dilemma of Justification

Introduction – Background to the Problem of Punishment

The Need for Justification

Within one of society's core institutions, the legal system, there exists a practice central to the system and with grave implications, yet scandalously lacking in a sure philosophical justification. The practice is that of legal punishment, and despite exercising many capable legal and philosophical minds (particularly during the twentieth century) no generally agreed upon justification of punishment has been reached. The two most plausible and frequently cited potential candidates for such a justification (in utilitarianism and retributivism) ebbed and flowed in their popularity throughout the century, with neither offering a sufficiently comprehensive rationale for punishment and both in fact harboring significant theoretical deficiencies. Nor did a potentially promising attempt to marry the merits of the two views into one superior position prove tenable, as will be discussed later in this Chapter. Explicating this problem then, the problem of justifying legal punishment, is the primary concern of this Chapter, and answering it the primary concern of this thesis. In what follows some background essential to understanding the justification of punishment will be outlined, prior to a sketch of the standard positions of the utilitarian and retributivist, and the relatively recently developed "mixed solution".

Before outlining the dilemma involved in attempting to justify punishment, it seems important to clarify why in fact such a justification is needed. To this end there appear to be at least two factors of significance. In the first instance although the practice of punishment has a long tradition in human society, it is nonetheless a practice human beings engage in by choice², and it is therefore one which could, theoretically at least, be abandoned. Secondly, the kind of suffering, harm and deprivation attached to punishment (whether as a result of the explicit aim of

² Of course, it could be argued that the extent to which punishment is a choice made by society is very limited, since it may be considered as almost essential to the viable functioning of the law and in turn society. In spite of this point however, it seems punishment is a choice in a way that other practices we engage in as human beings in society are not, like procuring food, shelter and so on.

punishment or as a byproduct of its practice³) appear evils⁴ whose infliction is at least prima facie problematic and at worst outright morally wrong. This is just to say that in the normal course of events the activities which fall under the rubric of punishment such as detainment, the infliction of physical pain and even death, are generally considered, in the absence of some exculpatory reasons, to be ethically and legally wrong. Thus given the deliberate nature of punishment and the potentially odious consequences of its implementation, punishment surely demands at least an attempt at justification.

Types of Justification

But even though many philosophers agree that an attempt to justify punishment is warranted, there is again no consensus about exactly what should be entailed by such a justification. Obviously this is a separate issue to the one about which theory can adequately answer the justification of punishment (utilitarianism, retributivism etc.), and instead concerns what form such a justification should take. It deals with such questions as the following. What is it to justify punishment? What would a justification of punishment look like? What is involved in presenting a view which can legitimate punishment? Now in order to clarify and answer questions such as these about the form of punishment's justification, a number of philosophers have thought it important to make distinctions between different possible facets of such a justification, and these distinctions appear to fall into roughly two classes. One centres on distinctions which seek to

³ It is tempting to consider some form of harm to simply be entailed by the very definition of punishment, but such a notion does not hold across all theories. For instance an adherent to the view that punishment should be deployed as some form of treatment or therapy will not consider the infliction of harm, suffering and so on to be a fundamental aim of punishment nor part of its definition. However the individual subjected unwillingly to this treatment may hold a very different view of the aims of such an activity. C. S. Lewis illustrates this point well when he writes: "To be taken without consent from my home and friends, to lose my liberty, to undergo all those assaults on my personality which modern psychotherapy knows how to deliver, to be remade after some pattern of "normality" hatched in a Viennese laboratory to which I never professed allegiance, to know that this process will never end until either my captors have succeeded or I have grown wise enough to cheat them with apparent success – who cares whether this is called punishment or not." C. S. Lewis, "The Humanitarian Theory of Punishment," in *Theories of Punishment*, ed. Stanley E. Grupp (Bloomington: Indiana University Press, 1971), 304.

⁴ Use of the word "evil" is not intended to invoke metaphysical connotations, simply to emphasize a wrong.

mark out for legitimization different *aspects* of the process of punishment, and the other on distinctions which point to different *reasons* which might be offered for the practice of punishment. Both of these types of answer to the form of punishment's legitimization will be discussed briefly below, prior to an outline of the form of justification to be pursued in this thesis.

Stanley Benn⁵, John Rawls⁶, H.L.A. Hart⁷, Michael Lessnoff⁸ and others fall into the former class of philosophers on punishment who maintain that for the purposes of overcoming difficulties in justification and for the sake of clarity, there is an important distinction to be made between the institution that is punishment and particular instances of punishment. So they consider that a relevant and discernable difference exists between the system of rules that comprise punishment and cases in which these rules are applied.⁹ From this distinction they draw the point that the institution or practice of punishment as a whole requires a justification which may (and generally does on their view) differ from that offered up for particular applications of punishment. Frequently for such philosophers a so called "mixed solution" is advocated where justification as it relates to the institution of punishment is thought to be the domain of the legislator and to require a utilitarian response, while justifying who is liable for punishment and why is considered to be within the purview of the judge and to conform with retributive principles.¹⁰ Hart refers to the kind of justification required for the institution of punishment as a whole as its "general justifying aim". A theory which hopes to justify this aspect of punishment needs to furnish a reason or reasons why the practice and its system of rules exists, what its goals are and what it achieves.¹¹ Clearly

⁵ Stanley I. Benn, "An Approach to the Problems of Punishment," in *Punishment: Selected Readings*, ed. Joel Feinberg and Hyman Gross (Encino, California: Dickenson Publishing, 1975).

⁶ John Rawls, "Punishment," in *Punishment: Selected Readings*, ed. Joel Feinberg and Hyman Gross (Encino, California: Dickenson Publishing, 1975).

⁷ H. L. A. Hart, "Prolegomenon to the Principles of Punishment," in *Punishment and Responsibility* (Oxford: Clarendon Press, 1968).

⁸ Michael Lessnoff, "Two Justifications of Punishment," *Philosophical Quarterly* 21, no. 83 (1971).

⁹ This distinction of course parallels the famous one made by Kant to be discussed in the following Chapter, between a rule and its application.

¹⁰ Though it should be noted that such a view does not consider the role legislators have to play in nominating typical punishments, as well as standard excuses, mitigations and justifications.

¹¹ As Dolinko suggests however, it is important not to simply beg the question here in favour of utilitarianism or some other form of consequentialism, by demanding that a theory of punishment produce a good end it serves (begging the question for utilitarianism) or in consequentialism's case seeking out a function it performs. David Dolinko, "Some Thoughts About Retributivism," *Ethics* 101, no. 3 (1991): 539. Although in the case of the utilitarian I agree that this is a relevant criticism, I am not convinced that it applies to the consequentialist more generally. It seems that

Lessnoff is referring to this same type of justification when he talks of punishment's teleological justification, defining this as its end, the overall aim to which punishment aspires.¹² While the legitimate "distribution" of punishment (to use Hart's terminology again) or its "entitling" justification (Lessnoff) relies on being able to justify when punishment is applied, on being able to give a coherent answer as to why punishment is enforced and against whom. It answers the question of justification framed in terms of why punishment is meted out in particular circumstances, what warrants punishment's application, why it is that an individual is, as it were, "entitled" to punishment. Punishment's entitling justification looks to the criteria for actually handing down punishment, as compared to the goal of the practice more generally. According to Lessnoff the role of the entitling justification in this context seems to be to ensure that in spite of the overarching goals nominated in the teleological justification of punishment, justice is still done in the case of the individual. That is, the entitling justification serves to secure the rights and interests of the individual in the face of "big picture" concerns which have the potential to override them. Now if this kind of institution/application distinction is accepted as a basis for the form of punishment's justification, then in order to give a comprehensive account to legitimize punishment, both these aspects must be dealt with.

The second class of distinctions identified earlier and intended to help define what needs to be justified with respect to punishment, looks to isolate different kinds of reasons or principles with which to address punishment's justification. Such an approach is not entirely dissimilar to the institution/application division outlined above, since separating out the institution from its application opens up the possibility that there may be different justifications for these different aspects of punishment, as some philosophers maintain and was touched in the foregoing paragraph. David Dolinko¹³ is one philosopher who adheres to the view that the best way to undertake the justification of punishment is in terms of different principles. For him the relevant division is between what he labels the "moral" and "rational" justifications of legal punishment. According to Dolinko the moral aspect of justification concerns why it is (or for that matter is not) morally legitimate to punish. This moral justification addresses the notion of what right society might possess which would sanction engaging in the practice of punishment. He differentiates this moral justification from punishment's rational justification, namely why we punish, the kind of

the retributivist (i.e. someone who is not a consequentialist) can coherently discuss in her own terms the function or aim of punishment. It seems that talk of the *raison d'être* of punishment does not have to be solely the domain of the consequentialist.

¹² Lessnoff in fact considers Hart's divisions to be instances of the broader distinction he makes (which he maintains applies across many social institutions) between teleological and entitling justifications.

¹³ Dolinko, "Some Thoughts About Retributivism."

reasons we can offer to adequately explain why we should have the practice of legal punishment. Dolinko clearly thinks that a satisfactory account needs to explain both why we have the institution of punishment and how we can ensure that such an institution does not contravene what is morally tolerable.

This brief outline of the kind of distinctions made in the literature deemed relevant to furnishing a solution to the justification of punishment, raises a number of possibilities and issues about the form and type of justification to be sought in this thesis. One such possibility is suggested by the kind of distinctions Hart and Lessnoff make, so that it seems one could frame a justification of punishment in terms of different audiences or addressees. For instance Hart's general justifying aim or Lessnoff's teleological justification could be construed to be addressed to society at large, to be seeking to give reasons to us all as to why we have the practice of legal punishment, whilst the distribution or entitling justification of punishment could be considered to speak directly to the criminal, to be about why he has been picked out for punishment and why this is nonetheless just. Thus in looking to different audiences there are clearly different concerns which can most naturally be brought to the fore, and presumably it will be possible to fashion a comprehensive justification from the conjunction of relevant viewpoints. For the purposes of this thesis three groups come readily to mind as suitable candidates for such separately formed justifications, namely those two groups nominated above (society and the criminal), as well as the victim of crime.¹⁴ Though often not accorded separate treatment in the literature, the victim surely merits particular attention as a distinct audience due to their situation as relevantly different to the rest of society. They have a special stake in the administration of punishment to the perpetrator of a crime against them, which goes beyond the broader justification they are owed qua member of society. Giving reasons for a particular application of punishment is, as has been established above, distinct to justifying the broader institution from which that application is drawn. So in discussing the standard positions of the utilitarian, retributivist and mixed views then, justifications as they can be addressed specifically to these groups will be attempted. And in the chapters that follow this one where the views of both Kant and Hegel are investigated, this audience targeted strategy will also be adopted.

It seems however, that in separating out different audiences for specifically tailored justifications, there is a possibility for conflict or inconsistency to be generated between the justifications offered up to these different audiences, so that when considered together the various justifications are not harmonious. Such a possibility is in fact realized in the so-called "mixed solution" to punishment which will be discussed toward the end of this Chapter. Obviously

¹⁴ Presuming of course that it is possible to identify particular victims for the crime, which may not always be the case.

adherents to such a position do not consider this a fatal flaw, yet it is surely reasonable to expect that all other things being equal, it is preferable for any audience specific justifications to be compatible with one another, to be able to sit comfortably side by side. For his part however, Hart does not see such a point as crucial and appears unperturbed by potential inconsistencies within a theory of punishment, stating that it is in fact necessary to give an account of punishment “as a compromise between distinct and partly conflicting principles.”¹⁵ Mark Tunick also considers punishment to be a “contested practice” having a set of not always consistent purposes.”¹⁶ And he concludes that we should just acknowledge and come to terms with this fact. But I am simply not convinced by Hart or Tunick here. On the theory Hart advocates this would mean attempting to justify the institution of punishment as a whole on a principle or principles which conflict with, or in effect contradict those offered up in justifying the practical implementation of punishment. And to me such a result appears unsatisfactory indeed, just as it would be unsatisfactory to actively maintain that conflicting reasons (whether they be of the kind suggested by Dolinko or on any other view) can support a single coherent justification of punishment. Thus for the purposes of this thesis, if different components are distinguished to render punishment’s legitimization, they must in some sense be able to be reconciled consistently with one another. No direct internal conflicts or contradictions of the kind suggested above will be tolerated.

The earlier discussion of David Dolinko’s work also raises issues of relevance for this thesis regarding what we will be looking for from a philosophical justification of punishment, what kind of reasons will be considered appropriate to offer up to the three audiences identified above. Dolinko of course suggests that both moral and rational reasons are suitable and desirable for a justification of punishment. It seems however that we should not at this stage be too specific in the kinds of reasons that we seek, lest we be guilty of significantly preempting the direction to be taken by the various accounts of punishment to be discussed. At the risk of sounding superficial or to be making a self-evident point, it seems that the reasons and principles to be appealed to in justifying punishment should be good ones and directed to meeting the requirements of the various audiences identified. Once these reasons have been set down we may, if we so desire (though this will not be done in this thesis), make some more abstract points about how they could be categorized (i.e. nominate whether they are moral, rational or whatever). It might be worth noting however, what form these reasons should not take. One could envisage various reasons why punishment might and does occur which have no bearing on giving a philosophical justification of the institution. There may for instance be political, historical, anthropological, sociological and other reasons for punishment, which in turn may legitimate it in political,

¹⁵ Hart, "Prolegomenon to the Principles of Punishment," 1.

¹⁶ Mark Tunick, *Punishment Theory and Practice* (Berkeley: University of California Press, 1992) 185.

historical, anthropological, sociological and other terms. But these are not necessarily and without further argument the philosopher's terms.

Thus in examining the standard views on punishment in what follows, we will be interested in how they address the criminal, the victim of crime and society more broadly and whether or not they do so using convincing principles and reasoning. Ultimately of course it will be concluded that these views fall short in various ways leaving room for the development of a superior view, what might be labeled an "ideal" justification of punishment, given its reliance on the idealist tradition.

The Standard Views on Punishment

Utilitarianism

It seems that the various positions which can be labeled "utilitarian", whether they be concerned with ethics or with social and political theory more generally, share a basic premise. The utilitarian is primarily concerned with consequences and the guiding principle of this consequentialism is to maximize in quantity and/or distribution some perceived good. Thus utilitarianism as it applies to jurisprudence, the law and legal institutions is based on, and aims to, maximize happiness, utility, self-actualization, autonomy or whatever account of good the particular version of utilitarianism being advocated prioritizes. As a consequence and in line with the type of justification being sought here (in so far as it is addressed to society at least), the reason the utilitarian can offer for punishment appears strong, straightforward and plausible. Namely, that since crime presents an obvious impediment to the attainment of these valued goods, it should be prevented. The institution of punishment is legitimate on the utilitarian view therefore, if it acts as an effective deterrent, by preventing or at least reducing the evil that crime represents. However when subjected to some scrutiny, the initial plausibility of the argument the utilitarian can mount to society begins to diminish, without even making reference to what many consider to be the knock-down weakness of this account, namely its treatment of the criminal himself (which will be discussed shortly). The strength of the utilitarian's account is challenged since two of the fundamental assumptions behind the legitimatization of punishment to society - that punishment is an effective means of preventing or deterring potential criminals and criminal acts, and that punishment thereby promotes the good are, though infrequently challenged,

contentious.¹⁷ Such assumptions are not analytically or self evidently correct (even if they seem probable), so that if they are to be maintained as key planks of the utilitarian platform, then some attempt must surely be made to demonstrate them empirically. But that such attempts are at best difficult and at worst impossible will be revealed below.

The proposition that punishment (i.e. the prospect of pain, harm or deprivation) is the most effective way¹⁸ to have a positive impact on the incidence of crime and to ensure compliance with the law, is clearly an assumption which must be tested and shown empirically. Yet as Michael Davis has argued, attempting to test and confirm this point is fraught with difficulties.¹⁹ Even if it is assumed for the moment that punishment (or at least of the threat of punishment) deters and prevents crime to some extent, to satisfy the (often implicit) utilitarian point that it is the most effective means of achieving this goal, its efficacy needs to be compared to alternatives. But it seems that it is just not possible to obtain the kind of data which could serve as sufficient evidence to secure the comparison. As Davis claims it is simply a “fallacy of omnipotent science”²⁰ to believe we can ascertain the information utilitarian theory requires. Evidence for any comparison between punishment and other strategies to reduce crime such as education, treatment, reduction of the temptation to crime, lessening the probability of its success etc., needs to be sought in the real world not via thought experiments. But this data is simply not obtainable. Even if two real world systems could be uncovered where in one punishment predominated over other methods of attempting to limit crime, and in the other education, for instance, prevailed, there would be other ways in which the societies would be so dissimilar as to render invalid any attempted comparison. Real societies vary, as Davis has argued, in terms of such things as

¹⁷ Of course there is an obvious sense in which certain types of penalty do undoubtedly prevent the commission of certain types of crime, at least by particular individuals. For instance whilst he is incarcerated a criminal will be unlikely to be directly engaged in armed robbery. However there is evidence to suggest that when an offender is incarcerated for some property crimes or drug trafficking, his role will simply be assumed by another individual if a market still exists for the stolen goods or drugs. Sally Loane, "Interview with Don Weatherburn (Director of Australian Bureau of Crime Statistics and Research)," (Sydney: ABC Local Radio, 22nd May 2002).

¹⁸ Though this point is not always made explicit, due to the “costly” nature of punishment the utilitarian can only be committed to it if it is the most effective way of achieving crime deterrence and prevention. For the utilitarian concerned with maximizing the good and minimizing harm, punishment with its attendant pain, misery, expense of implementation etc. is a strategy which is only ethically tenable if there is no “cheaper” way of achieving the same result.

¹⁹ Michael Davis, "How to Make the Punishment Fit the Crime," *Ethics* 93, no. 4 (1983).

²⁰ *Ibid.*: 733.

history, personnel and surrounding culture. These are significant factors whose effect cannot easily be “corrected for” to abstract the effects of punishment in order to undertake a comparison.²¹ Nor (again as Davis points out) could this problem be overcome by attempting to obtain the data within one society to make contrasts “before and after” the introduction of each method. Changing one society by favouring punishment, education or something else as the means of controlling the commission of crime at different times, would effectively create different societies with different histories and so on. Thus any benefit which might be thought to be gained by making the comparison within one society in which all other variables might be thought to remain stable, would not eventuate. It just does not seem possible to isolate out the data for comparison, as there simply are too many variables involved.²²

Although it therefore appears impossible to obtain the hard data to substantiate the utilitarian claim that punishment is the most effective means of deterring crime in society, it is worth examining the psychological theory which seems to underlie the proposition anyway. After all just because the evidence to support the position is unattainable does not mean the theory itself has to be flawed.²³ And perhaps it might in fact be simpler to explore this kind of proposition at the level of the individual, without the complexities that its examination on the broader scale of society draws in.

The psychological theory behind the utilitarian’s view is simply one that considers the prospect of pain to be the most efficient motivator. Yet on any critical inspection it appears far too crude and naïve to be generally useful in describing and explaining voluntary human behaviour. Crime is committed for a variety of different reasons and under different conditions, only some of which are even susceptible to influence by the prospect of punishment. In the first instance unless punishment is simply thought to loom as a large and amorphous threat, utilitarian psychological theory presupposes that a potential criminal engages in some rational risk assessment process prior to committing crime. During this process the prospect of punishment is weighed up and factored into the pros and cons of undertaking the lawbreaking activity. But surely in the case of genuinely spontaneous and opportunistic crime, as well as criminal acts undertaken by the career criminal committed to engaging in some form of crime, there may be no such reflective process

²¹ Ibid.: 732.

²² Braithwaite and Pettit claim, however, that there has been ample evidence collected by criminologists to indicate that utilitarian strategies actually fail to deter prevent or crime. J. Braithwaite and Pettit, P., *Not Just Deserts* (Oxford: Oxford University Press, 1990) 3.

²³ Unless of course the theory of truth held by the utilitarian is for instance a verificationist or assertabilist one, in which evidence is all there is to deciding whether a proposition is true or false.

and therefore no prospect of punishment deterring or preventing the crime. Further, the punishment envisaged by the criminal would surely have to be a real and credible prospect in order to determine action (or inaction). That is, for punishment to be an effective deterrent to crime the criminal would need to be convinced that he was likely to be caught, convicted and sentenced. Thus the effectiveness of the criminal justice system would come into play as well as the criminal's own ability to realistically (rather than optimistically) assess the likelihood of punishment.

To act as an effective deterrent the harm of punishment must not only appear real to the potential offender but undesirable. Though it may seem self evidently true that for most people most of the time punishment is an undesirable consequence of lawbreaking, the matter is not quite so straightforward. For the poor, imprisonment with the attendant provision of food and shelter has sometimes been desirable to life outside prison, as it has been for certain criminals habituated to prison life. The notoriety which attaches to certain punishments has also perhaps attracted particular individuals to lawbreaking, and the civil disobedient is drawn to commit violations of the law in order to have punishment inflicted to highlight what he may perceive as the injustice of some law. So it seems that for certain groups of people at least, punishment may not effect deterrence on the grounds that it is not undesirable.

The effectiveness of punishment surely also depends to some extent on the type and strength of the motivation to commit crime. Thus by itself punishment is unlikely to act as an effective deterrent in circumstances where failure to break the law may result in extreme hardship. If, for example, there is a possibility of stealing food which will prolong the life of a starving individual and their family, then the prospect of punishment is a moot point in any risk assessment they might engage in. One might also suggest that punishment could actually act as the most effective deterrent for people who aren't its real targets. That is, those individuals already predisposed for other reasons not to commit crime anyway, might be terrified of the prospect of punishment.

It seems then, that the utilitarian's apparent ease in furnishing a justification of the institution of punishment to society at large in terms of prevention and deterrence, is not quite as secure as might have been first envisaged. And when it comes to attempting to formulate a justification of punishment to the individual, utilitarian theory encounters even greater and more widely acknowledged difficulties. Whilst the assumption that punishment promotes the good if it can prevent or reduce crime might hold some sway at the level of society generally, it is difficult to reconcile utilitarianism with the claims of the individual, since adherence to the goals of deterrence and prevention can seemingly lead to patent injustice for the individual. For instance the individual can be subjected to cruel and excessive punishment or insufficient punishment, and

there may be punishment of the innocent and those not responsible for their actions. As utilitarian William Paley clearly expresses, deterrence, rather than any concern for the individual, is the paramount consideration in punishment since:

“[t]he crime must be prevented by some means or other; and consequently whatever means appear necessary to that end, whether they be proportionable to the guilt of the criminal or not, are adopted”.²⁴

Obviously it is not difficult to imagine examples of punishment that might deter crime though be indefensible to the criminal and run counter to our intuitive notions of justice. To punish littering with life imprisonment for instance, or with the public beating of a litterer’s entire family, might deter many more litterers than simple punishment by fine. But at the same time such punishment would seriously threaten principles of natural justice, that is, what we feel to be fair and reasonable.²⁵ These principles might also be violated if little or no punishment was handed down in a case where its deterrent value was deemed low. This might occur for instance where some kind of quota for the crime and its punishment had already been reached, or if the crime was of a kind unlikely to be repeated. Punishment of the innocent is also a tenable strategy for the utilitarian bent on crime reduction and prevention. In fact there is a sense in which it can be argued that a criminal’s guilt is irrelevant for the utilitarian. Punishment of a plausibly guilty,²⁶ though actually innocent individual, is surely just as likely to deter potential offenders as punishment of the criminal or criminals actually responsible for the perpetration of a particular crime. Empirically speaking it is not unknown for innocent individuals to be deliberately punished in the interests of getting a result in a case, and thereby assuaging fear and tension within society. At certain times in American history for example, any African American might be punished for a crime known to have been committed by an African American against a white, in order to fulfil a perceived need for vengeance as well as to promote utilitarian goals such as happiness, lack of fear etc. within the broader white community. A utilitarian might also advocate strict liability as a deterrent. Under such a system people are punished if they have committed a crime regardless of any mitigating circumstances such as provocation, self defence, mental

²⁴ William Paley quoted in Edmund L. Pincoffs, *Philosophy of Law a Brief Introduction* (Belmont, California: Wadsworth Publishing Company, 1991) 16.

²⁵ It might be objected that this is simply begging the question in favour of retributivism, however it seems to me that one does not have to be committed to retributivism to recognize cases of justice and injustice.

²⁶ It is important that this caveat be included since if the punished individual is *obviously* innocent, then in utilitarian terms their punishment might increase undesirable effects within society such as fear of random punishment. Such a fear is not generated however if a plausible case can be put forward implicating the innocent individual in the crime.

health and so on, the idea being that if there is absolutely no way of avoiding punishment, then the crime is less likely to occur. But again it is questionable whether such punishment equates with our sense of fairness and justice.

The utilitarian is however in a position to attempt to answer some of the concerns raised above, which are by no means concerns first raised by this thesis. According to the argument which has come to be known as the “definitional stop argument”, it has been suggested that so called “punishment” of the innocent is a nonsense. The argument runs that punishment of the innocent fails properly to conform to the definition of punishment (guilt for a crime being inextricably linked in with this definition) and therefore in effect cannot occur, it is simply not punishment. But it does seem that we can make sense of the notion of punishing an innocent individual *as though* they had committed a crime, and as observed above this does sometimes occur. In any event it is conceivable and coherent to treat an innocent as if they were a criminal. To rely on a definition to disallow this is surely to attempt to rule it out in an unsatisfying and peripheral way. The definition is a limit imposed externally because utilitarian theory itself lacks the resources to furnish this limit. This is of course unlike retributivism which carries the necessity of the criminal’s guilt in the theory’s very essence, since punishment is the criminal’s desert for having committed a crime.²⁷ In the case of the utilitarian the motivation for punishment can be separated out from the actual incidence of crime so that deterrence and prevention of crime by punishment are aims which can be pursued independently of punishment of the guilty individual in a particular case. The suggestion here is not that punishment of the innocent by the utilitarian is sustainable on a systematic or institutionalized scale, but that utilitarianism can sanction it on occasion if it can serve some greater good. The charge that utilitarian theory also permits unfair and extreme punishment may be addressed by the utilitarian noting that such punishment can surely cause greater unhappiness than good, and therefore goes against the general thrust of the theory. The utilitarian can suggest that unreasonable and harsh punishment, as well as the punishment of accidental or unintentional crimes may lead to public fear and insecurity, a lack of confidence in the justice system etc. and hence undermine and subvert the utilitarian aim of maximizing such things as happiness. In making this point a utilitarian might align himself with rule as opposed to act utilitarianism. On the latter view it is individual acts that are assessed using utilitarian principles and on the former it is more generalized moral rules which are subjected to utilitarian scrutiny. Thus a rule utilitarian would, it seems, be concerned to sanction punishment in particular instances only if punishments falling into the more general class to which that particular

²⁷ This is not to say that a retributively motivated system is incapable of punishing innocent individuals, just that such punishment would defeat its very purpose in a way that is not the case for the utilitarian.

punishment belongs were directed to achieving broader utilitarian goals. Basically this could amount to an argument for only punishing the guilty and only in proportion to their crime.

Regardless of the merits of the counter arguments outlined above, however, there is one charge the utilitarian simply cannot slip and that is the charge of treating the criminal in punishment as a means to an end. The crucial point to be made against the utilitarian is that he can offer no convincing justification of punishment to the criminal, who is effectively being exploited by society to further its own goals. So in the process of deterring future offenders the wrongdoer's autonomy is sacrificed and he is used as an instrument to another's end. Treating an individual in this way amounts to treating him as a mere impersonal object for gain, disregarding his own autonomously determined ends in the interests of some perceived or even genuine greater good. And it is in a similar fashion that the utilitarian has difficulty in satisfactorily justifying punishment to the victim of crime. Although the utilitarian aspires to deter and prevent crime into the future (which may of course indirectly benefit the victim of crime), the particularity of her circumstances are of no interest to the utilitarian in punishing. Punishment is forward looking, and the incidence of crime against her is just a prompt to punish with a view to reducing crime in the future.²⁸ The perpetration of crime against the victim is used for the utilitarian's own purposes with no regard for her inconvenience, pain, humiliation or loss. Like the criminal himself, the victim is exploited by the utilitarian to suit his own agenda.

In summary, then, it is often thought that the utilitarian is on good ground when offering up a justification of punishment to society (though such a view is challenged by the arguments presented above). Conversely, it is generally regarded that no such good case can be presented to legitimate to the criminal his treatment, nor for that matter can a satisfactory argument be presented to the victim herself.

Retributivism

Unlike utilitarian views which depend on the consequences of punishment, retributivist accounts hinge around the notion of criminal desert and in effect promote the principle of autonomy the utilitarian seems to breach. Put simply, according to the retributivist the criminal deserves punishment for having committed a crime so that the rationale behind legal punishment is to mete out to the criminal his desert. On more radical versions of retributivist theory a stronger

²⁸ Unless of course the nature of the crime is such that it ceases to have an impact when the perpetrator is punished, such as in a case of physical stalking if the wrongdoer is incarcerated.

claim about the infliction of suffering on those who have morally transgressed is purportedly advocated, or the sanctioning of pain for pain's sake. Retributivism is occasionally even characterized as some form of thinly disguised revenge. However such extreme and unsophisticated versions of retributivism appear to be based on misconceptions, and to exist primarily in the anti-retributivist literature. Retributivism is not mere barbarism but a serious philosophical view, as will be outlined below. It should be noted right up front, however, that although retributivism traditionally construed can answer to the criminal why he should be punished, it does not have a convincing case to present to society as to why the institution of punishment should exist.

Kant, who is often cited as the paradigmatic retributivist and whose view will be examined in more detail in the following Chapter, clearly distinguishes retributivism from other positions on punishment in terms of its embrace of the principles of desert and autonomy. On his view

*"[p]unishment by a court can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society. It must always be inflicted upon him only because he has committed a crime. For a human being can never be treated merely as a means to the purposes of another or be put among the objects of rights to things..... He must previously have been found punishable before any thought can be given to drawing from his punishment something of use for himself or his fellow citizens. The law of punishment is a categorical imperative, and woe to him who crawls through the windings of eudaimonism in order to discover something that releases the criminal from punishment or even reduces its amount by the advantage it promises".*²⁹

Thus for the retributivist as Kant paints him there is a clear and coherent answer which can be offered to the criminal as to why he has been singled out for punishment. Punishment is justified to the criminal as his desert for having committed a crime. In punishing according to desert the retributivist can claim to be respecting an individual and treating him justly and as a rational being, not as a means to another end. The criminal is regarded as a responsible moral agent capable of making choices and he is dealt with strictly in terms of what he did, not according to other considerations or hoped for consequences like the public good. The retributivist thereby avoids many of the difficulties which plague the utilitarian³⁰ about the individual being used in punishment as part of a larger social agenda. Allegations that the utilitarian sanctions excessive punishment, insufficient punishment, or punishment of the innocent and those not responsible for

²⁹ Immanuel Kant, "The Metaphysics of Morals," in *The Cambridge Edition of the Works of Immanuel Kant Practical Philosophy*, ed. Mary J. Gregor (Cambridge: Cambridge University Press, 1999), 6:331.

³⁰ Though it should be noted that Kant himself is not addressing utilitarianism and its shortcomings, as utilitarianism had not been formulated as a philosophical position at that time.

their actions in order to send a broader message, do not arise for the retributivist. Similarly the retributivist can give a strong and cogent justification of punishment to the particular victim or victims of a crime, since through punishment what they have suffered at the hands of the lawbreaker has been recognized and thought to be significant. Appropriate and proportionate action has been taken in direct response to the crime, so that justice has been done and the criminal has received what he deserved for the act he perpetrated against them.

However the manner in which the retributivist engages in talk about the criminal's desert is in some ways misleading. Despite the frequent and crucial reference made to it, it is in fact no simple matter to determine what this desert actually involves. There are two prongs to the retributivist's difficulties here; the first revolves around desert as it pertains to the method of penalty fixing, the second to desert in so far as it relates to the legitimization of the institution of punishment. The first of these problems is only of peripheral interest for this thesis and involves attempting to find some means of correlating the amount and type of punishment with the criminal's desert, that is, of determining exactly what it is that he has earned for the crime. Such questions of penalty fixing are notoriously troublesome on all views of punishment. The second difficulty (desert as it relates to punishment as a whole) is of course of crucial interest for the purposes of this thesis and will be expanded on below.

In spite of the plausibility of the answer which can be tailored to the criminal and the victim of crime regarding the justification of punishment as it pertains to them, the problem the retributivist faces regarding the justification of punishment to the community at large is substantial. It appears that the retributivist is at a loss when it comes to legitimizing the entire institution of punishment and that a major assumption of the position simply is that punishment is deserved. The retributivist in general does not offer a justification of the institution of punishment - it is apparently just presupposed to be entirely legitimate, so that the guilty deserve to be punished. But why the guilty as a whole deserve to be subjected to the institution of punishment is a key question the retributivist must surely answer. In many other spheres of life the existence of desert does not automatically result in its fulfillment. Perhaps the good deserve reward and the unfortunate compensation, yet even if this is true in some metaphysical sense, the state does not always furnish such deserts. So why is it that for breaching a particular group of legal prohibitions the guilty earn their punishment?

The retributivists who have sought to answer this question have done so in a variety of ways that appear to rely on the notion that ultimately it is *justice* which is served by the guilty receiving punishment. Although invoking notions of justice may not sound particularly informative in the context of justifying legal institutions, when this approach is compared to what the utilitarian

account can offer, its meaningfulness becomes apparent. In arguing for his view, the utilitarian does not and cannot legitimately appeal to an independent idea of justice to substantiate his position. Deterrence, prevention and attaining the greater good are the only determinants of punishment.³¹ Retributivism can license such a move, however.

A survey of the state of the art in punishment from late last century conducted by Anthony Ellis, suggested that there were two main approaches adopted by philosophers seeking to found their theory of punishment on desert – an approach which relied on a notion of intrinsic desert and another which appealed to a just distribution theory.³² Ultimately neither of these views will be regarded as up to the task of grounding desert satisfactorily, nonetheless they will be briefly examined below to reveal why this is the case. On the former view the idea fundamental to retributivism (that the guilty deserve to suffer and that this suffering should be in proportion to their guilt) is just a primitive claim, while on the latter view appeal is made to a supporting theory of distributive justice. In the case of the first view there is no more in depth response the retributivist can furnish as to why the lawbreaker merits punishment beyond referring to this primitive claim of desert. As Jean Hampton describes it the proposition just is taken to be a “bedrock intuition”³³ which cannot be analyzed further; it simply must be accepted as basic that punishment is the desert of crime. Such retributivist notions have, as J. L. Mackie states, an “immediate, underived moral appeal or moral authority.”³⁴ However, although intrinsic in the sense that it serves no consequentialist style goal, desert on this view does draw support from the notion that it serves the end of justice. Punishment is not meted out to the criminal merely for desert’s sake but for the sake of justice. Nonetheless such appeals to fundamental moral intuitions (or intuitions of any sort) should be treated with some measure of wariness. We need to consider whether or not the connection between crime, desert and punishment really is a natural and automatic one that applies to all people across all time, such that we can confidently regard it to be intuitive. Further, as Ellis notes,³⁵ the intrinsic desert theory leaves unanswered questions as to why even if it exists, the criminal’s desert can in fact be legitimately enforced and why it is the state which should be charged with undertaking this enforcement. These points can also be made against the second view and so will be discussed below.

³¹ Of course this greater good sought by the utilitarian might be justice.

³² Anthony Ellis, "Critical Study Recent Work on Punishment," *The Philosophical Quarterly* 45, no. 179 (1995).

³³ Jean Hampton, "The Retributive Idea," in *Forgiveness and Mercy*, ed. Jeffrie G. Murphy and Jean Hampton (Cambridge and New York: Cambridge University Press, 1988), 113.

³⁴ J. L. Mackie quoted in *Ibid.*

³⁵ Ellis, "Critical Study Recent Work on Punishment," 227.

Like the intrinsic desert theory, the just distribution view held by Herbert Morris,³⁶ explains the basis of desert in terms of justice, but justice explicated on distributive lines through the principles of fair play, respect and equity. On the view underpinning this position, laws constitute a system of burdens and constraints intended to benefit society and its members. Through his act the criminal disturbs this system; in effect he abuses and undermines it by gaining an unfair advantage over those who are law abiding. The success of his act may in fact depend on the majority's general adherence to the rule of law which he exploits. Thus the criminal has upset the balance of benefits and burdens within society and in the interests of fair play, equity and respect, it is claimed that this balance needs to be restored through punishment. Now although this characterization of crime as the obtaining of an undeserved advantage by the criminal seems plausible enough for certain types of crime like those against property, it has a number of shortcomings. If crime does in fact conform to such a characterization, then what seems to be called for in response is (as Hampton suggests) some kind of restitution or compensation, rather than punishment.³⁷ If the retributivist conceives of crime in terms of unfair advantage, and the illicitly obtained advantage is somehow restored to its rightful owner through legal means, then why is punishment warranted on top of this? Why isn't the return of property sufficient to nullify the advantage of crime and thereby dispose of the state's responsibilities with respect to the criminal? This seems to be a real sticking point for this kind of retributivist, as is the viability of describing non-property based offenses (such as those against persons) in terms of advantage. While property crimes can reasonably be conceptualized as the unmerited gain of money, goods, services or whatever by the criminal, it is more difficult to formulate an answer as to what is the unfair advantage obtained by the rapist or murderer for instance.³⁸ Is this really what is wrong with rape, assault and murder; that they unfairly benefit the criminal? Directly comparing these crimes with those related to property in effect implies (surely counter-intuitively) that ideally we aspire to the advantageous situation of rape, assault or murder, and that they are only wrong because of the unfairness of the benefit gained. For instance, when it comes to property its possession might generally be thought to be an advantage, but the method by which it is obtained is crucial. We might fortuitously and fairly win the lottery and thereby legitimately gain the kind of advantage that would be illegitimate if obtained via stealing. Yet in what sense do rape, assault and murder represent an advantage? In what way could they be cast as a benefit legitimately held? Some theorists suggest that the way in which to cash out the purported gain of the criminal

³⁶ For an espousal of this view see Herbert Morris, "Persons and Punishment," in *Punishment: Selected Readings*, ed. Joel Feinberg and Hyman Gross (Encino, California: Dickenson Publishing, 1975). and for a discussion of this kind of just distribution theory see Ellis, "Critical Study Recent Work on Punishment," 227-28.

³⁷ Hampton, "The Retributive Idea," 115.

³⁸ For a discussion of these issues see *Ibid.*, 115-16.

in these circumstances is in terms of the unfettered exercise of freedom that he has enjoyed. The manner in which the criminal has expressed his self preference and elevated his own interests and perceived good amounts to a benefit. This elevation of the self by the criminal stands in contrast to the restraint exercised by the law abiding element of society and therefore represents an unfair advantage over them. But again we might well wonder whether or not this unfettered freedom is in itself genuinely an advantage.

Therefore it seems that when it comes to retributivism the problems experienced by the utilitarian account are basically reversed. The retributivist's strength (the justificatory account that can be offered to the criminal and victim) is where the utilitarian is weakest, but where the retributivist struggles (in trying to legitimate the institution of punishment) the utilitarian is generally considered to succeed. And this is the dilemma for the justification of punishment, that neither of these standard views can give a comprehensive account. Nonetheless it will be suggested here that it is possible to bolster the retributivist account and make it work in a way that it is simply not possible for the utilitarian.

Mixed Solutions

No doubt due in part to both the success and failure of utilitarian and retributive accounts of punishment, there emerged in twentieth century jurisprudence the idea of combining the strengths of these two views in a mixed solution to the problem of justifying punishment. Since punishment's dilemma emerges from the inability of either of these major theories to provide a comprehensive legitimization that addresses the criminal, society and the victim of crime, it was thought that if they could be somehow merged, each would compensate for their compatriot's deficiency. As outlined above the utilitarian is apparently successful in offering up a justification of punishment to society at large³⁹ and the retributivist in answering its legitimization to the individual criminal and victim. Together it is argued they might furnish a thorough solution to punishment's justification.

Hart is one of the most prominent adherents to this view, arguing that what he describes as a "monolithic" justification of punishment is unsustainable. Such a justification is attempted by both the utilitarian and retributivist when they seek to answer punishment's general justifying aim and its distribution with a single unified theory. For Hart these attempts to legitimize punishment with particular principles, whether it be deterrence or desert, fail to do justice to the diversity and

³⁹ This of course is not the view taken here, although it is a view common in the literature.

complexity of the institution of punishment. Such approaches tend to oversimplify the issues involved in the interests of coherence, and inevitably lead to confusion and convoluted arguments which attempt to rescue what otherwise become untenable positions. Hart maintains that both the general justifying aim of punishment and its distribution can best be explained and governed by separate principles, linked together to resolve the problem of punishment. In his view (as in that of most other advocates of this approach) retributivist inspired limits on the treatment of the individual, curtail a utilitarian general justifying aim.

However in spite of its initial appeal and plausibility, resolution of the problem of punishment in this way is ultimately unsuccessful. Whilst superficially it may appear to work in fact it invokes untenable conflicts. The difficulty hinges around the point of crossover of the two justifications which the mixed view identifies. Though the view would attempt to keep them separate by suggesting they apply to different areas, in effect the two justifications must come together in the event of punishment. If the strategy of adopting a utilitarian general justifying aim for punishment and a retributive approach to the individual criminal is accepted, for instance, then in effect the punished criminal is being told that this is his desert, yet the overall aim driving the very existence of the institution of punishment is deterrence. This is surely in the very least a disingenuous tactic, to give one account to the criminal and to know that the reason for the institution is different to this. And this situation must be particularly troubling for those advocates tending toward a retributivist solution, since an important tenet of the retributivist position is that through his punishment the criminal is being addressed as a rational being, that is, a person who is susceptible to rational arguments in order to substantiate his punishment. It seems effectively that the criminal is in fact not being acknowledged as a fully rational being and that arguments are being manipulated and abused by those who advocate a mixed solution. It appears then, that there is a direct conflict between the principles which drive utilitarian and retributive theory that cannot merely be ignored in the interests of apparently resolving the dilemma of punishment's justification. The bases of utilitarianism and retributivism are so fundamentally different that it seems they cannot be reconciled.

A more sustainable kind of mixed solution might be achieved by harnessing ideas sometimes attributed to Kant and Hegel. According to this solution although the justification of punishment is retributive, punishment can also act as a deterrent or form of prevention for a potential lawbreaker. However these phenomena are just side effects of punishment, not the basis for its justification and they therefore do not undermine the retributive stance. On this view if punishment deters or prevents crime well and good, but such consequentialist reasoning has no place in driving the justification of punishment. This is significant for, as Bernard Shaw comments, "there is all the difference in the world between deterrence as an incident of the operation of criminal

law, and deterrence as its sole object and justification."⁴⁰ Many of the difficulties which arise for the utilitarian account do so because prevention or deterrence are seen as the primary motivations for punishment. It is when prevention or deterrence are the paramount concern that punishment of the innocent, those not responsible for their actions and so on, become, in the context of the theory, viable and reasonable undertakings. It seems prevention and deterrence may be considered to be compatible by-products of otherwise retributively motivated punishment, as will be noted in passing in the Chapters on Kant and Hegel. Strictly speaking of course this is not a genuinely mixed solution, with deterrence having only this incidental or parasitic role.

Conclusion

Thus the dilemma of punishment remains. Neither the utilitarian nor the retributivist can offer a comprehensive answer to punishment's justification, since both views fail in various ways to satisfy the demands of the three parties concerned - society at large, the criminal and the victim. Nor can the mixed solution advocated by Hart and others solve the problem, at least under the guise in which it is generally put forward. The most promising avenue which survives is the retributivist one, if certain difficulties in the notion of desert can be overcome and a more rigorous attempt to defend punishment to society can be mounted. Utilitarianism will not be pursued, since not only have shortcomings been pointed out in its purported strength (deterrence as the basis for a justification to society) but because this thesis takes seriously the task of justifying punishment to the criminal and I simply cannot see how the utilitarian (who must always construe the criminal as part of some bigger project) can satisfactorily account for his punishment to the criminal himself. Thus we turn now to consideration of two significant figures in the field of retributivism, Kant and Hegel, to see if their accounts can offer up a renewed retributivism able to meet the challenge of providing a comprehensive justification of punishment.

⁴⁰ Bernard Shaw, "Imprisonment," in *Philosophical Perspectives on Punishment*, ed. Gertrude Ezorsky (Albany: State University of New York Press, 1972), 293.

Chapter Three: Kant on Punishment

The Established View

For most philosophers of law Kant's name is synonymous with the doctrine of retributivism. The account generally attributed to him contains all the hallmarks of this standard position and consequently much of the criticism leveled at his view simply serves to affirm or reject aspects of the retributivist stance more broadly, rather than Kant's particular rendering of this doctrine. However, more recently there have been murmurings of discontent with this interpretation and suggestions that Kant's view is in fact either not a purely retributivist one or that his account of punishment creates problems internal to his system. The Chapter which follows will outline the traditional treatment of Kant on punishment prior to discussing this new breed of criticism and ultimately arguing for a revised reading of Kant on punishment.

The traditional picture – merely the paradigmatic retributivist

In the literature surrounding Kant he is almost invariably considered to be *the* paradigmatic retributivist. Thus it is Kant who is cited in textbooks of law when the traditional positions on punishment are being reviewed and set against one another. Such texts occasionally refer to Hegel or other more contemporary advocates of retributivism, but it would be a rare entry indeed which failed to mention Kant. And this characterization of Kant as the exemplar of the retributivist position continues, only occasionally challenged, through Kant scholarship more generally.

In support of this pervasive rendering of Kant, the same group of passages from the *Metaphysics of Morals* are generally quoted. Implicit in the way in which his view is presented through this unimaginatively repeated set of excerpts covering the usual retributivist points, is the notion that Kant is *merely* the paradigmatic retributivist, that his view has little more to offer than an archetype of a stock standard position on punishment. A sense is also conveyed by the manner in which these passages are put forward, that they lack an account which links and grounds them in any broader way - that such excerpts are isolated assertions rather than key markers of a more developed outlook on criminal punishment. Allen Wood, for instance, acknowledges Kant's "commitment to retributivism" but observes that his "defense of it remains at

best embryonic".⁴¹ While Don Scheid makes the even stronger claim that when it comes to his retributivist principles, Kant "offers no foundation for them; he merely introduces them ad hoc."⁴² Scheid observes that Stuart Brown mounts a similar criticism of Kant, Brown however suggests that Kant does in fact attempt to justify his retributivist principles, but that this justification in the case of the *lex talionis*, for instance, "is ad hoc and morally repulsive".⁴³ Jeffrie Murphy admits to doubting that "Kant develops anything that deserves to be called a *theory* of punishment at all" and wonders aloud "if he has done much more than leave us with a random (and not entirely consistent) set of *remarks* – some of them admittedly suggestive – about punishment."⁴⁴ David E. Cooper is another who notes in passing that Kant could be thought to have "no theory [of punishment] at all beyond a denial of utilitarianism, together with a bald assertion that punishment is justifiable."⁴⁵ Now this portrayal of Kant as a mere retributivist lacking a well grounded account is of course one challenged by this thesis, however this conventional view will first need to be outlined before a discussion of how it can be revised is undertaken.

There are three main claims attributed to Kant on the traditional interpretation of his view of punishment. These are that for Kant the entitlement to punish derives from looking back to the crime; that the type and amount of punishment is also derived from this source according to a principle of equality; and finally that there is in fact an obligation to mete out to the criminal his desert (a strong principle not subscribed to by all retributivists).⁴⁶ These standard claims will now be expanded on below.

In the first instance it is clear that for Kant punishment draws its motivation not from any of its potential effects such as deterrence, prevention, rehabilitation and so on (as it does for the consequentialist), but simply from the commission of crime. As he explicitly indicates in one of the tradition's oft quoted passages from the *Metaphysics of Morals*:

⁴¹ Allen W. Wood, *Hegel's Ethical Thought* (Cambridge and New York: Cambridge University Press, 1990) 109.

⁴² Don E. Scheid, "Kant's Retributivism," *Ethics* 93, no. 2 (1983): 274.

⁴³ Stuart M. Jr. Brown, "Has Kant a Philosophy of Law?," *Philosophical Review* 71, no. 1: 38.

⁴⁴ Jeffrie G. Murphy, "Does Kant Have a Theory of Punishment?," *Columbia Law Review* 87, no. 3 (1987): 509.

⁴⁵ David E. Cooper, "Hegel's Theory of Punishment," in *Hegel's Political Philosophy*, ed. Z. A. Pelczynski (Cambridge University Press, 1971), 160.

⁴⁶ The obligation to mete out punishment to the criminal is sometimes referred to as the positive retributive principle. This is in contrast to the negative retributive principle that *only* those who have committed crimes should be punished.

"[p]unishment by a court can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society. It must always be inflicted upon him only *because he has committed a crime*. For a human being can never be treated merely as a means to the purposes of another or be put among the objects of rights to things... He must previously have been found *punishable* before any thought can be given to drawing from his punishment something of use for himself or his fellow citizens. The law of punishment is a categorical imperative, and woe to him who crawls through the windings of eudaimonism in order to discover something that releases the criminal from punishment or even reduces its amount by the advantage it promises".⁴⁷

The only acceptable reason for carrying out punishment on Kant's account is as a response to a criminal act, and so his view can be labeled "backward-looking" since, quite simply, the motivation to punish is drawn from looking back to the crime. Forward-looking considerations about good effects for the criminal or society more generally are just not relevant to the decision to punish. Thus Kant's account is often thought to treat the criminal justly, since he is not regarded as a pawn in some broader and future-focussed social agenda about minimizing crime and its harmful effects. To coin the phrase from Kantian morals the criminal in punishment is therefore not "used as a means to another's ends", rather he is punished in accord with his own freely and rationally chosen action.

Now the second principle of Kant's account as it is traditionally construed (namely that not only does an individual's entitlement to his punishment hinge on looking back to the crime, but the type and amount of his punishment is also derived from this source), will be considered. The criminal must be punished according to the desert which attaches to the crime, and for Kant this is based on the standard retributivist principle of equality, as he outlines again in the *Metaphysics of Morals*:

"whatever undeserved evil you inflict upon another within the people.... you inflict upon yourself. If you insult him, you insult yourself; if you steal from him, you steal from yourself; if you strike him, you strike yourself; if you kill him, you kill yourself... only the *law of retribution (ius talionis)*.... can specify definitely the quality and the quantity of punishment".⁴⁸

In another less cited passage Kant reinforces this point, noting that there is only one just punishment, namely the one equivalent to the crime in a fashion analogous to the way in which for a straight line "there can be only one line (the perpendicular) which does not incline more to one side than the other and which divides the space on both sides equally."⁴⁹ The manner in

⁴⁷ Kant, "The Metaphysics of Morals," 6:331.

⁴⁸ Ibid., 6:332.

⁴⁹ Ibid., 6:233.

which the criminal is punished and the degree of that punishment are determined by reference to the act itself and attempts to match punishment to the crime, not by assessments of the possible consequences of such punishment.

Finally for the classical reading of Kant it is important to note that his retributivism entails not only a right to mete out punishment according to desert, but in fact an obligation to do so. In his famous example of a civil society about to dissolve Kant argues that in spite of their decision to disband, citizens are not thereby somehow absolved of their responsibility to undertake punishment of those found guilty of crimes and for whom punishment has already been determined. As he indicates, before the citizens separate

“the last murderer remaining in prison would first have to be executed, so that each has done to him what his deeds deserve and blood guilt does not cling to the people for not having insisted upon this punishment”.⁵⁰

Therefore even in the case where the society in which a crime was committed will no longer exist, the criminal cannot slip punishment if justice is to be done. This unswerving obligation to impose punishment is further reinforced in a passage where Kant discusses whether or not an individual convicted of a capital crime could opt to have potentially fatal experiments performed on him in lieu of punishment. Kant makes it clear that such experiments (even if they benefit society) are not an option, since they fail to meet his standard for justice.⁵¹ So in addition to supporting the obligation to punish, this passage also adds weight to Kant’s claim that punishment should be set independently of any concerns for the good of either the criminal or civil society more generally.

As it stands then (and significantly for the purposes of this thesis) the classic view of Kant on punishment suffers the same fate as other retributivist accounts when it comes to the practice’s justification. Whilst it seems Kant is able to offer a good justification of punishment to the criminal (since through punishment he is being treated as a rational and autonomous moral agent, solely in accordance with his actions rather than in line with other teleological agendas), and conceivably a satisfactory account to the victim⁵² (as an appropriate recognition of the wrong she has suffered), this is not the case when it comes to a general justifying aim of punishment. On this traditional reading Kant provides an inadequate rationale of the institution to society at large, since it appears as though he simply fails to address the broader question of why punishment should in fact exist at all.

⁵⁰ Ibid., 6:333.

⁵¹ Ibid., 6:332.

⁵² Though this justification is not often made in the literature.

Kant as a limited retributivist

Now although there is widespread acceptance of Kant's retributivist credentials amongst scholars and therefore of the above rendering of his view, there are those who challenge this reading of his doctrine on punishment. Some philosophers instead suggest that Kant's retributivism is in a sense limited or curtailed. So, for instance, Nelson Thomas Potter Jr.⁵³ and Don E. Scheid⁵⁴ label Kant a "partial retributivist", and Mark Tunick considers him to be a retributivist but not a deontologist.⁵⁵ What lies at the heart of these readings is the idea (following Hart's distinctions discussed in Chapter Two) that while Kant is clearly a retributivist when addressing issues concerning the distribution of punishment, he is a consequentialist when it comes to punishment's general justifying aim. Thus such writers as Sharon Byrd,⁵⁶ Potter, Scheid and Tunick have no difficulty ascribing to Kant a retributivist stance in considerations of punishment's title and even its amount. They clearly regard him here to be backward-looking in the requisite retributivist way since he advocates punishment only for those who have committed a crime. In these respects then their view incites no conflict with Kant's retributivism as traditionally conceived. However, when it comes to furnishing a general justifying aim for punishment, all those philosophers noted above suggest that Kant is really adhering to some form of consequentialism. They maintain that although he in fact fails explicitly to spell out what a general justifying aim of punishment might amount to, in effect teleological aspirations can be read into his philosophy. These teleological aspirations, for the convenience of analysis, can be considered to be of four different types. Firstly there is the commonplace notion that punishment is designed as a deterrent; secondly the idea that it is driven by the need to protect citizen rights; thirdly that it is intended to reform; and finally that punishment serves to promote good habits. Each of these points will now be detailed.

The idea that punishment aspires to deter crime is not an unusual one, although as has been made clear above, it is a view not generally attributed to Kant. Byrd, Potter, Scheid and Tunick all maintain, however, that Kant does consider punishment to be justified by its deterrent affect. To varying degrees these authors all argue that for Kant punishment serves as a disincentive to

⁵³ Nelson Thomas Jr Potter, "The Principle of Punishment Is a Categorical Imperative," in *Autonomy and Community*, ed. Jane E. Kneller (Albany: Suny-Pr, 1998).

⁵⁴ Scheid, "Kant's Retributivism."

⁵⁵ Mark Tunick, "Is Kant a Retributivist?," *History of Political Thought* XVII, no. No. 1 (1996): 64.

⁵⁶ Sharon Byrd, "Kant's Theory of Punishment: Deterrence in Its Threat, Retribution in Its Execution," *Law and Philosophy* 8 (1989).

crime,⁵⁷ that in the legal as opposed to the moral setting punishment provides the requisite external motivation to conform to the law. Further, for these authors Kantian punishment acts as both a special deterrent (serving to deter the individual criminal) and a general deterrent (serving to deter society more broadly, whose citizens are effectively warned off by the example of the punished criminal). Evidence for this reading of Kant is drawn from a number of sources and Tunick in particular carefully compiles it in order to substantiate the case for deterrence.

Both Tunick and Scheid draw attention to a section in the Collins' portion of Kant's *Lectures on ethics* entitled "Of Rewards and Punishments" to bolster their claims that Kant holds a deterrence account. In part of this passage Kant says:

"[p]unishment in general is the physical evil visited upon a person for moral evil. All punishments are either deterrent or retributive. Deterrent punishments are those which are pronounced merely to ensure that the evil shall not occur. Retributive punishments, however, are those pronounced because the evil has occurred. Punishments are therefore a means of either preventing the evil or chastising it. All punishments by authority are deterrent, either to deter the transgressor himself, or to warn others by his example. But the punishments of a being who chastises actions in accordance with morality are retributive."⁵⁸

And later that:

"All the punishments of princes and governments are pragmatic, the purpose being either to correct or to present an example to others. Authority punishes, not because a crime has been committed, but so that it shall not be committed."⁵⁹

Thus it seems clear, as the advocates of a deterrent interpretation of Kant argue, that Kant (at least in this work) maintains that all state instituted punishment has deterrence as its goal.

Tunick also gleans evidence for a deterrent reading of Kant on punishment from the essay *On the common saying: That may be correct in theory, but it is of no use in practice* in which Kant discusses a case where a man saves his own life by pushing another off a life raft. Tunick cites a portion of a footnote attached to this passage in which Kant writes that teachers of general civil right

⁵⁷ Though for Potter deterrence is, on Kant's account, only a secondary effect of punishment. Potter, "The Principle of Punishment Is a Categorical Imperative," 183. And this interpretation in some senses accords with the reading to be given here, in the section responding to the critics of Kant.

⁵⁸ Immanuel Kant, "Lectures on Ethics," ed. Peter Heath and J. B. Schneewind, *The Cambridge Edition of the Works of Immanuel Kant* (Cambridge: Cambridge University Press, 1997), 27:286.

⁵⁹ Ibid.

“proceed quite consistently in conceding rightful authorization for such extreme measures. For the authorities can connect no *punishment* with the prohibition, since this punishment would have to be death. But it would be an absurd law to threaten someone with *death* if he did not voluntarily deliver himself up to *death* in dangerous circumstances.”⁶⁰

Tunick explains Kant’s comment by arguing that since the point of state laws is to deter, “a law that imposes a punishment that could not deter the action the law proscribes lacks sense, is absurd.”⁶¹ That is to say that if we assume a legal system where laws aim to deter certain acts but in which the prospect of a particular punishment cannot provide that threat, then something has clearly gone awry. In the case in question then, the threat of future death at the hands of the state is not thought to provide an effective deterrent when the alternative is imminent death.

A version of this life raft scenario is also to be found in the *Metaphysics of Morals* where Kant writes:

“there can be no *penal law* that would assign the death penalty to someone in a shipwreck who, in order to save his own life, shoves another, whose life is equally in danger, off a plank on which he had saved himself. For the punishment threatened by the law could not be greater than the loss of his own life. A penal law of this sort could not have the effect intended, since a threat of an ill that is still *uncertain* (death by a judicial verdict) cannot outweigh the fear of an ill that is *certain* (drowning). Hence the deed of saving one’s life by violence is not to be judged *inculpable* (*inculpabile*) but only *unpunishable* (*impunibile*).”⁶²

Tunick wants to appeal to the excerpt to argue that Kant is making a distinction between the legal and moral domains, such that it is only the former which concerns external duties that can be reinforced by punishment motivated by deterrence. Thus Tunick considers that “there is a moral not a legal duty not to kill the other person. The rescued person is to be morally condemned but not legally punished.”⁶³ The fundamental point is much the same as the one derived from *On the common saying*, namely that given the peculiarities of the situation, the threat of capital punishment cannot reasonably act as an effective deterrent.

Finally, further textual support for the deterrence reading of Kant is drawn from the *Metaphysics of Morals* where Kant discusses two additional instances in which, according to Tunick, “the person committing the ‘crime’ could not be expected to be deterred by the threat of legal

⁶⁰ Immanuel Kant, “On the Common Saying: That May Be Correct in Theory, but It Is of No Use in Practice,” in *The Cambridge Edition of the Works of Immanuel Kant Practical Philosophy*, ed. Mary J. Gregor (Cambridge: Cambridge University Press, 1999), 8:301 footnote.

⁶¹ Tunick, “Is Kant a Retributivist?,” 64.

⁶² Kant, “The Metaphysics of Morals,” 6:235-36.

⁶³ Tunick, “Is Kant a Retributivist?,” 65.

punishment.”⁶⁴ The cases are those of a mother who kills her illegitimate child and a soldier who murders a fellow soldier in a duel. Contrary to what Kant stipulates elsewhere, in these special circumstances he considers that neither killer should receive a capital sentence. Although Tunick admits that “[m]uch of what Kant says about these two cases is puzzling and difficult to agree with”⁶⁵ he considers them to highlight the difference between the moral and legal realms, and he again explains the two cases as ones in which

“Kant implies that where a person could not be deterred by legal punishment from committing a crime, the state should not punish. In both cases Kant invokes a consequentialist theory of why we have the practice of legal punishment.”⁶⁶

Deterrence is not an isolated goal on the consequentialist reading of Kant, however, but is instrumental in promoting other goals with respect to citizens and the Kantian state. And this notion of punishment as motivated by the need to protect and bolster the claims of citizens, is the second strand which can be made out in the picture of Kant as a consequentially motivated philosopher of punishment. The institution of punishment exists on this reading as a means to secure and promote individual freedom and rights. The state is brought into being for Kant to secure the right to freedom we should all enjoy by virtue of being human, and this right is in turn supported by state sanctioned punishment.⁶⁷ Tunick, in order to add weight to this view that punishment aspires to protect citizen rights, points to the case outlined in the *Metaphysics of Morals* where accomplices to murder might have their sentences lessened if the security of the state is at stake.⁶⁸ If the execution of these individuals were to lead to the effective demise of the state because there were insufficient citizens, then Kant reserves for the sovereign power to ameliorate the situation by allocating non capital sentences. Thus on Tunick’s view because Kant provides for a more lenient punishment in these circumstances, the case for Kantian punishment as fundamentally concerned with “preserving a society of ordered liberty”⁶⁹ is reinforced.

Tunick observes in passing how for Kant punishment acts not only as a deterrent but in addition aspires to reform the criminal,⁷⁰ and this can of course be considered a further plank in the argument that Kant is a consequentialist. Tunick places no real emphasis on this point, linking it in with his discussion of deterrence. Kant clearly recognizes, however, the important distinction

⁶⁴ Ibid.

⁶⁵ Ibid.: 66.

⁶⁶ Ibid.

⁶⁷ Ibid.: 63.

⁶⁸ Kant, "The Metaphysics of Morals," 6:334.

⁶⁹ Tunick, "Is Kant a Retributivist?," 63.

⁷⁰ Ibid.: 62-63.

which exists between deterrence and reform (though he, like Tunick, does not dwell on the point). Compared to simply dissuading the criminal from the commission of crime, reform involves an attempt to correct or improve the criminal as well.⁷¹ Scheid also makes reference to a reformist strand in Kant, stating that "punishment may achieve some control of crime through... its educative effect".⁷² Potter however maintains that "Kant gives little hint that he wishes or expects to produce learning in the person punished."⁷³ Clearly then, though not highlighted by Tunick (or for that matter the other authors noted earlier who advocate a consequentialist interpretation), punishment as reform could represent another strand in a teleologically fashioned general justifying aim for Kant.

That punishment can help foster favourable behaviour (or as Tunick says "the habit of doing good deeds"⁷⁴) is the final teleologically inspired argument identified by the above-mentioned authors. Although not considered by Kant to be the ideal motivation for moral action, he does recognize in the *Lectures on Ethics*, that both "rewards and punishments can indeed serve indirectly as means in the matter of moral training.... If a person refrains from bad actions because of the punishment, he gets used to this, and finds that it is better not to do such things."⁷⁵ Though patently not Kant's preferred incentive, punishment can still effectively discourage repeat offenders.

Clearly then the consequentialist general justifying aim for punishment identified by some philosophers and outlined above, conflicts with the picture of Kant to be advocated in this thesis. After outlining the revised reading of Kant being proposed here, a critique of this consequentialist general justifying aim will be undertaken. However one further interpretation of Kant's view of punishment needs to be addressed prior to this undertaking.

⁷¹ Kant, "Lectures on Ethics," 27:286.

⁷² Scheid, "Kant's Retributivism," 267.

⁷³ Potter, "The Principle of Punishment Is a Categorical Imperative," 183.

⁷⁴ Tunick, "Is Kant a Retributivist?," 66.

⁷⁵ Kant, "Lectures on Ethics," 27:287-88.

The conflict between Kantian ethics and legal theory

It is sometimes thought that the traditional construal of Kant as merely the paradigmatic retributivist sits uncomfortably with the ethical views (broadly conceived)⁷⁶ he expresses outside the *Metaphysics of Morals*, such as in the *Grounding for the Metaphysics of Morals*. It appears that anomalies arise and even possible inconsistencies, when the political or legal Kant is set alongside Kant the ethicist. Tom Sorell, for instance, refers to the sense in which readers can be “attracted to Kant’s ethics...[but] repelled by his politics”⁷⁷, while Jeffrie Murphy actually suggests that if the *Rechtslehre* (or the Doctrine of Right) from the *Metaphysics of Morals* had not been written, the view of punishment Kant expresses there could not have been predicted from his other writing. Murphy further argues that it seems as though in writing the *Rechtslehre* “Kant simply *forgot* some of the most characteristic of his mature doctrines in moral philosophy, epistemology, and the philosophy of mind”.⁷⁸ Given the systematic philosophy Kant attempts to construct, such charges of inconsistency (if founded) would be very unwelcome indeed. According to Sorell⁷⁹ and Murphy, two main types of discrepancy emerge between Kantian ethics and legal theory, the first of which can be identified as a conflict between how it seems the state ought to be permitted to act given Kantian ethics, and how the state does in fact act in that part of Kantian legal theory that involves punishment. While the second discrepancy identified revolves around the epistemological and metaphysical limitations of human beings observed by Kant, and the fact that it appears as though these limitations are flouted, given the manner in which people are in fact required to act under the institution of punishment. The nature of these discrepancies will be expanded on below.

In the *Grounding for the Metaphysics of Morals* Kant sets down key components of his doctrine on ethics, some of which Sorell suggests appear to be violated by the institution of punishment. In particular it is the *Grounding’s* major ethical doctrine, the categorical imperative, which creates difficulties for Kant on punishment. In its perhaps best known form the imperative implores us to “[a]ct only according to that maxim whereby you can at the same time will that it should become a

⁷⁶ By broadly conceived here I mean to include reference to the epistemological and metaphysical aspects of his ethics.

⁷⁷ Tom Sorell, “Punishment in a Kantian Framework,” in *Punishment and Political Theory*, ed. Matt Matravers (Oxford: Hart Publishing, 1999), 10.

⁷⁸ Murphy, “Does Kant Have a Theory of Punishment?,” 512.

⁷⁹ It should be noted that Sorell maintains that the discrepancies he identifies can be addressed by his reading of Kant, and that his reading is similar to the one adopted here, in holding that the juridical and moral realms are properly held separate.

universal law.”⁸⁰ However it is the categorical imperative in two of its other guises that Sorell points to as problematic, at least in a *prima facie* sense. The formulation of the categorical imperative known as the “end in itself” enjoins “[a]ct in such a way that you treat humanity, whether in your own person or in the person of another, always at the same time as an end and never simply as a means.”⁸¹ The core idea behind such a formulation seems to be that in our ethical dealings with human beings we should respect their autonomy and right to determine their own ends and not simply manipulate or use them solely in order to meet foreign goals or agendas. Thus in the ethical sphere it is apparently the case that the coercion of others is forbidden. Sorell suggests, however, that when it comes to the Kantian theory of punishment, it appears that this ideal of respect for persons is violated. In fact, Sorell writes of the surprise many readers feel when, after being familiar with Kant’s ethics, they look to his political and legal theory. Part of the surprise hinges around what they may consider to be the “harshness of Kant’s retributive regime” when compared with his ethics, and the “gratuitous authoritarianism”⁸² which some maintain lies behind his writings on the law and politics. After all, punishment as outlined by Kant in the *Metaphysics of Morals* is a coercive institution dictating the enforced harsh treatment (including death at the hands of the state) for individuals convicted of criminal offences. Clearly the autonomy of individuals is impeded by punishment, such individuals are not pursuing their own freely determined ends. Rather, they are being compelled to comply with state determined goals.

The other formulation of the categorical imperative Sorell finds potentially problematic, is one associated with the so-called “kingdom of ends”. According to Kant if all rational beings could be united under self-legislated universal laws (i.e. if they all acted according to the categorical imperative) then the ideal of a kingdom of ends would be realized. Such a kingdom may thus be construed as a very basic sketch of a just society following Kantian ethics. But this vision of a civic ideal is threatened, according to Sorell, by some of what we find in Kant’s discussion of legal and political life in the *Metaphysics of Morals*. Kant argues in the *Metaphysics of Morals* that revolution within civil society can *never* be justified, and specifically states that irrespective of the origins of legislative authority and regardless of whether or not the ruler is a tyrant who flouts the law, rebellion by the people cannot be tolerated. However, such a society where the ruler has the power and license to abuse the laws and mistreat his people is not one in which the ruler is acting according to the categorical imperative, and in fact, as Sorell points out, such a society looms as the absolute antithesis of the kingdom of ends.⁸³

⁸⁰ Immanuel Kant, *Grounding for the Metaphysics of Morals*, trans. James W. Ellington, Third with new material ed. (Indianapolis: Hackett Publishing Company, Inc., 1993) 421.

⁸¹ *Ibid.* 429.

⁸² Sorell, "Punishment in a Kantian Framework," 26.

⁸³ *Ibid.*, 10.

Murphy suggests a further source of discord between Kant's ethics and his legal theory concerning the type of imperative punishment represents. In his ethics Kant distinguishes two kinds of imperative - hypothetical and categorical. On Murphy's reading of Kant, punishment should fall within the scope of the first of these, yet in the *Metaphysics of Morals* Kant explicitly identifies punishment as a categorical imperative. To understand the point at issue here it is clearly important to outline what each of these imperatives involves. According to the *Grounding for the Metaphysics of Morals* a hypothetical imperative is one in which a possible action is warranted in terms of some other desired goal, so, for instance, an act might be good insofar as it realizes some further and contingent agenda which an individual might have. A categorical imperative on the other hand is good in itself, and the action is in fact necessary in the circumstances, independently of its contributing to our realizing any other objective. Murphy argues that punishment should be a hypothetical imperative for Kant because of the kind of legal and political framework he envisages. According to Murphy society for Kant emerges from the agreement of citizens to live valuing freedom above all else. These citizens favour punishment to the extent that it helps to maintain this freedom, but given that punishment is invasive it should only be employed when other measures are unlikely to succeed. Thus punishment should be regarded as a hypothetical imperative which, on balance, can help facilitate a just and free society but which is acknowledged as not the only way to achieve this end. This view that punishment as determined by human beings (as opposed to God) should represent an instance of a hypothetical imperative appears to be supported by what Kant writes in a letter to J. B. Erhard. As quoted by Murphy he says:

“[i]n a world of moral principles governed by God, punishments would be categorically necessary (insofar as transgressions occur). But in a world governed by men, the necessity of punishments is only hypothetical, and that direct union of the concept of transgression with the idea of deserving punishment serves the ruler only as a prescription for what to do. So you are right in saying that the *poena meremoralis* [“ethical penalty”] (which perhaps came to be called *vindicatiua* [“avenging punishment”] for the reason that it preserves the divine justice), even if its goal is merely medicinal for the criminal and the setting of an example for others, is indeed a *symbol* of something deserving punishment as far as the condition of its authorization is concerned.”⁸⁴

But of course in direct contravention to any assertion that punishment should be a hypothetical imperative are Kant's frequently quoted remarks from the *Metaphysics of Morals* where he says that

⁸⁴ Kant quoted in Murphy, "Does Kant Have a Theory of Punishment?," 514.

"[t]he law of punishment is a categorical imperative, and woe to him who crawls through the windings of eudaemonism in order to discover something that releases the criminal from punishment or even reduces its amount by the advantage it promises".⁸⁵

In spite of this latter passage, Murphy considers there is a case to be made for regarding punishment as a hypothetical imperative and therefore for a conflict to ensue between Kant's ethics and legal theory.

Murphy is also keen to point to an apparent discrepancy between the law's legitimate scope and that of ethics, which again brings the two arenas into conflict. Across the body of his work Kant clearly and regularly makes the distinction between the law's concern with external acts and morality's plumbing of motivations and the inner life of the individual. For instance, as Murphy notes, in *Religion Within the Limits of Reason Alone* Kant writes

"woe to the legislator who wishes to establish through force a polity directed to ethical ends!... For in such a commonwealth all the laws are expressly designed to promote the *morality* of actions (which is something *inner*, and hence cannot be subject to public human laws) whereas, in contrast, these public laws – and this would go to constitute a juridical commonwealth – are directed only toward the *legality* of actions, which meets the eye, and not toward (inner) morality".⁸⁶

But in punishment, according to Murphy, the boundary Kant carefully defines between morality and legality is transgressed. Retributivism aspires to mete out to the criminal the suffering he deserves in proportion to his moral wickedness. Moral wickedness should be no business of the state, however, since moral wickedness concerns the ethical inner realm. Such an inner realm is officially off limits to the legal system. Besides the fact that moral life is not within the legitimate purview of the state, Murphy doubts that in the state as Kant imagines it, citizens would be concerned to pursue such a retributivist agenda. After all as observed above, citizens band together and agree to live under a system of laws in order to promote harmonious coexistence and to exercise their freedom only to the extent that it is compatible with that of their fellow citizens. On Murphy's view it is unlikely that such citizens would trade any of their liberty just to chastise the morally wicked.

The second major type of conflict between Kant's ethics and his legal theory identified above, can be linked to issues in the preceding paragraph. The nub of the problem for Murphy is that it is not simply the case that the state ought not act in punishment in the manner in which it does (attempting to intrude into the moral realm) but that it is in fact not possible for the state to act as is suggested. The state just cannot glean the kind of information required in order actually to

⁸⁵ Kant, "The Metaphysics of Morals," 6:331.

⁸⁶ Kant quoted in Murphy, "Does Kant Have a Theory of Punishment?," 515.

function according to the dictates of Kant's theory of punishment.⁸⁷ As Murphy quotes Kant from the *Grounding*:

"[i]t is in fact absolutely impossible by experience to discern with complete certainty a single case in which the maxim of an action, however much it may conform to duty, rested solely on moral grounds and on the conception of one's duty... [E]ven the strictest examination can never lead us entirely behind the secret incentives, for, when moral worth is in question, it is not a matter of actions which one sees but of their inner principles which one does not see."⁸⁸

Our metaphysical and epistemological limitations as embodied humans beings do not allow us secure insight into the real motivation of actions (not even our own). We cannot determine if we follow the maxims we ought because of our adherence to duty or if we act as we do due to other factors, which strictly speaking are irrelevant to morality. Ethical matters are the purview of the noumenal realm and are thus inscrutable to us. The only world that we can access is the phenomenal world of experience so that external actions and conduct are all that we can legitimately claim to know. The state is therefore in no position to draw on the kind of insights about motivations and intentions that are seemingly required by Kant in order to determine blameworthiness and thereby apportion punishment. According to Murphy Kant should perhaps reserve for God and an afterlife the task of setting and meting out punishment (as he sometimes appears to) since as Murphy asks, is it not "an absurd piece of arrogance and presumption for a human being to seek the harm of others in proportion to their inner viciousness?"⁸⁹ Human beings, collectively formed into states, just cannot discern internal moral failings in the way required by Kant's retributivism.

Now that a number of the key interpretations of Kant on punishment have been set down (his characterization as the paradigmatic retributivist, the charge that he might only be a partial retributivist, and the possible conflicts between his theory of punishment and other aspects of his philosophy), the reading of Kant to be advocated in this thesis can be laid out. Before this revised reading can be set out however, a number of the key concepts which comprise it (real negation, community or reciprocity, and construction) need to be explained. Once this task has been accomplished, this revised reading will be used to contest the interpretations outlined above, and then finally to address the central question of this thesis, namely how to formulate a comprehensive justification of legal punishment.

⁸⁷ It should be observed that Murphy maintains that Kant actually lacks a comprehensive theory of punishment.

⁸⁸ Kant quoted in Murphy, "Does Kant Have a Theory of Punishment?," 513-14.

⁸⁹ *Ibid.*: 518.

Kant on Punishment – A Revised Reading

If Kant is to be regarded as more than merely the paradigmatic retributivist, as well as a thinker capable of contributing to the problem of justifying punishment, then a more sophisticated account of his view of punishment needs to be established. It will be argued here that not only will the revised reading undertaken supply just such a suitably sophisticated account up to the task of addressing the justification of legal punishment, but it will also answer the challenges to his retributivist status outlined above. This revised reading will be grounded in the construction of justice, an approach deeply indebted to the work of Susan Meld Shell.⁹⁰ But in order to flesh out and come to terms with this revised account grounded in the construction of justice, a number of key pillars of this position need to be outlined in real negation, community and construction. While real negation and community both have a long history in Kant's thought, the idea of the construction of a concept like justice may appear an anathema to those familiar with the first *Critique's* attack on dogmatic metaphysics. Nonetheless all these notions feed into Kant's construction of justice to be outlined below.

Real Negation

In his pre-critical *Attempt to Introduce the Concept of Negative Magnitudes into Philosophy*⁹¹ Kant explores the idea of negation, arguing that applying this mathematical concept to philosophy enables certain errors and misunderstandings to be overcome. To illustrate his point Kant refers in the paper's preface to a flawed interpretation of Newton by Christian Crusius which could have been averted, Kant claims, if Crusius had understood how negative magnitudes are employed in mathematics. On Kant's view if Crusius had appreciated that negative magnitudes are not to be mistaken for negations of magnitudes, he would not have condemned Newton in the fashion in which he did.

According to Kant's *Negative Magnitudes* paper, at its most fundamental level opposition always involves two components, one of which cancels what the other affirms. Kant further elucidates this concept by suggesting that all opposition must be either what he terms 'logical' or

⁹⁰ Susan Meld Shell, "Kant on Punishment," *Kantian Review* 1 (1997).

⁹¹ Immanuel Kant, "Attempt to Introduce the Concept of Negative Magnitudes into Philosophy (1763)," in *Theoretical Philosophy 1755-1770*, ed. David Walford in collaboration with Ralf Meerbot (Cambridge: Cambridge University Press, 1992).

'real'. The first of these forms entails contradiction, and arises when something is both asserted and denied of the same thing at the same time. The result is in effect a nullity or nonsense which cannot exist, for instance a body which is simultaneously moving and at rest, or a spherical cube. In this logical form of opposition or negation it is the contradictory relationship between contemporaneously asserted predicates which is important, rather than any particular sense in which one or other of the predicates is truly (or in some stronger metaphysical manner) affirmative or negative. Kant gives the example of something being both dark and not dark at the same time. According to Kant, logical principles dictate that it is the first of these two predicates which is affirmative because it fails to be preceded by the word 'not', however when regarded from a metaphysical perspective darkness is actually a negation (presumably since it is counterpoised to light, which is often considered to be positive). But this is of no real consequence when considering the matter of logical repugnancy, since it is how the pair interact in a contradictory fashion (i.e. their relationship) which is the issue.

In contrast to logical negation, real negation results in something rather than a mere nullity or absolute nothing. This is because real negation bespeaks a relationship between two positive predicates such that the negative involved is not a denial of reality or a negative in itself; but rather one predicate is simply made or construed as negative by virtue of its relationship of opposition to another predicate. It is only when they are considered together that the two predicates work to divest each other of some part or all of their individual effects. Even in an instance where the consequence of two opposites is entirely to expunge each other of their respective effects creating a kind of zero, this is not to be understood as an absolute zero comprised of nothing. Rather the result is, as Kant describes it, a "relative nothing",⁹² the product of tension and reciprocal interaction.

Understanding the way mathematicians employ signs also helps elucidate the point Kant is making here about real negation. In mathematics whether or not a '+' or '-' sign precedes a magnitude does not impact on the magnitude itself, the sign does not signify a fundamentally different kind of entity but rather points to the role of the magnitude in relation to other magnitudes. Conventions surround how amounts preceded by '+' and '-' should be treated in relation to each other (namely in a reciprocal and opposed fashion),⁹³ but there is a sense in

⁹² Ibid., 212.

⁹³ Kant in fact states what are in effect two rules for the use of signs, namely that "in general, if the signs are the same, then the signified things must be simply added together, but if the signs are different they can only be combined through opposition, that is to say, by means of subtraction." Ibid., 2:173.

which the signs are interchangeable. So for instance *descent* could be referred to as 'negative rising', just as easily as *rising* could be referred to as 'negative descent'.⁹⁴

Kant further clarifies the concept of real negation in the *Negative Magnitudes* paper by employing a number of fairly straightforward examples. For instance he suggests that if an individual has a capital of 8 units and a passive debt of 8 units, effectively she has a net capital worth of zero.⁹⁵ He also develops an example based on a ship which sails from Portugal to Brazil. If distances eastward are represented with a '+' and those westward by '-', the journey could be expressed as "+12 +7 -3 -5 +8 = 19 miles"⁹⁶. The positive figures are added and the negative ones subtracted from these to give the result. However there is nothing inherent in eastward or westward directions which mean they should be referred to by '+' and '-' respectively. The directions are not innately positive or negative, merely positive and negative by assignation and possibly for the convenience of obtaining a positive result, though this need not have been the case. If the signs were swapped then the result would have been a negative 19, but would nonetheless have indicated a resultant journey of 19 miles eastward.

Kant draws on further and more involved examples from a diverse array of disciplines to both elucidate and show the utility of this notion of real opposition. In the paper he discusses instances from natural science and physics, as well as psychology and moral philosophy. So for example from an arena he labels 'psychology', Kant considers the notion of displeasure and whether or not it amounts to a mere lack of pleasure or something more substantive. He concludes that in line with his account of opposition, displeasure is related to pleasure in a real fashion. Kant argues that for any pleasure being experienced by an individual at a particular time, there will be other potential pleasures not being experienced, yet we would hardly consider the absence of these other specific pleasures to result in displeasure. Further, using the example of a Spartan mother informed that her son has fought heroically in battle and subsequently told that he has been killed, Kant illustrates how displeasure works in direct opposition to pleasure. The initial pleasurable feeling evoked by her son's heroism is tempered by displeasure at her son's death.⁹⁷ Thus displeasure has both a positive existence and one that is counterpoised to that of pleasure, so that it can be referred to as negative pleasure. From the realm of moral philosophy, Kant considers the case of vice and argues that it is no mere negation per se, but rather a negative virtue. By this he means a state of affairs which can only come into existence in counter-position to some positive internal law. He thereby clearly rules out the possibility of animals engaging in

⁹⁴ Ibid., 215.

⁹⁵ Ibid., 2:174.

⁹⁶ Ibid., 2:173.

⁹⁷ Ibid., 2:180-2:81.

acts of vice, since they lack the requisite inner laws against which acts of vice must be set. In a similar fashion to the example of displeasure from psychology, aversion can be described as negative desire, hate negative love, ugliness negative beauty, blame negative praise,⁹⁸ and from the moral sphere Kant maintains that prohibitions can be referred to as negative commands and punishments as negative rewards.⁹⁹ Kant makes it quite explicit in the discussion of these instances that this negative nomenclature is no mere word play but instead signifies in a clear and direct form, the relation between concepts. Kant regards the failure to appreciate the relationship signaled by this language, as pivotal to the failure of certain philosophers to comprehend, for instance, the nature of particular phenomena in moral philosophy.

One such failure is exemplified in Kant's charge that evils are falsely construed as mere negations. This criticism appears in the *Negative Magnitudes* paper and is again taken up in the *Critique of Pure Reason* where it becomes clear that Leibniz is a specific target. The critical resources of the later book allow for a different framing of the problem although the basic point holds across both works. In the *Critique* Kant accuses Leibniz of conflating the transcendental and empirical realms such that he falsely maintains that all knowledge can be obtained by investigating concepts. In Kant's critical terminology Leibniz "intellectualised appearances"¹⁰⁰. While Kant admits that according to Leibniz's conceptual schema it is true that realities cannot come into conflict with one another, and that conflict can only be generated on this view by some kind of negation or deprivation of reality, he insists that reality as we experience it does involve conflict. Kant argues that there are cases "where two realities combined in one subject cancel one another's effects"¹⁰¹ and that such cases are readily apparent in physics. However because Leibniz and others "do not admit the conflict of reciprocal injury, in which each of two real grounds destroys the effect of the other- a conflict which we can represent to ourselves only in terms of conditions presented to us in sensibility",¹⁰² they are forced to account for evils in this inadequate manner, as negations or deprivations of reality.

Kant mounts a further criticism of Leibniz with implications for real negation and this thesis in a paper published five years after the *Negative Magnitudes* piece, entitled *Concerning the ultimate*

⁹⁸ Ibid., 2:182.

⁹⁹ Ibid., 2:184.

¹⁰⁰ Immanuel Kant, *Critique of Pure Reason*, trans. Norman Kemp Smith (Hampshire and London: Macmillan Press Ltd, 1929) A271/B327.

¹⁰¹ Ibid. A273/B329.

¹⁰² Ibid. A274/B330.

*ground of the differentiation of directions in space.*¹⁰³ Here Kant attacks the notion of relativistic space Leibniz maintains and argues instead for the idea of absolute space. Kant's proof for absolute space revolves around the claim that something he calls "directionality" is a real and fundamental spatial quality which Leibniz cannot account for. Kant maintains that, for instance, two objects can be the same size and shape but yet they may not fit inside each other's spatial extremities so that they are referred to as "incongruent counterparts". For example even though they might share their size and shape, a right hand will not fit inside a left glove such that left and right hands can be acknowledged as incongruent counterparts. Thus, according to Kant, directionality matters; the orientation of objects represents a genuine point of difference and cannot be grasped without referring to the space outside the objects. It is not sufficient to do as Leibniz does and refer only to the relationship between parts of an object. Although Kant will go on to repudiate absolute space in favour of treating space as a pure intuition in his critical philosophy, aspects of his view on directionality will continue to be important. For this thesis, part of its relevance stems from the way in which the critical division between intuitions and concepts maps onto Kant's earlier distinction between real and logical negation, since intuitions and real negation are both significant to the representation of justice through punishment. In the discussion of right and wrong within the state later in this thesis, the potential of this distinction between real and logical negation will come into its own.

Real negation is also in the background of the third division of the section "Quality" in both the Table of Judgments (labeled the "infinite" division) and the Categories (the "limitation" division), whereas it seems logical negation lies behind the second division of these tables, "negative" and "negation". It is only with the development of Kant's transcendental logic (as opposed to general logic which is more like contemporary formal logic) that the possibility of this third division opens up, since in transcendental logic the actual content or value of predicates count. So whereas in a negative judgment belonging to general logic a predicate is denied of a subject, in an infinite judgment what might be labeled a "negative predicate" is affirmed of a subject. Perhaps some examples might help to illustrate the point here. Instances of negative judgments could include "Socrates is not beautiful", "The soul is not mortal" and "John is not good" while their infinite counterparts might roughly be "Socrates is ugly", "The soul is immortal" and "John is evil". In the latter examples something is affirmed of the subject, albeit a predicate which is in a sense a negative predicate. So again we see here how real negation is invoked because the predicates bespeak real and actual properties in their own right, even though these predicates can be

¹⁰³ Immanuel Kant, "Concerning the Ultimate Ground of the Differentiation of Directions in Space (1768)," in *Theoretical Philosophy 1755-1770*, ed. David Walford in collaboration with Ralf Meerbot (Cambridge: Cambridge University Press, 1992).

designated as negative. This is different to the case of the negative judgments where what is referred to is simply an absence of a positive predicate.

Community or Reciprocity

The concept of community or reciprocity appears in a wide variety of guises throughout the Kantian corpus – in his epistemology, in his treatment of the metaphysical cornerstones of natural science, in his account of judgment and in both his ethics and legal and political theory. In the first and second *Critiques* community even constitutes one of the categories or pure concepts of the understanding. Across the whole spectrum of these applications the concept of community shares a number of key features which will become apparent in the discussion below. To summarize these features we should note that at its most basic level community is about the relationship between parts and the whole composed of those parts. In particular, community involves how the simultaneous and mutual interaction of parts defines their limits with respect to each other, and unifies them into an organized and coherent whole. Interestingly for this thesis, given the analogy between the ethical and physical realms which Kant appeals to in discussing punishment, the concept of community can apply in both normative and descriptive contexts. Now in spite of its obvious prevalence and scope in Kantian thought, community receives relatively scant treatment in the secondary literature¹⁰⁴. One function of the discussion of community which follows then, will be to seek to address the inadequate treatment of this topic in the Kantian literature.

Community receives an epistemological rendering in the *Critique of Pure Reason's* Third Analogy of Experience, where it refers to issues surrounding the perception of coexisting

¹⁰⁴ Amongst those who defy this trend are James W. Ellington, "Essay," in *Philosophy of Material Nature* (Indianapolis: Hackett Publishing Company, 1985)., Lucien Goldmann, *Immanuel Kant*, trans. Robert Black (London: NLB, 1971)., Douglas Moggach, "The Construction of Juridical Space: Kant's Analogy of Relation in the Metaphysics of Morals," in *The Proceedings of the Twentieth World Congress of Philosophy*, ed. Mark D. Gedney (Philosophy-Doc-Ctr : Bowling Green, 2000).; Margaret Morrison, "Community and Coexistence: Kant's Third Analogy of Experience," *Kant-Studien* 89, no. 3 (1998), Margaret Morrison, "Space, Time and Reciprocity" (paper presented at the Eighth International Kant Congress, Milwaukee, 1995).; Hans Saner, *Kant's Political Thought Its Origins and Development*, trans. E. B. Ashton (Chicago and London: The University of Chicago Press, 1973)., and Shell, "Kant on Punishment.", while reciprocity is discussed to some extent in the punishment literature.

substances. Here it falls into the class of instantiations of community noted above, which lack thorough consideration in the literature. With respect to this shortcoming, Margaret Morrison comments that [i]n the abundance of writing on Kant's analogies of experience relatively little attention has been paid to the third analogy".¹⁰⁵ Morrison further observes that given its importance to his philosophy, such a situation is "odd".¹⁰⁶ Similarly, Henry Allison notes that the third analogy's "relative neglect in the literature may seem surprising."¹⁰⁷ Allison's point here is particularly interesting given that some might suggest that he in fact contributed to this relative neglect by not giving any consideration to the third analogy in his book *Kant's Transcendental Idealism*, as Morrison herself notes.¹⁰⁸ It is only in the recent revised and enlarged edition (from which the quote above is taken) that the third analogy receives any attention at all. Both Morrison and Allison furnish a number of reasons for the analogy's general neglect including that many simply regard the third analogy as less important than the others;¹⁰⁹ that the argument it runs is difficult to understand¹¹⁰ and perhaps ultimately unsuccessful;¹¹¹ or that the argument is regarded by some as redundant.¹¹²

The third analogy concerns the perception of coexistence, and on Kant's view it is this relational category of community or reciprocity which is the essential factor or governing rule that makes the coexistence of objects possible for human beings. In this context community describes the manner in which objects engage in mutual interaction to exclude each other and thereby determine their respective positions in space. The kind of reciprocity at play here can be contrasted to the uni-linear and hierarchical relations involved in the previous analogy where succession is at issue. In this second analogy cause and effect provide the governing law, and causation can be seen as a one way hierarchical process running from the superior cause to the lower level effect. Causality issues in an outcome or event, whereas with community the situation may be construed as an ongoing process. Unlike in the case of causality, with community there is no hierarchy or simple link, objects are on a par and their relationship is such that they *mutually* affect each other, potentially through time rather than just at a single instant.

¹⁰⁵ Morrison, "Community and Coexistence: Kant's Third Analogy of Experience," 257.

¹⁰⁶ Ibid.

¹⁰⁷ Henry E. Allison, *Kant's Transcendental Idealism*, Revised and Enlarged Edition ed. (New Haven: Yale University Press, 2004) 261.

¹⁰⁸ Morrison, "Community and Coexistence: Kant's Third Analogy of Experience," 257.

¹⁰⁹ Ibid.

¹¹⁰ Allison, *Kant's Transcendental Idealism* 261. and Morrison, "Community and Coexistence: Kant's Third Analogy of Experience," 257.

¹¹¹ Morrison, "Community and Coexistence: Kant's Third Analogy of Experience," 257.

¹¹² Allison, *Kant's Transcendental Idealism* 261.

Community in the above guise is absolutely essential to human experience, for in its absence there quite simply would be no coherent experience to be had; community is required to hold together what would otherwise be disparate and discontinuous perceptions. Now at first blush this necessity for community here might seem odd. Why is *interaction* in which objects mutually determine each other vital for coexistence? Surely we can be aware of coexistence simply by interrogating our perceptions. If we are able to look from the Earth to the Moon and vice versa (an example chosen by Kant), why isn't this sufficient to establish the coexistence of these two bodies? With respect to this kind of example Kant is careful to point out that this potential for the reversibility of perceptions, a type of indifference in their order of appearance, is an essential dimension to coexistence,¹¹³ but beyond this there must also be reciprocity. After all if we are only aware of the moon or the earth in a succession of perceptions, what is there to ensure that these two bodies do in fact exist in an objectively simultaneous manner, that this apparent coexistence is not merely a product of the manner in which they are apprehended? Time itself cannot be perceived in order potentially to interrogate the objects in it to check for their coexistence, it is only via their relationship to one another that the coexistence of objects in time can be determined. Thus for Kant in order to secure genuine coexistence a concept of the understanding is required and this concept is of course community, so that it is the mutual interaction of bodies in space which guarantees their synchronous existence. As Allison has suggested however, this may seem like an extremely arduous requirement. As he says "direct interaction (particularly when interpreted as..... amounting to reciprocal causal determination) is an implausibly strong necessary condition of the determination of coexistence."¹¹⁴ But the implausibility or otherwise of this point seems to hang on the interpretation of interaction here. Drawing on ideas from Eric Watkins about strong and weak interpretations of interaction, Allison advocates interpreting Kant here as making a weak claim. That is, Allison maintains that the interaction at issue should be interpreted as being indirect, it might simply be the case that each substance "be conceived as standing in such a relation with some coexisting substances, which, perhaps by a complex chain of mediations, stand in this relation to the other."¹¹⁵ This of course is in contrast to the stronger claim to the effect that "every substance in the universe directly interacts to some degree with every other".¹¹⁶ Also responding to the problem of how to give a plausible rendering to interaction in the third analogy, Margaret Morrison has argued that such reciprocal interaction should be

¹¹³ Again this can be contrasted with the previous analogy where such reversibility is just not possible. If A is the cause of B, the perception of B is not interchangeable in time with the perception of A, since A will be prior to B.

¹¹⁴ Allison, *Kant's Transcendental Idealism* 172.

¹¹⁵ Ibid. 167.

¹¹⁶ Ibid. 172.

interpreted as resulting in the mutual allocation of positions in space. Objects coexist if they synchronously determine certain features of each other, and on her view the salient feature is their position in space.¹¹⁷

In trying to come to terms with Kant's account of community here, it may be useful to examine something of its historical context. In developing the position he does on community in his epistemology, Kant is also addressing problems he maintains affect Leibniz's metaphysics and in fact attempting to refute Leibniz's view. For Leibniz the fundamental constituents of ontology are the non spatio-temporal, independent and isolated substances called "monads". By virtue of their isolation (both in space and time) monads can have no causal interaction with each other. In fact any appearance of such interaction is the result of flawed human perception. So in order to account for the *apparent* coexistence of monads Leibniz must, on Kant's view, make an undesirable appeal to God and a theory of pre-established harmony. It is these two factors which facilitate the appearance of coexistence or interdependence for Leibniz, and this situation stands in stark contrast to the position Kant has etched out for himself where it is real and substantial interaction that can actually be perceived by human beings, which grounds coexistence.

Community also appears in the *Metaphysical Foundations of Natural Science* (published five years after the A edition of the first *Critique* and just a year before the B) where the categories of relation from the three Analogies come to correspond to what Kant regards as the three fundamental laws of mechanics. Thus the categories of substance, causality and community in their turn tally with the laws of subsistence, inertia and the reaction of matters.¹¹⁸ Now whereas in the Analogies Kant is concerned with what it takes for objects to be objects of possible experience for human beings, in the *Metaphysical Foundations of Natural Science* it is the basic constituents of natural science which are under examination - time, space, motion, matter and force. In particular it is this work's take on discussion of matter and force that will be significant, as Douglas Moggach has argued, to understanding the analogy between juridical interactions and the interactions of bodies in space.¹¹⁹ Unlike many of his predecessors, Kant does not conceive of matter in terms of something which is simply inert and space occupying, but rather he views matter as dynamic and comprised of forces. Bodies are impenetrable not just because they fill out space, but because of the forces at play within them, so that the internal forces which constitute bodies serve to repel other bodies and thereby to define their limits. The law of the reaction of

¹¹⁷ Morrison, "Community and Coexistence: Kant's Third Analogy of Experience," 265-69.

¹¹⁸ Immanuel Kant, "Metaphysical Foundations of Natural Science," in *Philosophy of Material Nature* (Indianapolis: Hackett Publishing Company, 1985), 551.

¹¹⁹ Moggach, "The Construction of Juridical Space: Kant's Analogy of Relation in the Metaphysics of Morals," 205.

matters Kant refers to as corresponding to community therefore, is not simply a reworking of Newton's third law of motion (that for every action there is an equal and opposite reaction), since Newton's way of construing matter and force is clearly not Kant's. Rather, as Moggach notes, Kant's reaction of matters "refers to interactions in space, in which bodies resist penetration by others up to their limits, and are equally repelled from other bodies. The unity and continuity of space are constituted by this mutuality, or the congruity of limits."¹²⁰

Beyond its discussion in the Analogies, the category of community arises in another context in the *Critique of Pure Reason* with Kant's discussion of judgment, where he argues that the category accords with the disjunctive form. Kant admits that the connection here "is not as obvious"¹²¹ as the ones he draws between other judgment types and the categories of relation. A number of philosophers, however, have been even less charitable about the comparison he draws in this context. Béatrice Longuenesse describes it as being "generally taken to be the most artificial of all"¹²² and quotes Adickes as regarding it as "extraordinarily contrived" and Guyer saying it is "the most tenuous of all."¹²³ Nonetheless, according to Kant, the propositions which comprise disjunctive judgments are logically opposed in so far as the scope of one excludes that of the others, and in community when regarded together, since the sum of all the disjunctive judgments related to an area of knowledge can be thought to cover the field with respect to that area. As Longuenesse has argued, the way Kant sometimes treats disjunctive judgments here is symmetrically opposed to the manner in which he regards categorical judgments. Whereas a categorical judgment "starts from the *thing*, subsumes it under a concept A, and by means of this concept A subsumes it under a concept B that contains the first concept under it",¹²⁴ a disjunctive judgment "starts from a concept and then states all the possible divisions contained under it."¹²⁵ Kant observes that disjunctive propositions are not subordinate to one another in the way that propositions of cause and effect, for instance, might be thought to be subordinate. The subordination involved in such cases being a hierarchical one-way link as noted above, with effect being subordinate to cause. But where disjunctive propositions are involved they are coordinated so that they mutually and concurrently determine each other. Kant illustrates the application of community to disjunctive judgments in an example where he discusses propositions related to the origins of the universe. In this context Kant lays down three disjunctive propositions,

¹²⁰ Ibid., 206.

¹²¹ Kant, *Critique of Pure Reason* B112.

¹²² Béatrice Longuenesse, *Kant and the Capacity to Judge*, trans. Charles T. Wolfe (Princeton, New Jersey: Princeton University Press, 1998) 376.

¹²³ Ibid.

¹²⁴ Ibid. 104.

¹²⁵ Ibid. 105.

namely that “[t]he world exists either through blind chance, or through inner necessity, or through an external cause”.¹²⁶ Now, regarded separately each of these propositions represents a different and mutually incompatible answer to the problem of the world’s origin, and thus can be regarded as being logically opposed. When considered in their totality, these judgments are in community and cover all bases with regard to explaining the existence of the universe, since in Kant’s view they exhaust the relevant possibilities. Again from the perspective of their totality, the reciprocal and synchronous manner in which these propositions determine each other can be grasped. Each proposition is not radically isolated from the others, their contents are related insofar as there is no overlap between propositions and to the extent that all options regarding the origins of the universe are presented.

The concept of community also appears in Kant’s ethical writings, where it of course fulfills a normative rather than a descriptive function. In this capacity, community bespeaks an ideal of how the moral world should be, as opposed to an outline of how human beings do in fact treat each other. In the second *Critique* community forms one of the categories of freedom with respect to relation, namely the relation “of one person to the condition of others”.¹²⁷ However Kant does not always make the ethical employment of community explicit. Norman Fischer for example has observed an instance of community (not directly labeled as such by Kant) in the *Grounding’s* third formulation of the categorical imperative,¹²⁸ also known as the formula of autonomy. The formula states “the idea of the will of every rational being as a will that legislates universal law”,¹²⁹ which effectively means that “all maxims are rejected which are not consistent with the will’s own legislation of universal law.”¹³⁰ Such a rendering of the categorical imperative appears to point to the concept of community, since the formula indicates how individuals should make ethical decisions and actions showing regard for others and thereby to bring about a unified and harmonious whole. Discussion of the formula of autonomy in the *Grounding* in fact directly precedes Kant’s treatment of the ethical ideal of the kingdom of ends – his vision of a “systematic union of different rational beings through common laws.”¹³¹ According to the kingdom of ends, ethical acts should be compatible with, and limited by, appropriate concern for the legitimate ends

¹²⁶ Kant, *Critique of Pure Reason* A74/B99.

¹²⁷ Immanuel Kant, "Critique of Practical Reason," in *The Cambridge Edition of the Works of Immanuel Kant Practical Philosophy*, ed. Mary J. Gregor (Cambridge: Cambridge University Press, 1999), 5:66.

¹²⁸ Norman Fischer, "The Concept of Community in Kant's Architectonic," *Man and World* 11 (1978): 375.

¹²⁹ Kant, *Grounding for the Metaphysics of Morals* §431.

¹³⁰ *Ibid.*

¹³¹ *Ibid.* §433.

of others. Thus here again some of the common threads of community appear – the mutual interaction of individuals (parts) which go to make up a kingdom (the whole). Further, given the parallels which will shortly be made between the normative and descriptive realms for Kant, it is worth noting that he observes the following connection between the kingdom of ends and a kingdom of nature. He states “a kingdom of ends is possible only on the analogy of a kingdom of nature; yet the former is possible only through maxims, i.e., self-imposed rules, while the latter is possible only through laws of efficient causes necessitated from without.”¹³² Clearly then for Kant there is an important analogy between the ethical and the physical realms, though of course in the ethical realm the form of laws is normative and such laws must be freely chosen, whereas laws in nature are descriptive and have the force of necessity.

Kant further develops and explicitly discusses community in a work written after the *Grounding*, namely *Religion within the Boundaries of Mere Reason*.¹³³ In this book Kant is careful to identify the similarities and points of difference the term community evokes in an ethical as opposed to a political context.¹³⁴ In fact we glean something further of what Kant means by community via his observation that ethical community can also be labeled as an ethical *state* or *kingdom* of virtue, terms which might ordinarily be associated with a political context. An ethical community (as outlined in *Religion within the Boundaries of Mere Reason*) comprises individuals drawn together and organized by the shared goal of being ruled by common principles or laws of virtue. Since this relation is founded on virtue, significantly for Kant there can be no coercion which enforces this union of individuals. To hold together such an ethical community Kant presupposed the need for “a higher moral being through whose universal organization the forces of single individuals, insufficient on their own, are united for a common effect.”¹³⁵ In addition to making the notion of an ethical community viable by providing a kind of glue to bind together otherwise potentially disparate individuals, the idea of God makes feasible the ethical community by furnishing the kind of insight and knowledge essential to its functioning. Although as finite human beings we lack the requisite power to access the inner workings of our fellows in order that we might “give to each according to the worth of his actions”,¹³⁶ God is not limited or impaired in this way. God, unlike we mere mortals, can see into human hearts and make judgments of moral worth. God also serves a

¹³² Ibid. §438.

¹³³ Immanuel Kant, *Religion within the Boundaries of Mere Reason and Other Writings*, ed. Karl and Desmond M. Clarke Ameriks, trans. Allen Wood, *Cambridge Texts in the History of Philosophy Kant* (Cambridge: Cambridge University Press, 1998).

¹³⁴ These differences will be significant in answering the charge of inconsistency between Kantian ethics and legal theory.

¹³⁵ Kant, *Religion within the Boundaries of Mere Reason* 6:98.

¹³⁶ Ibid. 6:99.

necessary theoretical function within ethical community where we can envisage him as the lawgiver or source of true duties, which issue from him in the form of commands.

We gain further insight into what Kant means by ethical community, via considering it in relation to its corresponding state of nature. Both the ethical and the juridical states of nature share the following features. In these states of nature it is the case that

“each individual prescribes the law to himself, and there is no external law to which he, along with the others, acknowledges himself to be subject. In both each individual is his own judge, and there is no effective *public* authority with power to determine legitimately, according to laws, what is in given cases the duty of each individual, and to bring about the universal execution of those laws.”¹³⁷

The ethical state of nature is individualistic. There are no overarching principles established to guide actions and to which people can be held to account. There is no agreed public forum for resolving disputes so that the ethical state of nature is also a realm of conflict, not only between its members but within each individual who exists in the state of nature. The battle consists in “a *public* feuding between the principles of virtue and a state of inner immorality which the natural human being ought to endeavor to leave behind as soon as possible.”¹³⁸ Thus Kant maintains that the human race, by virtue of the idea of reason itself, is “destined to a common end, namely the promotion of the highest good as a common good to all.”¹³⁹ So as individuals in the ethical state of nature we should attempt to bring about the union of ethical community.

As mentioned above it is not only ethical community which is discussed in *Religion Within the Boundaries of Mere Reason*, but the notion of a juridico-civil (political) state or community. Although there are some fundamental similarities between these two forms of community (such as that in both it is individuals who stand together united under laws) there are also important differences. Crucially in the juridico-civil form of community the laws which hold sway are public juridical and coercive ones, as opposed to the laws of virtue which rule ethical community. It is noted by Kant that those held together by political community can also exist in ethical community, however membership of the latter community must be voluntary, lest such membership defy the very nature of the non-compulsive underpinnings of the ethical state. As Kant explains

“[e]very political community may indeed wish to have available dominion over minds as well, according to the laws of virtue; for where its means of coercion do not reach, since a human judge cannot penetrate into the depths of other human beings, there the dispositions to virtue would bring about the required result. But woe to the legislator who

¹³⁷ Ibid. 6:95.

¹³⁸ Ibid. 6:97.

¹³⁹ Ibid.

would want to bring about through coercion a polity directed to ethical ends! For he would thereby not only achieve the very opposite of ethical ends, but also undermine his political ends and render them insecure.”¹⁴⁰

So although it might be desirable in some sense for the political state to possess the power and insight of the ethical community, this clearly violates the basic tenets of ethical community.

A further point of similarity between the ethical and political forms of community as outlined in *Religion Within the Boundaries of Mere Reason* is that in both Kant sees the need to posit a common lawgiver. In the realm of ethical community God fulfilled this function, whereas in political community it is the “mass of people joining in a union”.¹⁴¹ Legislation is grounded in the principles of external right, proceeding on the basis of “*limiting the freedom of each to the conditions under which it can coexist with the freedom of everyone else, in conformity with a universal law*, and the universal will thus establishes an external legal constraint.”¹⁴² Now although this paragraph might not seem to contribute much to understanding the notion of community more broadly, nonetheless what is outlined here will be important to addressing certain criticisms of Kant on punishment to be taken up at the end of this chapter.

Construction

Not only will understanding real negation and community be important to understanding what the construction of justice means for Kant, but understanding what the notion of construction itself involves will obviously be relevant. As with real negation and community, construction appears in a variety of guises throughout Kant’s philosophy, and there is of course a common thread running through these applications, as will become apparent below. But there are also some important differences between how construction can apply to distinct kinds of concepts.

In the *Critique of Pure Reason* what is involved in the construction of concepts appears to be explained quite clearly when Kant states, “[t]o *construct* a concept means to exhibit *a priori* the intuition which corresponds to the concept.”¹⁴³ Earlier in the first *Critique* Kant had also discussed construction in connection with the method in mathematics, and in particular geometry. According to Kant a huge advance was made in mathematical thinking when geometers began “to bring out

¹⁴⁰ Ibid. 6:95-96.

¹⁴¹ Ibid. 6:98.

¹⁴² Ibid.

¹⁴³ Kant, *Critique of Pure Reason* A713/B41.

what was necessarily implied in the concepts that he had himself formed *a priori*, and had put into the figure in the construction by which he presented it to himself".¹⁴⁴ This differed from the previous method where a geometer would simply "inspect what he discerned either in the figure, or in the bare concept of it, and from this, as it were... read off its properties".¹⁴⁵ Thus the construction of a figure in geometry is a straightforward example of how construction helps to bring to the fore what the constructed concept essentially involves. But that Kant even seriously entertains the notion that there can be a construction of a concept like justice in his later *Metaphysics of Morals* will (as noted earlier in the introduction to this revised reading of Kant) seem extraordinary to those familiar with the first *Critique*, where he rails against the manner in which dogmatic metaphysics engages in manipulation and investigations of philosophical concepts to obtain knowledge. As Kant states in this *Critique*, he is opposed "to *dogmatism*, that is, to the presumption that it is possible to make progress with pure knowledge, according to principles, from concepts alone (those that are philosophical), as reason has long been in the habit of doing".¹⁴⁶ Kant objects to the notion that there can be meaningful philosophical knowledge obtained from the mere interrogation and play of philosophical concepts and explicitly states in the Doctrine of Method "it is the concept of quantities only that allows of being constructed, that is, exhibited *a priori* in intuition; whereas qualities cannot be presented in any intuition that is not empirical."¹⁴⁷ Clearly then if the construction of justice is not to conflict with this important critical tenet, Kant needs to have some way of explaining why the construction of a concept of justice is different to the kind of investigation of the concept of God, say, which metaphysical dogmatists engaged in and which purportedly issued in substantive knowledge claims. And fortunately Kant does have a way of distinguishing his enterprise from that of the dogmatists. His approach hangs around identifying different *kinds* of concepts and what can and cannot be legitimately obtained from the construction of such concepts.

In the *Critique* Kant compares the disciplines of philosophy and mathematics and finds important differences between the way each deals with its concepts. Philosophical knowledge involves rational cognition from concepts alone, while mathematical cognition cannot simply proceed from concepts, but must appeal to the construction of concepts in intuition if knowledge is to be obtained. So for Kant the essential point of difference between the two kinds of knowledge is not the result of their dealing with different subject matter (as might be expected) but rather has to do with their differing form or their methods of reasoning. Simply put, mathematicians can legitimately engage in the construction of concepts to obtain knowledge,

¹⁴⁴ Ibid. Bxii.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid. Bxxxv.

¹⁴⁷ Ibid. A714/B42- A15/B43.

while philosophers cannot. This is because to construct a concept, an *a priori* and non-empirical intuition is required and only mathematics can appeal to such intuitions. Intuitions that correlate to philosophical concepts on the other hand must be derived from experience. Kant gives as an example of the former a triangle for which there can be an *a priori* intuition, and for the latter the concept of a cause which cannot be exhibited in the absence of an example from empirical reality. The dissimilarities between mathematics and philosophy are further highlighted by a scenario Kant sets down where a geometer and a philosopher are faced with the problem of determining how the sum of angles in a triangle relate to a right angle. Confronted with this problem the philosopher, Kant argues, is at a real disadvantage since no amount of conceptual analysis of the triangle itself or its component parts will issue in new knowledge with which to address the assigned task. The geometer, conversely, can make genuine progress since rather than engaging in mere conceptual contemplation, the geometer will immediately begin by constructing a triangle and then manipulate that construction so that a solution is reached by reasoning directed by intuition.¹⁴⁸ Thus we can conclude that for Kant in the *Critique of Pure Reason* philosophical (as opposed to mathematical concepts) are simply not of a kind susceptible to construction.

What becomes apparent in some of Kant's later practical philosophy, is that he considers that a process akin to construction can be applied to certain practical concepts, but that what can safely be concluded from such a process will be different to what can be concluded from the construction of mathematical concepts. For Kant the construction of a mathematical concept constitutes both the concept and its schematization; that is, it can furnish an exemplifying instance of the concept and also illustrate how the concept is to be applied by falling under it. So, for instance, for Kant to know a geometrical concept like "triangle" is to know how to construct a triangle, either physically or in one's mind. The process of the construction of the triangle issues in both an example of the concept triangle and an exhibition of the method or rule for how to apply the concept. Now as the above discussion made clear, in order to construct a concept an *a priori* and *non-empirical* intuition is required (the sensory component of cognition). It might be objected, however, that the constructed triangle clearly does issue in an actual empirical intuition. Kant does respond precisely to this kind of objection by noting in the Doctrine of Method that "[t]he single figure which we draw is empirical, and yet it serves to express the concept, without impairing its universality. For in this empirical intuition we consider only the act whereby we construct the concept".¹⁴⁹ So we get the gist of the mathematical concept via the general nature of its construction, rather than getting hung up on the particularity of its actual presentation. When it comes to practical concepts, such *a priori* intuitions are obviously entirely lacking, since the

¹⁴⁸ Ibid. A716/B44-A17/B45.

¹⁴⁹ Ibid. A714/B42.

intuitions which correspond to practical concepts must be derived from experience. So in the case of a practical concept like justice, there simply are no sensible objects accessible to creatures like us which exemplify justice in the way the sensible presentation of the triangle exemplifies the concept triangle. Thus if practical concepts are to be in any fashion susceptible to a process like construction, then this process will also have to differ in important ways from construction as it pertains to the concepts of mathematics. Kant will argue that this is the case.

The main point of difference between the constructions of mathematics and the construction like process as applied to practical concepts, will be in what we can expect as a legitimate outcome of the process. The appropriate expectation when constructing a practical concept, according to Kant, should be of a symbolic representation of that concept. On Kant's view the construction of practical concepts issues in symbols or analogies that are an aid to understanding, rather than schemas (as in the case of the concepts of mathematics) that actually constitute knowledge. Thus constructions of practical concepts are only to be understood as furnishing an analogy or a regulative device that should not be mistaken as giving content to the concept, lest (as he states in the second *Critique*) we fall into the "mysticism of practical reason, which makes what served only as a *symbol* into a *schema*".¹⁵⁰ Again in *Religion Within the Boundaries of Mere Reason* Kant makes the point that our employment of practical concepts in practical reason is regulative, that what can be obtained from the analysis of such concepts is indicative, furnishing us with a guide only, rather than actual tangible knowledge. In fact, human beings would be in a far better position, Kant maintains, if instead of attempting to extend

"the *constitutive* principles of the cognition of supersensible objects into which we cannot in fact have any insight, we restricted our judgment to the *regulative* principles, which content themselves with only their practical use.... there would be no breeding of would-be knowledge of something of which we fundamentally know nothing – groundless though indeed for a while glittering sophistry that it is, at the end unmasked as a detriment to morality."¹⁵¹

As the critical philosophy had shown there are limits to the knowledge we can legitimately claim as human beings, and clearly Kant maintains that we would be better to acknowledge and work within such limitations than attempt to breach them. Kant reiterates this point about how we are to understand the limitations on moral concepts in the *Critique of Practical Reason* with reference to the moral law. Physical laws or "the nature of the sensible world" can furnish an analogy for understanding the moral law "provided that I do not carry over into the latter intuitions and what depends upon them but refer to it only the *form of lawfulness* in general.... For to this extent laws

¹⁵⁰Kant, "Critique of Practical Reason," 5:70-71.

¹⁵¹Kant, *Religion within the Boundaries of Mere Reason* 6:71.

as such are the same, no matter from what they derive their determining grounds.”¹⁵² So we can obtain some sense of what a normative law is and how it functions by comparing it with a physical or natural law, but as always we should be careful not to read too much into such comparisons. Normative laws are not physical laws, there are clearly significant differences between the two, not the least of which is the type of compulsion each involves. Nonetheless this comparison between the physical and normative realms will play an important role in understanding Kant's theory of punishment. As Kant clearly flags in the *Prolegomena*, “there is an analogy between the juridical relation of human actions and the mechanical relation of moving forces.”¹⁵³

The Construction of Justice or Right

Given that the background concepts – real negation, community and construction have been set down, we can now turn to how these concepts come together in the construction of justice or right. It is hoped that this construction of justice, which is drawn from the major work in which Kant discusses punishment, the *Metaphysics of Morals*, will help contribute to a fuller and more sophisticated account of Kant on punishment than is traditionally furnished in the literature. However it should be noted here that this does not mean that this more common view of Kant as “merely the paradigmatic retributivist” will be totally abandoned. Rather it is the case that this reading is seen as providing a very schematic understanding of Kant on punishment, one that requires further grounding so that the term “merely” no longer has a place in characterizing Kant's view. In the pages which follow, reference will not only be made to the role of the construction of justice in a more developed account of Kant on punishment, but also to a number of passages frequently passed over in the literature which have a bearing on Kant's view. The route through this material and to a revised reading of Kant will begin with a sketch of the basics of the Kantian state as outlined in the *Metaphysics of Morals*. This will lead into a discussion of right, wrong and punishment in the state which relies on both real negation and construction. Simply put, it is construction which will be shown to furnish the intellectual tool with which to unpack the key properties of justice or right and reveal what this notion of justice (essential to Kant's view of punishment) actually involves, while real negation functions in this context to describe the kind of

¹⁵² Kant, "Critique of Practical Reason," 5:70.

¹⁵³ Immanuel Kant, "Prolegomena," in *Philosophy of Material Nature* (Indianapolis: Hackett Publishing Co., 1985), 98.

opposition which exists for Kant between right and punishment, within a political realm conceived in terms of community.¹⁵⁴

According to Kant, the state within which the construction of justice can take place is comprised of the coordinated and complimentary interplay of what he labels three “authorities”. These authorities (whose various roles will be outlined shortly) appear to be united in a form of community. Although Kant does not identify their relation as such, nonetheless he describes their interaction thus:

“the three authorities in a state are, *first*, coordinate with one another (*potestates coordinatae*) as so many moral persons, that is, each complements the others to complete the constitution of a state (*complementum ad sufficientiam*). But, *second*, they are also subordinate (*subordinatae*) to one another, so that one of them, in assisting another, cannot also usurp its function; instead, each has its own principle, that is, it indeed commands in its capacity as a particular person, but still under the condition of the will of a superior. *Third*, through the union of both each subject is apportioned his rights.”¹⁵⁵

Clearly then, the operation of the three authorities here bear hallmarks of community, and in particular sit well alongside seeing disjunctive judgments as logical instantiations of community. Recall that for Kant the sum of all the disjunctive judgments related to an area of knowledge can be thought to cover the field with respect to that area, perhaps in a way similar to how the authorities in this context are coordinated to bring about the whole that is the state. Further, the way in which each of the functions of the authorities are related to each other is akin to how the propositions which comprise disjunctive judgments are logically opposed in so far as the scope of one excludes that of the others.

The authorities whose operations Kant is referring to above are firstly the sovereign authority embodied in the form of the legislator; secondly executive authority in the guise of the ruler; and finally there exists within the state judicial authority represented by the judge. Examining the analogy Kant makes in this section between the authorities and the propositions of a practical syllogism can bring out why Kant maintains that it is imperative to separate out these three different functions or roles. The sovereign is like “the major premise, which contains the *law* of that will”;¹⁵⁶ the executive is akin to “the minor premise, which contains the *command* to behave

¹⁵⁴ It is perhaps worth noting here that Kant’s treatment of real negation and community are not as full as one might hope so that trying to characterize their respective roles in this way is to an extent speculative.

¹⁵⁵ Kant, “The Metaphysics of Morals,” 6:313.

¹⁵⁶ *Ibid.*

in accordance with the law, that is the principle of subsumption under the law";¹⁵⁷ and finally the judge's role is like "the conclusion, which contains the *verdict* (sentence), what is laid down as right in the case at hand."¹⁵⁸ Kant's separation of these functions (explained by analogy with the practical syllogism) is further reinforced by a passage in the earlier work *Toward Perpetual Peace*, where he states that "the legislator cannot be in one and the same person also executor of its will (any more than the universal of the major premise in a syllogism can also be the subsumption of the particular under it in the minor premise)".¹⁵⁹ Kant, in a move that goes back to the first *Critique's* Analytic of Principles, recognizes there is a distinction to be made between a rule and its application.¹⁶⁰ And he employs such a distinction in the political realm to illustrate the difference between despotism and the republicanism he favours. In despotism the roles of the legislature and executive collapse into one, creating an undesirable and illegitimate form of government. As has been argued by others, for the despot "there can be no sense in which that which is being applied is a rule",¹⁶¹ since "for Kant it is logically incoherent that the law be created by an act of a single agent whose action is meant to be subsumed under that law."¹⁶² However in the republicanism Kant advocates, these two arenas are held distinct so that the body which makes law is separate to the authority which applies it, thereby giving to the state a legitimacy it would otherwise lack.

This separation of roles within the state is also used by Kant to support his objection to the claim by Marchese Beccaria that "capital punishment is wrongful because it could not be contained in the original civil contract".¹⁶³ According to Kant, Beccaria's argument is basically that in signing onto a social contract, no one would will their own capital punishment if they killed a fellow citizen. But as Kant explains in response

"[n]o one suffers punishment because he has willed *it* but because he has willed a *punishable action*.... Saying that I will to be punished if I murder someone is saying nothing more than that I subject myself together with everyone else to the laws.... As a legislator in dictating the *penal law*, I cannot possibly be the same person who, as a subject, is

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Immanuel Kant, "Toward Perpetual Peace," in *The Cambridge Edition of the Works of Immanuel Kant Practical Philosophy*, ed. Mary J. Gregor, *The Cambridge Edition of the Works of Immanuel Kant* (Cambridge: Cambridge University Press, 1999), 8:352.

¹⁶⁰ Kant, *Critique of Pure Reason* A133/B72.

¹⁶¹ Paul Redding, "Philosophical Republicanism and Monarchism - and Republican and Monarchical Philosophy - in Kant and Hegel," *The Owl of Minerva* 26, no. 1 (1994): 37.

¹⁶² Ibid.: 36.

¹⁶³ Kant, "The Metaphysics of Morals," 6:335.

punished in accordance with the law; for as one who is punished, namely as a criminal, I cannot possibly have a voice in legislation... Consequently, when I draw up a penal law against myself as a criminal, it is pure reason in me (*homo noumenon*), legislating with regard to rights, which subjects me, as someone capable of crime and so as another person (*homo phaenomenon*), to the penal law, together with all others in a civil union. In other words, it is not the people (each individual in it) that dictates capital punishment but rather the court (public justice), and so another than the criminal.... For, if the authorization to punish had to be based on the offender's *promise*, on his *willing* to let himself be punished, it would also have to be left to him to find himself punishable and the criminal would be his own judge. - The chief point of error in this sophistry consists in its confusing the criminal's own judgment (which must necessarily be ascribed to his *reason*) that he has to forfeit his life with a resolve on the part of his *will* to take his own life, and so in representing as united in one and the same person the judgment upon a right and the realization of right."¹⁶⁴

Kant can slip Beccaria's charge by resort to this separation of legislative and judicial authority in the state, this distinction between judgment and application.

Thus legislative authority is held by "the united will of the people"¹⁶⁵ and it is the demand for equity and mutuality within the state that results in the people holding this power. Such reciprocity of course represents yet another instantiation of community. For Kant

"when someone makes arrangements about *another*, it is always possible for him to do the other wrong; but he can never do wrong in what he decides upon with regard to himself... Therefore only the concurring and united will of all, insofar as each decides the same thing for all and all for each, and so only the general united will of the people, can be legislative."¹⁶⁶

Within the Kantian state the judge plays both an interesting and a significant role. Following the judgment of the people, carried out indirectly by their representatives in the form of the jury, the judge is charged with the task of "award[ing] to each what is his in accordance with the law".¹⁶⁷ It is the judge who must do the retributivist calculations in order to determine, in each individual case, the penalty appropriate to the crime. The sentence the judge comes to should be the one which fits the retributive form, but what this actually pans out to be cannot be decided a priori and without reflecting on the particular circumstances of the case. The judge applies the law which, as

¹⁶⁴ Ibid.

¹⁶⁵ Ibid., 6:314.

¹⁶⁶ Ibid., 6:313-14.

¹⁶⁷ Ibid., 6:313.

observed earlier, involves a different skill to simply knowing the law. Again quoting from the first *Critique*, Kant observes that

“a judge, or a ruler, may have at command many excellent... legal, or political rules, even to the degree that he may become a profound teacher of them, and yet, none the less, may easily stumble in their application. For, although admirable in understanding, he may be wanting in natural power of judgment. He may comprehend the universal *in abstracto*, and yet not be able to distinguish whether a case *in concreto* comes under it. Or the error may be due to his not having received, through examples and actual practice, adequate training for this particular act of judgment.”¹⁶⁸

The judge needs proficiency in applying the law over and above the requisite understanding he must possess of that law.

In addition to determining the appropriate sentence, the judge must also, crucially, publicly announce the criminal's sentence, thereby making justice legitimate, transparent and explicit. Significantly, the judge's role here parallels the one Hegel carves out for the judge in his vision of the state which will be outlined in the next chapter. However the importance of this role is rarely recognized in the literature pertaining to Kant on punishment (or Hegel for that matter), an exception being in the work of Susan Meld Shell on Kant. Shell draws particular attention to the language Kant uses in the section dealing with judicial authority and how this language bespeaks a connection, or rather even more strongly a *dependence*, of right on its public articulation through the judge. Shell notes that “[w]ithout civil government, and the punishment that it uniquely allows, a condition of right is literally unspeakable.”¹⁶⁹ According to Kant, unless we want “to *renounce* any concepts of right”¹⁷⁰ we must leave the state of nature. Shell observes that the German word translated here as “renounce”, namely “entsagen”, can be more directly rendered as “unsay”.¹⁷¹ Thus, we must join together in a civil condition if justice is to be effectively possible and not denied. This point is further reinforced when Kant observes that in the state of nature “there would be no judge competent to render a verdict having rightful force.”¹⁷² Shell maintains that “competent” here is more literally translated as “speak out”,¹⁷³ so that without the judge there is no one to speak out for, or perhaps in contemporary Australian parlance “speak up for” justice.

¹⁶⁸ Kant, *Critique of Pure Reason* A134/B73.

¹⁶⁹ Shell, "Kant on Punishment," 128.

¹⁷⁰ Kant, "The Metaphysics of Morals," 6:312. My italics.

¹⁷¹ Shell, "Kant on Punishment," 129.

¹⁷² Kant, "The Metaphysics of Morals," 6:312.

¹⁷³ Shell, "Kant on Punishment," 130.

Returning now to discussion of the nature of the state within which the construction of justice operates, there is yet another level at which community appears here, namely in describing how citizens should interact within the state. In this case a state's citizens are the component parts whose mutual interaction should be guided and coordinated by laws of right, to bring about the harmonious whole that is the civil realm. Thus Kant defines the state as "a union of a multitude of human beings under laws of right."¹⁷⁴ As might be expected given the earlier discussion of community, there is a kind of reciprocity underpinning the state so constructed. Citizens stand in relations of civil equality whereby one citizen does "not recogniz[e] among the *people* any superior with the moral capacity to bind him as a matter of right in a way that he could not in turn bind the other".¹⁷⁵ Law governed mutuality between citizens serves to define the Kantian state.

Definitions of right and wrong fall neatly out of this normative ideal of political and legal community, so that right is construed thus, "[a]ny action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law."¹⁷⁶ Quite simply, acts are right if they are compatible with every citizen's enjoyment of their legitimate freedom. Conversely, acts are wrong if they impede the exercise of the freedom of one's fellow citizens. As Kant explains "[i]f then my action or my condition generally can coexist with the freedom of everyone in accordance with a universal law, whoever hinders me in it does me *wrong*; for this hindrance (resistance) cannot coexist with freedom in accordance with a universal law."¹⁷⁷ That Kant is able to construe wrong here in a way that does not render it as mere deprivation or negation but rather as a real and existing phenomenon, is due to the resources of the construction of justice and in particular real negation. As Kant well knows, his interactionist account sets him apart from a philosopher like Leibniz who (as observed earlier in the section on real negation), Kant criticizes in the *Critique of Pure Reason's* Amphiboly for his inability properly to conceive of wrong or evil. Leibniz is forced into the awkward position of construing evil as some kind of limitation or absence of reality, because he lacks the kind of opposition the critical philosophy's separation of intuitions and concepts allows. Stuck within an entirely conceptual understanding of the world, Leibniz cannot entertain "the conflict of reciprocal injury, in which each of two real grounds destroys the effect of the other – a conflict which we can represent to ourselves only in terms of conditions presented to us in sensibility."¹⁷⁸

¹⁷⁴ Kant, "The Metaphysics of Morals," 6:313.

¹⁷⁵ *Ibid.*, 6:314.

¹⁷⁶ *Ibid.*, 6:230.

¹⁷⁷ *Ibid.*, 6:230-31.

¹⁷⁸ Kant, *Critique of Pure Reason* B330/A274.

Crucially the setting for the existence of genuine right and wrong, justice and punishment, must be the state. It is only within the confines of civil society as opposed to the state of nature that these notions can operate legitimately. As Kant observes, although “the state of nature need not, just because it is natural, be a state of *injustice* ... of dealing with one another only in terms of the degree of force each has. But it would still be a state *devoid of justice*... in which when rights are in *dispute*..... there would be no judge competent to render a verdict having rightful force.”¹⁷⁹ Here Kant points to two fundamental characteristics of the state mentioned above and essential to justice, namely a settled regime of rights and the existence of a judiciary.

Now that the context of the Kantian state as modeled on community has been established, we can turn to unpacking what the construction of justice or right situated within this state actually involves. Construction of a concept like justice or right brings out what mere philosophical contemplation cannot, namely the fundamental connection which exists between justice or right and punishment - the fact that for Kant “[r]ight and authorization to use coercion ... mean one and the same thing.”¹⁸⁰ Later in the *Metaphysics of Morals* he reinforces this point stating that the “mere idea of a civil constitution among *human beings* carries with it the concept of punitive justice belonging to the supreme authority.”¹⁸¹ Punishment is fundamentally and essentially linked to right since according to the principle of real negation, it serves to cancel the impediment to right which wrong represents. As Kant explains

“[r]esistance that counteracts the hindering of an effect promotes this effect and is consistent with it. Now whatever is wrong is a hindrance to freedom in accordance with universal laws. But coercion is a hindrance or resistance to freedom. Therefore, if a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e. wrong), coercion that is opposed to this (as a *hindering of a hindrance to freedom*) is consistent with freedom in accordance with universal laws, that is, it is right. Hence there is connected with right by the principle of contradiction¹⁸² an authorization to coerce someone who infringes upon it.”¹⁸³

Punishment therefore is a legitimate form of coercion within the state because it acts to neutralize wrong. Simply put, the net result of punitive coercion is that wrong is canceled and freedom prevails, i.e. justice is done.

¹⁷⁹ Kant, "The Metaphysics of Morals," 6:312.

¹⁸⁰ Ibid., 6:232.

¹⁸¹ Ibid., 6:362.

¹⁸² Kant's choice of the word "contradiction" (Widerspruch) is puzzling here since it would seem to imply a connection with logical opposition when in fact it is real opposition or negation that is involved in the construction of justice.

¹⁸³ Kant, "The Metaphysics of Morals," 6:231.

Since the construction of justice involves a practical rather than a mathematical concept it must proceed in an analogical fashion and issue in a symbolic representation of the concept rather than a constitutive one, as is discussed in the earlier section on construction. As Kant explains

“[t]he law of a reciprocal coercion necessarily in accord with the freedom of everyone under the principle of universal freedom is, as it were, the *construction* of that concept, that is, the presentation of it in pure intuition a priori, by analogy with presenting the possibility of bodies moving freely under the law of the *equality of action and reaction*.”¹⁸⁴

Thus, just as Newton’s third law of motion describes the mutual and reciprocal interaction of bodies in space, so too laws of justice govern how citizens should relate to each other within the normative realm of the state. Punishment is called for in response to crime, since the principle of justice is precisely analogous to the principle of equal and opposite reaction. Punishment should be a consequence of wrong in a system of equal, reciprocally related individuals. For, as Kant observes in the *Prolegomena* (partially quoted earlier)

“there is an analogy between the juridical relation of human actions and the mechanical relation of moving forces. I never can do anything to another man without giving him a right to do the same to me on the same conditions; just as no body can act with its moving force on another body without thereby causing the other to react equally against it.”¹⁸⁵

The construction of justice allows us to see and via analogy with the physical world understand the implications of disruptions within an ordered system, in the case of the physical world there is resistance or opposed action and in the legal, punishment. So the entire Kantian legal and political system can be seen to be grounded on this kind of mutuality, this holding of all citizens¹⁸⁶ to the same standard, ensuring punishment ensues if one citizen’s pursuit of their freedom conflicts with the legitimate pursuit of freedom by another.

The construction of justice thus aligns with the basic retributivist tenet of equality between crime and punishment. According to the principle of real negation, punishment must be commensurate with the wrong committed in order to effectively cancel that wrong. If punishment is insufficient a sort of lack of justice prevails, and if it is too great a further wrong is effectively perpetrated. Again, given the practical nature of the concept of justice, Kant explains these notions by analogies. In this case a comparison is drawn between a particular type of line as constructed in geometry, and punishment. Kant writes

“[a] right line (*rectum*), one that is straight, is opposed to one that is *curved* on the one hand and to one that is *oblique* on the other hand. As opposed to one that is curved straightness

¹⁸⁴ *Ibid.*, 6:232.

¹⁸⁵ Kant, “Prolegomena,” 98.

¹⁸⁶ It should be noted that not all individuals within society are citizens on Kant’s view.

is that *inner property* of a line such that there in is only *one* line between two given points. As opposed to one that is oblique, straightness is that position of a *line* toward another intersection or touching it such that there can be only *one* line (the perpendicular) which does not incline more to one side than to the other and which divides the space on both sides equally. Analogously to this, the doctrine of right wants to be sure that *what belongs* to each has been determined (with mathematical exactitude).¹⁸⁷

Thus it is the symmetry between the two angles created by the perpendicular which Kant maintains should be replicated when the amount of punishment is determined. The angle created by crime should be balanced by the angle made by its punishment. Later in the *Metaphysics of Morals* he repeats this point, stating that the amount of punishment must be found to be in accord with “the principle of equality (in the position of the needle on the scale of justice), [being] to incline no more to one side than to the other.”¹⁸⁸ No other principle is appropriate to the task of determining punishment since others “are fluctuating and unsuited for a sentence of pure and strict justice because extraneous considerations are mixed into them.”¹⁸⁹ “[T]he 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.”¹⁹⁰

The construction of justice therefore gives a grounding to Kant’s account of punishment which goes beyond the portrait of Kant traditionally painted in the literature. However (as noted earlier), it does not entirely override the more traditional reading, so that it is still the case that the three pillars of Kant’s position hold. These pillars are that the legitimacy of punishment is tied to the crime; that the type and amount of punishment also derive from the crime according to a principle of equality; and that there is an obligation to mete out to the criminal punishment as his desert. Looking to the construction of justice has only strengthened these positions. We can see more clearly now why punishment and crime are so interconnected for Kant – it is just the case that part of the meaning of justice involves the authorization to punish for breaches of right. We can also observe how the analogies drawn from the construction of justice support the basic retributivist principle of equality. And finally how there is an obligation to punish in response to crime because of the nature of real negation and community. The kind of obligation here being akin to the compulsion experienced by bodies governed by Newton’s third law of motion.

¹⁸⁷ Kant, "The Metaphysics of Morals," 6:233.

¹⁸⁸ *Ibid.*, 6:332.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*, 6:363.

Thus armed with this revised understanding of Kant on punishment, we can begin to address the various criticisms of Kant's view espoused in the literature and outlined earlier in the Chapter, before turning to how Kant's account of punishment can shed light on the central question of this thesis, regarding the justification of legal punishment.

Addressing the critics

Although not explicitly framed above as a criticism of Kant's view of punishment (more a shortcoming) the portrayal of Kant as merely the paradigmatic retributivist will briefly be addressed below, prior to a defence against the charges that Kant is a limited or partial retributivist, as well as to the claim that he contravenes his ethics through his theory of punishment.

Merely the paradigmatic retributivist

Given the construction of justice outlined above, it can surely now be acknowledged that Kant has a bigger story to tell about punishment than the one often ascribed to him in the literature, in which he can be characterized as merely the paradigmatic retributivist. The few but frequently cited passages from the *Metaphysics of Morals* used to outline Kant's position are not an adequate representation of his view. These passages (through their generally brief presentation absent of context) suggest that Kant's view is similarly bereft of a broader grounding and foundation. Now it is freely admitted here that there is some intellectual work required to uncover the construction of justice and to see how it can support Kant's retributivism (after all a significant amount of space in this Chapter has been dedicated to this task). Nonetheless the construction of justice is there to be found and in the *Metaphysics of Morals* itself where the interpretation of Kant as the paradigmatic retributivist originates, not in some other or more obscure text. It is simply erroneous to deride Kant's position and its principles as without foundation, "ad hoc"¹⁹¹ and "a random (and not entirely consistent) set of *remarks*"¹⁹² as for instance Scheid and Murphy respectively do. Or to state as Cooper does that Kant could be thought to have "no theory [of punishment] at all beyond a denial of utilitarianism, together with a bald assertion that punishment

¹⁹¹ Scheid, "Kant's Retributivism," 274.

¹⁹² Murphy, "Does Kant Have a Theory of Punishment?," 509.

is justifiable."¹⁹³ Kant may well be the paradigmatic retributivist, but he is by no means merely this.

Kant as a partial retributivist

So if Kant is not merely the paradigmatic retributivist, could he still be characterized as only a limited or partial one? Attention will now turn to refuting those who argue for this position, their view being that although Kant properly deserves the title "retributivist" when dealing with the distribution of punishment, he falls short of earning it when it comes to punishment's general justifying aim. In fact on this view Kant is so far from being a retributivist in this broader respect, that he can actually be labeled a consequentialist. As observed earlier in the Chapter there are four main planks to this critique - that punishment is intended by Kant as a deterrent; that it is used as a means of protecting the rights of citizens; that it serves as a way of reforming errant individuals; and finally that it acts as a device to promote good habits. Each of these claims will be dealt with below.

Part of the support for the claim that Kant is only a partial retributivist derives from ascribing to him an account in which punishment is said to deter crime. This reading depends on various references to his *Lectures on Ethics*, as well as to three main examples where Kant purportedly maintains that punishment is not appropriate in the circumstances, because it would be ineffectual as a deterrent. However it seems some caution is warranted in assessing any claims that come out of his *Lectures on Ethics*, particularly if they conflict with views he expresses elsewhere (as is surely the case with the deterrence reading, the claim that punishment aims to reform and the notion that punishment seeks to induce good habits). There are a number of reasons to adopt this more circumspect outlook on the *Lectures*, in the first instance, as Tunick notes,¹⁹⁴ Kant did not supervise the publication of this work and in fact their provenance is a matter of some dispute amongst scholars.¹⁹⁵ The notes are unlikely to be direct transcriptions of Kant's lectures and may not in fact be notes taken by a student at all, rather someone may have been employed to take such notes. Student notes were at that time occasionally compiled into a kind of text which might be copied, passed among students or even offered for sale. Thus given that Kant explicitly argues against punishment serving anything other than a retributive function in

¹⁹³ Cooper, "Hegel's Theory of Punishment," 160.

¹⁹⁴ Tunick, "Is Kant a Retributivist?," 64.

¹⁹⁵ For a brief discussion of these issues and an indication of where to locate a fuller treatment of them see J. B. Schneewind's "Introduction" Kant, "Lectures on Ethics," xiii-xxvii.

the *Metaphysics of Morals*, the *Lectures on Ethics* taken in isolation seem an unreliable source here.

As noted above, the deterrence reading of Kant Tunick runs depends on a number of special cases Kant discusses in *On the common saying: That may be correct in theory, but it is of no use in practice*¹⁹⁶ and the *Metaphysics of Morals*. These cases revolve around what appear to be failures to mete out the appropriate retributive punishment given the circumstances. For instance Kant outlines the case of an individual in a shipwreck who pushes a fellow survivor off a plank in order to save his own life. Although a capital sentence would seem to be the punishment required by retributivism, Kant does not advocate this. However in rejecting this sentence he does not follow what was apparently a strategy adopted by others who defended the survivor's actions in appealing to a right of necessity. According to Kant "[t]his alleged right is supposed to be an authorization to take the life of another who is doing nothing to harm me, when I am in danger of losing my own life."¹⁹⁷ In *On the common saying: That may be correct in theory* Kant explains why he disagrees with appealing to such a right. He states "to preserve my life is only a conditional duty (if it can be done without a crime); but not to take the life of another who is committing no offense against me and does not even *lead* me into the danger of losing my life is an unconditional duty."¹⁹⁸ For Kant the issue is whether there is a duty not to take life in these circumstances, since the unconditional duty (not to kill) clearly trumps the merely conditional one (to save one's life). Interestingly in the *Metaphysics of Morals* Kant explains his objection to the right of necessity in a different fashion, by suggesting that if such a right were to hold then "the doctrine of right would have to be in contradiction with itself."¹⁹⁹ He points out that the case does not involve self-defence where such violence might be justified, but rather is "a matter of violence being permitted against someone who has used no violence against me."²⁰⁰ Presumably one cannot have as a legitimate right what amounts to the license to initiate unprovoked violence (even in dire circumstances), as this would go against the very notion of right itself. The kind of reciprocity demanded of rights would be absent in such a situation and the conditions required for

¹⁹⁶ It should be noted that at one point Tunick mistakenly claims that the life boat passage from *On the common saying* is actually from *Lectures on Ethics*. Tunick, "Is Kant a Retributivist?," 64.

¹⁹⁷ Kant, "The Metaphysics of Morals," 6:235.

¹⁹⁸ Kant, "On the Common Saying: That May Be Correct in Theory, but It Is of No Use in Practice," 8:301.

¹⁹⁹ Kant, "The Metaphysics of Morals," 6:235. Unlike Kant's reference to contradiction commented on in an earlier footnote, his use here seems entirely correct. To assert a right to kill someone within a system which recognizes that individual as right bearing individual who should not be arbitrarily killed seems to invoke a logical contradiction.

²⁰⁰ *Ibid.*

justice would not obtain. Instead Kant maintains that “there can be no *penal law* that would assign the death penalty”²⁰¹ to the ultimate survivor of the shipwreck, “[f]or the punishment threatened by the law could not be greater than the loss of his own life.... Hence the deed of saving one’s life by violence is not be judged *inculpable (inculpabile)* but only *unpunishable* (impunibile), and by a strange confusion jurists take this *subjective* impunity to be *objective* impunity (conformity with law).”²⁰² Ordinarily “the *rightful* effect of what is culpable is *punishment*”,²⁰³ so that if one is found culpable (i.e. to have fallen short of doing what the law requires) one should be punished. But punishment is not advocated in this case. Although there might seem to be some support here for Tunick’s reading (since Kant notes that the death penalty could not provide a stronger threat than immediate death) this does not appear to be Kant’s main explanation of the scenario. A more significant point is surely that though the verdict of a court in this case would be to reject a capital sentence, this kind of subjective and particular decision to exempt an individual from punishment in these circumstances should not be carried over into the objective realm of what the law should actually prescribe more generally.

The deterrence reading supposedly finds further support in two cases from the *Metaphysics of Morals* where retributive punishment is not recommended, Tunick argues, because it cannot act as an effective deterrent. For Kant it seems the death penalty need not be imposed in the case of a mother who commits infanticide against her illegitimate child, nor in the case of the soldier who kills another soldier in a duel. Kant acknowledges that these are difficult cases in which the state’s retributive principles are in conflict with the individual circumstances the two wrongdoers find themselves in. As he notes these crimes are ones which are “deserving of death, [but] with regard to which it still remains doubtful whether *legislation* is also authorized to impose the death penalty.”²⁰⁴ For Kant the nub of the problem seems to lie in the fact that both acts are driven by honor and for Kant true honor is “incumbent as duty on each of these two classes of people.”²⁰⁵ In the case of the mother it is honor to her sex which is at issue, while for the soldier it is a matter of military honor. According to Kant these acts effectively lie outside the legitimate purview of the state and exist, rather, in the state of nature since state laws are unable adequately to deal with the kind of challenges to honor both the mother and soldier face here. In the mother’s case “[l]egislation cannot remove the disgrace of an illegitimate birth... no decree can remove the mother’s shame when it becomes known that she gave birth without being married.”²⁰⁶ As Shell

²⁰¹ Ibid.

²⁰² Ibid., 6:235-36.

²⁰³ Ibid., 6:227.

²⁰⁴ Ibid., 6:335-36.

²⁰⁵ Ibid., 6:336.

²⁰⁶ Ibid.

suggests, the state is unable to undo the mother's dishonor by, for instance, "declaring a bastard legitimate".²⁰⁷ Such a move would be insufficient in the face of the slight to honor which the case involves. Further, there is the issue alluded to above, namely that the child does not hold a rightful place within society, such a child

"that comes into the world apart from marriage is born outside the law (for the law is marriage) and therefore outside the protection of the law. It has, as it were, stolen into the commonwealth (like contraband merchandise), so that the commonwealth can ignore its existence (since it was not right that it should have come to exist in this way), and can therefore also ignore its annihilation".²⁰⁸

By virtue of the child's status as illegitimate, what happens to the child happens in the state of nature and is not subject to the same rules and sanction as would otherwise apply.

Honor is again the crucial factor at stake in the case of the soldier, where, similarly, mere legislation has no force to simply ameliorate the situation by, say, punishing the soldier who issued the challenge as Shell suggests²⁰⁹ and thereby to supposedly

"wipe away the stain of suspicion of cowardice from a subordinate officer who fails to respond to a humiliating affront with a force of his own rising above fear of death.... [W]hen a junior officer is insulted he sees himself constrained by the public opinion of the other members of his estate to obtain satisfaction for himself and, as in the state of nature, *punishment* of the offender not by law, taking him before a court, but by a *duel*, in which he exposes himself to death in order to prove his military courage, upon which the honor of his estate essentially rests. Even if the duel should involve *killing* his opponent, the killing that occurs in this fight which takes place in public and with the consent of both parties, though reluctantly, cannot strictly be called *murder*".²¹⁰

Thus for Kant in situations such as these "penal justice finds itself very much in a quandary."²¹¹ On his view only two alternatives present themselves as viable ways of resolving the cases. On the one hand to legally deny the importance of honor and to follow through on a capital sentence regardless of the circumstances, which he describes as "cruel",²¹² or to be on the other hand

²⁰⁷ Shell, "Kant on Punishment," 128.

²⁰⁸ Kant, "The Metaphysics of Morals," 6:336.

²⁰⁹ Shell, "Kant on Punishment," 128.

²¹⁰ Kant, "The Metaphysics of Morals," 6:336.

²¹¹ Ibid.

²¹² Ibid.

“indulgent”²¹³ and not enforce the appropriate retributive sentence for these crimes. Kant’s solution is to argue that

“the categorical imperative of penal justice remains (unlawful killing of another must be punished by death); but the legislation itself (and consequently also the civil constitution), as long as it remains barbarous and undeveloped, is responsible for the discrepancy between the incentives of honor in the people (subjectively) and the measures that are (objectively) suitable for its purposes. So the public justice arising from the state becomes an *injustice* from the perspective of the justice arising from the people.”²¹⁴

For Kant it seems there is a tension existing within the state which is brought out by these examples. The tension in these cases is between the subjective motivation of duty (an ethical priority) and the laws which dictate strict justice in the state. According to Kant (in a point to be elaborated on shortly) the ethical and legal realms are not coextensive. The latter is not justified ethically, so that there may be points of potential ethical/legal tension generated within the Kantian state. Although “a *collision of duties* and obligations is inconceivable”²¹⁵ for Kant strictly speaking, there can surely be situations in which it is difficult to determine which duty or obligation should prevail.

Ultimately Kant is saying that though the acts perpetrated by the mother and the soldier are “certainly punishable... [they] cannot be punished with death by the supreme power.”²¹⁶ Punishment is warranted but not in the amount ordinarily required by retributivism. However this seems to go against what Tunick reads into the examples, namely that “non-deterrable actions should not be regarded as crimes.”²¹⁷ There are two aspects to Tunick’s assertion which need to be addressed here - that these cases represent instances of non-deterrable actions and that they are also examples where no crime has occurred. Now regardless of the qualms that one might express about how Kant treats these cases – seemingly prioritizing a mother’s honor over the life of her child etc., it seems to me that there is absolutely no suggestion by Kant here that the death penalty (i.e. the strictly appropriate retributivist penalty) slips out of consideration because it would fail to deter such acts. Tunick is surely right to acknowledge that “[m]uch of what Kant says about these two cases is puzzling and difficult to agree with”²¹⁸ but it seems he draws a very long bow indeed when he attempts to incorporate these cases into a pro-deterrence consequentialist reading of Kant. It appears simply incorrect to assert, as Tunick does, that “[i]n both cases Kant

²¹³ Ibid.

²¹⁴ Ibid., 6:336-37.

²¹⁵ Ibid., 6:224.

²¹⁶ Ibid., 6:336.

²¹⁷ Tunick, "Is Kant a Retributivist?," 77.

²¹⁸ Ibid.: 66.

implies that where a person could not be deterred by legal punishment from committing a crime, the state should not punish. In both cases Kant invokes a consequentialist theory of why we have the practice of legal punishment.²¹⁹ In fact in both cases Kant explicitly states that punishment should still be meted out, just not in the amount his retributivism would usually require. It seems then that Tunick is just plain wrong when he says that in these cases punishment should not take place because it could not hope to deter such acts. The further point he makes that these actions do not even represent crimes is, however, slightly less straightforward to dismiss, as Kant can be read as equivocal here. Although Kant certainly does not make such a claim directly, some support for the claim can be drawn out of the passages where the cases of the mother and soldier are discussed. The killing involved “cannot strictly be called *murder*”,²²⁰ it is killing (*homocidium*) rather than murder (*homocidium dolosum*), *dolosum* meaning crafty or deceitful. For Kant a crime is an “intentional transgression”.²²¹ He defines a transgression as “a deed contrary to duty”²²² and intentionality as involving the agent’s consciousness that he is transgressing.²²³ So maybe the problem about whether or not a crime has been committed hangs around this notion of transgression, since there is surely some doubt over whether the act is strictly contrary to duty. Clearly the mother and soldier are caught between the pull of honour and the laws of the state. But Kant also draws attention to how the acts fall short of being the crimes they might otherwise be by virtue of certain special circumstances, so that for instance “murder” might be an inappropriate label since it does not adequately capture these special circumstances. Both acts occur in the state of nature (as noted earlier) and therefore outside of the legitimate reach of law. In the case of the duel Kant further notes that the event is undertaken openly and with the agreement of the two parties concerned, thereby perhaps providing a relevantly different context to, say, secretive cold-blooded murder. So Tunick’s claim that the acts are not crimes has *some* limited merit to it, although it should be noted that Kant still labels these acts as crimes (*Verbrechen*) in the discussion surrounding them, and they are still crimes to some extent, just ones different to straightforward murder. Thus we should not entirely concede to Tunick his extreme point that the actions of the mother and soldier are not crimes at all, if anything just a more modest point that they are somehow lesser crimes than murder. Now if we don’t concede this point to Tunick (particularly if it is not on the grounds that they fail as crimes because they are not able to be deterred) then what possible support could this point have for the case that punishment is motivated by the deterrence of crime? It is surely irrelevant. Tunick wants to suggest that Kant is a deterrence theorist because he does not push for the death penalty in

²¹⁹ Ibid.

²²⁰ Kant, "The Metaphysics of Morals," 6:336.

²²¹ Ibid., 6:224.

²²² Ibid.

²²³ Ibid.

these cases since the threat of punishment could not deter, but at the same time he is arguing that we effectively have two non-crimes here in the cases of the duel and infanticide, so how can this bear on a deterrence reading of punishment? How non-crimes are handled has nothing to say to the motivations or justification of legal punishment. Perhaps the “deep tension” Tunick finds in Kant’s position on punishment²²⁴ could equally be said to exist in Tunick’s reading of Kant here.

On the whole the three examples used by Tunick to give weight to the deterrence reading seem unusual choices on which actually to base a reading of Kant. They are clearly not representative instances of Kant’s account in action, rather they are special cases which need to be explained in order to avoid confusion over his view. As he states in the *Metaphysics of Morals* with respect to the examples of the mother and soldier (and another point about equity not relevant for the purposes of this thesis), “[w]e must first separate these two cases from the doctrine of right proper... so that their wavering principles will not affect the firm basic principles of the doctrine of right proper.”²²⁵ To treat such cases as the norm, or as some hitherto unrevealed agenda that Kant is *really* running in his view of punishment, seems simply to be mistaken.

In arguing for punishment as deterrence Tunick also appears to choose examples which fail to support his case at a very fundamental level. Tunick claims that for Kant “the reason we have the practice of legal punishment is to deter conduct that would threaten a society of ordered liberty”.²²⁶ In the terminology of Hart, Tunick is arguing that for Kant the general justifying aim of punishment is deterrence, yet the examples he uses to support his view (the life boat, the soldier, the mother, and shortly to be discussed the cases of accomplices to murder and potential clemency recipients) all, it seems to me, hinge around the distribution of punishment (i.e. its type and amount) not any question about why we have the practice of punishment in the first place. The examples highlight instances where the particular circumstances of the case mean that the standard retributivist penalty is not meted out, rather than being cases which challenge the very justification of the institution of punishment itself. Of course Tunick may think that both the general justifying aim of punishment and its justification in particular instances should be the same or at least compatible (as this thesis maintains), however in the absence of his making this point and furnishing an argument to support it, his examples appear misdirected.

Like Tunick, Paul Gerner adopts the view that Kant’s theory of punishment aims to prevent wrong and that it is consequently forward-looking, although he takes a different tack to that

²²⁴ Tunick, "Is Kant a Retributivist?," 77.

²²⁵ Kant, "The Metaphysics of Morals," 6:234.

²²⁶ Tunick, "Is Kant a Retributivist?," 77.

adopted by Tunick. Gorner is aware of both Shell's work and at least some of the passages from the *Metaphysics of Morals* crucial to the construction of justice discussed above, however he reads these sources in a manner at odds with this thesis. He complains that the analogy between persons in society and bodies in space "is *only* an analogy. It does not constitute a *justification* of the retributive view of punishment"²²⁷ and talk of punishment as a "hindering of a hindrance to freedom" is really just a convoluted way of saying that punishment is actually directed at preventing future wrongs. As he says,

"it is frankly a misuse of language to describe the cancelling out of the wrong action by punishment as 'hindering' (*Verhinderung*). The coercion of punishment does not hinder the act being punished. It can only be said to hinder other acts like it. Punishment can prevent the criminal from performing acts like those for which he is being punished and, through its deterrent effect, help to prevent others from performing such acts. But it cannot hinder or help to prevent acts which have already been performed."²²⁸

Peter Nicholson however, is surely correct when he takes issue with Gorner here and disputes that hindrance is equivalent to prevention for Kant.²²⁹ These are distinctly different terms with different implications, and anyway it seems Gorner reads Kant at entirely the wrong level, as Nicholson also points out.²³⁰ Gorner's interpretation of Kant appears to be far too literal. For Kant we can only truly understand a concept like justice via its construction and through analogy, however Gorner explicitly rejects this approach as inadequate. Taking this line means that Kant's point will be missed. Kant does not intend to suggest that somehow punishment represents a strange metaphysical force capable of rewriting wrongs. Nor does he mean to say that those who enforce punishment actually physically hinder or impede those who break the law, so that in the absence of prescience the hindrance has to be in the future and be in that sense forward looking. As has been discussed above it is rather the case that in order to comprehend the concept of justice or right we must see its relationship to wrong, and the connection to punishment licensed by infringements of right. Punishment restores balance to society, not by somehow altering what has actually occurred in the physical world but by revealing the role it plays in establishing justice. The denial of right which crime entails is reframed and put into its proper place by punishment. So the legitimate use of punishment in response to wrong is just part of the meaning of justice for Kant.

A further claim in the consequentialist rendering of Kant is that punishment serves to promote individual rights. Again in support of this view Tunick cites examples from the *Metaphysics of*

²²⁷ Paul Gorner, "The Place of Punishment in Kant's Rechtslehre," *Kantian Review* 4 (2000): 129.

²²⁸ Ibid.

²²⁹ Peter Nicholson, "Comment on Gorner," *Kantian Review* 4 (2000): 132.

²³⁰ Ibid.: 132-34.

Morals, where he claims punishment is used as a means of protecting the innate right to freedom once individuals have left the state of nature and entered into the civil condition. The first of these cases revolves around accomplices to murder having their capital sentences commuted if the security of the state is at stake. Tunick's reasoning here is that the sentences are reduced because if they were upheld then there could be no protection offered to citizens, as the state would effectively collapse by virtue of a paucity of citizens. Part of what Tunick is suggesting here is correct, although what he draws from the example diverges from the reading offered here. Kant certainly does argue that if the number of accomplices to be executed were so great as to risk the state lapsing back into the state of nature devoid of justice, then the sovereign should be permitted to alter these sentences. But this is not for the reasons Tunick suggests. As has been argued above, punishment is seminal to right within civil society, it is just part of the meaning of right rather than being a way of directly seeking to protect the interests of citizens. Unlike the consequentialist (and also incidentally potentially the just distribution theorist discussed in Chapter Two, who appears to harbour a consequentialist's desire to redistribute goods within society) for Kant punishment is not motivated by the *goal* of promoting individual rights or even by the end of achieving a just society, rather it is the case that the relationship instantiated by punishment between right and wrong brings out what it is to have justice. It brings home to all within society what normativity at the level of the state means. Thus if meting out a particular punishment would result in the whole system of justice breaking down, then it seems Kant is correct in opting for a different penalty under these circumstances. The capital sentence is commuted not because punishment aims to protect citizen rights which it could not do if the punishment went ahead, but rather it would make no sense to enforce a particular punishment that would destroy the very possibility of justice by undermining the state. Punishment should make apparent what normativity involves in the state but if a particular punishment is such that it could bring about the demise of the state, removing the possibility of the state as a normative realm, then it would surely be misguided and Kant is right to try to expunge this possibility. So under these specific conditions the strictly appropriate retributivist *penalty* would not be undertaken; nonetheless punishment itself would still be enforced. It should be noted that this case presents an exception to the standard retributivist sentence only under extreme circumstances and "cannot be done in accordance with public law but it can be done by an executive decree that is, by an act of the right of majesty which, as clemency, can always be exercised only in individual cases."²³¹ Such exceptions cannot be enshrined in legislation, but must be left to the discretion of the sovereign. Again it is also worth observing that such a decision, related as it is to an actual sentence, does not impact on the overall justification of the institution of punishment itself.

²³¹ Kant, "The Metaphysics of Morals," 6:334.

The second case Tunick cites in support of his claim that punishment aims to protect citizen rights involves the sovereign's right to grant clemency, and in particular Kant's comment that such a right should not be exercised "if his failure to punish could endanger the people's security."²³² Kant's treatment of this point is quite brief so it is hard to be sure one is getting his meaning. He is quite specific, however, in noting that such clemency only applies when considering crimes against the sovereign himself and that in fact in exercising such clemency the sovereign "is thereby doing injustice in the highest degree."²³³ Justice is about ensuring appropriate retributivist penalties in response to crimes and not following through on such sentences is therefore to fail to achieve justice. Kant, in referring to ensuring the people's security here, is likely again making the conceptual point that if the entire apparatus of the state is put at risk by not meting out a particular penalty, then such a penalty must be meted out. If the whole notion of the state as a normative realm is threatened by punishment not occurring, then punishment should occur.

Those who claim Kant's justification of punishment must derive from consequentialist sources, may also be guilty of taking what is merely a spin-off from punishment as its *raison d'être*. So, although it may well be the case that punishment serves effectively to act as a deterrent to crime; as a means of protecting the rights of citizens; as a way of reforming those who have erred; and a means of supporting good and appropriate behaviour; this does not mean that these consequences are intended outcomes or the primary motivation to punish. It seems clear in fact that Kant acknowledges just such a point in the *Lectures on Ethics*²³⁴ where it is noted that

"rewards and punishment can indeed serve indirectly as means in the matter of moral training. A person who does good actions for the sake of reward becomes afterwards so accustomed to them that he later does them even without reward, simply because they are good. If a person refrains from bad actions because of the punishment, he gets used to this, and finds that it is better not to do such things. If a drunkard abstains from tipping because it is doing him harm, he gets so used to this that he subsequently does without, even in the absence of harm, and merely because he sees that it is better to be sober than a drunkard."²³⁵

²³² Ibid., 6:337.

²³³ Ibid.

²³⁴ It might be objected that Kant's *Lectures on Ethics* have been dismissed as a reliable source above and so should not be appealed to here simply when it suits the argument being run. However the point made earlier is that the *Lectures* should not be relied on if they directly conflict with other sources. If they agree with or find support in Kant's other works they need not be disregarded.

²³⁵ Kant, "Lectures on Ethics," 7:287-88.

Although individuals might be motivated to abstain from crime by the threat of punishment and even to form good habits as a result of this (as the fourth strand of the consequentialist's case suggests) this does not mean that these are anything more than simply incidental effects of an institution set up to serve a different purpose, namely to mete out to criminals their desert. In this context Kant again draws a distinction between subjective and objective motivating grounds, with rewards and punishments falling into the subjective category. These subjective grounds *should not* be the reason for action or inaction, but in the absence of the objective grounds holding appropriate sway due to moral failings on the agent's part, they can stand in as an incentive at the level of the subject.

This kind of response to the claims that Kant is actually a consequentialist can be further bolstered by a careful reading of one of the key passages dealing with punishment from the *Metaphysics of Morals*. Kant writes that punishment "can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society. It must always be inflicted upon him only *because he has committed a crime*."²³⁶ "Merely" is crucial here. It could be interpreted to mean that Kant does not necessarily want to deny that punishment might have consequences such as reforming the criminal or protecting society. These consequences may even be deemed desirable and sufficient to stand as justifications for punishment on the view of the consequentialist, but this does not mean that Kant is trying to promote these consequences. As Kant notes a little further along in the same paragraph, the criminal "must previously have been found *punishable* before any thought can be given to drawing from his punishment something of use for himself or his fellow citizens."²³⁷ The very existence of punishment as well as its type and amount must be derived from retributivist principles, but this does not preclude the possibility of punishment having other outcomes.

So in summary the partial retributivist reading of Kant is dismissed in favour of a view which considers him to be a retributivist in terms of both punishment's application *and* its general justifying aim.

²³⁶ Kant, "The Metaphysics of Morals," 6:331.

²³⁷ Ibid.

The conflict between ethics and law

Having dispensed with the partial retributivist rendering of Kant, attention will now turn to addressing the view that there is an untenable discrepancy between Kantian ethics and Kantian legal theory. Incidentally, addressing this conflict will in fact further explain and bolster the case against a partial retributivist reading, by affirming that punishment is a categorical rather than a hypothetical imperative. There are two sources of ethical-legal conflict proposed in the literature. One suggests that through punishment Kant requires citizens to act in a way that contravenes his ethics, and further that in punishment we are forced to overstep the boundaries of what we can legitimately claim to know regarding the internal moral workings of our fellow human beings. The approach taken to meeting these criticisms below will simply be to point to the clear distinction Kant draws between the ethical and legal realms, noting that in recognizing this distinction the various conflicts can be removed. But before indicating how these criticisms can be met, they will be briefly reviewed.

As noted above there are two complaints that can be raised about Kantian legal theory when compared with Kantian ethics – that legal punishment requires citizens to act in a way contrary to how individuals should act given Kantian ethics, and that to mete out punishment to citizens demands a knowledge of their moral reasoning and motivations that it is in fact impossible to obtain. The first of these difficulties becomes apparent when certain passages from the *Grounding for the Metaphysics of Morals* are compared with those in the *Metaphysics of Morals*. As detailed earlier when the criticisms were initially outlined, the primary concern relates to two formulations of the categorical imperative – the so called “end in itself” rendering and the version pertaining to the ethical ideal of a kingdom of ends. The former take on the categorical imperative stresses that we should never use another human being merely as a means to our own ends or coerce them in any way. Obviously, on first blush at least, the institution of punishment by its very nature flouts such an injunction as it seems quite plainly to in fact revolve around coercion and to impede rather than foster the pursuit of individual autonomy. The ideal of a kingdom of ends (which focuses on the notion of rational beings uniting together under self-legislated universal laws) is also surely not realized in the kind of state sketched in the *Metaphysics of Morals*, since in such a state citizens are not permitted to overthrow their ruler even if he is a tyrant who severely abuses his power. Clearly such a state does not appear to be one governed by the categorical imperative, so we might well wonder why (given the background of Kantian ethics), it should not simply be overturned. The second main source of difficulty for the conjunction of Kantian ethics and law involves the notion that we cannot, as finite and embodied human beings, have the kind of knowledge of motivations required to determine if an individual truly merits punishment. Punishment, so it is claimed for the retributivist, requires a finding of moral wickedness, yet as Kant makes clear throughout the critical philosophy, the moral part of our

being belongs to the noumenal realm and is therefore totally opaque to us. So these are the main charges against Kant with respect to the conflict between the requirements of ethics and law. Given they have now been reviewed we can turn to how they may be resolved.

Throughout the critical philosophy Kant specifically draws and maintains a distinction between the legal and ethical realms, and the *Metaphysics of Morals* is in fact divided up along just these lines so that there are two parts to the book – a Doctrine of Right and a Doctrine of Virtue. The main distinguishing features of these two realms concern the kind of actions or decisions they relate to, and the motivation of such actions or decisions. Juridical laws (discussed in the Doctrine of Right) relate to external actions, which can be swayed by incentives other than simply duty. Ethical laws on the other hand (as discussed in the Doctrine of Virtue) deal with our internal moral workings and can have no proper incentive other than the fulfillment of duty. In ethics it is the case that the laws themselves should be considered sufficient to motivate choices, they should be “the determining grounds of actions”.²³⁸ As Kant further explains,

“[a]ll lawgiving can.... be distinguished with respect to the incentive (even if it agrees with another kind with respect to the action that it makes a duty, e.g., these actions might in all cases be external). That lawgiving which makes an action a duty and also makes this duty the incentive is *ethical*. But that lawgiving which does not include the incentive of duty in the law and so admits an incentive other than the idea of duty itself is *juridical*. It is clear that in the latter case this incentive which is something other than the idea of duty must be drawn from *pathological* determining grounds of choice, inclinations and aversions, and among these, from aversions; for it is a lawgiving, which constrains, not an allurement, which invites.”²³⁹

The separation of legal and ethical spheres is also discussed in *Religion within the Boundaries of Mere Reason*, where Kant explains that in an ethical community

“laws are exclusively designed to promote the *morality* of actions (which is something *internal*, and hence cannot be subject to public human laws) whereas these public laws (and in this they constitute a juridical community) are on the contrary directed to the legality of actions, which is visible to the eye, and not to (inner) morality”.²⁴⁰

Clearly then, the ethical and legal realms are separate for Kant, but how does this address the supposed conflict between these two arenas?

At least two responses can be made to the charge outlined earlier that Kantian ethics and legal theory are in conflict because the coercive institution of punishment flouts the injunction from

²³⁸ Ibid., 6:214.

²³⁹ Ibid., 6:218-19.

²⁴⁰ Kant, *Religion within the Boundaries of Mere Reason* 6:98-99.

ethics never to use people merely to achieve other ends. In the first instance to maintain that through the categorical imperative Kant is suggesting that we can never use people to achieve other ends is simply wrong. For instance, Kant is not opposed to commerce in whose transactions people regularly use other people to achieve their own ends. The second response relies on the distinction between the ethical and legal spheres, and notes that coercion in the legal realm can be legitimated in a way that coercion in the ethical sphere cannot. As outlined above the legal and ethical realms are separate, they are justified differently and different kinds of laws prevail. The Kantian state is established with a view to obtaining the possibility of justice for its citizens, so that laws of right or justice govern such a state. Such laws attempt to maximize individual freedom to the extent that it is compatible with the freedom of others. Within such a framework punishment is required to fill out the account of justice, to show what normativity within the state means (as has been argued earlier). People are free to choose how to act in society and they are free to adopt their own ends, but because we should acknowledge the rationality of individuals on Kant's view, if their actions break the law they should be punished. People are not forced to "do the right thing" but if they choose to contravene right within the framework of civil society, they should be held accountable for their choices and punishment should ensue. The coercive aspect of punishment is therefore not related to ethics, people are not coerced in the ethical realm by punishment, punishment is most definitely within the purview of the law and it is grounded in the very notion of what it is to live in a just state. It should however be reiterated here that the coercion of punishment is not directed to actually achieving a just state or some other greater civic ideal as a utilitarian's appeal to coercion might be. It is simply the case that in his account of punishment Kant treats criminals in accord with what they have done, not broader social programs - this is the utilitarian's agenda. There is no direct means by which coercion is intended to bring about the just state, rather for Kant civil society cannot be coherently conceived of without the notion of justice, and in its turn justice vitally depends on his notion of coercive punishment. Similarly the apparent discrepancy some critics point out between the kingdom of ends and the reality of the Kantian state can be disposed of by appeal to the difference between the ethical and juridical realms. The state is not the kingdom of ends realized, but then the state does not attempt to bring about a kingdom of ends. The latter is properly an ethical ideal not a juridical one. The apparently democratic and egalitarian role carved out for the individual within the kingdom of ends is different to the role of the individual within the state, where there is of necessity a hierarchical structure in operation. Thus even if the juridical state is ruled by a tyrant who mistreats his subjects there is no right to revolution for Kant. Such a state is still preferable to a return to the state of nature where there can be no prospect of justice at all.

The tactic of resolving possible conflicts between ethics and law by separating the two domains is however brought into doubt when we consider what Kant says directly about punishment and

the categorical imperative (of which the “end in itself” and kingdom of ends are of course particular formulations). So the famous quote goes “[t]he law of punishment is a categorical imperative”²⁴¹ and Kant notes early in the *Metaphysics of Morals* that the categorical imperative is one of the concepts which applies in both the doctrines of virtue and right.²⁴² Perhaps Kant claims too much here, since formulations like the end in itself and kingdom of ends do not hold in the legal sphere with respect to punishment, but there is something to asserting that punishment is a categorical imperative. Ironically, in spite of arguing against the idea that punishment be regarded as a categorical imperative (as outlined earlier) Murphy²⁴³ may point the way to how we can interpret Kant here. Murphy thinks Kant should have identified punishment as a hypothetical imperative, i.e. one where actions are directed to achieving some goal and are not to be regarded as good or necessary in themselves, and it seems to me this is surely the relevant contrast class with which to compare Kant’s point that punishment is a categorical imperative. In stating so adamantly that punishment is a categorical imperative, Kant is obviously denying that it is a hypothetical one, that punishment is of a kind intended to bring about some outcome. Such a reading is supported by the text which follows the famous quote, namely “woe to him who crawls through the windings of eudaimonism in order to discover something that releases the criminal from punishment or even reduces its amount by the advantage it promises”.²⁴⁴ Punishment is a categorical imperative to the extent that it should be the appropriate response to crime, and that it must not be directed to any goal, simply to making explicit what justice is within the state.

So now that the charges of a supposed conflict between how the state acts and how it ought to act given Kantian ethics have been addressed, what of the charge that punishment requires a knowledge of our fellow human beings that we lack? There is surely something to this point since Kant distinguishes faults from crimes on the ground that the latter require awareness on the part of the agent that what he did was wrong. Yet how are we to ascertain if the agent does in fact possess such awareness? Kant does not appear to address this point. Also in passing he perhaps confusingly refers to the criminal’s sentence in the *Metaphysics of Morals* in terms of being “in proportion to his *inner wickedness*”,²⁴⁵ thereby suggesting that in order to determine an appropriate sentence we must have knowledge of this inner realm. Nonetheless Kant otherwise and more generally seems to hold the view that internal considerations are irrelevant in determining punishment. The ethical and legal realms are properly held apart so that in deciding on punishment, its type and amount, it is only external considerations about the act itself which

²⁴¹ Kant, "The Metaphysics of Morals," 6:331.

²⁴² Ibid., 6:222.

²⁴³ Murphy, "Does Kant Have a Theory of Punishment?," 514.

²⁴⁴ Kant, "The Metaphysics of Morals," 6:331.

²⁴⁵ Ibid., 6:333.

should be brought to bear. That we cannot know the criminal's heart, mind or moral motivations has no impact on the decision to punish nor on the actual punishment meted out, so that Kant's critical position is upheld. The process of ethical decision making is not susceptible to scrutiny but no matter, Kant's account of punishment does not require a plumbing of the ethical, only a knowledge of external acts.

A Kantian Justification of Legal Punishment

It is time now to turn to making explicit how a revised view of Kant on punishment can address the significant problem in jurisprudence of obtaining a justification of legal punishment. It will be recalled from discussions in Chapter Two that certain criteria were set down as desirable in such a justification. They were that a suitable justification should give satisfactory reasons for the practice to three main audiences – the criminal himself, the victim of crime and society more broadly. It will also be recalled that the problem of justifying punishment revolves around the inability of the traditional accounts to provide just such a justification to all these audiences. While utilitarianism generally appears quite competent at justifying punishment to society (though this claim is challenged by the argument in Chapter Two), it falls down when it comes to offering good reasons for his punishment to the criminal, and the situation is reversed for the retributivist. It is also important to recall that the standard retributivist approach in discussions of punishment involves an appeal to the notion of desert, which although on first blush appears to resolve some issues about the justification of punishment, actually itself requires further grounding. Kant however, as has been argued above, is no *mere* retributivist, via the construction of justice he has the philosophical resources to provide a comprehensive justification of punishment that not only addresses society in the way that traditional retributivist accounts have failed to, but which also adds to the strengths of the standard retributivist view. A Kantian justification of punishment will now be outlined below.

Typically the retributivist justifies punishment to the criminal in terms of desert so that his fate is explained to him according to what he has done and what his actions have therefore earned him in response. Punishment of the criminal is provoked by crime itself not any other agenda, and Kant's account certainly agrees with all this, at least in so far as it goes. But Kant can add to this standard reasoning an appeal to the special circumstances the criminal finds himself in given what he has done and given the kind of society in which he lives. The criminal has contravened right and has illegitimately interfered with the exercise of freedom by another citizen. Such an act has ramifications in a society grounded on mutuality, and this is brought out by punishment. Kant

makes this point quite clearly in an infrequently referred to passage of the *Metaphysics of Morals* intended to explain a better known section. In explaining the principle of equality as it relates to the famous section where he states “whatever undeserved evil you inflict upon another within the people.... you inflict upon yourself”²⁴⁶ and so on, Kant says

“But what does it mean to say, “If you steal from someone, you steal from yourself”?

Whoever steals makes the property of everyone else insecure and therefore deprives himself (by the principle of retribution) of security in any possible property.”²⁴⁷

By his act the criminal has illegitimately infringed on the property of another and, given he has undertaken this act within a society which depends on or is grounded in reciprocity, there are broader implications, and so his punishment should be set to match or mirror his act. Punishment is required to rehabilitate right – to acknowledge the wrong the criminal perpetrated, to set things straight, and to restore the status quo in a conceptual sense. When we do the construction of justice we see the criminal’s act counterpoised to and therefore effectively canceling right. Punishment overturns wrong so that right stands vindicated.

Although Kant does not specifically address the question of punishment as it bears on the victim, nonetheless with punishment comes some satisfaction for the victim that the infringement of right committed against her has been acknowledged as wrong. What she has experienced has not been ignored or sidelined but instead recognized for what it is, so that her claim to the unimpeded exercise of her legitimate freedom has been upheld and proper recompense has been obtained for the act against her. Perhaps the success of the Kantian account here can best be understood by contrasting it with the utilitarian view. For the utilitarian the victim does not have the particularity of her situation addressed, the incidence of crime against her is just a prompt to punish with a view to achieving broader societal goals into the future about the reduction of crime and so on. There is no regard shown for such things as the victim’s possible inconvenience, pain, humiliation, loss etc. In fact in the utilitarian circumstance it is easy to construe the victim as simply being exploited to pursue utilitarian ends. The justification that Kant can offer the victim of crime is clearly quite different and surely much more satisfying from the victim’s perspective.

Finally, then, there is the justification of punishment as it can be addressed to society more broadly, and this is the point at which the orthodox retributivist account can be seen to flounder. In order to ground their reliance on desert, adherents to this view seem to either appeal to dubiously self evident intuitions about desert or look to other positions in distributive justice, which bring with them their own difficulties. Kant is able to slip these problems however and avoid resort to transcendent norms, mere assertion and questionable characterizations of crime, for “[t]he

²⁴⁶ Ibid., 6:332.

²⁴⁷ Ibid., 6:333.

mere idea of a civil constitution among human beings carries with it the concept of punitive justice".²⁴⁸ That punishment is the desert of crime is embedded in the very idea of justice and the conceptual fabric of civil society for Kant. Put simply desert ultimately rests on the possibility of the existence of the state. As he argues in the *Metaphysics of Morals* the *raison d'être* for the state is to furnish the conditions in which justice can occur, so that the existence of the state and the possibility of justice go hand in hand, and in fact for Kant this possibility of obtaining justice actually furnishes the incentive for people to leave the state of nature and join together to form a civil union. Thus according to Kant it is the prospect of justice which encourages individuals into society. In its turn (and as the construction of justice has shown) punishment is absolutely essential to how we construe and comprehend justice within the state. So for Kant desert is grounded and punishment made legitimate because punishment is a conceptual prerequisite for justice and justice is a prerequisite for civil society. Nicholson sets down this series of connections nicely (though for different purposes) when he notes that "[i]f there were no punishment, there could not be law; if there were no law, there could not be a state; if there were no state, there would be a natural condition devoid of justice."²⁴⁹ So desert finds its grounding in the notion of justice within the state, and the justification of punishment that can therefore be offered up to those within civil society draws attention to the fact that the civil condition and justice entail punishment. To have a concept of the state and of justice requires appeal to a concept of punishment. To know what justice is we need punishment.

Conclusion

This Chapter began by outlining the traditional reading of Kant on punishment in which he is considered to be merely the paradigmatic retributivist. Such an account has provoked various criticisms in the literature and perhaps more importantly for the purposes of this thesis, the account is generally thought to be incapable of furnishing a satisfying justification of legal punishment. By developing a revised reading of Kant on punishment dependent on the notion of the construction of right or justice, the Chapter can end with a justification of punishment formulated using the resources of this revised reading. The next task is to turn to that other prominent retributivist Hegel, to see what response he can offer to the problem of justifying punishment and to consider whether or not this can build on or even supersede the Kantian justification outlined above.

²⁴⁸ Ibid., 6:362.

²⁴⁹ Nicholson, "Comment on Gerner," 133.

Chapter Four: Hegel and Punishment

Introduction to Hegel on Punishment

The treatment accorded Hegel's theory of punishment²⁵⁰ in Hegel scholarship and the literature of jurisprudence is scant when compared to the space occupied by discussions of Kant's view, though this perhaps is simply indicative of the fuller treatment Kant receives in English speaking literature more broadly. Thus when punishment is dealt with in philosophy of law, Hegel's theory appears to lack the classic status and recognition of Kant's position, and is generally just not taken seriously. Ted Honderich, for instance, in a book which canvasses a number of justifications of punishment, labels Hegel's version of retribution "of very secondary interest",²⁵¹ though J.P. Day considers Hegel rather than Kant to be "the classic exponent of the retributive theory"²⁵². Nonetheless there is, in a loose sense at least, generally agreement that Hegel is a retributivist.²⁵³ This is almost unavoidable given his pointed disavowal of all consequentially grounded attempts to justify punishment as a deterrent or corrective strategy, and his colourful suggestion that justifying punishment consequentially amounts to "raising one's stick at a dog; it means treating a human being like a dog instead of respecting his honour and freedom."²⁵⁴ However regardless of this regular acknowledgement that Hegel is a retributivist, unlike in the case of Kant there is no clear or consistent explication of what this entails for Hegel. Frequently it seems his view is dismissed in direct response to its obscure (some would say impenetrable) language, or following attempts to render this language into theory, which issues in seemingly untenable positions. P. Noll for instance describes Hegel's theory of punishment as "invalid and

²⁵⁰ It is Hegel's mature theory of punishment which is the primary concern of this thesis, namely as it is found in the *Philosophy of Right* rather than *The Spirit of Christianity* G. W. F. Hegel, "The Spirit of Christianity," in *Early Theological Writings* (Illinois: University of Chicago Press, 1948).

²⁵¹ Ted Honderich, *Punishment the Supposed Justifications* (Harmondsworth Baltimore: Polity Press, 1989) 45.

²⁵² J.P. Day quoted in Charles W. Harvey, "Hegel's Theory of Punishment Reconsidered," *Dialogos* 43 (1984): 71 Footnote 1.

²⁵³ As will be noted below, there are those who attribute to Hegel a closet consequentialism.

²⁵⁴ G. W. F. Hegel, *Elements of the Philosophy of Right*, ed. Allen W. Wood, trans. H. B. Nisbet (Cambridge: Cambridge University Press, 1991) §99 Addition (H).

frankly unintelligent",²⁵⁵ while even Dudley Knowles, who delivers a generally sympathetic interpretation, maintains that "[i]t is fair to say that the theory is complex and unclear".²⁵⁶ The result is as Mark Tunick suggests, that some philosophers simply come to regard Hegel's theory as an "object of scorn or ridicule."²⁵⁷

As a consequence of the way in which Hegel's views on punishment are treated in the literature, it is more difficult to identify a consensus interpretation and a plausible position against which a revised reading can be set, which was of course the strategy adopted in the previous Chapter on Kant. So instead a different approach will be followed in the case of Hegel. A first take on his accounts of crime and punishment will initially be furnished, which may seem to those unfamiliar with Hegel to be plunging in at the deep end. However this is difficult to avoid since one needs to start engaging with his ideas, language and logic at some point. A brief sketch of some of the interpretations to be found in the literature will then follow this outline. In addition to forming a basis on which to build a potentially more widely acceptable account, these first blush readings may help illuminate why Hegel is frequently rejected in the literature. One obvious reason for this dismissive treatment is that one needs to persevere with Hegel, to penetrate through dense and difficult passages to make sense of his view. Knowles, for instance, in ultimately delivering up a favourable account of Hegel on punishment talks of having to traipse "through the textual thickets"²⁵⁸ before finding a clear path. Effort must be expended in tangling with Hegel since as Cooper points out, "if one does not look very closely at what Hegel says, it is possible to discover apparent nonsense."²⁵⁹ One contention of this Chapter (and a point that will be further explored in the Conclusion), is that some of the more outlandish readings of Hegel on punishment derive from a perhaps understandable failure to appreciate the recognitive and logical underpinnings of his view, and a tendency to interpret some of his claims in a very literal fashion, without an awareness of the specifically Hegelian loading of much of the language he employs. Thus an excursion into Hegel's theory of recognition and aspects of his logic will precede setting down a re-worked interpretation.

²⁵⁵ P. Noll quoted in Wolfgang Schild, "The Contemporary Relevance of Hegel's Concept of Punishment," in *Hegel on Ethics and Politics*, ed. Robert B. and Otfried Hoffe Pippin (Cambridge: Cambridge University Press, 2004), 150.

²⁵⁶ Dudley Knowles, "Hegel on the Justification of Punishment," in *Beyond Liberalism and Communitarianism Studies in Hegel's Philosophy of Right*, ed. Robert R. Williams (Albany: State University of New York Press, 2001), 125.

²⁵⁷ Mark Tunick, *Hegel's Political Philosophy Interpreting the Practice of Legal Punishment* (Princeton N. J.: Princeton University Press, 1992) ix.

²⁵⁸ Knowles, "Hegel on the Justification of Punishment," 125.

²⁵⁹ Cooper, "Hegel's Theory of Punishment," 160.

A First Take on Hegel

Hegel on Crime

Though the treatment of Hegel on punishment is sparse, the attention devoted to his theory of crime in the literature is even more limited.²⁶⁰ Yet as crime and punishment are inextricably linked for Hegel, any genuine attempt to come to terms with Hegel on punishment surely cannot ignore his view of crime. Now this link Hegel points to between crime and punishment is not merely a reference to the straightforward and common sense manner in which punishment follows crime, nor is it simply the basic point which retributivism appeals to – that punishment is the desert of crime and that its type and amount are derived from the criminal act. Rather the connection Hegel claims is much more fundamental than this, such that it is both logical and necessary. Crime and punishment are just two halves of the one whole which cannot be prised apart lest the resulting phenomena be meaningless and even misleading. To understand either crime or punishment you need to come to terms with the other concept, since, according to the one of the Additions to the *Philosophy of Right*, punishment is “merely a manifestation of the crime, i.e. it is one half which is necessarily presupposed by the other”.²⁶¹ So what is this concept of crime?

Crime is, according to Hegel, one of the three kinds of wrongdoing or offence which can occur, the other two being unintentional or civil wrong, and deception or fraud.²⁶² Each of these forms of wrongdoing corresponds to a different type of judgment involving a particular relationship to right, and all these relationships entail a fundamental opposition between right itself and an individual will. Briefly sketching the other two sources of wrongdoing here, in civil wrong and fraud, will help elucidate the discussion of Hegel’s vision of crime which follows. But already in acknowledging an important place to these other types of wrongdoing, it is apparent that Hegel has a more fully worked out and potentially more sophisticated account of wrongdoing, and in turn crime, than does Kant.

²⁶⁰ Nicholson however gives a very good account of Hegel on crime. Peter P. Nicholson, "Hegel on Crime," *History of Political Thought* III, no. 1 Spring (1982).

²⁶¹ Hegel, *Elements of the Philosophy of Right* §101 Addition (H).

²⁶² In addition to helping define what merits punishment, the way in which Hegel distinguishes between these three forms of wrong helps neatly overcome (as Nicholson has convincingly argued), a problem in jurisprudence about what constitutes a crime, and in particular about why some acts are crimes rather than merely civil wrongs. Nicholson, "Hegel on Crime."

On Hegel's view civil wrongs are cases in which there is no intention to do wrong, but in which there is nonetheless some dispute between parties over who actually possesses the legitimate claim to right. Thus the situation involves what Hegel calls a "collision of rights"²⁶³ - one party erroneously maintains that they hold the right when they do not, they simply mistake wrong for right. Significantly, such cases take for granted the entire system of right and attempt to resolve the conflict within that framework, so that they appeal to "the *recognition* of right as the universal and deciding factor"²⁶⁴ in settling matters. For instance in a civil dispute over property, it is accepted by the parties involved that there exists a rightful owner of the property, the disagreement concerns who that legitimate owner is and can be settled within the legal system. A legal authority may adjudicate on the matter and determine who is the wrongdoer and who is the legitimate rights claimant, some official redress may then follow. What is most significant in civil wrong for Hegel is that it is non-malicious and absolutely dependent on the system of right. Thus, according to *The Encyclopaedia Logic*, a civil offence represents an instance of a simple negative judgment or what he refers to in the *Philosophy of Right* as a "completely negative judgment",²⁶⁵ i.e. a judgment of the kind "The flower is not red".²⁶⁶ In linking civil offences to this form of judgment there are at least three things Hegel wants to point to. The first is that the negation invoked is simple, it is only the negation of the particular, i.e. in the case Hegel gives this is just the assertion that red does not inhere in the flower. A further point he wants to highlight is that at the same time as the particular is being negated, the broader relationship between the subject and other possible predicates prevails. So to use Hegel's example again, although the flower is not red, other colours could still be ascribed to it. It may not be red, but the flower could still be violet, yellow, maroon etc., so the assertion is not that the flower is without colour entirely, just that it is not one colour in particular, namely red. The implication with respect to the civil offence then, is that the negation of the right of the particular individual leaves intact the broader system of right. As Hegel notes with respect to disputes over ownership it is just the case that "in the predicate 'mine', only the particular is negated."²⁶⁷ Thus Nicholson states "the civil offender who claims 'this cow is not yours' does not deny that it is someone's property but asserts that it is his, nor does he deny that other things are yours; thus he affirms law in general."²⁶⁸ Finally (and building on the prior point) by invoking the comparison between civil wrong and simple negative

²⁶³ Hegel, *Elements of the Philosophy of Right* §84.

²⁶⁴ Ibid. §85.

²⁶⁵ Ibid.

²⁶⁶ G. W. F. Hegel, *The Encyclopaedia Logic*, trans. W. A. Suchting T. F. Geraets, and H S. Harris (Indianapolis/Cambridge: Hackett Publishing Company, Inc., 1991) 251.

²⁶⁷ Hegel, *Elements of the Philosophy of Right* §85.

²⁶⁸ Nicholson, "Hegel on Crime," 115.

judgments, Hegel means to suggest (as Tunick has argued),²⁶⁹ that although we could be mistaken in our claim about the colour of the flower, for instance, this says nothing about being mistaken about the concept flower. Carrying the analogy back over into the domain of civil wrongdoing, even if a civil offender makes an erroneous claim about a particular right, this does not in and of itself bear on his broader understanding of right. The system of right remains intact and in fact is appealed to in order to resolve the dispute.

Like civil wrong, fraud also assumes the existence of a system of right, however there is malice involved in fraud, or at least an intent to deceive and to actively infringe right. The party who instigates the fraud relies on the system of right and pretends to work within it, all the while being deceitful about some aspect of his transaction with others, for instance about the value of a particular commodity or his ownership of some property. For the person committing the fraud, a semblance of right is created which fails to capture the reality of right. Thus fraud is, for Hegel, an instance of a positively infinite judgment.²⁷⁰ In such judgments a kind of identity claim is made, but the positively infinite judgment is ultimately dubious considered as a form of judgment. For instance the judgment 'a rose is a rose' is a positively infinite judgment, but its being framed as a judgment is in a sense deceitful. The predicate, a universal, fails to reveal anything about the particular subject in the way in which we ordinarily assume it will or should in a judgment. The connection to fraud thus becomes obvious. In fraud there is an appearance of legality, so that the form of legality is adhered to but adherence to this form is misleading, it does not hold up under closer examination.

If we turn now to the form of wrongdoing known as crime, for Hegel this involves a coercive act by a free and rational agent and represents an unwelcome intrusion into another similarly situated individual's sphere of freedom and right. Perhaps the most crucial aspect of this intrusion is that it infringes right, and right in three different guises or levels. In fact right is negated by crime, so that there is a threefold negation invoked by the criminal's coercive act. This negation affects the victim of crime, law and society more broadly, and the criminal himself. Each of these spheres of negation will now be discussed in turn below.

It may be that the most obvious right negated by crime, that is, the one which an average person would likely readily nominate, is the right of the victim. In considering here the negation of the right of the victim in crime it is perhaps useful to contrast this with the situation of the victim in

²⁶⁹ Tunick, *Hegel's Political Philosophy Interpreting the Practice of Legal Punishment* 26.

²⁷⁰ It is perhaps worth observing here that Hegel's identification of positive, negative and infinite judgments correspond to the three divisions of quality in Kant's Table of Judgments, as discussed in the Chapter on Kant in the section entitled "Real Negation".

fraud and civil offences. In crime the victim is not led into regarding wrong as right as might be the case in fraud, this is because in fraud there is deception, whereas crime involves coercion. Instead of being manipulated into complying with a fraud, in crime the victim's rights are unequivocally and forcefully negated. Further, to the extent that consideration of the particular infringement against the victim can be held distinct from issues to do with the criminal's malice and the more far-reaching ramifications of crime, then this aspect of the criminal offence has direct connections to civil wrong. If the infringement of the victim's particular right is focussed on, for instance the particular wrong against her property, say, in it being removed from her possession, then the situation is like a straightforward civil offence. As observed above, a straightforward civil offence represents an instance of a simple negative judgment, which leaves intact the system of right as such but negates a specific right. Of course the case of crime is more involved than this and this is in part what demarcates it from civil wrong, that there are other negations invoked so that the affirmation of law does not occur and the system of right is not adhered to or upheld as happens in civil wrong. Nonetheless the particular wrong in a civil offence parallels the particular wrong suffered by the victim of crime.

Through the criminal act a particular victim has a particular right violated, and to some this might seem to encompass the entirety of the violation of right, but for Hegel the criminal act goes beyond this. The criminal act means treating the victim as if she were entirely without rights, her status and autonomy is challenged and ultimately disregarded by the criminal, who asserts his own right as paramount. Thus it can be seen that the criminal's act has significant implications beyond the individual victim and particular instance of crime, for law and society more generally.

So discussion of the crime *qua* particular wrong leads naturally into consideration of the broader and more substantial negation also invoked by crime, the negation of the very principle of right itself, or what amounts to the internally "null and void" nature of the crime. Hegel elucidates his point, again in *The Encyclopaedia Logic*, with the example of theft. When a thief steals something from a particular individual, it is not the case that he simply denies

"the particular right of someone else to this particular thing (as in a suit about civil rights); instead, he denies the rights of that person completely he has violated right as such, i.e., right in general."²⁷¹

Thus crime represents for Hegel an instance of what he labels a "negative infinite judgment". The ascription of "infinite" to the judgment betokens a broadening of the scope of the negation beyond the particular individual and their infringed right, to concern all people and all claims to right. Or to backtrack briefly to Hegel's example of the flower, if that negation were not merely a simple one but infinite, then rather than being "not red", the flower could have no colour ascribed to it

²⁷¹ Hegel, *The Encyclopaedia Logic* 251.

whatsoever. So in the case of theft it is not just that the criminal disputes the specific right to a particular item owned by the victim, but that the victim's entire claim to be a right bearing individual is subverted - right as right is negated.

Another important aspect of negative infinite judgments for Hegel, and one that is significant in terms of crime, is how unrelated subject and predicate are in such judgments, or as Hegel states, their "determinations are negatively connected as subject and predicate, one of which not only does not include the determinateness of the other but does not even contain its universal sphere".²⁷² In the *Science of Logic* Hegel furnishes a number of examples of such judgments including that "the rose is not an elephant" and "the understanding is not a table".²⁷³ Judgments of this kind, according to Hegel, are "correct or true... but in spite of such truth they are nonsensical and absurd".²⁷⁴ This is because it seems as though any meaningful relationship which might be thought to exist between subject and predicate has broken down. Subject and predicate do not even inhabit relevantly similar realms. If we return to consideration of a criminal act, then, as an instance of a negative infinite judgment, such an act "does indeed possess *correctness*, since it is an actual deed, but it is nonsensical because it is related purely negatively to morality which constitutes its universal sphere."²⁷⁵ Thus in referring to the criminal act as negative here, there is no fanciful suggestion that it did not occur, rather that the act simply makes no sense since it goes against the very foundations of right.

Of the three sources of negation Hegel points to, it is perhaps the negation of the right of the criminal which is the least intuitively obvious. Whereas it seems self evident to suggest the victim has her rights disregarded by the criminal, and perhaps even that broader principles of right are

²⁷² G. W. F. Hegel, *Hegel's Science of Logic*, trans. A. V. Miller (New York: Humanities Press International, Inc., 1969) 642.

²⁷³ Ibid. It is perhaps worth noting that the kind of examples Hegel points to here are instances of what Gilbert Ryle referred to as "category mistakes". Interestingly category mistakes contributed to Fred Sommers' attempts to rehabilitate term logic. (For a discussion of these issues see Fred Sommers, "Intellectual Autobiography," in *The Old New Logic*, ed. David S. Oderberg (Cambridge and London: MIT Press, 2005). and George Englebretsen, "Trees, Terms, and Truth: The Philosophy of Fred Sommers," in *The Old New Logic*, ed. David S. Oderberg (Cambridge and London: MIT Press, 2005).. As will be noted in the section on Negation and Contradiction, Hegel's logic has more in common with this kind of term logic than it does with contemporary post-Fregean logic.

²⁷⁴ Hegel, *Hegel's Science of Logic* 642.

²⁷⁵ Ibid. The translation is slightly misleading here with *Sittlichkeit* being translated as "morality", when in fact it is more accurately rendered as "ethics" or "ethical life".

flouted by the criminal's act, how is it that through crime the criminal subverts his own right? Surely in fact it appears as though the criminal's rights actually prevail in crime, at least to the extent that his action goes unchecked. Nonetheless on Hegel's account crime does involve the negation of the rights of the criminal by virtue of the recognitive implications of his act. By committing a crime the criminal has effectively undermined his own capacity for rights and standing, his self contradictory and nugatory act has subverted the system of right on which he depends for his own status. In fact, in the place of conventional rights he has set up a scenario in which he is treated according to his own rule – namely that since he has ignored the rights of the victim, his claim to be a fully right bearing individual should be reconsidered. As Hegel observes, for the criminal

“it is implicit in his action, as that of a *rational* being, that it is universal in character, and that, by performing it, he has set up a law which he has recognized for himself in his action, and under which he may therefore be subsumed as under *his* right.”²⁷⁶

Thus by acting in the manner he has, negating both the right of the victim and right more broadly, he has effectively negated his own right.

With this brief sketch of Hegel on crime concluded, it is perhaps possible to get the gist of his view here, to have some sense of how he means to construe crime. On first blush there is surely a way of understanding what the coercive aspect of crime involves and how this is a negation of right. However such a sketch also begins to reveal some of the aspects of Hegel's account which require further explanation, and which have provided sources of contention in the literature and even charges of incoherence from those who do not accept his system. After all what does it really mean to describe actual events in the world, whether in the form of civil wrongs or crimes, as being negations? What could be intended by what Wood has described as “the baffling claim”²⁷⁷ that the criminal act and crime's existence is null and void in itself, even contradictory? What is the nature of the theory of rights to which Hegel is constantly appealing in his discussion of crime? And what possible plausible and relevant connection can be made between forms of judgment and wrongful actions, as surely few could accept (on first blush at least) Tunick's commendation of Hegel here when he says “[c]omparing a crime to the judgment “the rose is no elephant” is a clever (if bizarre) way of seeing just how radical a flouter of right the criminal is, in Hegel's conception.”²⁷⁸

As noted earlier Hegel's account of crime is rarely singled out for attention in the literature, but the kind of complaints critics raise against his view of punishment more broadly can also be

²⁷⁶ Hegel, *Elements of the Philosophy of Right* §100.

²⁷⁷ Wood, *Hegel's Ethical Thought* 112.

²⁷⁸ Tunick, *Hegel's Political Philosophy Interpreting the Practice of Legal Punishment* 29.

levelled against aspects of his theory of crime. What is suggested here is that the supposedly problematic parts of Hegel's account of crime and punishment which commentators point to, and some of the issues raised above, can be successfully addressed by attending to his theory of recognition and aspects of his logic. However before delving into Hegel's theory of recognition and his logic to render intelligible his account of crime, a sketch of his view of punishment will first be drawn.

Hegel on Punishment

Retributive punishment is, for Hegel, a response to crime which is required to cancel or annul its various undesirable impacts. Thus the three manifestations of negation invoked by crime and outlined above are addressed through punishment's retaliatory negation of them, i.e. punishment negates the negations of the victim, of right and of the criminal.

Considering first the notion of negating the negation of the victim, it is perhaps useful once again to draw a comparison between the victim in civil wrong and crime. If the wrong against the victim in crime is, for the purposes of discussion, isolated from the broader wrong done to right (i.e. treated as if it were akin to the wrong in a civil matter) then the infringement could be thought to require something less than punishment. Civil offences in fact are cancelled not by imposing penalties, but by some attempt to simply ameliorate the unintentional wrong perpetrated, and to reinstate the status quo by restitution or compensation. So, for instance, in a civil dispute over the legitimate ownership of an article of property, the article should be restored to its rightful owner, and if there has been no further damage caused to the property or by its removal etc., then nothing further need be done. But of course in the case of crime there is damage done above and beyond the particular harm to the victim. By deliberately infringing a specific right of the victim in the manner in which he has, the criminal has effectively treated the victim as a being without rights, and has thereby subverted the whole system of right upon which civil society depends. Thus any kind of mere restitution or compensation would be an inadequate response, it is punishment which is demanded by the situation.

So as explained above, in addition to the right of the victim, through crime the very principle of right is itself negated. And it is this negation which represents the most severe challenge presented by crime. This is what makes crime especially disruptive and destructive - its attack on right per se, not simply on the rights of the individual victim in the particular instance involved. Thus it is the injured universal not just the injured part which is the real issue in crime. By his act

the criminal has attempted to operate outside the framework of right and has thereby subverted that framework. This more general and broad impact (the infinite aspect of the negative infinite judgment of crime) is (as noted above) precisely what makes punishment rather than restitution or compensation the required response to crime. Punishment is clearly demanded for Hegel so that right, in the face of the threat invoked by crime, is rehabilitated to its proper place. Through punishment the status of right is reinstated, the law “restores and thereby *actualizes itself as valid* through the cancellation of the crime”.²⁷⁹ The null and void nature of crime’s claims are also revealed through punishment, as Hegel explains:

“[t]he *manifestation* of its [crime’s] nullity is that the nullification of the infringement likewise comes into existence; this is the actuality of right, as its necessity which mediates itself with itself through the cancellation of its infringement.”²⁸⁰

The phenomena that is crime logically demands punishment as its reply. Crime’s negation requires negation, the infringement demands “infringement”, lest wrong be falsely posited and upheld as right.

It is perhaps useful to mention at this point the clear and crucial distinction Hegel makes between revenge and retribution, the importance of which is frequently overlooked by those who criticise and condemn his position as entirely vindictively motivated (i.e. as driven merely by revenge). Such critics appear simply to conflate the concepts of retribution and revenge. The purpose of discussing this distinction is to illustrate how it is only punishment and not revenge which can offer up what Hegel requires here, namely a true and adequate resolution of the negative infinity of crime. Although both retributive punishment and revenge find their motivation in a common desire to attain right or justice, it is punishment rather than revenge which is pitched at the appropriate level to achieve such a goal. Punishment is objective, universal and mediated as opposed to being subjective, particular and immediate. Because of these factors revenge attains justice, if at all, only by chance. According to Hegel if the content of revenge happens to coincide with retribution then it may be fair, but the form of revenge will always be individualistic and misguided. Rather than cancelling crime in a definitive manner, an act of revenge actually perpetuates a potentially infinite series of wrongs. Punitive as opposed to avenging justice seeks to genuinely negate the negation of crime and reconcile right with right. It requires therefore a justice system, that is, certain mechanisms and procedures enshrined within institutions intended to dispense appropriate and retributive punishment, and operating within a society governed by laws. Knowles has succinctly outlined a number of the critical characteristics of such a system for Hegel, which include that it

²⁷⁹ Hegel, *Elements of the Philosophy of Right* §220.

²⁸⁰ *Ibid.* §97.

“enlists the rational endorsement of citizens. The transparency which is at the heart of the administration of justice serves to embed the reasoning of the contractor in the institutions which identify, prosecute and punish criminality. The restoration of right is accomplished by social mechanisms which demonstrate to all, honest and criminal citizens alike, the nature of their rights, their concomitant duties and the penalties to be imposed for non-compliance. The institutions make explicit, through their laws, processes and punitive regime, the rights for which persons demand protection.”²⁸¹

The system of justice Hegel envisages helps furnish an appropriate distance between the particularities of the criminal event for what might be labelled the “interested parties”, enabling a certain formality and a disinterested application of the law. Thus punishment is no mere reflex (as revenge might be construed). The criminal is independently prosecuted and punished so that the penalty of punishment is both established and carried out by a civil body according to retributivist principles. It is worth noting that for Hegel the suggestion is not that punishment thereby avoids all taint of human intervention, but that any influence is not undue and skewed in the manner it might be if the victim were pursuing her own revenge. As this Hotho addition makes clear,

“[i]t is true that the members of a tribunal are also persons, but their will is the universal will of the law, and they do not seek to include in the punishment anything but what is naturally present in the matter in hand. On the other hand, the injured party does not perceive wrong in its quantitative and qualitative limitation, but simply as wrong without qualification, and [s]he may go too far in [her] retaliation, which will in turn lead to further wrong.”²⁸²

As Reyburn notes it is “only by an established court where the will of the judge is merely the medium of the law and does not taint the latter by any subjective elements is justice rather than revenge achieved.”²⁸³ The judge fulfils a vital role within such a system, not only by meting out punishment and applying his judgment to the particular instance of crime, but also by giving expression to the universal and objective aspects of law. As can be argued, the judge serves here the distinctive function of “representing the system per se.”²⁸⁴

All of the features outlined above are required for authentic punishment, that is, punishment which can actually overturn the negation wrought on the entire system of right by crime. Outside

²⁸¹ Dudley Knowles, *Routledge Philosophy Guidebook to Hegel and the Philosophy of Right* (London and New York: Routledge, 2002) 157.

²⁸² Hegel, *Elements of the Philosophy of Right*. §102 Addition (H).

²⁸³ Hugh A. Reyburn, *The Ethical Theory of Hegel* (Oxford: Oxford at the Clarendon Press, 1921) 152.

²⁸⁴ Paul Redding, *Hegel's Hermeneutics* (Ithaca: Cornell University Press, 1996) 179.

of the structures of civil society, “[a]mong uncivilized peoples”,²⁸⁵ right does not exist and so cannot be restored. It is only inside civil society with its recognition of property and personality, its universal and objective standards and institutions, that challenges to right can find their appropriate measure in retributive punishment.

Further insight into crime and punishment can be gleaned by interrogating how the treatment of punitive and avenging justice as well as crime sits within the broader framework of the *Philosophy of Right*, since their location in the book has implications for how Hegel construes them and the impact they have on the book’s development. The bulk of Hegel’s treatment of crime and punishment sits within that part of the *Philosophy of Right* labelled “Abstract Right”, a section of the book whose principle tenets are ultimately found wanting and are superseded by different principles governing sections entitled “Morality” and finally “Ethical Life”. Very roughly, Abstract Right can be seen as a fairly basic liberal take on what it is to be a person and how persons interact, a take which focuses on persons as discrete and self-interested individuals, governed in their interactions by a negative concept of freedom. The state on this scenario is simply an agglomeration of individuals controlled by instrumentally driven contractual relations. What crime and punishment highlight however, are the shortcomings of this way of construing matters. Crime and its punishment demonstrate that Abstract Right cannot represent the whole story if an adequate account of life in the state is to be given. As the foregoing discussion of revenge and punishment revealed, just punishment (i.e. punishment which genuinely negates the negation of wrong and which is essential to the effective existence of rights), requires the state with its attendant standards and institutions, rather than the more limited resources of Abstract Right. Crime also plays a role in revealing the limitations of the realm of Abstract Right, by showing the gulf that can exist between the individual and universal wills. Crime illustrates the fact that the particular individual in claiming his freedom or his “right” according to his point of view, may do so in a way that diverges from the universal will. Further, the functioning of contract in Abstract Right is also limited by its dependency on the contingencies of what the parties to contract chose to pursue and the ultimately artificial nature of this form of recognition (as the discussion of recognition later in this Chapter will reveal). Contract here lacks the greater binding force of family, with its more immediately felt sense of identity.

Finally, then, if we return to the negations invoked by crime, there is the issue of negation as it relates to the criminal himself. Again this negation is a necessary part of restoring the status quo, by addressing one of the ways in which wrong is perpetrated. The criminal’s act needs to be attacked at this level since for Hegel this is the only respect in which crime has a positive existence – via the criminal’s particular will. Neither the injury to the victim’s right or to the system

²⁸⁵ Hegel, *Elements of the Philosophy of Right*. §102 Addition (H).

of right more broadly can be directly perceived, right is just not this kind of thing, it is only through the criminal's will made manifest in his behaviour that these phenomena become apparent. "Thus, an injury to the [criminal's particular will] as an existent will is the cancellation of the crime, *which would otherwise be regarded as valid*, and the restoration of right."²⁸⁶ Just as in the case of the challenges presented to the rights of the victim and right more broadly, the challenge to right embodied in the criminal's will cannot be allowed to stand. Now in spite of the fact that crime has a positive existence with respect to the criminal's will, this will is also "null and void in itself", it is nugatory, since it contains within itself the seeds of its own demise i.e. "its own nullification.... in the form of punishment."²⁸⁷ Because the criminal has effectively undermined his own claim to standing by subverting the entire system of right, punitive action needs to be taken if he is to be reinstated to his former position as a being with rights. By negating the negation of crime through punishment the criminal can regain standing within civil society, a standing which was bought into doubt by crime.

Now surely few would argue with Hegel that punishment must address the criminal and his act. It may even be the case that those who have not considered the matter in any depth might regard the criminal as the sole target of punishment. Yet it is unlikely that the kind of claims Hegel makes about the criminal and the punishment he deserves could be anticipated by someone unfamiliar with Hegelian thought. Such claims include contentious and even odd sounding ones like that punishment is the criminal's right,²⁸⁸ that he in fact consents to his own punishment,²⁸⁹ and even that he wills such punishment.²⁹⁰ These claims are grounded in the retributivist motivations of Hegel's theory of punishment, however, and ultimately (as will be touched on later in this Chapter and in the Conclusion) in his idealism. Precisely because human beings (and by extension criminals) are free and rational beings it is retributivist punishment which is their due, rather than consequentialist style penalties. Consequentialist threats and attempts to deter the potential criminal find their source in an assumption that such individuals "are not free, and seeks to coerce them through the representation of an evil. But right and justice must have their seat in freedom and the will, and not in that lack of freedom at which the threat is directed."²⁹¹ Free and rational beings should be addressed by rational argument, not by attempts to force them into compliance.

²⁸⁶ Ibid. §99.

²⁸⁷ Ibid. §101.

²⁸⁸ Ibid. §100.

²⁸⁹ Ibid. §100 Addition (H,G).

²⁹⁰ Ibid. §100.

²⁹¹ Ibid. §99 Addition (H).

From the criminal's perspective retributive punishment should not only be regarded as the just response to his act, but also as his right. For Hegel this right to punishment in fact inheres in the criminal's act,

"[f]or it is implicit in his action, as that of a *rational* being, that it is universal in character, and that, by performing it, he has set up a law which he has recognized for himself in his action, and under which he may therefore be subsumed as under *his* right."²⁹²

Later in the *Philosophy of Right* Hegel reiterates the point when he observes that punishment

"applies to the criminal in that *his law, which is known by him* and is *valid* for him and *for his protection*, is enforced upon him in such a way that he himself finds in it the satisfaction of justice and merely the enactment of *what is proper to him*."²⁹³

Not only does the criminal's act contain his right to punishment, but his de facto consent to it, in fact on Hegel's view the criminal wills his own punishment. Retributive punishment acknowledges and treats the criminal rationally – by meting out to him the right which follows from his action and by recognising that as a being with reason, he must accept that he has freely legislated the law according to which he is treated. "Both the nature of crime and the criminal's own will require that the infringement for which he is responsible should be cancelled."²⁹⁴

Turning now to considerations related to the initial sketch of Hegel's view of punishment furnished above, it becomes apparent that just as with his view of crime, the language he uses and the points he attempts to convey regarding punishment can seem extremely odd and have caused interpretative difficulties in the literature. For instance, what can it mean to say that punishment is both the criminal's right and something he consents to? While David Dolinko has referred to Hegel's claim that punishment can annul crime as "obscure",²⁹⁵ and D. J. B. Hawkins (writing earlier than Dolinko) has made a similar complaint, extending his point to draw in the problem some philosophers have with regard to Hegel and negation. Hawkins writes:

"Hegelian theory is really excessively obscure. If you could bring the murdered person back to life by executing the murderer, you could truly be said to negate the evil act, and, if you can reform the criminal, you can truly be said to negate his evil will. But how the infliction of a punishment which neither reverses the evil act nor necessarily reforms the evil will can be said to negate the wrong done is surely beyond the comprehension of any literal-minded

²⁹² Ibid. §100.

²⁹³ Ibid. §220.

²⁹⁴ Ibid. §100 Addition (H,G).

²⁹⁵ Dolinko, "Some Thoughts About Retributivism," 548.

person. Such an assertion is the kind of thing which causes philosophy to be regarded as a species of poetry rather than of exact thinking.”²⁹⁶

Likewise, Honderich has pondered what the restoration of right means and has referred to the obscurity of Hegelian theory with regard to annulment, stating that although marriages qua contracts can be annulled, “crimes cannot be, in any ordinary sense.”²⁹⁷ Honderich goes on to make the point that “[m]y death or imprisonment, after I have killed a man, does not make things what they were before.”²⁹⁸ The obvious question then becomes “In what way can my death or imprisonment be seen as an annulment?”²⁹⁹

In the literature this puzzlement about annulment, the concern about the various claims related to the restoration of right, punishment as the right of the criminal etc. frequently seem to issue in dismissal of Hegel on punishment. Yet other more favourable interpretations also tend to focus on some or all of these claims. Playing up the first of these, Jami Anderson in fact labels Hegel’s view as “annulment retributivism”, to both highlight the significant role the concept of annulment plays for Hegel and to distinguish it from other forms of retributivism such as Kant’s, which Anderson argues is inferior to Hegel’s position.³⁰⁰ David Cooper also construes annulment to be central to Hegel’s project, stating that “[t]he crux of this [Hegel’s] positive theory is contained in the claim that punishment ‘annuls’ crime.”³⁰¹ Further, Cooper shows how some of the claims Hegel makes regarding rights can be made more plausible if, amongst other things, rights are interpreted as performatees. Also focussing attention on Hegel’s various claims about rights Dudley Knowles, in a generally favourable rendering, describes Hegel’s theory of punishment as “a very near miss.”³⁰² Knowles argues that problems with his view could be overcome if only Hegel had endorsed and incorporated a hypothetical social contract model into his thinking on punishment.³⁰³

²⁹⁶ D. J. B. Hawkins, "Retribution," in *Theories of Punishment*, ed. Stanley E. Grupp (Bloomington: Indiana University Press, 1971), 16.

²⁹⁷ Honderich, *Punishment the Supposed Justifications* 45.

²⁹⁸ Ibid.

²⁹⁹ Ibid.

³⁰⁰ Jami L. Anderson, "Annulment Retributivism: A Hegelian Theory of Punishment," *Legal Theory* 5 (1999).

³⁰¹ Cooper, "Hegel's Theory of Punishment," 160.

³⁰² Knowles, "Hegel on the Justification of Punishment," 125.

³⁰³ The points made here by Cooper and Knowles will be taken up and discussed toward the end of this Chapter.

More unusual than the type of interpretations of Hegel outlined above is one which suggests that, counter to his explicit rejection of this kind of view of punishment, he really effectively advocates some form of consequentialism. Stanley Benn, for instance, considers Hegel's theory to represent a closet utilitarianism. Benn renders Hegel on annulment and right in consequentialist terms, arguing that if punishment did in fact annul wrong "it would be justified by the betterment of the victim of the crime or of society in general."³⁰⁴ Similarly he asserts that in suggesting that punishment reaffirms right, Hegel is really making a utilitarian point, "for why should it be necessary to reaffirm the right, if not to uphold law for the general advantage?"³⁰⁵ Further, Benn thinks that neither of the goals (to annul crime or affirm right) can actually be achieved by punishment. Allen Wood also questions whether the notion of restoring right is genuinely a retributivist one and finds Hegel wanting here. As he explains,

"the state's intention to *reassert* the validity of right in the face of wrong looks like an intention not to do justice as such, but to promote a good end, namely the public *recognition* of the validity of right. If there is room for doubt about this, that is largely because the precise nature of the end is rather mysterious. Why is it important for the state to *assert* the validity of right, to *express* its disapproval of crime? Is there any reason for it to do this apart from its devotion to such consequentialist ends as preventing future crimes and reassuring people that their rights are being protected?"³⁰⁶

Gertrude Ezorsky (relying on McTaggart) directs her attention to the criminal in Hegel's account of punishment and thereby comes to label his account teleological, since on her view, it attempts to achieve as its goal an improvement of the criminal. According to Ezorsky, for Hegel "the pain of punishment yields repentance, whereby the criminal recognizes his sin. He does not merely change his ways. Fear of future punishment might yield this superficial reform. He really becomes a better man; thus, Hegel declares, realizes his true nature."³⁰⁷ Likewise, Paul Griseri argues that the notion that punishment annuls crime only makes sense if interpreted as bearing on the criminal and therefore "the concern to annul collapses into the concern to reform."³⁰⁸

Though not of central importance to this thesis given that the main question here concerns the justification of legal punishment rather than issues surrounding its type and amount, Hegel does undoubtedly acknowledge a place for consequentialist style considerations in the determination of

³⁰⁴ Benn, "An Approach to the Problems of Punishment," 65.

³⁰⁵ *Ibid.*

³⁰⁶ Wood, *Hegel's Ethical Thought* 110.

³⁰⁷ Gertrude Ezorsky, "The Ethics of Punishment," in *Philosophical Perspectives on Punishment*, ed. Gertrude Ezorsky (Albany: University of New York Press, 1972), xii.

³⁰⁸ Paul Griseri, "Punishment and Reparation," *The Philosophical Quarterly* 35, no. 141 (1985): 411.

specific punishments. For instance in discussing the notion that crime committed in the context of civil society may represent a danger to that society, he states that

“[a]lthough the view that they are a threat to civil society may appear to aggravate crimes, it has in fact been chiefly responsible for a reduction in punishments. A penal code is therefore primarily a product of its time and of the current condition of civil society.”³⁰⁹

Hegel clearly maintains that a more stable society can afford to punish more leniently, and in a Hotho addition the point is made that “if society is still inwardly unstable, punishments must be made to set an example”.³¹⁰ So for Hegel the actual penalties meted out for particular infringements may vary based on such concerns as the state of the society in which those penalties are disbursed. Such an approach is of course in contrast to the one pursued by Kant, where, with few exceptions, the dominant consideration in penalty setting is to achieve strict justice.

Excluding the role of consequentialism in the actual determination of punitive penalties, the interpretations of Hegel which suggest that he is some form of consequentialist with respect to the motivation of punishment do not represent the standard picture. Yet there is a still more idiosyncratic view held by Mark Tunick. Tunick, sharing with Benn a concern to explain Hegel’s point that punishment is about vindicating right, explicitly distances himself from Benn’s interpretation, observing that Hegel is no disguised utilitarian. Instead Tunick maintains that Hegel’s account of punishment is non-deontic or forward looking. This of course runs counter to the traditional view of retributivism as outlined in Chapter Two which construes retributive punishment to be backward looking, since its motivation derives from looking back to the past incidence of crime. According to Tunick, Hegel’s view is forward looking because “we punish to avoid a future where crimes no longer are regarded as wrong.”³¹¹ If we did not punish wrongdoers, right would be confused with wrong. Punishment is therefore motivated not by some social good as Benn would have it, but simply by the need to have right remain unchallenged as right.

Following this first blush outline of Hegel’s theory of punishment and a number of the interpretations it has attracted, questions remain about the meaning of annulment and the claim that punishment is driven by the need to restore right. Can sense and a coherent account be drawn from Hegel’s thoughts on punishment here? Lingering questions such as these will, it is hoped, find some resolution following on from an excursion below into Hegel’s notion of recognition and aspects of his logic.

³⁰⁹ Hegel, *Elements of the Philosophy of Right* §218.

³¹⁰ Ibid.

³¹¹ Tunick, "Is Kant a Retributivist?," 67.

A Revised Reading of Hegel on Crime and Punishment

Recognition

Hegel's theory of recognition is central to his account of the legal, political and social worlds, and it has actually further been argued, that it is absolutely central to his philosophy more broadly.³¹² Now regardless of the status of this latter claim it *should* be un-contentious to nominate recognition as being a key concept in unlocking what Hegel means by crime and punishment, given that these notions are obviously situated within the legal, political and social realms. In fact Hegel's whole concept of recognition (in its many and various guises) traces its genesis back to Fichte's concept of recognition from his account of right. However in spite of this thesis' claim that recognition does play this key role (particularly when it comes to judicial matters) the nature of this relationship is not generally acknowledged in the literature dealing with Hegel on crime and punishment.³¹³ In order to get some sense of what recognition involves and the role it will play for crime and punishment, two critical instantiations or manifestations of recognition from the *Phenomenology of Spirit* and the *Philosophy of Right* respectively, will be outlined. And following discussion of Hegel's logic and more particularly negation and contradiction in the next section, an account of how recognition feeds into explaining Hegel on crime and punishment will be given.

The first instantiation of recognition to be discussed here is perhaps Hegel's most famous, that is, recognition as it pertains to the master-slave dialectic from the Fourth Chapter of the *Phenomenology of Spirit*. This Chapter follows on from three others on consciousness where Hegel can be interpreted to be discussing the kind of criteria to which a consciousness might appeal to substantiate knowledge claims. This Fourth Chapter however concerns self-consciousness, and more particularly how as human beings we come to be self-conscious, recognition for Hegel being the key. In the dialectic between master and slave we see an instantiation of recognition emerging, and with it a sketch of civil society.

³¹² Paul Redding, "The Independence and Dependence of Self-Consciousness: The Dialect of Lord and Bondsman in Hegel's "Phenomenology of Spirit", in *The Cambridge Companion to Hegel*, ed. Frederick C. Beiser (Cambridge: Cambridge University Press, Second Edition, Forthcoming), Manuscript 11.

³¹³ For exceptions to this general neglect see Redding, *Hegel's Hermeneutics*. and Robert R. Williams, *Hegel's Ethics of Recognition* (Berkeley: University of California Press, 1997).

The story goes that master and slave are both immersed in a struggle, but reach a kind of resolution or equilibrium by what amounts to a tacit agreement to each fulfil a certain role. The master assumes what may appear to be the superior position of lawmaker, while the slave *chooses* to assume the role of slave, to serve a master and be subject to his laws. The slave actively decides (rather than passively falling into the situation or being coerced), to no longer pursue the immediate gratification of his desires, but rather sustain himself in a way mediated through his master. It might seem then, that at least the master has achieved appropriate acknowledgement through the slave, since “[s]elf-consciousness achieves its satisfaction only in another self-consciousness”.³¹⁴ As can be argued “this is what the lord has found in his bondsman, a self-consciousness that in renouncing his desire “effects the negation within itself”.³¹⁵ The slave is no mere object, but a being who has chosen to subjugate himself to the master and acknowledge him in that role. Each player here is

“equally independent and self-contained, and there is nothing in it of which it is not itself the origin. The first does not have the object before it merely as it exists primarily for desire, but as something that has an independent existence of its own, which, therefore, it cannot utilize for its own purposes, if that object does not of its own accord do what the first does to it... Each sees the *other* do the same as it does; each does itself what it demands of the other, and therefore also does what it does only in so far as the other does the same. Action by one side only would be useless because what is to happen can only be brought about by both.”³¹⁶

In a perhaps characteristically Hegelian fashion, however, all is not as it first seems. The master does not actually sustain the apparently superior position he at first assumes, nor does the slave remain fixed in a seemingly “servile” position. There is a tension issuing from the initial unequal situation of the two parties which drives the dialectic and means that the two, in some sense, swap roles at various points. The evidently independent master and supposedly dependent slave start out respectively with “one being only *recognized*, the other only *recognizing*.”³¹⁷ However for his part the master comes to demonstrate a dependence on the slave since he requires the slave to satisfy his basic needs and, perhaps more significantly, to give assent to his normative claims in order that he can maintain his status. For the master’s

³¹⁴ G. W. F. Hegel, *Hegel's Phenomenology of Spirit*, trans. A. V. Miller (Oxford: Oxford University Press, 1977) §175.

³¹⁵ Redding, "The Independence and Dependence of Self-Consciousness: The Dialect of Lord and Bondsman in Hegel's "Phenomenology of Spirit", " Manuscript 9.

³¹⁶ Hegel, *Hegel's Phenomenology of Spirit* §182.

³¹⁷ *Ibid.* §185.

claims to be legitimate, they require the slave's stamp of approval to his master's authority. But the slave only obtains his status via the master bestowing it upon him and the master, still operating with what can be characterised as a desire model of self-consciousness,³¹⁸ treats the slave as an object rather than a fellow self-conscious being. As has been put in the literature, "in failing to recognize the bondsman as a self-consciousness, the lord negates the very conditions for his own self-consciousness."³¹⁹ And thus as Pinkard sees it, the master is stuck in the so-called "Kantian paradox"³²⁰ (to be explained below).

Compared to the master, the slave appears to undergo a genuinely transformative experience. As Hegel notes,

"just as lordship showed that its essential nature is the reverse of what it wants to be, so too servitude in its consummation will really turn into the opposite of what is immediately is; as a consciousness forced back into itself, it will withdraw into itself and be transformed into a truly independent consciousness."³²¹

By making himself subject to the master, the slave in fact learns a number of things. Via his work in serving the master "he rids himself of his attachment to natural existence in every single detail; and gets rid of it by working on it."³²² Thus unlike the master he frees himself of the unhealthy immediacy of desire, and through learning to shape objects in the world he is able to experience himself, "to see in the independent being [of the object] [his] *own* independence."³²³ As Pinkard has argued, the slave also learns, through subjecting himself to the master's laws, "what it would *mean* to be a lawgiver".³²⁴ Thus in some respects, the slave has surpassed his master in what he has gleaned from their interaction.

Part of what can be drawn from this parable-like dialectic is that for Hegel social life is mediated via social roles (like those of master and slave) and these roles are normative. Individuals

³¹⁸ What Hegel appears to be doing is describing and criticising a conception of self consciousness based on desire, in which the object of self consciousness is consumed to satisfy self consciousness' needs.

³¹⁹ Redding, "The Independence and Dependence of Self-Consciousness: The Dialect of Lord and Bondsman in Hegel's "Phenomenology of Spirit", " Manuscript 10.

³²⁰ Terry Pinkard, "Hegel's Phenomenology of Spirit: Post-Kantianism in a New Vein," in *German Philosophy 1760-1860 the Legacy of Idealism* (New York: Cambridge University Press, 2002), 228.

³²¹ Hegel, *Hegel's Phenomenology of Spirit* §193.

³²² *Ibid.* §194.

³²³ *Ibid.* §195. First parenthesis are as per the translation, the second are my own.

³²⁴ Pinkard, "Hegel's Phenomenology of Spirit: Post-Kantianism in a New Vein," 229.

recognize themselves and each other through such roles, which are inescapable if self-consciousness is to be attained. Hegel's account of recognition here in the *Phenomenology* in fact addresses several problems about normativity and freedom, a couple of which will be briefly outlined below, before turning to consideration of the instantiation of recognition found in the *Philosophy of Right*.

For Hegel an issue arises as to how normativity can be obtained both epistemologically and ethically/legally. In the case of knowledge claims about external objects, the problem becomes apparent in his discussions of consciousness in the *Phenomenology*, where it is acknowledged that the subject makes a contribution in judgments about apparently independent objects. So if the "independence" of such objects fails to secure our knowledge claims concerning them, the question arises as to how such claims can be supported? As Pinkard notes, if

"we are driven to comprehend that our mode of *taking* [objects] to be such-and such plays just as important a role in the cognitive enterprise as do the objects themselves or our so-called direct awareness of them. That itself therefore raises the question: what are the conditions under which our "takings" of them might be successful? In particular, how might we distinguish what only seems to be "the way we must take them" from the "way they really are?"³²⁵

The problem concerns how we can certify our claims to knowledge, but it does not only concern this, it also affects how we address normativity in the legal realm, and addressing this problem of normativity in our interactions with others can be construed as an important motivation for Hegel's theory of recognition.

In the sphere of our interactions with others, the nub of the problem for Hegel is what Pinkard has referred to as the "Kantian paradox". Kant (building on notions from Rousseau) had assumed that we must regard ourselves, from a practical perspective, as self legislating agents, i.e. we must think of ourselves as the kinds of creatures who, being free, must give to ourselves the norms or laws which we then follow. But, as Pinkard has argued

"if the will imposes such a "law" on itself, then it must do so for a reason (or else be lawless); a lawless will, however, cannot be regarded as a free will; hence, the will must impose this law on itself for a reason that then cannot itself be self-imposed.... The "paradox" is that we seem to be both required not to have an antecedent reason for the legislation of any basic maxim and to have such a reason."³²⁶

Now although Hegel wants to retain something of the importance placed on freedom and self legislation in Kant, he certainly does not accept Kant's solution to the paradox, which is,

³²⁵ Ibid., 225.

³²⁶ Ibid., 226.

according to Pinkard, to simply resort to the “fact of reason”.³²⁷ Instead Hegel, realizing that the subject in isolation cannot secure normative force, attempts to garner it by appealing to an inter-subjective or social grounding through the notion of recognition.

Given this outline of recognition in perhaps its most famous guise in the *Phenomenology*, we can now turn to recognition as it appears in the *Philosophy of Right*. After all this is where we find the bulk of Hegel’s account of crime and punishment, the latter being the focus of this thesis. In the *Philosophy of Right* recognition concerns right – the status of individuals as bearers of rights and the whole normative underpinning of civil society, the framework of rights. Now in order to begin to understand what right and recognition really mean here for Hegel, we need first to address his pivotal notion of property, before going on to discuss what the concept of contract involves on his view.

At one level of analysis, property for Hegel is about a certain kind of relationship which can exist between an external object and a free will, namely one in which the free will is embodied in the external object. The nature of free will’s relationship to the external object in property can take on three different forms or determinations for Hegel – taking possession, use, and alienation, although it is primarily the first of these, taking possession, which is of interest and relevance here. Taking possession (to draw on notions from Hegelian logic once more) is an instance of a “*positive* ... [judgement] of the will upon the thing.”³²⁸ It represents property ownership in its most immediate guise, and again within the concept of taking possession (as with property) there is a threefold division of taking possession into “the immediate *physical seizure* of something”, “giving it form” and “*designating* its ownership”.³²⁹ These three forms of taking possession represent three different glosses on how possession might be established.

Physical seizure, actually tangibly grasping or taking hold of something, claiming it in quite a direct fashion, is akin to the cognitive form described in the *Phenomenology* as sense certainty.³³⁰ This mode of taking possession can, in a certain light, be construed as absolutely comprehensive, since in physical seizure as an agent I am “immediately present in this possession and my will is thus also discernible in it.”³³¹ On this view there is a very straightforward link between object and owner, such that ownership is instantly apparent and

³²⁷ Ibid.

³²⁸ Hegel, *Elements of the Philosophy of Right*. §53.

³²⁹ Ibid. §55.

³³⁰ On the model of sense certainty, the criteria for reality is the direct and unmediated apprehension of objects via sensual contact.

³³¹ Hegel, *Elements of the Philosophy of Right*. §55.

thereby the will has an immediately perceivable expression. Examples of this form of ownership could include my possession of a table in a restaurant or of a hand of cards in a card game. Whilst I am sitting having a meal at the table, or while I hold the cards in my hand before I lay them down as part of the game, these things are mine. Occupancy amounts to possession on this view, so that a right to ownership might be thought to follow from simply obtaining something. Physical seizure could be construed to be the principle operating behind a maxim like “finders keepers”, which suggests that to actually physically possess something amounts to legitimately owning it. However, as these examples suggest the seeming comprehensiveness and other advantages of the physical seizure model are misleading. It ultimately turns out to be a rather primitive version of taking possession, since it is “merely subjective, temporary, and extremely limited in scope, as well as by the qualitative nature of the objects”.³³² In this form of taking possession the object only falls under my will insofar as it is actually held by me, to the extent that it is in my grasp or is occupied in some sense by me, ownership does not persist beyond this. On finishing my meal and leaving the restaurant the table is no longer mine. Once I have played the hand and the game is over, I have no lingering claim over the cards. Thus instances of physical seizure are particular in time and place, contingent and transient, and limited to objects of a certain kind (namely the kind that can actually be physically seized). Physical seizure describes a means of taking possession that, on reflection, is relatively unsophisticated.

More developed than physical seizure is the version of taking possession which involves giving form. Unlike in physical seizure, the relationship between will and object here is not one in which things must be immediately and directly claimed, but rather involves the more sophisticated form of consciousness identified by Hegel in the *Phenomenology* as perception.³³³ Giving form to something involves affecting change, imposing a structure on some aspect of the world, imparting an order to it that can be readily appreciated externally. In giving form what is formed (say a particular object I have fashioned from a piece of timber) can be seen as an expression of my will. Thus, giving form is more lasting and stable in its affect than the mode of physical seizure. The form imposed on something can remain long after physical contact with the object has ceased.

Perhaps what Hegel intends here with his account of taking possession can be better understood by comparing his view with Locke’s, as there are clear similarities between the views.

³³² Ibid.

³³³ Perception represents a step up from sense certainty, on this model there is no direct access to objects rather they are filtered via perception. Objects on this model are apprehended as being comprised of an underlying substrate in which a variety of universal properties can inhere. It should be noted here that this basic structure of substrate and properties will also play a role in the discussion of Hegelian logic and negation to follow this section.

For Locke I can claim legitimate ownership of what I have transformed through my labour, since on his view each person has property in themselves and they own their labour, so that it follows that they own what their labour has produced.³³⁴ When it comes to the ownership of land for instance, this means that such things as physical demarcation and enclosure, and that the land has been worked by human labour, contribute to the legitimacy of ownership. Now phenomena like enclosure and tilling of the soil surely represent instances of Hegel's idea of giving form to land by transforming it in some sense in order that it be seen to be rightfully possessed. What Hegel means by giving form can perhaps further be brought out here by comparing this Lockean account with what amounts to a physical seizure model of property acquisition. Historically Locke's account was used to support colonial land appropriation in a way which would not have been possible on the physical seizure model of taking possession. On the physical seizure model, for instance, a continent such as Australia would have been regarded to have been occupied by the indigenous population and therefore for the land to have been legitimately owned. Instead colonial justifications appealed to Locke's model which demanded more than mere occupancy to justify land seizure, it required such things as enclosure, working of the soil etc.

The final version of taking possession is making a mark or sign which signifies the relationship between the object and the will concerned, so that the will in this instance is represented rather than directly present or imposed on an object. And just as giving form was an improvement on physical seizure and linked to the cognitive forms from the *Phenomenology*, so too is making a mark an improvement on giving form, which links to Hegel's discussion of the understanding.³³⁵ In marking a thing an agent takes matters to a very different level, he engages in representing possession through a sign rather than a direct physical claim. The relationship is flagged by some third thing which lies outside both the will of the agent and the object itself, and which need have no intrinsic connection to either. "For the concept of the sign is that the thing does not count as what it is, but as what it is meant to signify."³³⁶ As observed in a Hotho addition however, there is

³³⁴ Many have objected to this argument however, citing as problematic the manner in which Locke regards man as having property in himself. See for instance Dudley Knowles, "Hegel on Property and Personality," *The Philosophical Quarterly* 33, no. 130 (Jan.) (1983): 47.

³³⁵ According to the model of force and the understanding it is recognized that the objects of perception form part of a cohesive world, held together by forces and laws. In this Hegel in some sense follows Kant who, as noted in the previous Chapter, had interpreted Newton in dynamicist rather than mechanist terms. The world is not made up of inert lumps of space occupying matter that are moved by externally imposed forces (as the mechanist might have) but matter itself is, on the dynamicist account, empowered, that is, comprised and held together by forces of attraction and repulsion.

³³⁶ Hegel, *Elements of the Philosophy of Right*. §58 Addition (H).

a sense in which both forms of taking possession prior to this one can be regarded as marking the object. "If I seize a thing or give form to it, the ultimate significance is likewise a sign, a sign given to others in order to exclude them and to show that I have placed my will in the thing."³³⁷ It is in this aspect of taking possession, with its mediation through a third thing acknowledged by the relevant parties for its capacity to signify, that we get some sense of the importance that the peculiarly human phenomenon of recognition will play, not only with respect to property, but also with regard to contract. As has been observed by others,

"[w]hat the arbitrary sign does is demonstrate the non-naturalness of the relationship of fully human forms of possession and demonstrate that, here, possession exists only in virtue of its being recognized by another: a sign is a sign of something only in virtue of the fact that it is recognized and acknowledged as such."³³⁸

Sign usage is a human phenomenon that depends on recognition. It is the kind of phenomenon that distinguishes us from other creatures. So whilst it might be possible for my dog to physically seize something, for instance *his* bone, he lacks the capacity to signify that the bone is his property by using a mark or symbol. Such a mark or symbol would further presuppose its acceptance and acknowledgement, by other relevant parties.³³⁹ And this will ultimately be the point which is significant for this thesis, that to be property properly construed the legitimacy of property ownership must be recognized by wills other than simply that of the property claimant or "owner".

Interesting parallels can be teased out here between property and language, some of which will be taken up later with regard to Wittgenstein and rights. Knowles draws out a number of these parallels when he writes that

"[p]roperty is a social relation akin to language in interesting ways; a medium of social transparency, it permits both self-expression and public intelligibility, both self-identification

³³⁷ Ibid.

³³⁸ Redding, *Hegel's Hermeneutics* 173.

³³⁹ Perhaps a dog marking his territory might at first blush seem to represent a counter example here to the notion that sign usage is a peculiarly human phenomenon. However even if we do entertain this as an instance of sign usage for a moment, it is quite a limited one. The sign will always be in the same medium (the dog's urine), it is only generally used on physical territory rather than other types of property (like his bone) and it can only represent a quite blunt message (namely "mine"). The mark a dog leaves is also not exclusive since it does not seem to present any real impediment to other dogs also claiming or marking the same object. But the primary reason why the dog's mark does not actually represent an instance of sign usage is that it is not the kind of claim that can be supported by reasons, i.e. it cannot be given justification by the dog.

and mutual recognition. Like language, a consciousness which determines itself cannot be a private object of introspection."³⁴⁰

Clearly then property for Hegel is no mere by-product of civil society, but something absolutely vital to how we understand ourselves and others in this realm.

With these fundamental notions from property outlined, we can now turn to how, through contract, recognition is further developed in the *Philosophy of Right*. So what is the nature of this link between contract and recognition for Hegel? Very roughly we could think of a series of connections which lead from property, through contract to recognition, with each stage in the series presupposing the next. Thus the series could be thought to begin with property, which presupposes certain relationships between external objects and wills (both individual and common), which in turn presupposes the co-ordinating hand of contract, which then also assumes recognition. If these are the critical connections then, how might this story be filled out for Hegel?

On Hegel's view property can be thought to involve two types of existence, an existence in terms of the world of external objects, where property can simply be regarded as existing for other external objects, and a type of existence in terms of the will where, critically, "its existence for another can only be for the will of another person."³⁴¹ This formulation of property in which "I no longer own property merely by means of a thing and my subjective will, but also by means of another will, and hence within the context of a common will, constitutes the sphere of *contract*."³⁴² Thus a fuller understanding of the nature of property involves appreciating that there is more to property than just the object concerned, combined with the owner's will through the claim "mine". For, "[m]y inner act of will which says that something is mine must also become recognizable by others."³⁴³ This more sophisticated understanding acknowledges the existence of a shared will and assumes the mediating realm of contract. In order for property to function there needs to be a broader system into which claims related to property fit. Property is not just about a particular agent's will being invested in a specific object, but about how such objects and wills sit within a larger framework that they must presuppose. It makes no sense to talk about property in isolation. Perhaps it might be plausible to think of something like physical seizure in such individualistic terms, but as described above this is a very limited and primitive form of one of the three determinations of property, taking possession. Physical seizure is insecure and susceptible to various vagaries which property, properly construed, should avoid. As Williams observes,

³⁴⁰ Knowles, "Hegel on Property and Personality," 57.

³⁴¹ Hegel, *Elements of the Philosophy of Right* §71.

³⁴² *Ibid.*

³⁴³ *Ibid.* §51 Addition (H,G).

"[t]hrough recognition the contingent fact of possession of a particular thing by a particular individual becomes universal. Possession is always particular, while property, as recognized possession has universal and social significance."³⁴⁴

Thus a more fully-fledged understanding of property depends on contract as a means of mediating between the different parties involved in negotiations concerning property, of coordinating and directing the interaction of wills. In contract, broadly construed, there is an "agreement" that governs changes of property ownership. Two parties share a common goal or common will, in the desire to see a transaction take place, though they come at the transaction from opposed perspectives, namely one may be seeking to dispose of some property, and the other to receive that property. Therefore the two parties, though having a common or convergent will, also retain their own individual wills. As Hegel explains it, in disposing of some piece of property

"my will, as externalized, is at the same time *another* will. Hence this moment, in which this necessity of the concept is real, is *the unity* of different wills, which therefore relinquish their difference and distinctiveness. Yet it is also implicitly (at this stage) in this identity of different wills that each of them is and remains a will distinctive for itself and *not identical* with the other."³⁴⁵

So in order for contract to be viable, it requires the existence of individual and common wills, but further than this it also requires recognition. As Hegel explicitly points out "[c]ontract presupposes that the contracting parties *recognize* each other as persons and owners of property".³⁴⁶ In undergoing a contractual exchange there must be an acknowledgement by the parties involved that each is suitably positioned. Positioned in terms of being an intentional and right bearing individual, and one who legitimately has a claim to the property he is attempting to alienate (whether in the form of the property being sold, or the money for purchase being alienated in the transaction). Thus through the social roles of buyer and seller another version of recognition is played out, just as in the *Phenomenology* the interaction between master and slave represented a sketch of recognition. In the *Philosophy of Right* the buyer acknowledges the seller as a legitimate owner by his willingness to buy the seller's offering, and simultaneously and mutually the seller acknowledges the buyer as a legitimate owner and purchaser, by returning his property in exchange for the buyer's property.

³⁴⁴ Williams, *Hegel's Ethics of Recognition* 142.

³⁴⁵ Hegel, *Elements of the Philosophy of Right* §73.

³⁴⁶ *Ibid.*

Recognition is employed by Hegel, in part, to address the issue of the gulf between humans as natural beings susceptible to desires, and the need to think of humans, at the same time, as normative creatures, i.e. ones who follow norms or rules rather than simply their natural inclinations. Here in the *Philosophy of Right* recognition serves a normative function, but it does so via contract in the first portion of the book without making what many would consider to be any overtly moral demands on the parties involved. There is no requirement, for instance, to sacrifice one's own interest for the sake of others, or to forgo anything in the name of morality. In fact in the marketplace the parties involved are motivated not by any form of altruism or broader regard for their fellows, but by openly selfish concerns. Adam Smith was also aware that the kind of acknowledgement which occurs in the marketplace "is not based on any moral regard for the other but rather on self-interest."³⁴⁷ Acknowledging either the buyer or seller is in the interests of the "opposing" party, in order for the transaction (hoped for by both) to proceed. Each acts in an instrumental fashion, simply to further their own ends. It is not the case that their common will is some almost divine convergence or something they have both explicitly agreed to as being in their mutual best interest. The common will is not to be understood in the way a consequentialist, for instance, might regard it as being some common good akin to the utilitarian notion of the greatest happiness for the greatest number. Rather the common will is something both parties desire for their own particular individually motivated reasons, so that contract can be seen to mediate the relationship between self-interested individuals.

In reaching a point from where we can appreciate contract as an instantiation of recognition, we have traversed terrain from property, through individual and common wills, to contract and finally recognition. However it should be noted that the path is not really the linear sequence or step by step process its mode of presentation here might suggest. Instead all these phases coexist and mutually presuppose and depend on each other. And this is surely part of Hegel's point here, that aspects of the functioning of civil society cannot simply be pulled apart and examined in isolation, if a meaningful understanding is to be obtained. Unlike many liberal political theorists, Hegel does not posit a radical dichotomy between the individual and society. Human beings are not otherwise free individuals who rail against the strictures of civil society and who must be lured into joining its ranks. Rather, we only exist as fully human beings within society. Thus rights for Hegel are not something to be construed individualistically, but have their seat in mutual recognition.

As is revealed earlier in this section, what could be called Hegel's "theory of recognition" makes its first appearance in the *Phenomenology*, and aspects of how it appears in this work contribute to the notion of recognition in the later political treatise. In the *Phenomenology's* treatment of the development of self-consciousness (not explored in detail here) and the master slave dialectic,

³⁴⁷ Redding, *Hegel's Hermeneutics* 175.

there is some suggestion of the kind of recognitive loop that will underpin civil society in the *Philosophy of Right*. This recognitive loop is set up when individuals mutually acknowledge each other as intentional or self-conscious beings with rights. This means that for Hegel I can in fact only recognize *myself* as an intentional right bearing being *in another's* recognition of me as such, and in turn others only count as intentional right bearing individuals because I recognize them to be so. It is worth noting here that these points concerning mutual recognition will of course be crucial to the situation of the criminal to be discussed later. Civil society and the legal world just depend on rights and rights depend on recognition. So rights are only rights in fact, if those over whom they purport to hold sway (simultaneously right bearers and right claimants) *recognize* the claims these rights seek to bind with as normative. Further, recognition is not only significant to rights because it represents an acknowledgement of their normative bindingness, but because it bespeaks an important public dimension rights must have. Hegel makes this point explicit in his criticism of Roman law when he says "*Privatrecht* is therefore equally a non-existence and non-recognition of the person; consequently, this situation of right amounts to the utter absence of right. This contradiction is the misery of the Roman world."³⁴⁸ Clearly Hegel does not believe that supposedly private rights represent real rights. Genuine rights require public recognition, and in this respect there are perhaps interesting parallels here between Hegel and Wittgenstein.³⁴⁹ Just as for Wittgenstein there can be no radically private language since language presupposes the use of signs mutually acknowledged to carry certain meanings, so too for Hegel there can be no truly private rights, because genuine rights presuppose public recognition. Thus right and recognition are critically intertwined concepts for Hegel.

As observed earlier, contract is the model on which the framework of rights is fashioned (or at least can be understood) and this connection will now be briefly outlined. Contract, a manifestation of recognition, mediates and controls property transactions in a way analogous to how right guides transactions in the civil realm. And both contract and right depend on recognition. In undergoing a contractual exchange the parties involved must recognize each other as legitimate players and also acknowledge contract itself as legitimate mediator of their wills. When it comes to the parallel with rights then, this model dictates that in the interactions and transactions of civil or legal life there must be an acknowledgement by the parties involved that each is suitably positioned, i.e. positioned as a person - an intentional and right bearing and binding individual. The system of rights must also be mutually accepted as the common framework within which interpersonal legal relations are mediated.

³⁴⁸ Hegel quoted in Williams, *Hegel's Ethics of Recognition* 138.

³⁴⁹ As pointed out by Redding, *Hegel's Hermeneutics* 173. Redding however makes this comparison in the context of a discussion of the form of taking possession known as marking.

Given this sketch touching on the importance of the recognitive underpinnings of civil life, the significance of the rift crime creates for Hegel within this sphere by challenging the status of other right bearers and in fact the whole system of right itself, can perhaps begin to be appreciated.

Now before completing this section on recognition it should also be noted that recognition does appear again later in the *Philosophy of Right* in the context of the family, where it can be seen to underpin recognition's manifestation in the civil realm. As touched on in passing in the earlier section on Hegel and punishment, in the family recognition is much more immediately felt. Family members readily identify with the family, there is a natural affinity and affection there so that the relationship is clearly not an artificial one, nor is it merely instrumental. Recognition's manifestation in the family also helps to answer a criticism Hegel has of Fichte's account of recognition, which he maintains is too legalistic, since recognition in the familial realm does not suffer this defect. Hegel does however admit that such charges of formalism and abstraction apply just as much to his own account of recognition in the civil sphere as they do to Fichte's account. Nonetheless for the purposes of this thesis there is no real need to provide any further detail of this later manifestation of recognition in the family, since it does not bear directly on the matters of central interest here, crime and punishment.

So what conclusions can be drawn from Hegel's theory of recognition as outlined above? It should now be apparent that the principle of recognition is absolutely essential to Hegel's account of civil society and more particularly to what constitutes a legitimate and viable civil society underpinned by right. The principle draws attention to the fact that our normativity, our capacity to follow rules (whether epistemological or legal/ethical) depends on our social existence. Such rules only make sense, in fact, in a public context, where individuals mutually hold each other to account. Claims, whether knowledge claims or rights claims, need to be justified by reference to communally held norms, established and enforced by suitably entitled individuals i.e. those individuals who mutually acknowledge each other and recognize that they have this appropriate status. In the *Phenomenology* Hegel argued that rather than issuing simply from our humanity, self-consciousness must be made in society. That as human beings we possess self-consciousness because we exist not in isolation, but for each other as self-consciousness entities. "Self-consciousness exists in and for itself when, and by the fact that, it so exists for another, that is, it exists only as something acknowledged."³⁵⁰ Thus recognitive acknowledgement establishes at base subjectivity and status, and further, as we discover in the *Philosophy of Right*, it also grounds the legitimacy of normative claims in the legal world, being linked to both contract and personhood. Having undertaken this explication of recognition we can now turn our attention

³⁵⁰ Hegel, *Hegel's Phenomenology of Spirit*. §178.

to the other main pillar of Hegel's account of crime and punishment, in negation and contradiction.

Negation and Contradiction

Hegel's logic is vast, involved and not of the kind taught in elementary logic classes, yet if we are to attempt to obtain a proper understanding of much of his extremely systematic philosophy (at least if this understanding is to be on something like his own terms), we must grapple with this difficult area. Michael Quante, aware of this point, has noted that "[a]ll the central concepts, and the justificatory strength of the dialectical argumentation on which Hegel relies, are derived from logic."³⁵¹ Quante goes on to reaffirm Hartmann's point that without engaging with the logic, "all study of Hegel is nonsense."³⁵² The spheres of crime and punishment present no evident exception here in requiring Hegelian logic for their adequate interpretation. However for the purposes of this thesis it is hoped that it will be possible to explore a small and relatively discreet portion of this vast logical corpus, in order to further explain and understand what he means by crime and punishment. The relevant portion in this context being related primarily to Hegel's views of negation and contradiction.

As observed above, Hegelian logic is very different to contemporary post-Fregean propositional logic. This difference is the result of design however, and not some failure on Hegel's part to properly understand logic, i.e. Hegel is not guilty of "logical illiteracy" as Michael Wolff (supporting Hegel against such charges) has described it.³⁵³ Rather, in developing his logic Hegel was critical of the way in which form had become isolated from content in the Aristotelian based logic of his time (with the emphasis being placed on form only), and he attempts to bridge this gulf in his own system.³⁵⁴ Thus Hegelian logic is not merely concerned with form absent of content. This means that for Hegel the form or structure of statements, propositions etc., both internally and externally in their relations to each other, are not, counter to "traditional" logic, his primary concern. For Hegel content cannot merely be an after-thought inserted into already structured statements, rather consideration of content is just as essential to logic as form. This relates to Hegel's employment of a term based as opposed to a propositional style logic, since on a term based

³⁵¹ Michael Quante, *Hegel's Concept of Action*, trans. Dean Moyar (Cambridge: Cambridge University Press, 2004) 4.

³⁵² Ibid.

³⁵³ Michael Wolff, "On Hegel's Doctrine of Contradiction," *The Owl of Minerva* 31, no. 1 (1999): 1.

³⁵⁴ Redding, *Hegel's Hermeneutics* 167.

account where there are no operators (like negation) which apply externally to entire propositions, the content of individual terms clearly counts.³⁵⁵ And it should be noted that there are obvious parallels here with Kant's view (as discussed in the section of Real Negation) where the development of transcendental logic sees the possibility of the actual content or value of predicates counting.

Hegel's point about the importance of simultaneously considering form and content is at the forefront (as the name suggests) of his criticism of Kantian formalism. In the *Philosophy of Right*, for instance, Hegel considers the categorical imperative to have major shortcomings. He maintains that, counter to what Kant appears to suggest,³⁵⁶ we in fact need to have already determined principles with content, before it is possible to know if an act or a possible act violates that principle and evokes a contradiction. As he observes,

"if it is already established and presupposed that property and human life should exist and be respected, then it is a contradiction to commit theft or murder; a contradiction must be a contradiction with something, that is, with a content which is already fundamentally present as an established principle. Only to a principle of this kind does an action stand in a relation of agreement or contradiction."³⁵⁷

Hegel is clearly critical of the way Kant thinks that we can determine the rightness or wrongness of actions by appeal to the form of the categorical imperative alone. Hegel just regards form and content as inseparable with respect to logic. And further, in making these two aspects considered in unison integral to his logic, he seems to be trying to get at a far more fundamental or basic sense of what logical terms like negation and contradiction really mean. This sense is bound up directly with objects and processes themselves, not merely the linguistic devices and structures used to describe them.

Another important point of orientation for the discussion here is that Hegel (like Kant as discussed in the previous Chapter), wants to reject the view of negation and contradiction found in Leibniz. In the *Science of Logic* Hegel illustrates some of the shortcomings of the Leibnizian

³⁵⁵ As noted earlier Fred Sommers has worked up a term based logic, while Richard Sylvan has also recently discussed the advantages of a term based account. Richard Sylvan, "What Is That Item Designated Negation?," in *What Is Negation?*, ed. Dov M. Gabbay and Heinrich Wansing (Dordrecht, Boston, London: Kluwer Academic Publishers, 1999). For an excellent overview of term logic and its history see Laurence R. Horn, *A Natural History of Negation* (Chicago and London: The University of Chicago Press, 1989).

³⁵⁶ The choice of "appears" here is deliberate since recent work on Kant's moral anthropology challenges aspects of Hegel's reading.

³⁵⁷ Hegel, *Elements of the Philosophy of Right* §135.

view by discussing the ontological proof for the existence of God. According to Hegel, the metaphysical idea of God underpinning this argument was that

“God was defined as the sum-total of all realities, and of this sum-total it was said that no contradiction was contained in it, that none of the realities cancelled any other; for a reality is to be taken only as a perfection, as an *affirmative* being which contains no negation.

Hence the realities are not opposed to one another and do not contradict one another.”³⁵⁸ God, for someone like Leibniz, can only be comprised of positive determinations, because God contains no contradictions, only perfections. The picture of reality which emerges from this view is that reality is what “is assumed to survive when all negation has been thought away”.³⁵⁹ Part of what Leibniz presupposes here (problematically for Hegel) is that in a contradiction involving two propositions, there can be only one positive determination. The problematic component of the judgment, what causes the contradiction, must actually be construed as a lack of determination, a limitation, rather than any positive but opposed determination. The difficulty that arises on Hegel’s view is that by suggesting that reality or God contains no negation, Leibniz has effectively removed the possibility of all determinations. This is because, for Hegel, if something is to be determined, it requires a contrast class from which it can be distinguished, i.e. it requires its negation. As he says reality “contains the moment of the negative and is through this alone the determinate being that it is.”³⁶⁰ For instance, in order for it to be meaningful to say “this thing is purple” the class of non-purple things is required. If we lack this class, how are we to pin down what purple is? If everything were purple it would not be possible to meaningfully talk about purple, as there would be no relevant phenomena to distinguish it from. Thus, for Hegel, as opposed to Leibniz, negation is not a lack of determination or absence of reality, there can be negations which have a positive existence and these negations are in fact required in order to define other positive properties or phenomena. The notion that for Hegel, unlike for Leibniz (or for that matter Kant), it is possible for objects actually to embody contradictions, will be expanded on later in this section.

In spite of their differences over contradiction (which will become more apparent shortly) in Hegel’s treatment of negation there are echoes of Kant’s position on real negation. For instance unlike Leibniz, both philosophers share the idea that the two sides of opposition are in a sense positive, it is only by virtue of their relationship and an arbitrary choice, that one is designated as positive and the other negative. As Hegel explains “although one of the determinatenesses of positive and negative belongs to each side, they can be changed round, and each side is of such

³⁵⁸ Hegel, *Hegel's Science of Logic* 112.

³⁵⁹ Ibid.

³⁶⁰ Ibid.

a kind that it can be taken equally well as positive as negative.”³⁶¹ “[E]ach of them [positive and negative] is on its own account only in virtue of *not being the other one*, each *shines* within the other, and is only insofar as the other is.... each has its own determination only in its relation to the other: it is only inwardly reflected insofar as it is reflected into the other, and the other likewise; thus each is the other’s *own other*.”³⁶² Neither side is in some absolute sense positive or negative “*in themselves* apart from the relation to other”.³⁶³ “[E]ach is simply an opposite, yet, on the other hand, each side exists indifferently on its own, and it does not matter which of the two opposites is regarded as positive or negative.”³⁶⁴ In addition to their obvious similarity over the basic idea of negation here, the examples Hegel uses to illustrate his position in the *Science of Logic* also bear a striking resemblance to those offered in Kant’s *Attempt to Introduce the Concept of Negative Magnitudes into Philosophy*. Both Hegel and Kant discuss mathematical sign usage, economic relationships of credit and debt, light and dark, virtue and vice, evil, and journey’s in opposed directions, to demonstrate how they construe negation.

However, Kant and Hegel also diverge in certain respects when it comes to their accounts of negation. While they both identify two forms of negation (real and logical for Kant, and negation and contradiction for Hegel) they differ as to how to ground these notions. Kant (after criticising the manner in which Leibniz had intellectualised appearances) avoids framing real negation in conceptual terms. Instead Kant appeals to the distinction between intuitions and concepts to account for real and logical negation respectively, while for Hegel negation and contradiction are re-conceptualised and thus dealt with in a fashion internal to his logic. Hegel explains negation by noting, as Wolff argues, that of “two determinations that differ in content stand[ing] in relation to a substrate of logical reflection [they] become, by virtue of this relation, “opposed” determinations.”³⁶⁵ Thus as Hegel puts it, “it is a third point of view outside [the two determinations] that makes one positive and the other negative.”³⁶⁶ Hegel’s point (and Wolff’s explanation) may be clarified here by noting (as Wolff does) that this mediating third point of view, this substrate of logical reflection, could be considered to have as a special case, absolute value. If we envisage a case in which there are two opposed determinations (+a and –a), then their absolute value “is the “bearer” of two quantitative determinations, +a and –a, that one must presuppose in order to regard both determinations as opposite, that is, as positive and

³⁶¹ Ibid. 426.

³⁶² Hegel, *The Encyclopaedia Logic* §119.

³⁶³ Hegel, *Hegel's Science of Logic* 427.

³⁶⁴ Ibid. 428.

³⁶⁵ Wolff, "On Hegel's Doctrine of Contradiction," 14.

³⁶⁶ Hegel, *Hegel's Science of Logic* 428.

negative.”³⁶⁷ Their absolute value is the common ground, or as Hegel says “the dead something”,³⁶⁸ which the two determinations share, and against which they can be seen as counterpoised. It is “the unity of reflection into which the opposition withdraws as into ground.”³⁶⁹

Hegel’s discussion of contradiction builds on his view of negation. In fact, contradiction is simply a special type of negation. His take on contradiction here differs markedly from that of many previous philosophers and Hegel indeed recognizes that his view is unlike the more conventional one generally espoused. He explicitly comments on the low regard with which contradiction is held within philosophy, stating that “it is one of the fundamental prejudices of logic as hitherto understood and of ordinary thinking, that contradiction is not so characteristically essential and immanent a determination as identity”.³⁷⁰ Thus unlike many other philosophers (both before him and since) Hegel embraces contradiction rather than attempting to disavow it or regard it as something undesirable with “negative” connotations. As he states in the *Science of Logic* “it is not... a blemish, an imperfection or a defect in something if a contradiction can be pointed out in it.”³⁷¹ In fact he makes the striking claim that contradiction is actually manifested in the empirical world, it exists in objects and their relations. He suggests that those who maintain that contradiction cannot even be thought hold a “ridiculous” position. “What is correct in this assertion is just that contradiction is not all there is to it, and that contradiction sublates itself by its own doing.”³⁷² Contradiction does not remain but is resolved. Now in addition to surely differing here from the bulk of philosophers throughout history in maintaining that contradiction can have an empirical existence, Hegel’s view is also in contrast to that held by Kant. In his *Negative Magnitudes* paper, Kant discusses not only real negation, but also what he calls “logical negation”. Logical negation is the form of opposition which involves contradiction, whereby something is both asserted and denied of the same thing at the same time. However on Kant’s view the possible “outcomes” of logical negation cannot genuinely exist, they are in effect nullities or a nonsense. Kant gives examples like a body which is simultaneously moving and at rest, or a spherical cube, neither of which can be instantiated in the world. And in the *Critique of Pure Reason* Kant notes that it is “a necessary logical condition that a concept of the possible must not contain any contradiction.”³⁷³ For something to even be a possible object of experience for Kant it

³⁶⁷ Wolff, "On Hegel's Doctrine of Contradiction," 15.

³⁶⁸ Hegel, *Hegel's Science of Logic* 439.

³⁶⁹ Ibid.

³⁷⁰ Ibid.

³⁷¹ Ibid. 442.

³⁷² Hegel, *The Encyclopaedia Logic* §119 Addition 2.

³⁷³ Kant, *Critique of Pure Reason* B268/A20.

must not involve contradiction. Hegel on the other hand holds that contradiction can have an empirical existence.

Not only does Hegel maintain that contradiction can actually exist in the world, he ascribes to it a vital role in change and life. “[C]ontradiction is the root of all movement and vitality; it is only in so far as something has a contradiction within it that it moves, has an urge and activity.”³⁷⁴ And his treatment of contradiction here puts an interesting spin on an old problem in philosophy to do with things in motion. He states that

“[s]omething moves, not because at one moment it is here and at another there, but because at one and the same moment it is here and not here, because in this ‘here’, it at once is and is not. The ancient dialecticians must be granted the contradictions that they pointed out in motion; but it does not follow that therefore there is no motion, but on the contrary, that motion is *existent* contradiction itself.”³⁷⁵

Thus according to Hegel the ancients correctly diagnosed what motion involves (i.e. contradiction), but failed to draw the correct inference from such a diagnosis. They inferred that motion does not exist, rather than simply admitting that it was extant contradiction.

So contradiction is for Hegel both a real and existing phenomenon extant in the empirical world and one that is absolutely critical to change and development. But what in fact is contradiction for Hegel, what does it actually mean for him? Simply put contradiction is a higher level opposition than negation. As Wolff explains it, contradiction “is a relation between one of two opposed determinations and the substrate of logical reflection with regard to which the determinations are mutually opposed”,³⁷⁶ that is, contradiction is a discrepancy or opposition between one of the two sides of a negation and what that negation is grounded in. So for instance if the opposition at stake were between two journeys, one of P kms east and the other of P kms west and the substrate of logical reflection were distance itself, then a contradiction could be invoked if there were an opposition between one of the two distances and distance itself. Contradiction can in this light be seen as undermining or overturning something on which it is actually critical dependent.

³⁷⁴ Hegel, *Hegel's Science of Logic* 439.

³⁷⁵ *Ibid.* 440.

³⁷⁶ Wolff, "On Hegel's Doctrine of Contradiction," 18.

Crime and Punishment Revisited

Following this excursion into Hegel's theory of recognition and aspects of his logic in negation and contradiction, we can return now to the main purpose of this excursion, namely applying these notions to enhancing our understanding of his theories of crime and punishment.

Beginning with Hegel's view of crime, there were a number of oddities identified that seemed to require further explanation in order to make his account tenable. In the first instance the question as to how it was possible to describe actual events in the world as negations or in fact contradictions arose. The issue of drawing analogies between forms of judgment and types of wrongdoing seemed to require further justification, and running through the whole section on crime, was the question of the nature of the theory of right to which Hegel was appealing. An attempt will now be made, using as resources the exploration of Hegel's theory of recognition and his logic, to explain these apparently problematic phenomena.

In sketching Hegel's view of crime it was revealed that this form of wrongdoing involves for him three negations – of the victim, of right itself, and of the criminal. Now as has been made clear in the foregoing discussion of Hegel's logic, what Hegel means by negation is not what contemporary logicians mean by negation. Whilst it would be odd in the extreme for a logician to talk about an act as a negation, for Hegel it is entirely in keeping with his approach to logic. Contemporary logicians generally limit themselves to consideration of propositions, their internal structure and relationships, and to some extent how these propositions relate to the empirical world in terms of being borne out or not. Negation simply deals with propositions or parts of propositions that are not the case - it concerns the denial of something. From this perspective then it is perhaps not surprising that Hegel's approach frequently appears bizarre. For Hegel, however, (as outlined earlier) negation concerns form *and* content, it is a kind of embedded notion which can reside or inhere in processes, objects and concepts themselves, rather than simply dealing at the level of statements about processes, objects and so on. Thus given that Hegel's view differs so markedly from that of most logicians it seems reasonable not to dismiss it out of hand based on its difference alone. Hegelian negation as it bears on issues to do with crime needs to be assessed on its own terms.

Applying Hegel's account of negation to his theory of rights and recognition can further elucidate his notion of crime and show that he is not making perverse metaphysical claims here. Clearly he does not consider that he is making a claim of the kind that crime is somehow not a genuine event because it is a negation. As he explicitly states in the Philosophy of Right “[w]hen

an infringement of right as right occurs, it does have a *positive external existence*, but this existence *within itself* is null and void."³⁷⁷ Crime actually occurs, its negation is not a negation of existence, rather it can be explained in terms of the three types of negation it invokes, or negation as it pertains to three different realms.

In the first instance, through crime the right of a particular individual to be treated as a free and autonomous person is effectively negated, that is, crime results in the victim having her rights actively overturned or ignored. She is treated by the criminal (incorrectly) as if she had no claims to right, as if she stood outside the legitimate cognitive structures of civil society. This is the negation of the victim's rights which occurs in crime.

Secondly, Hegel suggests that the very process and concept of crime is bound up with and contains negation – the negation of right. And as has been suggested earlier this is perhaps the most pressing negation invoked by crime. Via the criminal act the denial of right inflicted on the victim is writ large. Effectively the criminal has gone beyond the mere denial of a particular individual's rights in a specific instance, and shown a flagrant disregard for rights more broadly, for the very principle of right itself. In refusing to acknowledge the status and rights of an individual, the very cognitive basis of civil society is challenged by the criminal's act. Crime is not a discrete negation of the individual and her rights but involves a rather more substantial negation of right, which has significant implications for law and society as a whole.

This explanation of negation as it applies to right here can segue nicely into a brief outline of how crime connects to a particular form of judgment for Hegel, namely the negative infinite form. Again it no doubt it sounds odd to many contemporary ears to draw a comparison between a judgment type and an act in the world. For Hegel, however, in making a connection between judgments and crime, a better understanding of the latter may be obtained. Hegel is suggesting that there might be some useful comparison between what occurs in a judgment, i.e. the kind of relationships involved, and the kind of phenomenon something like a deliberate criminal act represents. As has been discussed earlier, in a negative infinite judgment there is a kind of truth posited but there is also a kind of absurdity. For instance, while it is undoubtedly the case that the following negations hold - "the rose is not an elephant", and "the understanding is not a table", these judgments are peculiar because they attempt to draw together otherwise disparate elements or realms. "Table" is not the kind of predicate which could ever be meaningfully ascribed to the understanding, and thus it is no surprise that it can be negated in relation to the understanding. However we might well question why a judgment would even attempt to bring such subjects and predicates together, it seems as though the whole notion of a judgment being

³⁷⁷ Hegel, *Elements of the Philosophy of Right* §97.

meaningful breaks down in cases such as these. Now in linking crime to this form of judgment Hegel is pointing to the manner in which crime not only has infinite scope because it challenges right as such rather than just a particular right, but the way in which there is a truth involved (the criminal act has occurred), but that the act makes no sense since it negates its proper universal sphere, that of ethical life.

Finally with respect to the negations crime invokes, Hegel maintains that the criminal also negates his own right. Such an apparently odd sounding claim can be made sense of in the context of the recognitive meaning of the criminal act. By his act, which fails to properly recognize and acknowledge another as right bearing, the criminal effectively cuts himself out of, or off from, the recognitive loop which underpins civil society. Thus this form of wrongdoing can be thought to initiate a disruptive change in the recognitive relations which surround and impinge on the wrongdoer. By committing a crime the criminal has refused to acknowledge (and in fact has actively undermined) the right of another and, by extension, has violated the more general principle of right itself and by implication his own claim to right and recognition. So the point Hegel is making by this positing of crime's three forms of negation is not that crime is some sort of non-act or something which does not genuinely exist or occur in the empirical world, but rather that crime is simply a negation or an effective denial of right and rights on three fronts.

Although not directly concerned with the negation of the criminal's right, another important dimension to crime related to the criminal's perspective, is the notion that crime must involve what Hegel calls "the right of knowledge".³⁷⁸ As Hegel explains "[i]t is.... the right of the will to recognize as its *action*, and to accept *responsibility* for, only those aspects of its *deed* which it knew to be presupposed within its end, and which were present in its *purpose*. – I can be made *accountable* for a deed only if *my will was responsible* for it".³⁷⁹ And as Quante argues, Hegel here prefigures both Donald Davidson and Elizabeth Anscombe.³⁸⁰ Thus Hegel distinguishes between different takes on or descriptions of an external act, and it is only those takes in which the criminal recognizes himself in the description, for which he can be held to account. There are different ways of describing the same event in the world, some of which will match up with the criminal's purpose or intent and some of which will not. So in the example Hegel uses, parricide cannot be imputed to Oedipus because he would not have recognized his act in such a description. Oedipus did not conceive the killing in these terms since he did not know that it was his father whom he slay.³⁸¹ So Hegel has the wherewithal here to fill out a dimension to crime

³⁷⁸ Ibid.

³⁷⁹ Ibid.

³⁸⁰ Quante, *Hegel's Concept of Action* 3.

³⁸¹ Hegel, *Elements of the Philosophy of Right*. §117 Addition (H).

which factors in what the criminal should be held accountable for. And further, the criminal's identification with a particular description of his act also facilitates another way of understanding the level at which the annulment of crime takes place, as will be discussed shortly.

We can now turn to Hegel's view that not only does crime involve negation, but contradiction, and that the criminal's will is null and void in itself. In a sense these claims are similar to the foregoing ones about negation and the negative infinite judgment, though they seem to have been the target of more direct comment and criticism in the literature than these other assertions by Hegel. And perhaps this is not surprising, as it does seem odd to suggest that an actual event in the empirical world could possibly embody a contradiction. However as the discussion of Hegel's logic revealed, he is not troubled by the notion that contradictions can occur.³⁸² Recalling that for Hegel contradiction is invoked when one of the two sides of a negation and what that negation is grounded in are opposed, we can now apply this definition of contradiction to the example of criminal acts. In crime the criminal wills the negation of a particular individual's rights. This quite specific negation is however grounded in a more general notion of right itself, a universal notion of right. And this is where the contradiction comes into play, because it is contradictory on Hegel's account when this opposition is set up between the particular will of the criminal and the universal notion of right on which this will depends. In spite of depending on this universal grounding, the individual will goes against the universal, and thereby undermines and overturns the very basis on which it exists. Though not referring specifically to the contradiction involved, Lewis Hinchman makes the point well when he states that for Hegel "the criminal is someone who denies his own status as a person in the act of violating the personality of another. To be a person is to be the incumbent of a *universal* role, but the criminal sees his act in purely particular terms."³⁸³ Likewise, though this time observing the Hegelian contradiction, Reyburn notes that "the notion of crime contradicts itself: it cancels that in virtue of which it is".³⁸⁴ Thus by failing to recognize the claims of a legitimate rights holder through his criminal act, the criminal effectively undermines the whole system of recognition on which he in fact depends and makes a

³⁸² Although here in the normative realm it can perhaps seem more plausible than when he discusses the existence of contradiction in the empirical world. In the normative world there can clearly and un-problematically be a discrepancy (labelled a contradiction) between the world as it ought to be and the world as it is, whereas it is not as clear that such a relationship can exist in the empirical realm.

³⁸³ Lewis P. Hinchman, "Hegel's Theory of Crime and Punishment," *The Review of Politics* 44, no. 4 (1982): 541-42.

³⁸⁴ Reyburn, *The Ethical Theory of Hegel* 148.

claim which is always destined to fail. In Reyburn's words the criminal's claim here is "intrinsically void".³⁸⁵

Perhaps another way of approaching what Hegel means by contradiction in the context of crime is to draw a comparison between the structure of the criminal act and the structure of the perceptual model of cognition which appears in the *Phenomenology*. As observed in an earlier footnote, on the perceptual model objects are regarded as mediated through perception, and comprised of an underlying substrate in which a variety of properties can inhere, both essential and non-essential. Non-essential properties might include the redness of a rose, its specific perfume and so on, while on the other hand colour and scent more generally could be construed as essential properties. Now contradiction arises when these essential properties are somehow denied, while a positive claim is simultaneously being made about them. So for instance in the case of the rose a contradiction would be invoked if it was being claimed that the rose had a sweet aroma (an inessential property) in conjunction with some kind of denial that roses were scented (an essential property). Now if we return to consideration of contradiction with respect to crime, and again compare crime to civil wrong, then a civil dispute is like a case in which non-essential properties are up for grabs, compared to one in which essential properties are challenged. In a civil dispute I might disagree about the ownership of a particular book and so the predicate "mine" (an inessential or contingent property of the book) could be seen as requiring determination. The book might turn out to be "yours" not "mine". However, in the case of crime it is not some mere inessential property of the book that is in dispute, rather it is an essential or inherent property of the book which is challenged. The criminal through his act effectively denies that the book is part of the legitimate system of property. Its essential status and meaning as property, as opposed to its particular ownership, is brought into doubt and this again represents the heart of the contradiction. The very basis of particular rights (such as property rights in the example given above) is threatened by crime, and thus a Hegelian contradiction ensues.

Many commentators have struggled to understand Hegel on contradiction, surely in part because they fail to probe the Hegelian meaning of this term. Cooper, responding to Reyburn, seems to conclude that for Reyburn at least Hegel means to suggest that crime is a piece of behaviour that exhibits an inconsistency between crime as an act of a free man and crime as an attack on free men. And as has been revealed in previous paragraphs this is basically where the contradiction is located for Hegel – in an act that depends for its grounding on a system of right and freedom which the act itself contravenes. However, Cooper appears to trivialise or at least downplay the nature of this contradiction, referring to it as simply inconsistency and wondering how it could possibly license punishment. As he states, "[n]o doubt inconsistent behaviour should

³⁸⁵ Ibid. 149.

be brought to the attention of the agent – this might be the job of a psychoanalyst – but I do not see how inconsistency *per se* merits punishment.”³⁸⁶ In suggesting that a psychoanalyst rather than a gaoler might be of assistance here, Cooper is surely trading on a sense of inconsistency that implies a discrepancy between an agent’s intentions and actual behaviour, or perhaps between behaviour and social norms, which might be closer to Hegel’s meaning. It is difficult to know what Cooper actually intends here given his relatively brief and inclusive thoughts, however regardless of the details, an Hegelian contradiction surely runs deeper than inconsistency, and such terminology underplays the significance of the criminal’s act.

Just as the manner in which Hegel has outlined his theory of crime has led to many dismissing his view, the same holds for his theory of punishment. Thus if his view is to be taken seriously amongst a broader audience, then a number of the more seemingly problematic points he makes need to be addressed here just as they have been in the case of crime. In the first instance the claim that punishment can annul the crime is one that has attracted a great deal of criticism in the literature. After all how is it possible (other than by some strange metaphysical force) to overturn events which have undoubtedly occurred in the world? How can punishment serve to expunge crime’s very existence? It seems that part of the confusion created here, particularly in English speaking literature, hangs around the very one dimensional translation of the more multifaceted German word “*Aufhebung*” into simply “annul”. As Dudley Knowles has observed, running the argument that annulling crime implies that the crime never took place “trades on ordinary language associations which are remote from the German text. It has no critical purchase on Hegel’s discussion, since the term *Aufhebung* which Hegel uses in this context is much richer than ‘annulment’ as found in common usage.”³⁸⁷ Jami Anderson has made a similar point describing the translation of *aufhebung* as annulment “an unfortunate choice of words”.³⁸⁸ *Aufhebung* means “preserving” as well as “repealing”, “raising” as well as “abolishing”, and even “bringing out”. Thus the way in which *aufhebung* is generally rendered in the literature on punishment as imply “annul” misses this level of sophistication. Further, this very limited translation of *aufhebung* has, it seems, contributed to critics often construing it to be targeted at just one aspect of the crime, namely the very existence of the criminal act, with all the attendant oddities such a targeting has led to. Hegel does think punishment can annul crime but not via some magic which changes the physical reality of the act having occurred, altering its very existence. Rather punishment serves to annul crime on a different level, a level which is concerned with crime’s implications and its broader meaning. Thus punishment takes up the role of overturning or negating the three forms of negation invoked by crime, or to use Anderson’s

³⁸⁶ Cooper, "Hegel's Theory of Punishment," 160-61.

³⁸⁷ Knowles, *Routledge Philosophy Guidebook to Hegel and the Philosophy of Right* 143.

³⁸⁸ Anderson, "Annulment Retributivism: A Hegelian Theory of Punishment," 381.

words “it makes vivid the facts that the victim has rights, that the criminal committed a wrong, and that society takes the victim’s rights seriously enough to invalidate the criminal’s wrong.”³⁸⁹ So in a manner reminiscent of Kant’s characterization of punishment as a “*hindering of a hindrance to freedom*”,³⁹⁰ for Hegel punishment can be considered to be a negation of a negation. Through punishment, the threefold negation outlined earlier is nullified.

At the level of what has occurred to the victim, punishment serves to acknowledge the harm done in terms of the effective denial of rights and recognitive standing by the criminal. The victim’s rights and standing, ignored in the perpetration of crime, are reaffirmed as counting by the act of punishment. The criminal was wrong to ignore the victim’s standing, to regard her as a mere object for his own purposes rather than a subject deserving of mutual recognition and rights, and this wrong is recognized and made right through punishment. So punishment annuls crime in this respect by reasserting the victim’s legitimate claim to be recognized as a right bearing individual. Cooper, making a similar point, puts a slightly different gloss on how punishment annuls crime with respect to the victim here, by focusing on how punishment illustrates that the victim’s rights were never actually damaged by the criminal. As he writes

“there never was such a thing as an injury to the implicit will [of the victim]. The crime was, in intention, a demonstration that the victim had no rights. But the victim did have these rights, so there never was such a thing as the demonstration that [s]he did not have them. So, to speak of annulling the crime is to speak of whatever it is that establishes that the victim did have those rights which were implicitly denied by the criminal. What establishes this, of course, is punishment.”³⁹¹

The necessity of punishment in the face of crime rather than other possible measures sometimes suggested (such as compensation or restitution) becomes apparent when it comes to annulling the more substantial negation instigated by crime, the negation of the very principle of right itself. Punishment is demanded in the face of the threat posed to the entire recognitive structure of civil society by the criminal’s act. If such an act were allowed to stand, it would have the potential to effectively extinguish right, to bring down society’s whole recognitive framework. Punishment is an essential part of a process to re-establish and re-acknowledge the validity of right. So again Hegel’s claim here that punishment annuls crime can surely be construed as a quite plausible one. It is not the act itself which is revoked by punishment, but instead its significance and potential impact are overturned by punitive measures. According to Hegel the

³⁸⁹ Ibid.

³⁹⁰ Immanuel Kant, *The Metaphysics of Morals*, trans. Mary Gregor Introduction and notes (Cambridge and New York: Cambridge University Press, 1991) 57.

³⁹¹ Cooper, "Hegel's Theory of Punishment," 164.

slate is wiped clean by punishment, crime with all its negative implications is effectively neutralized, the negation of right is brought to naught by the negation of punishment, so that wrong is sublated and right reaffirmed when punishment is undertaken. We can also understand what Hegel means here by reference to the earlier discussion of the importance to notions of criminal responsibility, of how a crime is described. For instance the act of tapping my nose at an auction could be described in a number of different ways, entailing different implications. One way in which it might be labelled is as "making a bid", and if I recognize my act in this description then I should take responsibility for that act. And as noted above this is the level at which the claim that punishment annuls crime is pitched. It is the implications of the crime which are removed by punishment, the implications for right of a certain act described in a particular way are what punishment attacks. Returning to the nose touching example, imagine that I am not a registered bidder. Given recent law changes in New South Wales regarding property auctions, my bid would not count as I would lack the requisite standing to make a genuine bid. So just as my nose tapping would not constitute a legitimate bid, so too the criminal's denial of right also fails because in the circumstances it is not recognized as a licensed move in the game of rights. The tangible expression of this failure being punishment. This of course parallels the important conceptual role punishment plays for Kant, on whose view the construction of justice lays bare what normativity in the state involves. Similarly for Hegel punishment by its nature exhibits what rights are all about.

This is perhaps a pertinent point to take a moment to expand on the claim made here that punishment restores right, thereby annulling the negation of right itself. Critics of Hegel have wondered both how it is possible to restore right and why this should not simply be regarded as a consequentialist goal. Questions such as these are important, in part, because they go to the very heart of the idealist underpinnings of Hegel's enterprise, of how an idealist conceives of rights. Part of what is at issue has to do with the nature of rights ontologically, and how they can be affirmed and denied. The existence of rights is importantly different to the existence of tables and chairs and therefore the existence of rights as opposed to tables and chairs requires a different kind of justification. Rights are claims that only exist by virtue of their recognition by others, i.e. they must exist within a social context, they have no larger kind of existence independently of people and their interactions. There can still be real and objective facts of the matter about rights (for instance there can be a real and objective fact about the ownership of a particular item i.e. about property rights), but these facts would not exist or even make sense if it were not for people claiming and granting such rights. So rights claims have as their response either an acknowledgement that they are valid or a rejection of them as invalid and not holding. As has been noted earlier, the criminal disrupts this system of rights recognition both by ignoring the legitimate rights claims of the victim and by himself making claims which are invalid, i.e. not

recognized as legitimate by his fellow citizens. Now as observed in the section dealing with the negations invoked by crime, these injuries to right cannot be perceived in the same way as injuries (or more properly “damage”) to say, tables and chairs, can be perceived. Damage to right is more abstract than damage to physical items and so must be ameliorated in a different way too. The damage to right only becomes apparent through the criminal’s will made manifest in her behaviour, i.e. through her treatment of the victim. And the only way to meet this kind of challenge is also by impacting on the criminal’s will through punishment. As Hegel notes, “an injury to the [criminal’s particular will] as an existent will is the cancellation of the crime, *which would otherwise be regarded as valid*, and the restoration of right.”³⁹² So as has been argued in many different ways at different stages of this Chapter, the attack on right which crime represents must be remedied, and this remedy comes in the form of punishment. Punishment reaffirms right. Punishment is the way of showing to the victim, criminal and society, that rights should be, and are, taken seriously within society. Punishment restores the status quo. In the absence of this kind of measure which seeks to amend a rift in rights, in what sense could rights be thought to be genuine? If rights only exist as recognized and they are to have meaning and force within society, then violations need to be acknowledged and attended to, for as one of the Hotho additions makes clear “it would be impossible for society to leave a crime unpunished – since the crime would then be posited as right”.³⁹³ If challenges to right are not picked out and acted upon then in what sense are the rights they represent real? Knowles nicely reinforces the kind of point Hegel is making here with a number of pertinent examples, he writes

“if technical violations of the law go openly unpunished, as was the case in Scotland before the law on consensual homosexual acts was brought into line with the reforms effected in English law, we may judge that no wrong is committed. Where prosecution is capricious and arbitrary – this is the early history of boxing in Britain; sometimes the magistrates stopped the fights, sometimes they sat in the front row – the law is an ass because the right is indeterminate.”³⁹⁴

Such inconsistency in the application of law would lead a citizen quite reasonably to wonder where right truly lay in these cases. So given the nature of rights for Hegel, the claim that punishment restores right is surely a plausible one that can be seen as a vital part of the effective operation of right and law within civil society.

We can now turn to the second complaint identified in the preceding paragraph, namely that the restoration of rights thesis represents some form of consequentialism (which obviously sits uncomfortably alongside the notion that Hegel is a retributivist). Again it is worth noting that his

³⁹² Hegel, *Elements of the Philosophy of Right* §99.

³⁹³ *Ibid.* §218 Addition (H).

³⁹⁴ Knowles, *Routledge Philosophy Guidebook to Hegel and the Philosophy of Right* 146.

line of criticism parallels the one run against Kant and discussed in the last Chapter. The argument goes that if punishment is intended to restore right, then this appears to be an attempt to obtain a certain favourable social end or consequence, namely recognition within society that right is valid. And why would the state try to bring about this social end, other than to prevent crime and make it apparent to all citizens that their rights are secure? Again, these goals being consequentialist rather than retributivist ones. Knowles articulates a similar complaint, however in his case homing in on how this restoration of rights thesis plays to the criminal.³⁹⁵ As is spelt out in Chapter Two, the retributivist generally frames the justification of punishment to the criminal in particular terms. The rationale most frequently offered up to justify legal punishment is to mete out to the criminal his desert, which derives directly from his crime. But how can punishment that aims to obtain the socially useful goal of respect for rights be justified to the criminal? Isn't this simply using the criminal's punishment as a way of achieving goals other than justice for the criminal? In response to all of these concerns it can be noted that in developing his theory of punishment Hegel is not primarily motivated by a desire to achieve the likely laudable goal of the public recognition of the validity of rights, this is just not his aim. Hegel's concern with the restoration of right is much more fundamental and essential than this. After all, the link between the infringement of rights and their rehabilitation is not for Hegel a means ends one, but rather is a conceptual link. As one of the Hotho additions to the *Philosophy of Right* makes clear, punishment is "merely a manifestation of the crime, i.e. it is one half which is necessarily presupposed by the other".³⁹⁶ The sense of necessity here being logical necessity, and the point being that punishment is logically necessary for the conceptual existence of crime and vice versa. The gist of this point was first brought out in the section on negation and contradiction, where it was argued that in order for something to be determined for Hegel it actually requires a contrast class to distinguish it from, namely it requires the existence of its own negation. So crime requires its negation in punishment, and similarly right requires its negation in wrong. Punishment exposes the flawed logical structure of the criminal act and shows it for what it is – self contradictory and nugatory.

Now for Hegel certain behaviour is also essential to support this conceptual distinction in practice. Given how Hegel construes rights within the recognitive framework of civil society, restoring damaged rights is essential conceptually and via actions which support this conceptual distinction. It is just the case that if right and in turn wrong and crime are to be meaningful or to even exist, then there must be an adequate and appropriate response to both valid and invalid rights claims. If "right" and "wrong" claims alike were met with indifferent responses, then what would distinguish the two phenomena, how could they be coherently separated? On the Hegelian

³⁹⁵ Ibid. 148.

³⁹⁶ Hegel, *Elements of the Philosophy of Right* §101 Addition (H).

system of recognition, there simply cannot be a meaningful notion of right in the absence of an appropriate response to failures of recognition. Cooper appreciates this point in his interpretation of Hegel's theory of punishment and argues that for Hegel rights can be considered to be performatees, that is, to require "rule-governed performance or procedures for their existence".³⁹⁷ Such rights "logically depend for their felicitous existence upon the punishment of those who infringe them."³⁹⁸ Similarly (as outlined earlier) Tunick can be interpreted to be making this kind of point when he talks about punishment as forward looking, since "we punish to avoid a future where crimes no longer are regarded as wrong".³⁹⁹ The restoration of right is not a consequentially driven empirically motivated exercise, but an essential part of defining and understanding what rights really are conceptually and in practice.

Following this excursion into aspects of the role punishment plays at a societal level we can return now to consideration of the forms of annulment invoked by punishment, the last of which relates to the criminal himself. Punishment has a role to play in overturning the wrong the criminal commits against himself in the act of punishment, and here again sense can be made of the notion that punishment annuls crime. In failing properly to recognize and acknowledge another as right bearing, the criminal's act embodied an effective denial of his own right, a self contradiction in fact, because through this act the criminal cuts himself out of, or off from, the recognitive loop which underpins civil society. He deals himself out of the game by initiating a disruptive change in the recognitive relations on which he himself depends for his status as a right bearing individual. The point here is similar to the one Kant makes in explaining the principle of equality with respect to stealing (discussed in the last Chapter) where the criminal has his act turned back upon himself. Kant writes "[w]hoever steals makes the property of everyone else insecure and therefore deprives himself (by the principle of retribution) of security in any possible property."⁴⁰⁰ Now according to how Hegel sees the matter, through his punishment the criminal can come to a deeper understanding of his situation. This is facilitated in part by the judge who is able to present and reformulate his situation to him in a direct manner. As has been pointed out by others, "[t]he criminal's first attitude toward apprehension and punishment may have been to see these as thwarting his satisfaction, but he is now able to find in the punishment the "satisfaction of justice" itself and the "enactment of what is his", his recognition as a legal agent."⁴⁰¹ The judge here helps the criminal to re-frame his act, to no longer construe it merely from his own subjective and self serving point of view, but to see the social dimension, the implication of his act within society.

³⁹⁷ Cooper, "Hegel's Theory of Punishment," 161.

³⁹⁸ Ibid., 163.

³⁹⁹ Tunick, "Is Kant a Retributivist?," 67.

⁴⁰⁰ Kant, "The Metaphysics of Morals," 6:333.

⁴⁰¹ Redding, *Hegel's Hermeneutics* 180.

Following his punishment the criminal can be rehabilitated⁴⁰² and re-engaged with as a person with rights. In this context then, annulling the crime amounts to an acknowledgement that the situation has been adequately dealt with, and that the criminal is in a position to move on, i.e. that he is so situated that he is permitted to rejoin civil society as a fully-fledged right bearing individual.

Given this explanation of how punishment annuls crime with respect to the criminal, we can turn to attempting to unpack some of the other odd sounding claims that Hegel makes regarding the criminal. These claims (which are related) include that punishment is his right, that he consents to and in fact even wills his own punishment, and that the criminal actually sets up the principle of his own punishment. If read literally in a contemporary English speaking context such statements appear absolutely nonsensical. A right to punishment, for instance, is surely not something the average person would want to claim, and why would the criminal be any different here? What can it mean to consent to punishment which by its very nature (as discussed in Chapter Two) seems to involve suffering, harm and deprivation? Who but a masochist would consent to such treatment? And, in a similar vein, how can the criminal truly will this kind of outcome? In ordinary parlance will implies something like want or desire, but such terms seem misplaced when it comes to the criminal and punishment. To want or desire punishment to be inflicted on oneself seems bizarre. Surely just as odd is the suggestion that the criminal himself establishes a rule under which he is treated unfavourably by the state. Clearly then these common sense meanings cannot be the ones Hegel is operating with if his theory is to be regarded as at all plausible, and fortunately for the tenability of his position it will be suggested here that this is not the correct interpretation of Hegel. Such readings of Hegel are superficial and miss the specifically Hegelian loading of such terms. Focussing instead on the retributive basis of Hegel's theory and its recognitive underpinnings will help unlock what he means here by this series of related claims.

Part of the apparent oddity of some of these claims can be removed almost immediately, if the level at which they are pitched is recognized. Namely it should be acknowledged that they are not empirically descriptive claims for Hegel. In proposing that punishment is the criminal's right, something that he consents to and wills, the claim is not the apparently far fetched one that the criminal readily and necessarily agrees that this is the correct way of construing his situation, at least initially. It may not be the case that he claims punishment as his right or that he actively consents to it or intentionally wills his punishment. In fact it may well be that in confronting his

⁴⁰² This sense of rehabilitation should not of course be confused with the consequentialist use of the term. For the consequentialist rehabilitation might be said to follow a successful course of compulsory treatment or therapy. The sense of rehabilitation appealed to here is instead one that relates to the criminal having her legitimate standing re-acknowledged.

retributive punishment it does have, as a matter of empirical fact, “the appearance of an alien destiny”⁴⁰³ for him, something that thwarts his aspirations and appears from his perspective undeserved. Further, on pain of blatant conflict, it just cannot be the case that Hegel intends that the criminal must in actual fact give consent to his punishment, since he explicitly states that punishment must be enforced by the state “with or without the consent of individuals”.⁴⁰⁴ Thus it is argued here that the claims Hegel makes are conceptually normative rather than empirical. It is not that the criminal *does* see matters in these terms, but rather that he *should* recognize his punishment as being justified in these ways. The criminal is someone with the capacity to be a free and right bearing individual, otherwise his behaviour would not be deemed criminal. This is just to say that if he were impaired in the way an insane individual is, or unfit to be a full member of society in the manner a child is, he would slip outside the normal patterns of recognition and the same expectations would not be placed on him. As Hegel notes “such pronounced conditions as these [imbecility, lunacy and childhood] can annul the character of thought and free will and allow us to deny the agent the dignity of being a thinking individual and a will.”⁴⁰⁵ The criminal unlike the child etc. has the resources to see matters in the rational and correct manner, so that he can come to realize the legitimacy and necessity of his punishment. Thus the criminal should appreciate the situation he has placed himself in and recognize punishment as his right, something he must consent to and even that he wills, in spite of the fact that this may not describe his actual response.

In attempting further to explore what Hegel means by the claims listed above (and in particular the notion of the criminal’s right to punishment) it is crucial to note that for Hegel the justice of the entire system of punishment cannot be considered independently of the justice of the individual criminal’s punishment, and vice versa. The two levels go hand in hand and are mutually reinforcing. So claims about the criminal’s right to punishment need to be considered in the context of the justice and legitimacy of the entire institution of retributive punishment. As has been argued earlier, the justice and necessity of punishment are grounded in its role in upholding the system of mutual recognition which secures right within civil society. This system operates to secure the rights of all, criminal and non-criminal alike, so that the criminal has just as much stake in the effective operation of the system as other citizens do. He should recognize, therefore, punishment as his right, just as he would recognize it as the right of any other transgressor. And he may be helped to this realization by the efforts of the judge (as noted earlier) who presents the perspective of law and civil society more broadly, allowing him to see his act in a different light.

⁴⁰³ Hegel, *Elements of the Philosophy of Right* §101 Addition (H).

⁴⁰⁴ Ibid. §100.

⁴⁰⁵ Ibid. §120.

Another aspect of what Hegel wants to bring out with talk of the criminal's right to punishment is that his right is a right to a specifically retributive form of punishment. The criminal has the right to be addressed and treated as a rational agent who has chosen his course of action. Being treated according to his right means being treated based on principles derived from his act, i.e. retributive principles. The obvious contrast here is with consequentially motivated punishment which would in fact mean eschewing his right entirely in favour of being used as part of some other agenda, such as reform or deterrence. As Hegel explicitly states, to the extent that his punishment

“is seen as embodying *the criminal's own right*, the criminal is *honoured* as a rational being. – he is denied this honour if the concept and criterion of his punishment are not derived from his own act; and he is also denied it if he is regarded simply as a harmful animal which must be rendered harmless, or punished with a view to deterring or reforming him.”⁴⁰⁶

The system of right on which all individuals depend must be supported by the infliction of punishment on those who infringe it. Given the status of those who transgress, it is retributive punishment which is their due and in fact their right. Expanding on the points made above, Cooper explains Hegel's view thus:

“[i]f a man acts as a free, rational agent, and is aware of himself as such, then he must, in general, wish to be held responsible for the intended results of such actions. He has a right, indeed, to have his actions looked upon in this light. To treat him otherwise is to treat him like an animal or a maniac.... To speak to the criminal as Hegel thinks the utilitarian must speak to him would deny him the status of a rational being”.⁴⁰⁷

Retributive punishment is appropriate punishment because it addresses the criminal as an individual capable of reason, rather than as akin to an errant animal. Punishment is meted out not in an attempt to forcibly coerce the criminal into curtailing his behaviour, but simply as the just response to his act.

What Hegel intends here in stating that retributive punishment is the criminal's right, can be brought out further by exploring this contrast he points to between retributive punishment of rational human beings, and the punishment of both animals and children. According to Hegel in training and punishing animals fear and the threat of harm are employed with a view to invoking obedience to the will of a human. Now whilst this *may* be an apt way of dealing with animals, this is not the appropriate form of address to a fellow rational creature. We should not attempt to forcibly impose our will on others, since such behaviour is demeaning and degrading to their rationality. And when it comes to the punishment of children,

“[t]he end to which punishments are directed is not justice as such; it is rather of a subjective and moral nature, seeking to have a deterrent effect on a freedom which is still

⁴⁰⁶ Ibid. §100.

⁴⁰⁷ Cooper, "Hegel's Theory of Punishment," 153.

entrained in nature and to raise the universal into the children's consciousness and will."⁴⁰⁸

Children are subjected to this form of discipline not as rational beings with the aim of achieving justice, but to break their "self-will in order to eradicate the merely sensuous and natural."⁴⁰⁹ A child is still in training to be a fit member of society, and punishment at this stage is undertaken in order to ensure the success of this goal. Thus punishment of the child for Hegel is focused on the consequentialist goals of deterrence and reform. As opposed to a child, Hegel can justify the punishment of an individual wrongdoer to him on the basis that such punishment reflects a respect for him as a free and rational creature. After all by his freely chosen and self initiated criminal action, he has violated both the right of another as well as the general principle of right, thereby setting up a new principle according to which he himself can be treated. It would be wrong for him to expect to be treated in a manner which enabled him to disregard the rights of others but retain his own recognition as a right bearing individual. The wrongdoer has the right to be recognized as a human being, and this right is respected in his retributive punishment.

So far it has been shown that some of the sting can be taken out of the claims that the criminal sees punishment as his right, something he consents to and wills, by observing that these claims are not intended empirically. In addition, they are made within an institutional setting which it has been argued is itself just and construes retributive punishment to be the criminal's due. It is time now to turn to further developing a response to the criticism that it is simply not the case that the criminal consents to or wills his own punishment. Critics have argued, for instance, that it is extremely improbable that the criminal committed his act with his own punishment firmly set in his sights, so how can he possibly be thought to have willed his punishment? Indeed it does seem odd to suggest that a criminal would have deliberately undertaken an act with the intent of being punished. But it should be reiterated that for Hegel this is not an empirical claim, it is not the case that the criminal's will as referred to here is his actual psychological intent (which is surely impervious to scrutiny anyway) rather it is his will as identified in his act that is at issue. How else (other than through its externalisation) would we have access to the criminal's will? As an addition to the *Philosophy of Right* makes clear "the criminal gives this consent by his very act."⁴¹⁰ Thus regardless of what the criminal might think or even say on the matter, he has committed or willed a criminal act and so it follows that he has effectively willed his own punishment. The criminal has sanctioned his punishment, given that punishment is simply a necessary consequence or implication of his act. As Jami Anderson explains

⁴⁰⁸ Hegel, *Elements of the Philosophy of Right* §174.

⁴⁰⁹ Ibid. §174 Addition (H).

⁴¹⁰ Ibid. §100 Addition (H,G).

“[t]he criminal may (truthfully) claim that he did not commit a crime with the thought of his punishment in mind, but he cannot deny that he committed a criminal act. And, therefore, Hegel claims that the criminal cannot truthfully claim that he did not will an act that is punishable.”⁴¹¹

Thus the notion that the criminal wills and consents to his own punishment can be made sense of when interpreted as a claim that it is his will as construed through his behaviour which establishes his consent. Again there are clear parallels here with Kant's view when he states “[n]o one suffers punishment because he has willed *it* but because he has willed a *punishable action*”.⁴¹²

Linked to the claim that retributive punishment is the criminal's right and something he wills is another proposition some critics have taken issue with, namely that through his punishment the criminal is being treated according to his own law. Criticism of this proposition has taken two forms of interest here, in the first case some critics have wondered how it is plausible for the criminal to set up a rule which is so unfavourable to himself. While the second kind of criticism is given voice in an argument from Knowles to the effect that the state cannot be expected to adopt the criminal's principle in punishing, since it is by virtue of the objectionable nature of this principle that he has suffered punishment in the first place.⁴¹³ Before addressing these criticisms however, the particular passage at issue should be laid down. Hegel writes of the criminal's punishment that

“it is implicit in his action, as that of a *rational* being, that it is universal in character, and that, by performing it, he has set up a law which he has recognized for himself in his action, and under which he may therefore be subsumed as under *his* right.”⁴¹⁴

By now it is perhaps obvious how the first of these objections can be met. It is not that the criminal actively constructs or writes a rule which will issue in his own demise, rather the situation is as Hegel explicitly states it to be. Namely, it is the criminal's *actions* which can be construed to have this effect. Inside civil society governed by recognitive relations, actions have consequences and implications. One of the implications of the criminal act is that it expresses his self-legislated will, a will that cannot be apprehended in any way other than by virtue of external actions. What he has done demonstrates in a vivid and immediate manner how he has chosen to act in the context of others, i.e. he has chosen to ignore recognitive rights – the rights of the victim, right in general and ultimately his own right. Now both the criminal himself and others within civil society know how to interpret such acts, they have this shared meaning concerning the negation of rights. And as noted above, because he is a rational being, the criminal's act can be considered

⁴¹¹ Anderson, "Annulment Retributivism: A Hegelian Theory of Punishment," 378.

⁴¹² Kant, "The Metaphysics of Morals," 6:335.

⁴¹³ Knowles, *Routledge Philosophy Guidebook to Hegel and the Philosophy of Right* 149-50.

⁴¹⁴ Hegel, *Elements of the Philosophy of Right* §100.

to be self legislative, to embody a law to the effect that he does not value rights, that he in fact thinks they can be disregarded. Thus he legislates his own retributive punishment, to restore his standing.

A response can also be formulated to the charge Knowles makes against this passage, that it “does little more than dress up the thought that the criminal cannot complain if he is treated in exactly the same fashion as he treats his victims.”⁴¹⁵ Although Knowles thinks that such an argument has advantages, he maintains that it is an inappropriate justification from the point of view of the state. As he says “[t]he last thing the punishing agency should be doing is adopting the moral perspective of the criminal. Cack-handedly, that would be to endorse the semblance of right rather to establish its actuality.”⁴¹⁶ Knowles considers Hegel’s argument to be a poor one but also thinks that it may be able to be salvaged. He suggests that part of the problem with Hegel’s argument here is that it is incomplete, but that it can however be made whole by the employment of a hypothetical social contract, even though Hegel does not actually sanction such an argument. In fact, as Knowles is aware, Hegel explicitly rejects a social contract view of society. In the portion of Abstract Right entitled “Contract” Hegel clearly says “[t]he nature of the *state* has just as little to do with the relationship of contract [as marriage], whether it is assumed that the state is a contract of all with all, or a contract of all with the sovereign and the government.”⁴¹⁷ And later when elaborating on just the passage noted above which Knowles is trying to explain, Hegel asserts that “the state is by no means a contract”.⁴¹⁸ Knowles however thinks Hegel was simply mistaken in dismissing the notion of a social contract (particularly a hypothetical one) and that he could have adopted one without committing to a social contract vision of society more broadly. Armed with a hypothetical social contract and an argument premise to the effect that punishment can be justified to the extent it secures the restoration of right which the criminal approves of, Knowles thinks Hegel’s argument is far more plausible. Interestingly the role Knowles carves out here for a hypothetical social contract is the function that this thesis argues is performed by the recognitive based system which grounds civil society. That is, recognition serves to mutually bind individuals within society in the way they might be bound if they had given hypothetical consent to their situation. Just as on Knowles’ view the hypothetical social contract is integral to obtaining the legitimacy of punishment, so recognition plays a similar grounding role in this thesis.

⁴¹⁵ Knowles, *Routledge Philosophy Guidebook to Hegel and the Philosophy of Right* 150.

⁴¹⁶ Ibid.

⁴¹⁷ Hegel, *Elements of the Philosophy of Right* §75.

⁴¹⁸ Ibid. §100.

In addition to drawing parallels between the function of Knowles' hypothetical social contract and the theory of recognition here, there is a slightly different way in which we can address Knowles' concerns. It is not the case that through punishment the state inappropriately takes up as its own the criminal's principle or law, it does not adopt the criminal's perspective. The state in fact offers up perspective of society, putting the criminal's act in its proper and broader perspective. Without the objective perspective of society the criminal might never see his act for what it was. Further (and counter to what Knowles seems to be suggesting) the criminal is not treated in the way he treats the victim thereby justifying his punishment. Punishment should not be seen in this context as a denial of rights (the criminal has already in fact undermined his own right by opting out of the system of recognition) but rather as a way of showing regard for rights by seeking to reinstate them.

An Hegelian Justification of Punishment

Now that Hegel's account of crime and punishment has been revisited and surely made more tenable in light of his theory of recognition and his logic, it is time to consider how an Hegelian justification of punishment might be mounted. It will be recalled from Chapter Two that it was deemed desirable that a justification of punishment should give satisfactory reasons for the practice to three main audiences – the criminal himself, the victim of crime and society more broadly, and that the standard retributive account (as outlined in Chapter Two and reiterated in Chapter Three) only offers up an acceptable justification to the individual criminal as to why he should be punished, so that this orthodox view is widely acknowledged to fail when it comes to mounting any broader justification to society at large. Satisfying this latter audience is often thought to be the great strength of utilitarianism. However it should now be apparent that Hegel is well positioned to give a comprehensive and unified justification of punishment that can address not only the criminal, but the victim as well as society. In fact Hegel's account with its identification of three negations invoked by crime (of the criminal, victim and society) and the corresponding annulments of these three via punishment, seems almost tailor-made for this audience oriented justification of punishment.

However before spelling out the details of an Hegelian justification of punishment, it is worth observing how objectionable Hegel would likely find the framework within which the contemporary question of justification is frequently set (particularly in liberal theory). Often the problem is put directly in terms of the need to justify the infliction of harm on an individual by the state. Hegel would, it seems, find this approach misconceived on a number of fronts. To see the individual as

pitted against the state in this way is to misconstrue for Hegel the nature of our existence within society. We are not otherwise radically free individuals who stand counterpoised to the overwhelming power and might of the state, rather we and our freedom only exist within the state, we are made within the state. The “individual versus the state” mentality of some liberals is just a flawed starting point for a discussion of punishment. Further, in focusing on the particular criminal and the consequences of punishment (i.e. harm) what Hegel considers to be the absolutely fundamental relationship of punishment to crime and its emphasis on righting wrong, is mislaid.⁴¹⁹ By isolating punishment from its full context it actually becomes tenable, contra the view he holds, to consider punishment as a “purely *arbitrary* association of an evil *with an illicit action*”,⁴²⁰ and reasonable to question why we should “will an evil merely *because another evil is already present*”.⁴²¹ Framing the problem of justification in the way that liberals typically do makes punishment seem like an odious institution indeed. Already in merely stating the problem we seem to be on the back foot. After all why should we meet a harm with a harm or an evil with an evil? What possible justification could there be for copying the criminal and committing an immoral act? But as has been argued above punishment for Hegel is not an independent harm or evil or an immoral act, it is an integral part of a process initiated by a criminal action, which cannot meaningfully be abstracted from this context. It is not the harm of punishment that should be in the foreground in justification, since harm is just a side effect or consequence of having to punish. It is the connection between crime and punishment that is critical, and the role punishment plays within the system of right.

Now returning to how this relationship between crime and punishment can be justified, and firstly to the situation of the criminal. For Hegel a justification can be formulated to the criminal as someone who has legislated an act which has seen him reject not only the victim’s right but right more broadly, and in fact to thereby undermine his own standing within civil society. Society depends on mutual recognition of rights and in failing to acknowledge another’s legitimate rights claim in a particular case, he has failed to appropriately support and partake in the system of right on which he depends. If he is to regain his place within society’s cognitive structure he cannot stand outside the system in such a manner and attempt to be some kind of free-rider, looking to others to accept his rights claims whilst he flouts theirs and the system of right more broadly. Right must be reinforced and the implications of his act annulled by punishment. Punishment can even be given a positive spin for the criminal on a number of counts. Without punishment the criminal cannot be restored as a legitimate member of civil society, he will remain an outsider. Further, through his punishment the criminal has a chance to gain a better appreciation of his

⁴¹⁹ Ibid. §99.

⁴²⁰ Ibid. §101.

⁴²¹ Ibid. §99.

situation, the implications of his act, the rights based underpinning of society and so on. Finally his punishment, in spite of embodying a rejection of his act, still acknowledges his status as a rational and autonomous individual. And this last point is, it seems to me, one of the real benefits of a retributivist outlook - that it shows appropriate regard for the individual and their freedom, it does not patronise the criminal with some simplistic “carrot and stick” approach to their choices and behaviour, nor use them as part of some bigger scheme for society as a whole. The criminal has made a choice, albeit a flawed one, and he should be held responsible and accountable for his freely determined act.

It follows that a good justification can also be framed to the victim of crime who can be satisfied that she has had her standing clearly reaffirmed and endorsed by the punishment of the individual who illegitimately ignored and infringed on her rights. Her situation (in which a wrong was unfairly perpetrated against her) has been acknowledged as just that - wrong, as a flawed move in the game of rights and an appropriate response has been formulated to it in the shape of punishment of the wrongdoer.

A broader justification to society also emerges from Hegel's claim that punishment is an essential element in acknowledging, restoring and rehabilitating right to its proper place. And here we see Hegel's idealist credentials coming to the fore. As an idealist Hegel can give the kind of convincing account of rights and how they can be grounded that seems to be lacking on some other rights based accounts. Rights originate in and are maintained by our reciprocal recognition of them, and this is why crime is so significant and punishment so critical to right and society. Crime threatens the whole structure of right and recognition within society by ignoring or actually subverting the specific rights of individuals, so that it cannot be allowed to pass unchallenged. A society grounded in recognition simply cannot function if denials of right such as that made by the criminal are not addressed. And this is how punishment is justified on this view (in a manner similar to how Kant can justify punishment) by making explicit how vital punishment is to society, not in some consequentialist means ends sense, but conceptually. Punishment is logically necessary for the conceptual existence of crime and vice versa. As explained earlier, crime requires its negation in punishment just as right requires its negation in wrong. As was also outlined earlier these logical connections and distinctions require for their existence and viability certain appropriate actions and reactions. If the distinction between right and wrong is to be meaningful it must be borne out in our responses to encounters with right and wrong. Affirmations of right and denials of right must be met differently, lest the contrast between the two be lost. Affirmations of right are and should be supported within the network of mutual recognition, while denials must be rejected and responded to with punishment.

Conclusion

This Chapter has furnished an outline of Hegel's view of both crime and punishment, and by taking seriously Hegel's overt appeal to notions from his logic and his underlying dependency on his theory of recognition, has addressed a number of the common criticisms made of his account in the literature. This has enabled a justification of punishment to be formed which overcomes the dilemma of punishment and can instead give a comprehensive justification to the crucial audiences – the criminal, the victim and society more generally.

In comparison to Kant's account outlined in the preceding Chapter, Hegel's theory of punishment is perhaps stronger and more thoroughly worked out than Kant's. Hegel takes the time to develop the notion of crime and distinguish it from other forms of wrongdoing, and the justification of punishment to be found in his theory is much more readily apparent. Yet many of the successful moves in Hegel's account can be read back into Kant's theory of punishment so that Hegel's philosophy gives us a new lens with which to explore and reinterpret Kant. In the next and final Chapter then, various points of summation on these topics will be made and strands from both Kant and Hegel will be drawn together in an attempt to set out an idealist justification of punishment, able to meet the challenges of justifying legal punishment outlined in Chapter Two.

Chapter Five: An Ideal Justification of Punishment

Introduction

The preceding chapters have, it is hoped, not only shown that there exists a problem in the literature with respect to justifying punishment, but also indicated plausible ways in which this problem can be overcome. Chapter Two began by outlining the state of the art with respect to punishment – the need for its justification and the type of justifications to be found in the literature, before moving on to outline the standard positions of the utilitarian and retributivist, and the relatively recent innovation of a mixed solution to punishment's justification. The dilemma of punishment however survived the Chapter, meaning that neither of the major views was regarded as being able to offer up a comprehensive justification to all the relevant parties. The Chapter however concluded by observing that a retributivist view offered the most promise for resolving this difficulty. The Chapter on Kant began with an outline of the standard rendering of his view of punishment in the literature, which revolves around the claim that he is merely the paradigmatic retributivist. An alternate view, which suggests he is actually a limited or partial retributivist, was also explored in addition to a number of potential conflicts between his ethics and legal theory. The revised reading of his view of punishment advocated in this thesis was developed by first examining the notions of real negation, community or reciprocity and construction, before incorporating these into the construction of justice. A number of the criticisms of Kant on punishment were addressed prior to the development of a sketch of a Kantian justification of the practice of legal punishment. The Chapter concerning Hegel began with a first blush review of his interrelated theories of crime and punishment (in order to get a sense both of the bare bones of his view and to gain some understanding of where critics are coming from) before a full-blown reading of his view was attempted. A summary of his theory of recognition as well as his position on negation and contradiction were given in order to facilitate an interpretation of his account of crime and punishment. Finally, of course, a Hegelian justification of punishment was furnished.

As noted above the Chapters on Kant and Hegel finished with brief outlines of how these two philosophers could address the problem of justifying legal punishment. Now in the Conclusion a justification of legal punishment will be set down which combines elements from both of these perspectives, before a discussion of various other points of interest raised by the thesis is undertaken. It is suggested here that this unified account does not issue so much from the

retributivism Kant and Hegel share, but that in looking at Kant following Hegel we can read into his thought an idealist orientation. This idealist commitment and how the two philosophers conceive of concepts leads them to a position that can be characterised as retributivist, rather than a retributivist stance being a starting point for their takes on punishment. This is perhaps a subtle point but one which is significant in understanding the broad and rich context in which their views on punishment sit. It may be worth observing at this juncture however, that to some ears it may seem perverse to embrace or even admit to idealism as a way of understanding Kant and Hegel on punishment. But to this view one could surely reply with a question about what assumptions lie behind the reticence to accept such a move. What is so objectionable about idealism? Is it some lingering thought that it involves the world as a giant mind or some such implausible claim? For this is most definitely not the idealism which is appealed to here in exploring Kant and Hegel on punishment.

An Ideal Justification of Punishment

In addressing a justification of punishment to the criminal, both Kant and Hegel can appeal to the fact that it is the criminal himself who has initiated the act which sees him punished, and in so doing they do not diverge from the view espoused by traditional retributivists. But in their broader explanation of the meaning and implications of the criminal's act, the particularities of their approaches begin to appear. Kant and Hegel maintain that the criminal act adversely impacts on the way in which right is conceived in the state. For Kant it is the state construed in terms of community or reciprocity which is affected, and for Hegel it is the recognitive basis of civil society which suffers in crime. On Kant's view one of the ramifications of the criminal act given that society is based on mutuality, is that the act should be turned back on the criminal through his punishment. Thus his act is mirrored in the type and amount of his punishment. Via the way in which Kant talks about the criminal's act undermining his own situation we perhaps see in embryonic form what Hegel will develop in much greater depth. With regard to theft, Kant writes in the *Metaphysics of Morals* "[w]hoever steals makes the property of everyone else insecure and therefore deprives himself (by the principle of retribution) of security in any possible property."⁴²² In Hegel this becomes a story about how the criminal's act (again given the kind of society in which it is perpetrated) impacts on his standing, effectively excluding him from the legitimate recognition to which he would otherwise be entitled. By failing to recognize right in another, the criminal falls out of what has been described earlier as the recognitive loop underpinning civil society. So the criminal's punishment is justified to him on the grounds that he has freely chosen

⁴²² Kant, "The Metaphysics of Morals," 6:333.

his act, that he should be responsible for such an act and that this act has implications for both himself and for society, which cannot be ignored given the way in which society is construed. The criminal's punishment also puts him in a kind of "privileged" position (explicitly for Hegel and possibly implicitly for Kant) with respect to comprehending the nature of right and wrong within the state. For Kant the criminal can perhaps appreciate more readily what justice involves given his direct role within its construction. Through his punishment the criminal sees justice in action and potentially gains purchase on what normativity in the state is all about. On Hegel's account the criminal is helped to insights into right and recognition by the judge. The judge can frame his punishment in such a fashion that the criminal can appreciate what justice within the state means and how through his punishment his status as a rational being is acknowledged and respected, and his recognition as a right bearing individual re-established. The punishment of the criminal on the accounts of both Kant and Hegel does not patronise or talk down to him as someone who needs to be deterred or reformed, but treats him as an agent who earns his punishment based solely on his illicit act, not as someone who has these other kind of agendas imposed on him. This does not have to mean that the criminal is not deterred or reformed, this may well be a result of the realization of his situation, but just that this is not the aim of his punishment.

Again there is a clear similarity between the justifications Kant and Hegel can offer up to the victim of crime. Through punishment of the criminal who offended against her, the victim has her situation acknowledged as wrong. Explicitly in the case of Hegel and perhaps implicitly in Kant's, the victim has her place as a right bearing individual recognised. Her status was threatened by the act of a criminal who ignored her rights, but this has been shown up as flawed by punishment of the criminal, so that her standing is reaffirmed as counting. Thus punishment is justified to the victim as a way of showing appropriate regard for what she has suffered. Punishment involves taking remedial action that ensures she has her rightful place in the recognitive structure of society endorsed.

Traditionally the sticking point for retributivist justifications of punishment has related to the justification which can be offered to society and how desert is grounded, whereas (as discussed in earlier chapters) both Kant and Hegel have a way around any such impasse at this level. The justification that can be formulated to citizens *en masse* actually connects punishment to society itself at a very fundamental level, so that the justification of punishment is inextricably linked to the reason for and the legitimisation of the existence of society. On Kant's view the state exists to facilitate the possibility of justice and to know what justice is, to understand what it involves, we need to engage in a construction of the concept of justice. Such a construction reveals an analogy between the interactions of objects in space and the normatively governed interactions of citizens in civil society. Right actions which do not impact on the freedom of others go

unchallenged but wrongful actions should be met with punishment, just as resistance among physical objects in space elicits an opposed reaction. Right, wrong, punishment and justice are intertwined notions for Kant. So to citizens Kant can say that the institution of punishment is essential to the functioning and the comprehension of justice within their society. For Hegel punishment is similarly vital to how right is conceived of and appreciated within this context, although it has to be said that his approach is more developed and sophisticated than is Kant's. Hegel's idealist account of rights depends on rights claims and their denial being suitably addressed, as the entire nature of their existence just issues from their mutual recognition by citizens. Rights are rights as recognised. Thus punishment is the only appropriate response to the type of wholesale denial of right which crime represents, since it is not only the right of the victim which is infringed by crime but (perhaps more significantly from the broader societal perspective) it is the whole system of right which is actively shunned by the criminal act. The crime and its implications must be expunged if right is to have meaning and an ongoing existence. So in Hegel's case the justification of punishment to society consists in pointing to its absolutely essential role in making sense of and supporting right within such a society.

Some Interpretative Implications of this Thesis

This thesis has a number of implications for both Kant and Hegel scholarship and philosophy more broadly, some of which will be expanded on briefly below. Roughly speaking these implications can be considered to centre around a number of points – how to interpret the corpus of Kant and Hegel; the frequently flawed reception of these philosophers by the analytic tradition; how reading Hegel can change how we construe Kant; and how their philosophies can offer insight into contemporary debates.

The bulk of attention devoted to Kant in the English speaking literature at least, appears to revolve around just two of his critical works – the *Critique of Pure Reason* and the *Grounding for the Metaphysics of Morals*. Kant is renowned for his critical turn exemplified in the first *Critique* and for his contribution to ethics in the form of the categorical imperative, as discussed in the *Grounding*. However this very narrow focus has clearly ignored works that it is hoped this thesis has shown to be of value and bearing. In particular, texts such as the pre-critical *Attempt to Introduce the Concept of Negative Magnitudes into Philosophy*, as well as critical works like the *Metaphysics of Morals* and *Religion Within the Limits of Reason Alone* have made significant contributions to developing an understanding of Kant's account of punishment, are coherent and have an important place within his entire philosophy. In the *Negative Magnitudes* paper and

another entitled *Concerning the ultimate ground of the differentiation of directions in space* we see instances of Kant's pre-critical work exhibiting a continuity and a relevance into his critical thought. Real negation first appears in the *Negative Magnitudes* paper and has a role in the *Critique of Pure Reason* (although not explicitly labeled as real negation there). In this *Critique* Kant takes up the point raised in the *Negative Magnitudes* piece that it is incorrect to regard evils as mere negations, although it is perhaps unsurprising that the critical resources of the later work enable the point to be framed in a different way. And of course real negation also proves crucial to understanding the construction of justice as it appears in the *Metaphysics of Morals*. In addition, the notion of directionality which derives from the pre-critical *Directions in Space* paper feeds into grasping the construction of justice. The *Metaphysics of Morals* itself, though often treated as an isolated source or actually disregarded in the philosophical literature, has been shown in Chapter Three to be both seminal to Kant's account of punishment and clearly connected to his critical regime. Without the *Metaphysics of Morals* Kant's account of punishment and its justification would be extremely limited, since it is in this work that we find his most extensive treatment of punishment as well as his formulation of the construction of justice. And there is clear continuity exhibited here with themes from the more widely acclaimed first *Critique*. Real negation, community and construction all trace their lineage back through the *Critique of Pure Reason*, so that the *Metaphysics of Morals* should in no way be regarded as an anomalous text. Further, a work like *Religion Within the Limits of Reason Alone* seems to have made almost no impact in the literature on Kant, and yet again is both important to developing his view of punishment and is connected to his critical ideas. Understanding Kant's account of community and of the state would be impoverished if this source were not consulted. Further, the contribution of the *Metaphysical Foundations of Natural Science* should not be ignored as it bolsters comprehension of community as well as supporting Kant's dynamist account of matter, a crucial factor in his construction of justice.

Now even though Kant's philosophy might receive unduly narrow or cursory treatment in the literature as observed above, Hegel's work is generally held in even lower regard. In light of what has been argued in Chapter Four, however, the disparaging treatment frequently accorded Hegel is surely not entirely warranted. Though his idiom and views require real intellectual effort to work through and comprehend, Hegel is deserving of consideration. Charges of incoherence made against him with respect to his position on crime and punishment (though understandable) are not borne out. Sense can be made of his characterization of real events in the world as negations, and of his claim that criminal acts are null and void in themselves and even contradictory. The comparison he draws between forms of judgment and wrongful acts is not idle and in fact has much to offer in explanation of how he conceives of intentional behaviour. When it comes to punishment even Hegel's most perverse sounding claims can be shown to be coherent. As has

been established earlier the notions that punishment is something the criminal consents to, wills and is his right, are not to be understood as descriptive of the criminal's psychological state, but rather to be conceptually normative. With respect to the broader claims made for punishment by Hegel - that it can annul wrong and restore right, these are shown to be an important part of a well developed account of crime and punishment, not bizarre metaphysical points.

Perhaps one of the reasons why a more sophisticated view of both Kant and Hegel has not generally been forthcoming in the literature is due to the way in which the analytic tradition does philosophy. In analytic philosophy there is an emphasis on examining concepts abstractly and of construing terms in a very strict sense, and this kind of approach might, it seems, work against obtaining a favourable reading of Kant and Hegel. As observed in the Chapter on Kant his characterization as merely the paradigmatic retributivist strips down his account of punishment to what are generally thought of as the three main planks of a strong retributivist position. These key planks being that the warrant to punish issues from the crime itself; that the type and amount of punishment is also derived from this source according to a principle of equality; and that there is in fact an obligation to mete out to the criminal his desert. It is surely ironic then, that some commentators go on to attack this pared back account of Kant on punishment claiming that it lacks adequate grounding. It is ironic because they themselves have created it. Such commentators make Kant's account fit the neat category of retributivism and then apparently wonder why it falls short of giving a comprehensive justification of punishment. This kind of very literal reading of Kant's view of punishment is exemplified in the position Paul Gorner develops. Gorner, as discussed in Chapter Three, just outright denies that the analogy between persons and objects which lies at the heart of the construction of justice can play any role in justifying punishment. For Gorner the analogy is just an analogy and nothing more. However since for Kant practical concepts like justice can only be really understood via construction and analogy, this really limits what someone like Gorner can take away from Kant's account. Gorner is again very literal in construing Kant's talk of punishment as a "hindering of a hindrance to freedom" leading him to conclude (erroneously according to the view espoused in this thesis) that Kant is a consequentialist. This is because Gorner equates hindrance with prevention and so considers Kant to be arguing that punishment actually physically prevents the criminal from offending and also deters others like him. Gorner appears determined here to interpret Kant on his own rather than Kant's terms, ignoring what Kant attempts to point to by analogy and what he means by words like "hindrance". As has been observed earlier the attention paid to these portions of the *Metaphysics of Morals* to which Gorner refers has been quite limited, though one suspects that if they were more widely circulated amongst an analytic audience they would attract further unfavourable comment and the kind of strained interpretations in which Gorner engages.

As is apparent from the discussion in Chapter Four, Hegel has also been the brunt of many of these very literal minded attacks, though of course as the first take reading of his view of crime and punishment showed there is ready ammunition in what he says and how he says it for such readings. However it is surely the business of philosophers of integrity to probe those thinkers they criticise and at least attempt to engage with them in some sense on their own terms, even if they still ultimately conclude that their views are flawed. The areas of interpretative difficulty outlined in an earlier paragraph in this section stem, at least in part, from a failure to come to grips with the peculiarly Hegelian meaning of certain of his terms – annulment, negation, contradiction, will, right and so on. Hawkins' comment (quoted at more length in the relevant Chapter) is revealing when in discussing the negation involved in Hegel's view of punishment he says that Hegel's account defies "the comprehension of any literal-minded person. Such an assertion is the kind of thing which causes philosophy to be regarded as a species of poetry rather than of exact thinking."⁴²³ Clearly Hawkins maintains that Hegel falls short of the test of good philosophy since his thinking, meanings and language are not immediately explicit, direct and transparent.

Just as with Kant, difficulties are also created for Hegel if his ideas are abstracted from their context. If philosophers attempt to examine his views without appreciating their broader setting (as it appears some analytic philosophers are want to do) then clearly their interpretation will be flawed. As Hegel expressly acknowledges, the isolation of punishment from its wider situation has encouraged a skewed understanding of what it involves. Punishment for Hegel is inextricably linked to crime, but if we pull these two notions apart and attempt to consider them entirely separately then we can end up construing punishment as a "purely *arbitrary* association of an evil *with an illicit action*".⁴²⁴ However as has been argued above punishment is not an independent harm, it is an integral part of a process set in train by the criminal's action which cannot meaningfully be abstracted from this relationship and its role within the system of right.

As the Chapters on Kant and Hegel revealed there are clearly points of similarity as well as obvious points of difference between the two philosophers, which have been commented on along the way. However what will briefly be highlighted now is the way in which having examined Hegel's view of punishment we can go back and shed further light on Kant's account. In doing so certain aspects of Kant's position are played up which are not ordinarily at the forefront of discussions of his thought. Frequently it seems the analytic tradition simply construes Kant as responding to the likes of Hume, so for instance the *Critique of Pure Reason* is sometimes just characterised as an answer to Hume's problem of causation. And such a narrow focus misses

⁴²³ Hawkins, "Retribution," 16.

⁴²⁴ Hegel, *Elements of the Philosophy of Right* §101.

other important aspects of his view. With respect to punishment then, looking at Kant after Hegel we perhaps get a sense of how Kant could have further developed his view, and we can detect in Kant a much stronger idealist tendency. Of particular interest and relevance here is Hegel's idealism with regard to rights. As was made apparent in Chapter Four, rights can have no tangible existence in the way that physical objects, for example, do. Rights only exist for Hegel in their recognition by other wills. Such recognition is made manifest in behaviour which either acknowledges or denies rights claims. In turn denials of right should have punishment as their appropriate response. Similarly, we can look back to Kant's account and see that for him right or justice only really exists in the construction we undertake of this concept. This construction has as its physical counterpart the law governed relations between bodies in space, which provide an analogy for the normative interactions of citizens within the state. Right and wrong have no larger existence beyond their exemplification in the relationships between individuals within the context of society and brought out by the physical model. In a society governed by community or reciprocity, punishment is simply the appropriate response to or the ramification of, wrongdoing.

A further implication of this thesis which it is hoped is borne out by the arguments presented earlier, is that the philosophies of Kant and Hegel (although dating back to the eighteenth and nineteenth centuries) are not of merely historical interest. The exegesis of the views undertaken here was not driven by a desire to examine the accounts of Kant and Hegel for their own sakes (though this approach to their work may also have merit), but rather by a concern to address a particular problem – the problem of justifying legal punishment. Thus why not consider the possibility that their views can be fruitfully applied to other contemporary problems and that they can make a positive contribution to further debates? The breadth of their work, covering as it does a vast array of topics, certainly makes them a rich resource for dealing with potential issues into the future. It also seems to be the case that exploration of a particular subject matter like punishment through the lens of German idealism can serve the dual function of not only shedding light on the subject under consideration, but providing a tangible vehicle for assisting in coming to terms with the philosophies of both Kant and Hegel. Punishment has provided here a direction through what at times might otherwise seem to be unwieldy texts and theories.

Conclusion

This thesis has argued that a resolution to the long-standing problem of justifying legal punishment can be found if the philosophies of the two great German idealists Kant and Hegel are engaged with. These two philosophers can offer up resources which other accounts, even

retributivist ones, do not and cannot. Their accounts of punishment can be seen to address not only the criminal and the victim of crime but also (in a manner unlike other retributivists) they can proffer a convincing justification of the institution of punishment to society itself.

In the past there was a reticence within philosophy to discuss and interact with the ideas of Kant, and when he was actually consulted it was often in quite limited or even flawed terms, as has been argued earlier. More recently his work has begun to be regarded with the seriousness it deserves, yet Hegel scholarship still lags far behind Kant in acceptance. The abysmal reception he has frequently received is misplaced (as discussion of his view of punishment has surely revealed) and in fact could be characterised as sheer folly. To ignore a thinker of such enormous capacity and depth is to disregard a wealth of potential. Contemporary philosophers and contemporary problems can surely only benefit from an engagement with Hegel's thought. It is perhaps appropriate to end then on this note of promise. The promise of future philosophical work and research invigorated and driven by encounters with the rich and powerful tradition of German idealism.

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