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German Idealism and the Concept of Punishment

Jean-Christophe Merle

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translated from the German by

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GERMAN IDEALISM AND THE CONCEPT OF PUNISHMENT

Against the background of early modernism – a period that justified punishment by general deterrence – Kant is usually thought to represent a radical turn toward retributivism. For Kant, and later for Fichte and Hegel, a just punishment respects the humanity inherent in the criminal, and serves no external ends: it is instituted only because the criminal deserves it. In this original study, Jean-Christophe Merle uses close analysis of texts to show that these philosophers did not in fact hold a retributivist position, or even a mixed position; instead he traces in their work the gradual emergence of views in favor of deterrence and resocialization. He also examines Nietzsche's view that morality rests on the rejection of retribution. His final chapter offers a challenge to the retributivist position, and a defense of resocialization, in the context of current legal theory and practice concerning the punishment of crimes against humanity.

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. . . we all know today's executioners are humanists.

Albert Camus

PREFACE

"Nemo prudens punit quia peccatum est sed ne peccetur," says Seneca in *De ira*, and many philosophers who have come after him recommend such a justification of punishment by deterrence. Since Immanuel Kant, a completely different concept has spread among philosophers, considerably more so than among legal scholars and lawyers. According to Kant, the question of justification of punishment should not read: For what purpose punish? Rather, according to Kant's absolutist or categorical imperative regarding punishment, punishment can only be carried out because the malefactor is *deserving* of the punishment. Everything else is allegedly unjust, and is detrimental to the malefactor's human dignity as a moral subject. Such a theory of retributive justice, which draws not only from Kant but also from G. W. F. Hegel, inspires a great deal of fascination in many philosophers, but that notwithstanding it still stands on shaky ground. A precise analysis of Kant's and Hegel's philosophy of law and morality leads rather to a special form of deterrence theory.

I will attempt to conduct this analysis within the confines of this book. The analysis begins with Kant, continues with J. G. Fichte and Hegel, leads to Friedrich Nietzsche, and then concludes with a discussion of the justification of punishment for crimes against humanity. This closing discussion should be seen as the touchstone. Should my position be able to explain this difficult case, then it should be even more able to explain cases of lesser difficulty.

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ABBREVIATIONS

Kant

GMS *Groundwork of the metaphysics of morals*
(*Grundlegung zur Metaphysik der Sitten*)
(1785, Ak IV:385–464)
Immanuel Kant, *Practical philosophy*, ed. Mary Gregor (Cambridge: Cambridge University Press, 1996), pp. 37–108

Idee *Idea for a universal history with a cosmopolitan purpose*
(*Idee zu einer allgemeinen Geschichte in weltbürgerlicher Absicht*)
(1784, Ak VIII:15–32)
Immanuel Kant, *Political writings*, ed. Hans Reiss, trans. H. B. Nisbet, second edition, (Cambridge: Cambridge University Press), pp. 41–53

KpV *Critique of practical reason*
(*Kritik der praktischen Vernunft*)
(1788, Ak V:1–164)
Immanuel Kant, *Practical philosophy*, ed. Mary Gregor (Cambridge: Cambridge University Press, 1996), pp. 133–272

KrV *Critique of pure reason*
(*Kritik der reinen Vernunft*)
(1st edn 1781, 2nd edn 1787, Ak III:1–552)
Page numbers are from the second edition
Immanuel Kant, *Critique of pure reason*, ed. and trans. Paul Guyer and Alan W. Wood (Cambridge: Cambridge University Press, 1997)

Päd Lecture *On pedagogy*
(*Pädagogik*)
(1803, Ak IX:437–99) (no translation)

Rel *Religion within the boundaries of mere reason*

(*Religion innerhalb der Grenzen der bloßen Vernunft*)
(1793, Ak VI:1–202)
Immanuel Kant, *Religion within the boundaries of mere reason*, in Kant, *Religion within the boundaries of mere reason and other writings*, ed. Allen Wood and George di Giovanni (Cambridge: Cambridge University Press, 1998), pp. 31–192

RL *The doctrine of right* (Part 1 of *The metaphysics of morals*)
(1st edn 1797, 2nd edn 1798, Ak VI:203–372)
Immanuel Kant, *Practical philosophy*, ed. Mary Gregor (Cambridge: Cambridge University Press, 1996), pp. 363–506

TL *The doctrine of virtue* (Part 2 of *The metaphysics of morals*)
(1st edn 1797, 2nd edn 1798, Ak VI:373–493)
Immanuel Kant, *Practical philosophy*, ed. Mary Gregor (Cambridge: Cambridge University Press, 1996), pp. 507–615

VE Immanuel Kant, *Lectures on ethics*, ed. Peter Heath and J. B. Schneewind, trans. Peter Heath (Cambridge: Cambridge University Press, 1997)
(*Eine Vorlesung Kants über Ethik*) (*c.* 1875–80, Ak XXVII:286)

ZeF *Toward perpetual peace*
(*Zum ewigen Frieden*)
(1795, Ak VII:341–86)
Immanuel Kant, *Practical philosophy*, ed. Mary Gregor (Cambridge: Cambridge University Press, 1996), pp. 311–52

Fichte

GNR *Foundations of natural right, according to the principles of the Wissenschaftslehre*
(*Grundlage des Naturrechts nach Principien der Wissenschaftslehre*)
Johann Gottlieb Fichte, *Foundations of natural right: Grundlage des Naturrechts nach Principien der Wissenschaftslehre*, ed. Frederick Neuhouser, trans. Michael Baur (Cambridge: Cambridge University Press, 2000)

Hegel

GPhR *Elements of the philosophy of right*
(*Grundlinien der Philosophie des Rechts*)
G. W. F. Hegel, *Elements of the philosophy of right*, trans. H. B. Nisbet (Cambridge: Cambridge University Press, 1991)

NRSW Lecture on *Natural law and the science of state*
(Vorlesung über *Naturrecht und Staatswissenschaft*)
(1818–19)
(No translation)

PhR Lecture on *The philosophy of right*
(Vorlesung über *Philosophie des Rechts* (1824–5))
(No translation)

Nietzsche

GdM *On the genealogy of morality*
(*Zur Genealogie der Moral*)
Friedrich Nietzsche, *On the genealogy of morality*, ed. Keith Ansell-Pearson, trans. Carol Diethe (Cambridge: Cambridge University Press, 2007), pp. 1–128

WuL *On truth and lies in a nonmoral sense*
(*Über Wahrheit und Lüge*)
Friedrich Nietzsche, *Writings from the early notebooks*, ed. Ladislaus Löb, Raymond Geuss and Alexander Nehamas (Cambridge: Cambridge University Press, forthcoming)

Note on translations of primary and secondary literature

Every effort has been made to find published English translations of all foreign-language texts. Where there is no published translation, German passages have been translated for the purposes of this book. The reader should assume that if a quotation is from a German work for which no English-language citation is given, then the text has been newly translated. In the interests of simplifying the footnote citations, this will not always be noted unless there is a specific need for clarification.

CONTENTS

INTRODUCTION

A nearly total unanimity prevails with regard to the fundamental necessity of a public penal system.[1] Even among those few who advocate the abolition of all punishments, a large majority advocates instituting alternatives to the usual prison sentence, rather than calling for the abolition of punishment without anything to replace it. When seen in this light, the existence of public penal law can be regarded as being completely justified. The manner in which punishment might actually be justified, however, remains just as controversial a subject as determining the appropriate amount of punishment. This is because these issues are closely related to one another.

Every theory of punishment currently advocated shares the rejection of the system of punishment which was prevalent in the early modern age. This rejected system, illustrated by such penal provisions as the *Constitutio criminalis Carolina*, enacted in 1532, was placed in opposition to the modern system of punishment by Michel Foucault in *Discipline and punish*. The early modern system differs from the modern system in the sense that the latter prefers either prison sentences or (if any) the most painless and most decent death sentences possible.[2] It is worth noting that well into the eighteenth century more than one hundred crimes were capital offenses. Torture,

1. For an example of the few exceptions, see Herman Bianchi, "Abolition: assensus and sanctuary," in Alexander R. Duff and David Garland (eds.), *A reader on punishment* (Oxford: Oxford University Press, 1994), pp. 336–51.
2. See the beginning of Michel Foucault, *Discipline and punish: the birth of the prison*, trans. Alan Sheridan, second edition (New York: Random House, 1995); see also the *Constitutio criminalis Carolina* in Friedrich-Christian Schroeder (ed.), *Die Carolina: die Peinliche Gerichtsordnung Kaiser Karls V. von* 1532 (Darmstadt: Wissenschaftliche Buchgesellschaft, 1986).

which was already systematically employed as an interrogation method, was often a component of the punishment, as well as constituting an intensification of the death sentence. Even though torture as a means for investigation and security is currently being propagated again[3] and even though the death penalty is still supported,[4] there are no theorists to be found who would come out in support of a return to early modern practice. All contemporary theorists show themselves to be guided by the humanitarian spirit of the Eighth Amendment to the United States Constitution: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

What exactly this humanism consists of, and where the limits of this humanism might lie, are still controversial issues. However, the fundamental discrepancy is generally seen to be somewhere between the theories of retributive justice and general deterrence.

Retributivist theories justify the punishment of a criminal on the grounds that retribution is demanded by justice to compensate for the inequities created by the crime. On this basis, one may make a subsidiary distinction and ask whether what needs to be compensated for is the gravity of the offense itself or the malevolence of the criminal that was illustrated by the said offense. Theories of general deterrence, on the other hand, justify the punishment on the grounds that all of the citizens will be deterred from carrying out an offense before it occurs, either through the threat of a certain punishment or through the enforcement of the said punishment; the latter option relies on the example it displays.

On the one hand, the modern advocates of general deterrence (examples include Thomas Hobbes, Samuel von Pufendorf, Christian Wolff, Cesare Beccaria, Anselm Feuerbach and Arthur Schopenhauer) consider that the uselessness inherent in punishments that do not serve to deter others from committing crimes is inhumane. The current system of positive criminal law also requires that each punishment contains elements of general prevention as stated in the initial paragraphs of the German Penal Code:

3. See, for example, Winfried Brugger, "Darf der Staat ausnahmsweise foltern?," *Der Staat*, 35 (1996), 67–97; and "Vom unbedingten Verbot der Folter zum bedingten Recht auf Folter?" *Juristenzeitung*, 35, no. 4 (18 February 2000), 165–73. For a detailed repudiation of torture, see, for example, Henry Shue, "Torture," *Philosophy and Public Affairs*, 7, no. 2 (1977–88), 124–43.
4. See Ernest van den Haag, "Why capital punishment?," *Albany Law Review*, 54, nos. 3–4 (1990), 501–14.

> By serving a prison term, a prisoner should eventually become able to lead a life in which he or she commits no crimes (which is the goal of the execution of punishment). The completion of a term of imprisonment also serves to protect the general public from further crimes.[5]

On the other hand, theories of general deterrence often draw the criticism that they treat criminals inhumanely, because the intended aim of punishment is conceived of solely to serve the interests of the other citizens without taking into consideration the dignity of the criminal. This criticism is leveled in its most intense form when it is postulated that general deterrence allows the punishment of an innocent person.[6]

This objection can be understood in at least two different ways. General deterrence can be objected to on the one hand, for the reason that the aim of punishment ignores the interests of the convicted, or on the other hand, in accordance with retributivism, for the reason that any kind of interest – whether of the criminal or of the fellow citizens – should be disregarded by the penal sentence, because a punishment justified in a retributivist way is merely about inflicting on the criminal what he or she intrinsically deserves because of the deed. A punishment situated in the retributive model should be concerned with inflicting a punishment that is in line with what the prisoner merited because a certain crime was perpetrated. The latter objection is raised by retributivism. The former objection is raised by positions that hold that the rehabilitation of the perpetrator should be the punishment's goal. Admittedly, the latter position recognizes that for the purpose of reaching rehabilitation a certain period of time of specific deterrence may become necessary, in which society is protected from further crimes through incapacitation of the criminal.

5. From the German National Code of Enforcement of Sentences, the "Strafvollzugsgesetz" (StVollzG), published by the German Federal Ministry of Justice, § 2. The above passage is the precept to the later statutes in the codex. Compare as well with the judgment of the German Federal Court of Justice (*Bundesgerichtshof*) on December 8, 1970, 1 StR 353/70. (Translation mine.)
6. Cf. Peter Koller, "Probleme der utilitaristischen Strafrechtfertigung," *Zeitschrift für die Gesamte Strafrechtswissenschaft*, 91 (1979), 45–95; Kristian Kühl, *Die Bedeutung der Rechtsphilosophie für das Strafrecht* (Baden-Baden: Nomos, 2001), p. 29; Peter Landau, "Karl Christian Friedrich Krauses Rechtsphilosophie," in Klaus-Michael Kodalle (ed.), *Karl Christian Friedrich Krause (1781–1832): Studien zu seiner Philosophie und zum Krausismo* (Hamburg: F. Meiner, 1985), pp. 80–92 (p. 29). For a refutation of this objection, compare Fred Rosen, "Utilitarianism and the punishment of the innocent: the origins of a false doctrine," *Utilitas*, 9, no. 1 (March 1997), 23–37.

Retributivism criticizes theories of general deterrence as well as theories of rehabilitation considered as the aim of punishment for much the same reason, that is, because these theories treat punishment as a mere means to an end. Retributivists themselves hold that punishment ought to be justified without any reference to further goals, invoking the rationale that the criminal deserves it because he or she knowingly violated the law. It is for this reason that legal theorists term retributivism an *absolute theory*, because, according to retributivism, punishment represents a good that does not depend on any goal. On the contrary, in the "relative" theories the justification of punishment always depends on its relation to a goal. According to the proponents of retributivism,[7] it derives its superiority from the fact that it alone – as the only theory of criminal justice that views the punishment solely as a goal in itself – treats the malefactor not as a simple means to an end, but as a subject possessing human dignity. In this work, I will attempt to refute these theses. I hope to show that it is not retributivism but rather rehabilitation that meets this requirement.

Proponents of rehabilitation obviously consider the aim of punishment to be to grant the criminal the best "possible" status, by which it is understood that this is the way of treating the criminal that is both the most benevolent and still compatible with the protection of society against further crimes. Thus, with rehabilitation as an aim in punishment, clear limits are set for specific deterrence. Without specific deterrence, rehabilitation would be unthinkable, for if there were no public enforcement of the law, there could in turn be no reintegration back into society, for there would be no rule of law into which a criminal could be reintegrated after the rehabilitation has been completed.

Unlike rehabilitative and specific deterrent punishments, retributivism does not concern itself with the future of the malefactor beyond the duration of the punishment. In this respect, the theory of rehabilitation is the only one that can categorically exclude those sorts of punishment that – as mentioned at the beginning of this introduction – the proponents of all the theories of punishment reject resolutely: the "cruel and unusual punishments." The vice president of the Federal Constitutional Court of Germany Winfried Hassemer rightly

7. See, for example, Otfried Höffe, *Gerechtigkeit: eine philosophische Einführung* (Munich: C. H. Beck, 2004), p. 83.