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Hegel's Complete Views on Crime and Punishment

ABSTRACT: *In this article, I argue that Hegel's complete and mature view of crime and punishment is more robust than many interpretations of the* Unrecht *passage in the 'Abstract Right' section of Hegel's* Elements of the Philosophy of Right *suggest. First, I explain the value of revisiting the interpretation of Hegel as a simple retributionist in the contemporary debate. Then, I look at Hegel's treatment of crime and punishment in the section on abstract right to show the role of punishment in Hegel's account. Next, I argue that this needs to be situated in Hegel's broader social philosophy and that we can accomplish this by looking at how the* Unrecht *passage fits in the* Elements of the Philosophy of Right*'s dialectical structure. I do so by building on the sections on civil society and state in the part of* Elements of the Philosophy of Right *dealing with ethical life* (Sittlichkeit)*, which include considerations of prevention and rehabilitation. I contend that this analysis reveals an account of punishment as more complicated than simple retribution.*

The Need to Revisit Hegel's Account

For much of the twentieth century, the debate over the nature of punishment was framed as Bentham's and Mill's arguing that punishment is about rehabilitation and prevention against Kant and Hegel as the advocates for punishment as retribution (Tonry 2011: 8–14). While the utilitarian view held sway, it shaped criminal law in the United States and abroad. Data from the social sciences and critiques of incarceration's own brutality have, however, recently buoyed the retributive explanation of punishment (Tonry 2011: 4–5; Bedau and Kelly 2017).

With this change of fortune, Kant's status as a retributionist has come under scrutiny. Jeffrie Murphy (1987) concluded that we may be wrong to attribute a proper theory of crime and punishment to Kant at all, claiming Kant has left us with 'a random (and not entirely consistent) set of remarks—some of them admittedly suggestive about punishment' (509). For Murphy (1987: 518), a crucial problem is that he finds the accounts of crime and punishment in *the Metaphysical First Principles of the Doctrine of Right* (Part I of the *Metaphysics of Morals*) to be at odds with Kant's accounts of these ideas in other works.

Thomas Hill (1997) is slightly more hopeful, and he argues that Kant's theory of punishment can be reconstructed by putting together pieces of Kant's writing and things that he believes Kant took for granted. This reconstruction yields an account that includes both retribution and deterrence (Hill 1997: 292–93). Hill concludes that this gives Kant an account with a 'deep retributive ground' for

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punishment joined to a deterrent effect arising from the fact of punishment in society (1997: 306–7).

This has left Hegel as the supposed champion of retribution. In this article, I argue that Hegel, even more so than Kant, is no champion of unadulterated retribution in punishment but instead presents a complex view that incorporates the value of deterrence and considers rehabilitation when considering how to punish crime in the state rather than in abstraction. In doing so, I reject Duff and Hoskins's (2017) characterization of the objection to punishment as deterrence as 'the Hegelian objection' and the singular reading of Hegel as retributionist that Brooks catalogues in J. N. Findlay, Richard Stillman, and R .A. Duff (Brooks 2012: 39–40).

In this article, I maintain that Hegel's complete and mature theory of crime and punishment, while never denying retribution, utilizes rehabilitation and prevention within the state. To achieve this, I show that we should not see the account of crime in the section on abstract right as Hegel's last words or full theory of crime and punishment in the *Elements of the Philosophy of Right* (1991) and that both of the later sections on morality and ethical life reveal a picture that is substantially different.

From the Introduction to the *Unrecht* Passage of 'Abstract Right' in the *Elements of the Philosophy of Right*

To make sense of Hegel's views on crime and punishment, we must first look at how Hegel's *Elements of the Philosophy of Right* tells a story about will and right. For better and for worse, Hegel believes that from the free will of a rational being, we not only can but also must wind up positing rights, property, society, and a state (contrast with Nozick 2013: 44 and his argument about what must be in the minimal state). Hegel begins this ambitious project by defining 'will' as the ability to 'posit a difference' (*Elements of the Philosophy of Right* §4A; hereafter cited as *PR*, by section) or determine things in the world (*PR* §5). As this will affects the world, it also reveals an 'I' who has this effect (*PR* §6) and distinguishes itself from its world (*PR* §13). The will, so imagined, is highly abstract since it is understood as existing only in its momentary acts of willing (*PR* §§18–19).

Hegel calls the realm where will experiences the freedom to act 'right' (*PR* §29) and proceeds from these abstractions to discover (on his account) the actuality of freedom and right (*PR* §30). The primary motion here is from an individual abstract will to a will that is both subjectively and objectively universal whose action 'constitutes the principle of right, of morality, and of all ethics' (*PR* §21R; see *PR* §§25–28). This movement happens in three phases: in the section 'Abstract Right' (*PR* §§34–104), Hegel specifies how property, contract, and crime make will more concrete; in 'Morality' (*PR* §§105–41) he moves from the individual to the universal object; and in 'Civil Society' (*PR* §§142–360) he reveals the final and proper understanding of right as subjectively and objectively universal (*PR* §33A; *PR* §40). As Hegel explains them, the concepts of abstract right, morality, and civil society represent dialectical stages, or levels, in the development and comprehension of right.

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Abstract Right and Personality

The passage that commentators have most used to discuss Hegel's views of crime and punishment is the one on the concept of 'wrong' that appears near the end of 'Abstract Right' (PR §§82–104). To understand this passage, we need to follow the argument from the beginning in general outline. Hegel begins 'Abstract Right' with a description of naïve abstract will—much like he begins *Phenomonology of Spirit* with a naïve sense data theorist (Hegel 1977: §§90–110). This will shapes its world through 'determinate ends' (*PR* §34) and also shapes itself (*PR* §34A). This capacity to make internal determinations is unlimited precisely because these determinations are internal. Consequently, it is also universal in itself but not an objective universal, because it does not extend past the internal determinations of a single individual to objective-shared reality.

The will is a person when will itself becomes its own object (*PR* §35, §35R). Persons have 'the capacity for right' and thus the will becomes a person with the abstract right to: '*be a person and respect others as persons*' (*PR* §36; here and throughout, all emphases in quotations are original to the source). Personhood links the will and ethics. Echoing Kant, Hegel says that personality assigns importance to rational will grounded in personality rather than subjective desires and drives that particularize the will (*PR* §37, §39). Abstracted from these particulars, this right has only a negative implication: '*not to violate* personality' (*PR* §38).

Property

The 'personality' Hegel refers to is persons, who as the bearers of formal rights bring things from the world into their possession by investing their wills in them (*PR* §§44–45). Hegel sees this subsuming of things that makes them '*mine*' as necessary for both human beings and animals (*PR* §47). Hegel believes this model is still abstract since it builds on subjective needs and is 'not identical with freedom' (*PR* §49). Moreover, while this possession does possess particulars, it remains abstract about them (*PR* §49R). The image here is a hungry dog that makes meat 'mine' when it takes it without any further thought about right.

Property (*Eigentum*), makes right more concrete by being that which has the '[my] own' (*eigen*) built into it (PR §45; see also 'Proper' [2017]). Property thus enables multiple persons to express will at the same time (*PR* §46A). With this, Hegel attacks the simplistic picture that by grabbing things physically one possesses them to the highest degree; he does so by pointing out that this possession is 'merely subjective, temporary, and extremely limited in scope' (*PR* §55).

Hegel maintains that both giving form and marking objects are better types of possession than physical seizure (*PR* §§56–58). Giving form lets a person keep something even when they are not gripping it in their hands (*PR* §56). In his account of marking objects Hegel follows Locke in seeing possession as a comingling of the agent's labor on or modification of the object (*PR* §58A; *PR* §59). Thus, we move from holding a strawberry to working a strawberry patch or harnessing the wind in a windmill as an active process of possession (*PR* §56A).

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In contrast to the contingent particular nature of physical seizure, property functions universally by negating the thing-qua-thing (*PR* §59A). Hegel illustrates this with currency that takes its value from the investment of will in the sign (*PR* §64) and not the paper it is written on (*PR* §63A). Its value is the full faith and trust of the people who accept it. With this, Hegel brings in the concept of 'prescription' (*PR* §64) that expresses the '*reality* of property' (*PR* §64R), whereby things like the sanctity of graveyards and author's rights stick around for only as long as the prescription lasts (*PR* §64A).

Property, both physical and intellectual (*PR* §§68–69), can also be passed to other persons (*PR* §65) and abandoned (*PR* §65A) since property only exists when and while a will is invested. There is no right, however, to take possession of personality itself that is an individual's 'universal freedom of will, ethical life, and religion' (*PR* §66), because as the origin of right, will cannot be possessed or owned.

In a point that seems out of place in Hegel's argument but is ultimately important for the argument of this paper, Hegel states that suicide is wrong because individuals do not own their own selves: 'the individual [*einzelne*] person is a subordinate entity who must dedicate himself to the ethical whole' and that the individual lacks a relation to his own self where he can legitimate the taking of his own life (*PR* §70A).

Contract

While the discussion of property (*PR* §§41–71) explains how possessing things works, Hegel's discussion of contract (*PR* §§72–81) reveals that what we are actually witnessing in property is wills relating to other wills through things in the world: 'This relation [*Beziehung*] of will to will is the true distinctive ground in which freedom has its existence' (*PR* §71). A contract reveals a 'common will' when two arbitrary wills will the same thing about an object (*PR* §§74–75).

Hegel thinks that *contract* is inadequate to describe the political state and marriage. It is not good enough for the state, because a contract is the act of arbitrary will, but individuals live, as Aristotle taught us, by necessity in states (*PR* §75A). Similarly, a contract is the thing-mediated unity of two wills, and this is inadequate to marriage as a part of ethical life in the state (*PR* §75R). Both of these limits hint at a universal will (to be found in the state) and the inadequacy of abstract right.

Hegel defines contracts by their formalizing function (*PR* §76). Contracts happen in a world of value, which has a universal character, insofar as things can be exchanged for equal value (*PR* §77). Hegel sees the relation between agreement and performance in contract as paralleling the relation between the formal nature of property and the physical nature of possession (*PR* §78). Right binds the self to execute once the agreement has been reached (*PR* §79), because once the agreement has been reached the self has already alienated the thing and transferred it to the other in will (*PR* §79R). Hegel spells this out for several types of contract: gifts (gift of thing, loan of thing, gift of service), exchange (of things, purchase/sale, letting/hiring of things, paid work), and pledge (*PR* §80).

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Wrong

The above supplies the background for Hegel's account of wrong (*Unrecht*), with his discussion of contract providing the model. For Hegel, the move to wrong is a *necessary* stage to move from the particular towards the universal (*PR* §81R). In a contract, two wills unite into a common will, and this can go wrong when the particulars do not match up with the universal that the contract promises (*PR* §82; §84). When this happens, right has to reassert itself against this semblance of right as something '*actual* and *valid*' in negating this semblance that was 'only *in itself*' and '*immediate*' (*PR* §82).

Hegel divides these wrong 'contracts' into three species: 'if the wrong is right in my opinion,' then it is unintentional; when I create the semblance to trick it is 'deception'; and when 'I will the wrong and do not employ even the semblance of right,' it is crime (*PR* §83A). Selves at the level of abstract right experience unintentional wrong as conflict. Hegel identifies this conflict as a signal of the universality in the '*recognition* of right, so that the thing may belong to the person who has a right to it' (*PR* §85). The parties involved experience this as opposition and external obligation on their individual wills (*PR* §86; §86R).

Deception sharpens the issue by showing the contractual form can be intentionally abused when individuals agree to exchanges with no intent to fulfill (*PR* §87). In *PR* §88, Hegel explains his metaphysics for contractual exchange: the combination of a particular thing [*Sache*] and the notions of value and property. Both parties agree to exchange objects they consider of an even value and then trade objects. In deception, at least one party lies about either the value of what they offer or that the thing traded is their property (*PR* §88). Hegel believes a penalty only applies to deception—not unintentional wrong, because deception creates a 'matter of infringement of right' (*PR* §89A).

Crime goes further than unintentional wrong and deception, because it respects neither 'right in itself nor [right] as it appears to me' (*PR* §90R, Nisbet's interpolation). Hegel believes his account so far justifies the following metaphysics of crime:

1. The will that can extend itself into things: 'When I own property, my will is embodied in an external thing [*Sache*]' (*PR* §90).
2. The will exists as it embodies itself in freedom in things (*PR* §92).
3. Canceling out a will's expression in the world is 'coercion'.
4. As extended, the will can be 'subjected to necessity' by the acts of others (*PR* §90).
5. When one will forces another will to retreat, this coercion is one freedom cancelling another freedom (*PR* §92).
6. Ergo, crime is coercion.

In this framing, Hegel sees wrongdoing as pushing the will of another person out of its expression in the world: 'violation of . . . is an initial coercion, or at least force, insofar as I withhold or withdraw from another person a property which belongs to him or a service which is due to him' (*PR* §93R). In this way, crime and wrongdoing are 'contrary to right' (*PR* §92) and '[t]he initial use of coercion . . .

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infringe[s] right as right' (*PR* §95). Hegel posits right (here in its abstract form) as the equally coercive correction to crime:

1. Right seeks to restore the freedom of the person wronged.
2. Right restores the initial freedom by countering the crime.
3. The crime is the expression of the will of the criminal in the world (above)
4. To 'restore' the initial expression of freedom, right coerces the criminal's will.
5. Ergo, right is coercion and abstract right is '*coercive right*,' because it coerces the criminal who wrongfully coerced (*PR* §94).

As Foessel (2003: 532) notes, Hegel's conclusion that right is coercion echoes Kant, who states in the 'Doctrine of Right' from *The Metaphysics of Morals*, 'there is connected with right . . . an authorization to coerce someone who infringes upon it' and 'Right and authorization to use coercion therefore mean one and the same thing' (Kant 2006 [1797]: 6:231–32). Hegel's proof, however, is substantially different than Kant's. In Hegel's account, right's nature as coercion becomes clear 'indirectly by way of wrong' (*PR* §94R; see also *PR* §93). For Hegel, the coercive nature of right becomes clear when we first encounter crime and then discover what is necessary for right to counteract crime.

Hegel emphasizes that this account is about crime in the abstract, which structurally negates both the particular right and the '*capacity for rights*' (*PR* §95). Insofar as it is abstract, Hegel does not intend this to provide policy for an ideal state—merely to work out the consequences of the idea of crime with the will and abstract right. This also makes sense of Hegel's claim that crimes are in themselves 'null and void,' but their emptiness only becomes clear in cancelling of crime by right, which is itself actual (*PR* §97). Hegel further contrasts crime as a positive and empty existence sustained by the criminal's will (*PR* §99) against right as natural and prior (*PR* §97A).

While Hegel briefly catalogues types of crime, he states that categorizing belongs to morality—not of abstract right (*PR* §96R), and it is not for thought to 'specify how each crime should be punished' (*PR* §96A) Thus, the distinctions he draws here are merely to bypass practical challenges to his account by distinguishing between infinite infringements (murder, slavery) and partial infringements that strike only at particular extensions (*PR* §96). Hegel believes that minor infringements can be resolved by 'civil satisfaction' with compensation (*PR* §98). Here, the question of resolving the value is about the *quality* of violation rather than the value of the object (*PR* §98R). That Hegel, instead of producing such determinations at the level of abstract right, sees these determinations as occurring at the level of morality (though absent from the section 'Morality') reflects the incompleteness of the account in 'Abstract Right'.

Crime and Punishment as its Cancellation. In *PR* §99R, Hegel unequivocally characterizes rehabilitation and all other utility justifications for punishment as fit for the dogs and demeaning towards the criminal:

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> The theory of punishment is one of the topics which has come worst in the positive jurisprudence [*Rechtwissenschaft*] of recent times . . . The superficial character of an *evil* is the primary assumption in the various theories of punishment as prevention, as a deterrent, a threat, a coercive, etc.; and conversely, what is supposed to result from it is just as superficially defined [*bestimmt*] as a *good*. But it is neither a question merely of an evil nor of this or that good; on the contrary, it is definitely [*bestimmt*] a matter of *wrong* and of *justice*. As a result of these superficial points of view, however, the objective consideration of *justice*, which is the primary and substantial point of view in relation to crime, is set aside; it automatically follows that the essential consideration is now the moral point of view, i.e. the subjective aspect of crime, intermixed with trivial psychological ideas [*Vorstellungen*] of stimuli and the strength of sensuous motives [*Triebferden*] as opposed to reason, of psychological coercion and of psychological influences on representational thought [*die Vorstellung*]. (*PR* §99R)

Thus, in 'Abstract Right', Hegel actively declares understandings of criminal punishment that invoke rehabilitation and social coercion as inadequate.

Some interpreters, like Dubber (1994: 1582), believe this captures Hegel's complete view: 'Hegel saw retribution as the only reason for punishing anyone'. Cooper (1971: 152) sees Hegel's stance as acerbic and a sign that Hegel's preference for retribution over deterrence is a raw disagreement of taste with deterrence and reform theorists. Duff and Hoskins (2017) identify this as a blanket and misplaced opposition to deterrence in Hegel.

Such interpretations overstate the significance of this remark in Hegel's wider thought. To situate it, we must return to the understanding of the relation between will and right in 'Abstract Right': to will rationally is to be subject to right. For Hegel, punishment's role and necessity are both pre-decided by this plus the meaning of crime. Hegel defined crime as an expression of the criminal's will that coerces right (*PR* §99). The punishment is the actuality of right pushing back coercively against crime's own coercive nature. A person is a rational free being that extends its will in possession, property, and contract. Consequently, a person has the right to be punished as a person, because this is consistent with their nature and the nature of crime. This point is both constructivist and realist for Hegel insofar as these are the necessary consequences of rational wills extending themselves and these are consequences that afford on what these wills rationally commit themselves to.

On this ground, Hegel believes people who violate the rights of others can and should be punished as persons rather than as animals. Crime thus both affirms the criminal's rational use of free will and demeans the victim's rights claim as a fiction that cannot impact the world (Cooper 1971: 163–64). For right to be actual, it must be able to effect things in the world. In this case, it must be able to coerce the criminal's will back into the arena of right. Hegel calls this second coercion that cancels the crime out of existence by removing the criminal's will from the criminal's act punishment (*PR* §99R).

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This framework makes punishment both coercive and restorative: Coercive against the will behind the crime and restorative of the right that the crime seemingly denied. Punishment is counter-coercion that restores the right established by will. In this, Hegel shares Kant's commitment to the idea that punishment is counter-coercion (Hill 1997: 300). Punishing shows the actuality of right and forces the criminal to acknowledge right (the next section looks at what Hegel means by this locution) (McTaggart 1896: 483).

Hegel sees his model as fundamentally different from revenge (*PR* §101R, §101A). While revenge wants to hurt, retributive punishment's role is not to inflict pain on the criminal, but rather to restore the actuality of right by bringing the individual criminal's will back into sync with the general will and right. Similarly, utility calculations cannot enter in at this point because well-being and harm have yet to appear in 'Abstract Right' (Peperzak 2001: 292). Instead, Hegel believes the punishment should match the 'value' (here meaning amount of will invested and the infringement against will rather than material cost) coerced away from the person wronged in the crime (Knowles 2002: 179). As references to Hegel's *System of Ethical Life* and *Spirit of Christianity and its Fate* show, he believed the necessary equality was not equal material compensation but restoration of right (See Hegel 1979: 137; Hegel 1948: 218).

For Hegel, punishment is a necessity if right is to exist at all. As with many other features, Hegel shares this commitment with Kant: see *Metaphysical First Principles of the Doctrine of Right* (2006 [1797]: 6:331). Hegel maintains the necessity of punishment in several works:

1. The need to punish is as sure as fate (Hegel 1948: 230). And 'The punishment inflicted by law is merely just' (Hegel 1948: 238)
2. 'Retribution alone is rational in [punishment]; for by retribution the crime is subjugated' (Hegel 1975: 93).
3. 'in accordance with absolute Reason this reversal [i.e. punishment] is just as absolutely necessary as the former subsumption is actually robbery' (Hegel 1979: 136).

For Hegel, the necessity of punishment follows necessarily from freedom's existence in conjunction with crime (see Acton 1975: 33). Due to its ubiquity, I call this 'Hegel's postulate of practical reason'. In *Elements of the Philosophy of Right*, Hegel presents this as a proof of the actuality of right (*Recht*) through its triumph over wrong (*Unrecht*), particularly insofar as Hegel sees crime as willfully trying to negate right.

Precisely what Hegel thinks is necessary deserves clarification. Steinberger (1983: 861) comes very close to the position I take, stating that '[a]s the negation of the negation, punishment is in effect a statement, a declaration that the act of a criminal is a crime and that Right, although apparently annulled by crime, is in fact universal and eternal.' This reading correctly highlights the necessity Hegel sees in responding to crime but, this reading confuses the performative nature of punishment with the sufficiency of a mere statement. In 'Abstract Right', a mere statement does not suffice, because crime's coercion must occur in

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counter-coercion rather than a symbolic or declaratory act to negate the force of crime.

As I show later in this article, in the discussion of the 'Ethical Life' portion of *Elements of the Philosophy of Right*, this does not mean the state cannot deter citizens from willing to violate the rights of others or consider this in evaluating what crimes to prosecute and how severely. What it does reveal is that any deterrent effect comes after the metaphysics of crime and its punishment.

Punishment as Right for the Criminal. *PR* §100 contains the difficult claim that punishing the criminal is 'not only just *in itself*' but also '*right for the criminal himself*'. Hegel explains that

> [t]he injury [*Verletzung*] which is inflicted on the criminal is not only just in itself . . . it is also a right posited in his existent will, in his action. For 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. (*PR* §100)

Hegel's argument begins by noting that the criminal's action involves not only the abstract concept of crime but also a *rational* will that requires us to treat the criminal as someone *rational* (*PR* §99R and *PR* §100R). Consequently, he maintains that the punishment mirrors the nature of the will itself (Heyman 1996: 178).

Interpreters have struggled both to find Hegel's argument and to accept it. Cooper (1971: 153) states this account 'is false, if taken at all literally' and reconstructs it as follows: 'If 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.' Cooper rehabilitates this as a Golden Rule or Kantian universalization test where the criminal who denies right proposes a maxim for society (such as 'coercion is okay') and this maxim can then be applied to him as well. Feinberg (1974: 73) sees this as similar to a right to receive curative care and struggles to make sense of Hegel's view. Peperzak (2001: 290) also finds the idea of the criminal's willing his own punishment curious and proposes seeing a criminal as committing a performative contradiction where she uses her particular will to make right nonactual.

Despite these attractive reconstructions, seeing punishment as a rational consequence of the criminal's culpable action corresponds with *PR* §99's idea that punishment is fit for rational beings rather than dog training (Mohr 1997: 114–15). The first premise is that crime is the willing act of a rational person with a free will. The second premise is that right is the actualization of freedom (*PR* §29; See also *PR* §4). This means that the crime qua free act has at least the semblance of right insofar as it is an expression of free will. To avoid accepting crime as actual right, Hegel clarifies that the freedom that occurs in actual right expresses a universal will (*PR* §21R) and connects subjectivity to objectivity (*PR* §25–28). Thus, crime as an act of will has only a semblance of right, because it is a subjective expression trying to become universal and objective.

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Moreover, the idea that the criminal and right can be reconciled demonstrates a change compared with Hegel's earlier thought. In *Spirit of Christianity and Its Fate*, the wrongdoer cannot experience reconciliation with the law but must instead endure dread and a guilty conscience (Hegel 1948: 227), which can only be overcome in life (which evolves into ethical life in *PR*) (Hegel 1948: 238). The same pattern of joining the necessity to punish with a higher reconciliation of the criminal to society in 'Ethical Life' appears in *Natural Law*, where the crime-punishment relation is merely one aspect or 'superficial appearance' rather than the whole (Hegel 1975: 93–95), which differs from those made in 'accordance with true total justice and ethical life [*Gerechtigkeit und Sittlichkeit*]' (96).

Given these parameters, it is apparent that Feinberg's analogy is not apt because punishing a criminal redeems the criminal not by declaring their action to be moral but by restoring the individual to the status of an agent whose actions can be judged in terms of morality, rather than what in the *System of Ethical Life* Hegel calls 'natural havoc' or suffering from moral disability or disease (see Hegel 1979: 133–35). Put another way, the criminal has a right to be punished as a human agent rather than retrained, because the criminal is someone capable of having willful relations to property et al—that is rights, and these rights need to be recognized by others to become actual. Punishing the criminal restores him to the world of actual right by reconnecting him with universal will.

Ending Abruptly with the 'Abstract Right' Section

Many interpretations of Hegel's theory of punishment consider only the 'Abstract Right' section. Cooper consciously and conspicuously makes this choice:

> In this essay I discuss Hegel's theory of punishment for its own sake. I am not concerned with its relation to the rest of the *Philosophy of Right*, and even less with its place in the dialectic as a whole. For example, I shall not consider how the concept of punishment is meant to forge a link between the stages of Abstract Right and Morality. (Cooper 1971: 151)

While Cooper claims parsimony, others read *Elements of the Philosophy of Right* as a heap of disparate topics with no structure. Plamenatz (1971: 33) maintains that *Elements of the Philosophy of Right* 'traces no process of development'. Against this trend, Brooks points out, stopping at 'Abstract Right' leaves us mostly with curiosities (2012: 112). On such a reading, Hegel is a retributionist with the odd belief that punishing criminals is the right of criminals and this is the whole of his views on punishment.

Hegel's Fully Developed Theory of Crime and Punishment in the *Philosophy of Right*

To get the full picture of Hegel's account, we must turn to Hegel's account of crime and punishment in civil society and the state in 'Ethical Life'—not 'Abstract Right'. My claim is that while not denying Hegel's postulate about punishment, Hegel's

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concepts of civil society and the state provides more leeway than the *Unrecht* passage alone offers. I defend this first by explicating the evolving concept of right within the dialectical character of the *Philosophy of Right*. Second, I show how several concepts change in valence through the text. Third, I argue that a similar evolution can be seen in Hegel's account of crime and punishment.

The Dialectical Spiral in *Philosophy of Right*

In *The Philosophy of Right*, Hegel explicates the moral and social part of his encyclopedic system by explaining the concept of right as it unfolds before a free will. He records the will's move from abstract right to morality and finally to concrete ethical life in the state, with each advance expressing right more concretely and situating it more concretely in human community. As with Aristotle's *Politics*, the whole precedes the parts even if we learn about the whole by first looking at the parts. Still, Hegel thinks that every distinction in the concept we pick up along the way is real (Peperzak 2001: 24; 224; Mohr 1997: 95–96).

Hegel's declaration in the *Unrecht* passage shows its incompleteness insofar as crime exists only positively while right has actual existence. Moreover, as Hegel states in *PR* §100R, these punishments are actually meted out only in a state. This indicates that right's true nature can only be found in the social whole (See Peperzak 2001: 156). As Plamenatz notes, 'to partake in ethical life is to stand in social relations to others' (1971: 35). Punishment of crime is the standing negation against crime's attempts to posit that persons do not have a right to property or life. Behind the punishment of crime stands a general will, and the process of recognizing this will is the transition from being abstractly universal and individual to a more concrete universal (*PR* §104).

For Hegel, this general will becomes more concrete in 'Morality' (*Moralität*, *PR* §§ 105–41), where he explains that morality binds people together into a larger whole that affirms right and acknowledges and negates wrong. In 'Morality' Hegel changes the persons in 'Abstract Right' to subjects who are consciously engaged with the infinite and universal (*PR* §§105–6; *PR* §107A). Echoing Kant, Hegel says that rational moral agency appears in a subject that universalizes its will (*PR* §112A) and whose actions express a form of obligation (*PR* §113). Moreover, subjects are judged based on their ends and subjects mutually assume they pursue ends with rational intent within a community of free subjective individuals who band together in the Kingdom of Ends.

Repeating themes from his critique of Kant and Fichte in *Natural Law* and elsewhere, Hegel sees morality as inadequate for the social whole: '*fiat justitia* should not have *pereat mundus* as its consequence' (*PR* §130; see also Hegel 1975: 102; Moyar 2012: 31). Hegel's objection echoed across his works is that morality's obligations, which occur in the form of universal objective duties, cannot by themselves direct the conduct of particular living rational beings (*PR* §135; see also Hegel 1975: 70–84; Hegel 1977: §§419–37). For understanding how this works in Hegel's dialectic, it is immaterial whether this is a good critique

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of Kant and Fichte; instead what matters is that Hegel thinks morality is inadequate (for a treatment of the critique's validity, see Freyenhagen 2012).

For Hegel, the 'ought' of morality leaves behind an indeterminacy answered in the concept of ethical life. In *Natural Law*, ethical life unifies what Hegel sees as the rational objective nature of morality with the empirical and subjective nitty gritty of individuals (Acton 1975: 22–23). The final division of the *Encyclopedia of the Philosophical Sciences*, which Wallace translates as *Hegel's Philosophy of Mind* (2012 [1894]), describes ethical life as 'the completion of objective Spirit, the reality of subjective and objective Spirit itself' (Hegel 2012 [1894]: §513). Ethical life unifies the objective universal of morality with the subjective universal of people as found in the family, the civic society, and the state (Peperzak 2001: 382). Just as in 'Morality' Hegel reconsiders right within the frame of universal law, he reframes right as fully integrated social reality in the family, civic society, and, finally, the state by considering ethical life in 'Ethical Life'.

Family, Property, and Marriage Reconsidered in 'Ethical Life'

In the 'Ethical Life' section of the *Elements of the Philosophy of Right* Hegel revisits and transforms his considerations of family, property, and marriage. In 'Ethical Life' family supplants the moral sphere of independent subjects with contractual and procedural claims on one another with an organic and relational family where members are part of the whole (*PR* §158–59). This also changes property by making it the possession of families rather than individuals (Peperzak 2001: 411).

In 'Ethical Life', marriage also escapes from the contractual model whereby Party A and Party B enter a contract for conjugal exchange. Instead, Hegel believes, in marriage the couple transcends the contractual model and enter into a noncontingent relation (*PR* §163R).

In 'Ethical Life' Hegel also reframes his discussion of property in 'Abstract Right' as 'resources' (*Vermögen*) that satisfy needs universally. He does this through three mediations: '(a) needs and their satisfaction (§§ 190–95), (b) work (§§196–98), and (c) resources (§§ 199–208)' (Peperzak 2001: 445). This refactors Hegel's possession-based conception of property in 'Abstract Right'. In each case, the original is not wholly negated but rather is absorbed into a more robust and living account that is ethical life which Hegel describes in detail in 'Ethical Life'.

Reconsideration Punishment at the Level of Ethical Life

The same pattern extends to Hegel's thoughts on crime and punishment. This does not eliminate the necessity Hegel attaches to retributive punishment, but it recasts how crime and punishment work in the family, civil society, and the state. The groundwork for this thesis appears in the administration of justice (*PR* §§209–29), the *Polizei* (*PR* §§230–56), and the powers of the sovereign (*PR* §§275–86).

In 'Ethical Life', Hegel's discussion of administration of justice clarifies right on several fronts. First, that rights become actual as people are educated about them (*PR* §§209–11; §215). Second, human beings have the special attribute of giving laws to themselves to express justice (*PR* §211A). Third, law is the form that right

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in itself takes in civil society (*PR* §212), and individual expressions of right (will) occur in contracts and formal agreements (*PR* §217). Importantly, Hegel expresses that in civil society he has abandoned the approach to property and acquisition of 'Abstract Right' (*PR* §217R). If Hegel thinks mature right can abandon this, right as it occurs in ethical life can abandon other aspects of abstract right as well. Fourth, law can never be the whole of right (which relates to will) but only applies to material expressions (such as contracts and crimes). In all of its forms, this expresses Hegel's distinction between laws as the codifications of values from the past that have the appearance of truth (Hegel 1975: 130–31) and Ethical Life as living and vibrant.

Hegel's account of the administration of justice also directly modifies crime and punishment. Like property, Hegel tells us that crime has changed (*PR* §218). While Hegel reiterates that 'it would be impossible for society to leave crime unpunished—since the crime would then be posited as right' (PR §218R), the application of punishment and the determination of crime must now happen within a system of proof (*PR* §222; Hegel 2012 [1894]: §532). While in 'Abstract Right' Hegel presents crime as a direct relationship between the criminal and victim, crime in 'The Administration of Justice' (*PR* §§209–29) is crime against society. As Peperzak (2001: 459) explains, this means that considered from the perspective of ethical life, crime has become 'a social event with a considerable impact on the society in which it occurs, the evaluation of the criminal act must include the question of how dangerous the criminal is for the society at large'.

Since crime has at the level of ethical life become an issue between the civic society and the criminal, Hegel maintains that punishment must be rationally applied within each civil society (and by extension state) (*PR* §214R; §218A; Hegel 2012 [1894]: §529). The socialization of crime yields a distinction between society's prosecution and punishment of the criminal from revenge by the victim or the victim's relatives (*PR* §220; §223).

A further important change is that at the level of ethical life, punishment occurs in courts with human judges. This is a long-held view for Hegel, stretching back to the ideas in *Spirit of Christianity and Its Fate* (Hegel 1948: 226). This is important enough to show up in the *Encyclopedia*'s overview (Hegel 2012 [1894]: §502) with the idea that only a state can give actuality to law. This requirement for judges connects with Hegel's rejection of revenge and better explains it than the cursory remarks in 'Abstract Right' (Hegel 2012 [1894]: §501; §531). In 'Ethical Life', prosecution of law becomes a type of civic rite that reverences the law and through its publicity achieves universality (*PR* §224) (Pelczynski 1971: 22). This occurs precisely because punishment is now within the domain of a civic society rather than an abstract account of what crime demands.

This shift helps to clarify Hegel's idea of the criminal's reconciliation. In 'Abstract Right', this was the reconciliation of a criminal to the realm of right understood abstractly. In 'Ethical Life', Hegel describes it as the objective reconciliation between the criminal and right as expressed in the laws of a state (*PR* §220; §225). In 'Ethical Life', it is clearer what the 'right' is to which the criminal is to be reconciled since it has now taken the form of civic society and the state. And here we can see an important advantage of Hegel's view over punishment as

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therapy: once the punishment is executed, the criminal is no longer any different from any other citizen.

This arrangement highlights an important error of stopping at 'Abstract Right'. Farnham (2008: 617) supplies an example in stating, 'on this Hegelian theory criminal punishment for drug use makes no sense. There is no relation between two people that needs correction.' This idea and suggestions that Hegel would be sympathetic to decriminalization or nonprosecution miss a critical point: unlike the picture Hegel gives in 'Abstract Right', crime as he describes it in 'Ethical Life' is not against an individual's right but against objective right that exists for and in itself in the social whole. While in 'Abstract Right' Hegel discovers crime in the coercion of one individual by another, in 'Morality' he sees it as a violation of the universal and objective, and in 'Ethical Life' he transforms this as the violation of the laws that express the will of the people. Hegel had already hinted at this point by rejecting the idea that people have a right to suicide (*PR* §70A). Since law expresses right for the state, actuality requires enforcement or total repeal. Laws should express the values of nations (See Hegel 1975: 116).

The second place that shows a change in crime and punishment is Hegel's discussion of the *Polizei*. The *Polizei* seeks to actualize '*particular welfare*' and treat it as right (*PR* §230). As such, it is the state's response to the system of needs. This institution provides oversight as people conduct exchanges to meet their needs that can extend to supplying public utility (*PR* §235). This system has the power to regulate commerce broadly to overcome problems that arise due to the narrow vision of individuals (*PR* §236). In this role, Hegel claims that it supplants the family, making individuals '*sons of civil society*' (*PR* §238) and that this gives the *Polizei* paternalistic powers over individuals (*PR* §240).

Hegel mentions this specifically with the idea that the civic society, in addition to private individuals, has a duty to help alleviate poverty and that in this capacity it should attend to their deficiencies in 'the administration of justice, health care, and . . . the consolation of religion' and help them against laziness and viciousness (*PR* §241). Hegel calls those who begin to lack 'that feeling of right, integrity' the rabble (*PR* §244).

Hegel claims that this disenfranchised rabble tends to become criminal, because of need. While Hegel believes this does not give them right, Hegel does seem to think that they are unable to overcome this predisposition, because they are in a both educationally and emotionally inadequate position. As we saw above, education is a condition for the possibility of being under law. As such, it is not clear that this rabble can commit crime proper but are rather more akin to barbarians who need 'pedagogical coercion' (*PR* §93R). Hegel implies that the state's security and welfare help such individuals and reduce their inclination to crime (Hutchings 2012: 132). Thus, the punishment of crime is no longer the only pole for right to consider in ethical life.

This awareness does not, however, change the theory of punishment. There is no hint that Hegel abandons the idea that the nature of crime is that it should be punished. Nor is there any reason to believe Hegel thinks that punishment in the state should be understood as what Morris calls 'therapy' (1968). Instead, there

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are merely more concerns to be brought to bear when the question is the prosecution of crime within the state.

Hegel's account of the sovereign's right of pardon supplies the final change that argues against seeing 'Abstract Right' as providing the complete picture of Hegel's account of crime and punishment: 'The sovereignty of the monarch is the source of the right to *pardon* criminals, for only the sovereign is entitled to actualize the power of spirit to undo what has been done and nullify crime by forgiving and forgetting' (*PR* §282). Hegel here references his earlier discussion (*PR* §§95–102) as the application of, or reflection into, a higher sphere to a lower one (*PR* §282R). Hegel's addition makes clear that he thinks clemency is the 'remission of punishment' but not the overthrow of right itself (*PR* §282A).

Contrasting this with Kant reveals how far things have moved from Hegel's discussion in 'Abstract Right'. Kant's sovereign is tasked with enforcing even immoral laws and not straying from them (Hill 1997: 295). Consequently, Kant restricts the power to crimes against the sovereign in *Doctrine of Right* and claims the power is wrong to use for crimes between his subjects since 'failure to punish . . . is the greatest wrong against his subjects' (Kant 2006 [1797]: 6:337). This follows in Kant's model because the determination of justice falls completely in the hands of pure reason, and the sovereign is not different from any other in this respect. Thus, the intervention of the sovereign can amount only to particular meddling.

As Corlett points out, it is not clear that there is room for clemency on Kant's picture since punishing is a perfect duty (2001: 106). Hill suggests a defense of leeway on the grounds that Kant's vociferous objections to leeway focus on 'making exceptions (a) on consequentialist grounds, (b) on the general excuse that the law is unjust, or (c) whatever special personal interests a Sovereign might have in 'pardoning' someone' (1997: 298). From this, Hill contends that we can understand Kant's position as saying there's an obligation that '*all and only those both morally and legally guilty should be punished*' (298). To give the sovereign anyone to pardon, Hill's argument hinges on 'Kant, I think, took for granted' conditions that have an impact on moral agency in criminals (299).

This is thin soup to justify positive grounds for clemency, and we find no full-throated statements from Kant in praise of this power. It gets even thinner when we consider Kant's distinction between law and ethics, which muddles things by requiring us to consider what is appropriate in law and appropriate in ethics separately (Brooks 2001: 567). The perfect duty to punish is ethical; the leeway Kant grants is legal. Kant spells this out repeatedly in both parts of *Metaphysics of Morals* (2006 [1797]): *Metaphysical First Principles of the Doctrine of Right* and the *Metaphysical First Principles of the Doctrine of Virtue*.

Hegel draws no such distinction and declares that the sovereign as the incarnation of Spirit in the state has the power to grant clemency. Hegel identifies the sovereign as the vessel in whom 'the different powers [of the political state are] united in an individual unity' (*PR* §273). In other words, Hegel sees the sovereign as the incarnation of Spirit in an individual that unites the universality of a people's organic constitution and laws and the particularity of the case at hand (*PR* §275).

As he does in in *Natural Law* and in his critique of Kant, Hegel believes in clemency because he maintains that laws by themselves do not get us to right.

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Instead, the sovereign expresses the truth of Spirit in his actions, correcting gaps between law and right. This makes clemency one of the sovereign's most important powers for Hegel since it reconciles the slow-changing law to the reality of right in the state. Thus, unlike Kant's concession, Hegel sees abrogating punishment as necessary to right and the domain of the sovereign as the incarnation of the ethical life of his people. From this and the preceding considerations, we can see that 'Abstract Right' does not express Hegel's complete view. While Corlett remarks that the ability to grant mercy rather than punish makes it questionable that a view can even be called retributionist (2001: 107), the sovereign's ability to grant clemency is an integral part of Hegel's account of right at the level of ethical life.

Hegel's Mature Account as Retribution Plus

Hegel, like Kant, can avail himself of deterrence and rehabilitation as response to crimes as long as these do not supplant the need to punish. As Corlett (2001: 87) points out, 'it is no embarrassment even for Kant, or for retributivists in general, that appeals to social utility are made once the primary justification of punishment is provided'. Hegel has even more contexts in which to place rehabilitation and deterrence into his ethical system.

First, Hegel's insistence that we treat criminals as people and as parts of civil society (*PR* §§99–100) implies that we rehabilitate them by punishing them, since punishment affords them the dignity of humanity (as opposed to the mere force with which one would meet 'natural havoc') and makes them members of society in full standing.

Second, Hegel suggests that life has rights against the right found in 'Abstract Right':

> Life, as a totality of ends, has a right in opposition to abstract right. If for example, life can be preserved by stealing a loaf, this certainly constitutes an infringement of someone's property, but it would be wrong to regard such an action as common theft. (*PR* §127A)

In other words, the right to maintain one's life by getting food can violate right abstractly considered, but Hegel refuses to view this as the crime of theft. This solidifies the idea that crime and its punishment as Hegel considers them at the levels of morality and ethical life would no longer be merely about individual property but rather violations against society.

Mohr (1997: 109) makes the interesting claim that in 'Civil Society' Hegel rejects one form of prevention theory but in fact affirms a certain form of prevention:

> Hegel spricht somit der Strafe als ihrem immanenten Zweck die Aufgabe einer positiven Generalprävention zu, die darin besteht, die Normgeltung zu bekräftigen und zu bewähren, während er die negative Generalprävention, die die Mitglieder der Rechtsgemeinschaft über den Abschrecksungseffekt der Strafandrohung zur Normtreue

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> motivieren will, zumindest als Begründung der Strafgerechtigkeit ablehnt.
>
> (Hegel thus confers on punishment as its immanent end the task of positive general prevention, which consists in reaffirming and proving the application of the norm, while at the very least he is rejecting the negative general prevention as the justification for criminal punishment, which the members of the legal community want to motivate for the deterrent effect of the punishment to the violation of norms.) (My translation).

In other words, punishment prevents crime from developing a permanent grip on reality or being a valid expression of human will.

To understand how Hegel views the complex relation between the necessity of punishment and other aspects of punishment, we can look at two passages. First, one passage makes it seem that retribution is one aspect among others for Hegel:

> Punishment, for example, has various determinations: it is retributive, a deterrent example as well, a threat used by the law as deterrent, and also it brings the criminal to his senses and reforms him. Each of these different determinations has been considered the *ground of punishment*, because each is an essential determination, and therefore the others, as distinct from it, are determined as merely contingent relatively to it. *But the one which is taken as ground is still not the whole punishment itself*. (Hegel, *Science of Logic* §1012, p. 465, as quoted in Brooks 2013: 49)

Brooks (2012: 104) believes that failure to consider this passage has led to a failure to understand that Hegel thinks retribution, deterrence, and rehabilitation are each 'a different and legitimate facet of justified punishment'. It is true that here we see Hegel making a distinction between ways of looking at punishment and the whole punishment, but it's also important to recognize that for Hegel these are empirical determinations. In *Natural Law* Hegel explains:

> Or in the case of punishment, one specific aspect is singled out—the criminal's moral reform, or the damage done, or the effect of his punishment on others, or the criminal's own notion of the punishment before he committed the crime, or the necessity of making this notion a reality by carrying out the threat, etc. And then some such single aspect is made the purpose and essence of the whole. The natural consequence is that such, since such a specific aspect has no necessary connection with the other specific aspects which can be found and distinguished, there arises an endless struggle to find the necessary bearing and predominance of one over the others; and since inner necessity, non-existent in singularity, is missing, each aspect can perfectly well vindicate its independence of the others. (Hegel 1975: 60)

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Here, the same idea occurs: that we can look at different aspects of punishment. But Hegel tells us that it's a mistake to single out any empirical determination and from that understand the nature of punishment at its core. In *Natural Law*, Hegel explains that the rational core of punishment is retribution (1975: 93). Merging these two thoughts we can see that the whole punishment also includes deterrence and reform. Consequently, I have shown that Hegel's view is best understood as retribution plus, an account where punishment is necessitated as just desserts but includes other desirable effects in society.

Conclusion

In this article, I have looked at Hegel's account of crime and punishment in *Philosophy of Right* without restricting it to that found in 'Abstract Right'. Moreover, I have also related this to Hegel's encyclopedic system and where necessary to other parts of Hegel's works. This enables us both to summarize and critique Hegel's views with new clarity.

First, Hegel maintains a postulate of practical reason that punishment must occur and must be retributive. Hegel's best argument for this is that to leave crime standing would give its coercive positive reality actuality, and that right must stamp this out for right itself to continue to be actual (i.e., to mean anything at all). For this reason, Hegel does not think any other role for punishment can fulfill its nature—even if (per *Natural Law*) they seem empirically promising.

Second, Hegel's mature view is that punishment reconciles the criminal to society. His account sounds constructivist: A person who commits a crime is already an individual who wills universally and wills for the ideas of possession, property, and contract even when they seek to violate these norms. As such, they are already committed to the universal and must be reconciled as subjects of society in morality and viewed as part of the civic society whether they consciously yield to their punishment or not with these stages of right being treated in sections with the same names.

Third, building on Hegel's account of ethical life in the *Elements of the Philosophy of Right* and the encyclopedia, I contend that Hegel's idea of civic society can allow punishment to serve in other roles and be integrated into society for reasons other than mere retributive punishment. The outline of my argument is that the *Elements of the Philosophy of Right*, like other Hegelian texts, has a dialectical structure, and this means that the concept of right is not fully understood until it reaches its pinnacle at the discussion of the state in 'Ethical Life', which earlier texts called 'absolute ethical life'. Hegel calls the state the 'immanent end' of all prior expressions of right (*PR* §261).

Finally, the justification for seeing the account of punishment as beyond mere retribution is that Hegel's applications of this model to family, marriage, and property demonstrate that their forms in 'Ethical Life' supplant the forms as presented in 'Abstract Right'. Hegel's ideas of civil society suggests that the level of ethical life allows similar modifications to occur to the nature of crime and punishment in the mercy of the sovereign, the need for human judges, and the role of the *Polizei*. As such, Hegel supplies a theory that while retributionist in its

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understanding of punishment's nature is capable of incorporating consequentialist concerns in the state, which deserves further consideration in the contemporary debate.

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