

Punishment and the restoration of rights

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Abstract

This article considers the attempt to justify punishment in terms of its ability to restore the breached rights of the crime victim. It examines the arguments put forward by Immanuel Kant and Georg Hegel and contends that their theories, having followed similar patterns linguistically and stylistically, each founder though for different reasons, at the key stage of demonstrating how punishment restores rights. Kant relies upon an inappropriate analogy while Hegel resorts to an over-extended metaphor. Neither demonstrates how punishment 'undoes' the wrong inherent to crime. Within the contemporary literature there is a move from punishment as the restoration of right towards punishment as the reaffirmation of right. However, the article argues that the theories following this path fail to demonstrate why punishment is necessary to the reaffirmation of right. For the above reasons, there is, as yet, no satisfactory 'justificatory' link between punishment and victims' rights.

Key Words

Hegel • Kant • punishment • rights • victim

When we talk about punishment and victims' rights there are several connections that we might be making. Perhaps the most basic is an intuitive link between the harm done to the victim, in breach of his right, and the harm done to the criminal by way of punishment. If nothing else there is something pleasingly symmetrical about the process thus conceived. However, despite the fundamental appeal of punishment played as poetic justice, most theories of punishment expounded in the last century excluded or ignored the wrong done to the immediate victim of the offence in explaining why we punish. This was true of rehabilitation theories that concerned themselves with the criminal and the need to 'cure' her criminal tendencies and/or successfully reintegrate her into society. It was equally true of deterrence theories that concentrated upon society's need for protection from future crimes. It was also true, although less obviously so, of retributive theories that conceived of crime as being a wrong against the law abiding. This reduced the status of the *immediate* victim – the one who had been raped or burgled – to merely

one within a class of wronged citizens. In so doing these theories passed over the significance of the wrong done to the immediate victim with the somewhat off-hand observation that '[w]hat is done cannot be undone' (Finnis, 1980: 263; see also Honderich, 1969: 45; Nozick, 1981: 379; Sadurski, 1985: 227).

Given the recent background, it is unsurprising that retributive theories of punishment, recast in terms of victims' rights, are now widely welcomed as a return to what ought to be a key concern of the criminal legal system. However, those of us interested in penal theory and practice must surely look for something beyond the *Schadenfreude* of watching those who cause suffering, suffering themselves, to justify punishment. We must look for good or sufficient reasons *to bring about* a situation in which other humans suffer and those reasons ought to transcend the basic, and possibly base, assertion that it 'feels good'. In this regard there are at least two 'justificatory' connections that might be made between punishment and victims' rights. The first is that once crime is committed the victim has a right that the criminal be punished. The second is that once crime, in the form of a violation of the victim's right, has been committed, punishment restores the violated right. It is the second of these claims that forms the focus of this article.¹

The claim that punishment is justified because it restores the victim's violated right is an attractive one. It trumps the obvious objection to punishment – it harms the criminal – with the observation that punishment also (in one sense) undoes the harm done by the criminal. It does not, because it cannot, un-rape or un-stab the victim, but it does, it is claimed, restore the violated right not to be raped or stabbed. The two main proponents of this claim within classical punishment theory are Immanuel Kant and Georg Hegel and in this article I examine their theories in an attempt to elucidate the thesis that punishment restores right. I argue that their theories take us up to the point of accepting that crime is a breach of the victim's right and can lead us to accept that the state ought to do something about this breach. However, in claiming that the state should respond punitively, Kant and Hegel make a leap that remains unjustified except by recourse to metaphor and analogy.² When unpacked these fail to demonstrate a meaningful (as opposed to semantic) sense in which punishment restores right. However, before turning to the argument I will outline some key themes of Kant and Hegel on punishment so that the line of theory under consideration can be seen in philosophical context.

First, Kant and Hegel's theories are usually held to be paradigmatically *retributivist* (but see Scheid, 1983: 262; Byrd, 1989; Murphy, 1992: 31–60). Kantian retributivism has been cast as the theory that we punish criminals because they deserve it, a line that received much attention during the 1970s and 1980s. However, for present purposes the general strand of retributivism that links Kant and Hegel is the claim that we need look no further than the fact that a criminal has committed an offence to justify punishment. It is something inherent to crime that justifies penal intervention. Within this article the 'thing' in question is that crime represents a deliberate choice to infringe right.

Second, both Kant and Hegel justify punishment, at least as a general system, by reference to an overarching moral and, thereafter, political theory. The significant thing for this article is that they share a concept of crime that goes beyond mere breach of a posited rule: if their theories work they do so by reference to a realm of absolute right and wrong. While this might turn off some at the outset, it should not. We may not command the degree of moral consensus found in 18th- and 19th-century Northern Europe but it is still relatively uncontroversial to state that murder and torture, for instance, are *wrong*

in a more than purely legal sense. Nevertheless, the point should act as a caution to those attracted by particular conclusions that Kant or Hegel reach: there are significant philosophical foundations to be laid if those conclusions are to stand.

Third, because both Kant and Hegel were primarily concerned with justifying punishment as a system operating within a moral scheme, neither gives much consideration to the particular punishments to be meted out to actual criminals (see especially Hegel, 1967: 72–3). Within an article such as this it is perhaps safest to claim that at least in a core of cases it ought to be possible to extrapolate from Kant and Hegel's general conclusions to the individual case. Certainly if it is *never* possible to do so then their theories are of purely academic interest at most. Having covered this basic groundwork I now turn to the argument proper, the first thing to establish being the strand of retributive thought that forms the focus of inquiry.

Both Kant and Hegel see crime as an attack on something good – 'right' – and regard punishment as a justified defence of that which is attacked. In the *Metaphysics of morals* Kant says this:

[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 contradiction an authorization to coerce someone who infringes upon it.* (Kant, 1991: 57, emphasis changed from original)

Similarly, in the *Philosophy of right* Hegel states that:

coercion is annulled by coercion; coercion is thus shown to be not only right under certain conditions but necessary, i.e. as a second act of coercion which is the annulment of one that has preceded . . .

A crime, as an act, is not something positive, not a first thing, on which punishment would supervene as a negation. It is something negative, so that its punishment is only a negation of the negation. Right in its actuality, then, annuls what infringes it and therein displays its validity and proves itself to be a necessary, mediated, reality. (Hegel, 1967: 67, and at 246 in note to 69)

What must be noted is that both claim a logical progression: premise; contradiction; contradiction of contradiction (reassertion of premise). It is the inability to translate this logical progression into anything substantial that undermines their respective justifications of punishment. Before turning to this step in the argument and pinpointing where error creeps in, I shall consider the first two steps in the progression, discussing the terms of reference employed by Kant and Hegel.

THE PREMISE: VICTIMS HAVE RIGHTS

Although Kant uses the language of *freedom in accordance with Universal laws* and Hegel the concept of *Recht* it is clear that these ideas overlap. Kant writes that '[f]reedom

(independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity' (Kant, 1991: 63). In typically idiosyncratic prose Hegel writes that:

[t]he basis of right is, in general, mind; its precise place and point of origin is the will. The will is free, so that freedom is both the substance of right and its goal, while the system of right is the realm of freedom made actual, the world of mind brought forth out of itself like a second nature. (Hegel, 1967: 20)

Kant and Hegel both have in mind some metaphysical concept of 'right' sourced in the freedom of the will. It is not my purpose to offer an exegetical account of what they might have meant by this since, as developed by Kant and Hegel, the notion of right need, *at this stage*, be no more than abstract (see further Stillman, 1976: 169–70). For this reason, the argument to this point can be accepted by anyone who agrees with the premise that victims, as agents, have rights, notwithstanding that there may be disagreement as to the ambit of those rights. The basic form of the theories – premise, contradiction, contradiction of contradiction (reassertion of premise) – holds whatever the initial premise may be. In order to liberate the prose from cumbersome constructions, I shall talk in terms of simple 'right'. What should be remembered is that whenever Kant talks in terms of freedom he is talking of something that he held to be an absolute and inalienable right. Similarly, whenever Hegel talks in terms of right he is referring to something that he held to be derived from, and having as its aim, the freedom of the will.

THE CONTRADICTION: CRIME AS AN ATTACK ON THE VICTIM'S RIGHT

That which makes crime *wrong* is precisely that it is a wilful attack upon the victim's right. Extrapolating from this, Hegel claims that crime negates (or threatens to negate) the rights of all persons. The pertinent dicta here are 'crime – a negatively infinite judgement in its full sense' and '[t]he initial act of coercion. . . infringes the right *as right*' (Hegel, 1967: both at 67, emphasis added). Crime attacks not only a particular right but also 'right as right' or the very basis of all rights. Inwood, explaining this, states that:

[w]hat is wrong with crime is thus not that it is unpleasant or inconvenient for its victims, but that it is an *Unrecht*, an attack on right as such, usually in the form of an attack on a particular person or his property. (Inwood, 1992: 233)³

The point for Hegel is that an attack on the particular victim's right and an attack on the entirety of rights cannot be separated. The victim's right not to be assaulted, say, is a feature of his 'personhood', as are all his other rights. In refusing to acknowledge the link between personhood and the specific right, the criminal implicitly refuses to recognize the link between personhood and rights and hence all of the victim's rights. However, since the victim is no different from any other person in respect of his rights being a feature of his personhood, the criminal also attacks, by implication, the rights of all persons. Ultimately then, in refusing to acknowledge the fact that being a person,

in and of itself, carries certain rights with it, the criminal refuses to acknowledge the category 'right'. Therefore, the wrong against the victim *must* be addressed otherwise the whole realm of rights is negated. Thus, when Hegel talks of punishment restoring right he means both the particular right attacked and the realm of rights. On the one hand the restoration of the realm guarantees the particular right dwelling within it and, on the other hand, the restoration of the particular right guarantees the security of the realm just as mending a hole assures the safety of a ship (see further Stillman, 1976: 170–1 and Matravers, undated: 9 for elaboration on this point).

If the state were to do absolutely nothing about the criminal's breach of right – if it were to *tolerate* the breach – it would by implication 'agree' with the criminal's negation of right. In this case, rights would cease to have practical import for the victim (and others). It would be *as if* the victim did not have rights. Given that the state ought not to allow such a situation to arise, it must be seen to do something about the breach of right. It is at this point that the theory demands the state *punish* the criminal on the grounds that punishment restores negated right. As I shall argue, this step in the argument is problematic.

CONTRADICTION OF CONTRADICTION (REASSERTION OF VICTIM'S RIGHT)

Crime throws the victim's right into question and, if we are to follow Hegel, it threatens to do substantially more than this. On the basis of this it is relatively straightforward to conclude that were the state to do absolutely nothing in response to crime, rights would cease to be of significance: they would, as it were, *remain* in question. One plausible defence of punishment, therefore, is to argue that it somehow restores breached rights. Since rights are important this argument could suffice to justify punishment, notwithstanding our countervailing moral objections to harming other people. What remains to be shown then is *how* punishment restores the breached rights of (at least) the victim (see further Bradley, 1962: 27).

Kant uses the enforcement of a debt as an analogue of how coercion may be consistent with right, stating that 'coercion which constrains everyone to pay his debts can coexist with the freedom of everyone, including that of debtors' (Kant, 1991: 58). He contends that just as going to court to enforce a monetary debt protects the claimant's rights to the money, while remaining consistent with the rights ('freedoms' in Kant) of the debtor, punishment protects the victim's rights to freedom from molestation while remaining consistent with the criminal's rights. However, to show why this analogy fails it is necessary to highlight an equivocation in the use of the term 'freedom' as a synonym for 'right'.

The statement 'I am free to do X' may be an empirical description of my abilities or it may be a normative claim about my rights. In the former sense, I could claim that I am free to hurt the weak and give to charity but that I am not free to steal from Fort Knox or end world poverty. Each claim correctly describes my abilities. In the latter, normative, sense I might claim that I am free neither to hurt the weak nor to steal from Fort Knox while maintaining that I am free both to give to charity and to end world poverty. Of course, in practical terms I am not free to end world poverty because I do not have the resources to do so. There nevertheless remains a point to making the purely

normative claim: it entails that in ending world poverty I would do no wrong. For present analytical purposes, what is important is that the reader understands the difference between 'empirical freedom' and 'normative freedom' because there is an equivocation in Kant's analogy as to which type of freedom he means, made possible by his reference to 'freedom' *simpliciter*.

First, consider the freedoms of the wronged parties: the creditor and the crime victim. The creditor, *ex hypothesi*, has a normative freedom or right to do as she wishes with the money albeit that the debtor's refusal to repay her means that she has no corresponding empirical freedom. Returning the loan money to the creditor restores her empirical freedom to control it and, thereby, gives practical effect to her *right* to possess the money. In other words, returning the money allows the creditor to exercise her normative freedom. With regard to the victim of crime, the freedom in question is the freedom from molestation breached by the criminal. However, once someone has been stabbed or raped it is too late to undo this infringement of his empirical freedom. Thus the crime victim's empirical freedom to control his bodily integrity cannot be returned to him in the same way that a debt can be repaid. Since it cannot, his right not to be assaulted cannot be given effect in any way *analogous* to the repaying of a debt to a creditor. It may be possible to construct other arguments as to why punishment restores the status quo ante, but it does not make sense to claim that punishment corresponds to the repayment of a debt unless it can be shown what is returned to the victim by punishing the offender.⁴ Enforcement of a debt *clearly* restores the creditor's freedom to control her money and, because it does this, gives effect to her corresponding right. Punishment of a criminal *clearly cannot* restore the victim's freedom to control his autonomy and, because it cannot, does not *clearly* give effect to any corresponding right.

Second, consider the respective defendants in the debt and criminal cases. The debtor has her control over a certain amount of money terminated and is therefore no longer empirically free to do anything with it. The criminal is punished and thereby loses some of his empirical freedom. However, the analogy fails because of the *rights* of the defendant in each case. Crucially, the debtor's rights are always subject to the creditor's right to repossess the money. Because of this, no rights are infringed when we take the owed money from her. However, in the case of the criminal who is punished a freedom that is at least *prima facie* normative – i.e. a right – *is* infringed. Generally speaking agents have rights over their own bodily integrity and time. If the analogy is to work it must be shown why the criminal should lose some of his *prima facie* rights. But this is merely a restatement of the original problem with punishment: why should an individual ever have his rights infringed? Kant's analogy therefore fails because the very issue we are trying to settle is why we should ever harm someone by deliberately infringing his rights.

If bodily integrity were a transferable commodity such that taking a portion of it from the criminal restored a like portion to the victim then punishment could be justified by recourse to Kant's analogy. This would be so notwithstanding that, as we have seen, the criminal has a *prima facie* right over his bodily integrity while the debtor has no corresponding right over the owed money. The analogy would only have to be modified so that the debtor has spent the original money and the creditor is seeking reimbursement of a like amount. In both cases the defendant has wrongfully created a situation in which only one party can benefit from the enjoyment of a certain freedom and it is fair that she, and not the wronged party, bears the cost of her wrongdoing. However, we cannot

argue along these lines because of the irrefutable fact that bodily integrity, unlike money, is not transferable. Once the criminal has breached the victim's freedom from molestation it is too late to restore that freedom to the victim. And this point holds even for property crimes. We may justify reclaiming stolen goods by direct application of the creditor–debtor analogy but in punishing we take not only the stolen goods from the criminal but also some of her own goods by way of a fine or some of her freedom by way of a prison sentence.⁵

Hence there are two problems with Kant's analogy. First, in restoring the creditor's empirical freedom to control the money we give direct effect to her corresponding right. However, nothing obvious is restored to the crime victim by punishing the offender and so it is not clear how any of the victim's corresponding rights are being given effect. Second, punishment infringes the (at least *prima facie*) right of the criminal in a way that making a debtor repay a debt does not. Recourse to the analogy does not tell us why we are justified in infringing a freedom that the criminal, in the absence of a justification for punishment, would unquestionably have as a right. The equivocation in Kant's analogy is that while the debtor and the criminal each have an empirical freedom breached, only the criminal has a freedom breached that would normally be a right. Thus there is a sense in which Kant can claim that 'coercion which constrains everyone to pay his debts can coexist with the freedom of everyone, including that of debtors' (Kant, 1991: 58) but not a sense that, through analogy, could overcome the objection to punishment that it looks like a gratuitous diminution – rather than a justificatory restoration – of rights.

To my mind Hegel's treatment of this issue is more sophisticated than Kant's. For Hegel crime negates right and the function of punishment is to negate this negation and restore right. The key passage is the following:

[i]n so far as the infringement of the right is only an injury to a possession or to something which exists externally, it is a *malum* or damage to some kind of property or asset. The annulling of the infringement, so far as the infringement is productive of damage, is the satisfaction given in a civil suit, i.e. compensation for the wrong done, so far as any such compensation can be found . . . But the injury which has befallen the *implicit* will (and this means the implicit will of the *injuring* party as well as that of the injured and everyone else) has as little positive existence in this implicit will as such as it has in the mere state of affairs which it produces. In itself this implicit will (i.e. the right or law implicit) is rather that which has no external existence and which for that reason cannot be injured. Consequently, the injury from the point of view of the particular will of the injured party and of onlookers is only something negative. The sole positive existence which the injury possesses is that it is the particular will of the criminal. Hence to injure [or penalize] this particular will as a will determinately existent is to annul the crime, which otherwise would have been held valid, and to restore the right. (Hegel, 1967: 69, emphases in original)

Here Hegel neatly spots and sidesteps the problem in Kant's analogy. He states that the annulment of material damage is effected by compensation after a civil suit. By indicating that the injury which punishment annuls is something other than the attack on the empirical freedom to control one's property (including one's self) Hegel opens the way for consideration of a sense in which punishment restores right.⁶

Hegel's argument has several stages. First, he asserts that a crime as a 'mere state of

affairs' is undifferentiated from an accident. From the point of view of the harm done there is no difference between being murdered by a hitman and killed by a tiger, since the outcome – death – is the same. However, from the point of view of 'right' there is a major difference, because the former is a deliberate choice and therefore a breach of right whereas the latter, while unfortunate, is not in any moral sense 'wrong'. For this reason punishment is concerned not with undoing the *harm* done to the victim (although this may be the concern of other institutions) but with undoing the negation of right manifested in an attack on the victim.

Second, Hegel argues that nothing in crime diminishes right as a concept: the 'implicit will (i.e. the right or law implicit) is . . . that which has no external existence and which for that reason cannot be injured' (Hegel, 1967: 69; also Cooper, 1971: 164; compare to Benn and Peters, 1959: 177 who miss this point). Another way of putting this would be to say that I have an absolute right not to be attacked before, during and after an assault because the attack cannot affect my *right*. However, what necessitates action against crime as a category is that left unchecked it negates the practical significance of right as a category because rights would cease to have their proper bearing on inter-human relationships (see further Bosanquet, 1951: 212–14). That is, crime as a category threatens right as a category. The conundrum for Hegel is that while *harm* is to be solved by compensation, *right as a concept*, is not affected, and the *relevant* attack – the attack on the practical significance of rights – does not 'exist' in any obvious sense such that it could be undone. As he states in the passage quoted: 'the injury from the point of view of the particular will of the injured party and of onlookers is only something negative' (Hegel, 1967: 69). To use this insight in an example, I may be compensated for the lost earnings, hospital bills, pain, etc. occasioned by a stab wound, and I can be assured that I have, and always have had, a right not to be stabbed, yet these responses seem inadequate. There is something worse about being stabbed than carelessly falling onto a knife blade. The worse thing is that an accident, though unfortunate, does not imperil my rights but the deliberate choice of another agent to ignore her duties towards me does negate the significance of my rights as a limit on the actions that she may perform. Therefore, the locus of 'wrong' (as opposed to pain or misfortune) is the *will* of the criminal, since that is the source of the decision to ignore my rights.

Third then, Hegel argues that because the only existence that the relevant attack has is the will of the criminal the target of any response must be that same will. For Hegel this response takes the form of an 'injury' or 'penalty'. In his notes Hegel sums this up:

the only important things are, first, that crime is to be annulled, not because it is the producing of an evil, but because it is an infringement of the right as right, and secondly, the question of what that positive existence is which crime possesses and which must be annulled . . . (Hegel, 1967: 70)

Hegel's location of the wrong to be negated is sophisticated and accurate. If ignored such wrongs call rights into question because the class of rights is given no empirical actuality. Therefore, even though we might not be able to do something about every crime, we must do as much as we can about as many crimes as we can. I also think that Hegel is right to identify the explicit will of the criminal as the seat of the crime, the 'positive existence . . . which must be annulled' (Hegel, 1967: 70).

For Hegel the negation of the attack on right takes the form of punitive action against the criminal's will. It seems to me that Hegel's argument can lead us to accept that doing *nothing* in response to crime would amount (eventually) to holding the victim's right to be worthless. But the most difficult step to establish is exactly why injuring the will of the criminal reverses this situation. This is surely an example of metaphor dictating reality, talk of a *realm* and an *attack* on that realm making it seem logical that only a *forceful* repression will suffice. What Hegel has shown is that it is the will of the criminal that has thrown the continued enjoyment of rights into danger. If we legitimate one breach of right then, by implication, other breaches are legitimated and rights cease to have practical import. However, without further argument it is not yet established how an attack on what would otherwise be the right of the criminal restores the right of the victim. As Richard Posner says, once a crime is committed the costs become 'sunk' (1980: 74).

At this point the contemporary Hegelian accounts of punishment consider other, non-literal, ways in which punishment might undo the negation of right implicit in crime. For example, Peter Steinberger writes that:

[t]he stance that the criminal implicitly adopts, that there are no rights, must be rejected and annulled if rights are to have actuality and force. For Hegel, punishment is precisely this annulment. Its function is to erase, *at least symbolically*, the criminal act, and thereby to reaffirm and restore the right . . . (Steinberger, 1988: 124, emphasis added)

Here, the italicized phrase is crucial. If the erasing of crime is *only* symbolic then why not use a symbol other than punishment, one that is less morally problematic? The equivocation, as to whether punishment is merely symbolic or (sometimes) something more, is compounded by conflation of the terms 'reaffirm' and 'restore' as in '. . . the restoration or reaffirmation of Right is the sole purpose of punishment' (Steinberger, 1988: 124). Clearly, reaffirmation and restoration are not coterminous: I could reaffirm your right against assault even while someone else is assaulting you, but I could not *restore* your right against assault without doing something about the ongoing attack. Restoration implies something greater than reaffirmation. We have then, two alternative interpretations of Hegel's theory. Either the purpose of punishment is the *restoration* of right, in which case we must have the proof, which Hegel himself failed to provide, of how punishment actually achieves this. Or else the purpose of punishment is the *reaffirmation* of right, in which case it seems this could be achieved *at least* as effectively (and certainly more efficiently) by some non-punitive intervention. Most pertinently, why not reaffirm right by means of a mere vocal declaration (see further Matravers, undated: 20–2). One attempt to get around this problem is to *link* punishment with the reaffirmation of right, in such a way that the reaffirmation does not 'work' in the absence of punishment. Thus, the purpose of penal intervention is the reaffirmation (rather than restoration) of right, but this can only be achieved if punishment forms part of the intervention.⁷

Jami L. Anderson, for example, argues that the need to punish, rather than *merely* denounce, the criminal, arises from the contradictory responses indicated by denouncement in the absence of punishment. According to Anderson denouncing the murderer corresponds with 'the verbal statement that "killing is wrong"' (Anderson, 1999: 383).

However, 'not punishing' delivers an implicit and contradictory verdict that 'killing is acceptable' for the reason that 'crimes and noncrimes are alike in that they are treated alike: They are actions tolerated without punishment' (Anderson, 1999: 384). But this is a poor argument. After the commission of an offence, we may not eat cakes or dance the fandango. It cannot be the case that *simply* because after an act of charity we also do not eat cakes or dance the fandango, we are implicitly holding crime and charity to be qualitatively similar. This is because we are not merely looking for *a* way to distinguish crime from non-crime. If we were, then not eating cakes or eating cakes, dancing or anything else would suffice (see further Rawls, 1969: 113). Rather we are looking for the *appropriate* or *correct* way to distinguish crime from non-crime. Anderson's argument only holds if *we have already accepted* that punishment is an appropriate or correct response to crime, which is precisely the issue at stake. The failure to punish could only constitute the implicit statement that 'crime and non-crime are the same' which entails that 'crime is acceptable' if *it had already been shown* that punishment is the proper method of distinguishing crime from non-crime. Anderson's argument therefore begs the question because it has not already been established that the state should *punish* criminals.

Anderson then considers the possibility of reserving 'a special set of painless responses to go with our denouncements' of crime, by virtue of which 'we would be both explicitly *and implicitly* treating crimes as acts different from non-criminal acts' (Anderson, 1999: 384, emphasis in original). She says:

[u]nder such a system we would know that murder, for example, is different from charity, because acts of charity would be rewarded and acts of murder would receive a 'special treatment'. But we would not know that murder is regarded as a *wrong*, that is, as an act that deserves moral judgment and righteous indignation. (Anderson, 1999: 384, emphasis in original)

But this argument is circular. If we genuinely would not know that murder is wrong without punishment then how would we know to punish – or denounce – it in the first place? And it remains to be demonstrated that punishment proves crime to be 'wrong' by more than conventional association. Without this demonstration, we could simply change our conventions and make any non-punitive action the thing that is used in response to crime in order to demonstrate its wrong-ness. By way of explanation Anderson considers two hypothetical student essays, one worth an 'A', the other worth a 'D' (Anderson, 1999: 378). She correctly observes that whatever she might *say* about the relative merits of the two papers, their different values would not be appropriately established were she to award them the same mark. That is, her actions would negate her pronouncements. The similarities between this situation and one in which we denounce crime but do not punish criminals are obvious enough. Suppose however, that we asked 'why is it ever appropriate to grade two papers differently?' It would not be a satisfactory answer to say that without differential grading we would have no means of telling the two papers apart because the very thing we are questioning is the legitimacy of *telling two papers apart*. The analogy only holds because we do not question the appropriateness of giving differential grades to student papers but clearly we *do* question the appropriateness of differentiating crimes from non-crimes by causing pain to criminals. Certainly, it is vacuously circular to justify punishment as a mechanism for distinguishing crimes from

non-crimes by asserting that without punishment we would have no method of distinguishing crimes from non-crimes, even if we accepted the truth of the assertion.

Steinberger is also interested in punishment as a mechanism for distinguishing crimes from non-crimes (Steinberger, 1988: 126–9). However, he is not *merely* interested in telling the two apart, but rather in distinguishing crimes as deliberate infringements of rights, from other acts. This reflects the core of Hegel's definition of 'wrong'. Steinberger claims that denunciation by itself would not sufficiently distinguish the two categories. He argues that punishment is a type of response relevant to responsible agents – those who might deliberately infringe the rights of others – in a way that other responses are not. There is some sense in this because punishment, as a response, is predicated on the idea that the criminal is responsible for her actions. Treatment, for example, need only be predicated on the idea that the criminal is sick or malfunctioning, which could equally be true of an animal or a computer. This is sufficient to establish that punishment is *an* appropriate response to crime, in the limited sense that it is a response that assumes that individuals can be responsible for their actions. But in this limited sense, it would be *as* appropriate to give the criminal a medal because the award of a medal is also a response that is predicated upon the idea that individuals can be responsible for their actions. Steinberger states that for the offender's crime 'to be *marked* as such, for society to *identify* it as a crime, he must be punished' (Steinberger, 1988: 128, *emphases in original*). However, he has only demonstrated that crime must be met with *some* response that assumes that offenders are responsible for their actions. This would be sufficient to distinguish the relevant feature of crime – that it is caused by human agency – from non-crimes. Steinberger has failed to prove that punishment is *the* appropriate response so to delimit crime. Finally, given that denunciation is also predicated on the notion of agency – we do not *denounce* volcanoes or man-eating tigers – Steinberger's argument is insufficient to show that denunciation by itself could not fulfil the criteria for reaffirming right (which was the entire point of his discussion of this issue; see especially Steinberger, 1988: 126).

The criticisms of Hegel, Steinberger and Anderson must be properly understood. Hegel has established that were the state to do nothing in response to crime – were it to shrug its shoulders, so to speak – then right as a category and rights as experienced by individuals would wither. As Peter Stillman says, 'when rights are not enforced and denials of them not refuted, the rights fall into disuse and disappear' (Stillman, 1976: 172). However, none of the theorists has shown why punishment is the appropriate response *in lieu* of doing nothing. I suspect that the readiness with which each theorist jumps to the conclusion that punishment is the correct response is down to the historical contingency that punishment has been the orthodox response to crime. This makes it seem obvious that the opposite of doing nothing about crime is punishing whereas, logically, the opposite of doing nothing is doing something (which could be anything). Anderson is the most explicit on this point when she concedes that the appropriateness of punishment 'is an intuitive claim' (Anderson, 1999: 384). However, the critical theorist is not interested in what we have always done so much as whether there are any good reasons for doing it. And unless we are to subscribe to a particularly stagnant version of philosophical Conservatism the answer 'we have always done so' cannot be a satisfactory response to the question 'what justification is there for causing harm to others?'

CONCLUSIONS

This article set out to consider one possible justificatory link between punishment and victims' rights, namely that punishment is justified because it restores a breached right of the victim. My argument has been that Kant and Hegel's attempts to forge this link are unsuccessful, or to use Findlay's more poetic turn of phrase, they represent 'an impressive arch from which the keystone is missing' (Findlay, 1958: 313).⁸ So what are we left with?

First, the idea that punishment should be the institution aimed at redressing the attack upon victims' rights remains attractive. Hegel is convincing in his arguments that the difference between crime and misfortune is that the former is the product of human will and therefore a breach of right. This definition of crime has the potential to tie the focus of the criminal law directly to the need to uphold human rights. One implication of this is that truly victimless 'crimes' (if there be such) should not be dealt with by way of punishment.

Second, Hegel and those working after him are correct in the observation that to do *nothing* in response to crime would effectively undermine the practical significance of rights. The state, therefore, ought to do all in its power to reverse this trend. Furthermore, Kant and Hegel have shown how we might consider retribution as an *attempt* to uphold right, because punishment is, at least in principle, opposed to crime. But this is not the same as saying that punishment reverses crime.

Third then, what Kant, Hegel and others working in their names have failed to show is that *harming the criminal* makes any difference to the rights of the victim. Kant's analogy cannot demonstrate that anything is actually returned to the crime victim in punishing the criminal. Hegel, on the other hand, relies upon an overextended metaphor of an attack upon the realm of right but still fails to show how attacking the will of the criminal 'defends' right in any meaningful sense.

Fourth, because of these difficulties there is, within the contemporary literature, a move away from punishment as the *restoration* of right, towards punishment as the *reaffirmation* of right. It then becomes necessary to show why simply denouncing the criminal's actions would not suffice to reaffirm right. At this point, both Anderson and Steinberger claim that denunciation by itself fails to achieve what punishment offers: the differentiation of crimes from non-crimes. I have argued that these claims do not succeed. However, what must be noted, because it is directly relevant to a recurrent theme in modern penal discourse, is that neither Kant nor Hegel's arguments *by themselves* are sufficient even to justify the most obvious forms of denunciation. Their justification for coercing the criminal is that coercion *restores* the victim's right (reaffirmation of right being a later development of their theories). I have argued that each failed to demonstrate a meaningful sense in which harming the criminal in this way actually does restore the victim's right. Because of this, their theories fail to justify coercion of the criminal. However, the most obvious forms of censure would also involve coercion, at least in the minimal sense of forcing the criminal to turn up in court to hear her actions denounced. But forcing someone to part with one minute of her time is problematic in exactly the same way that forcing her to part with six years of her time is problematic: this is a matter of principle not of degree. The central issue remains why we would ever be justified in coercing someone against her will. Andrew von Hirsch, for example, queries whether formal censure (plus compensation⁹) could satisfy the demands of

retribution (von Hirsch, 1986: 59; also Duff, 1986: 215–16; Ten, 1987: 59, 65). However, if we are going to require the criminal herself to attend court to be censured we still require a justification for this act of coercion. It remains to be shown then, precisely how coercing the criminal (in this case by making her listen to her actions being denounced) meaningfully restores the victim's right. Now it may be that this particular link is not so hard to make because denouncing the act that breached the victim's right seems much more intimately connected to the breached right than, for example, locking the criminal up for a year. Even so, I suspect that those who are currently calling for victims' rights to be incorporated into penal practice would find the mere censure of criminals to be thin gruel.

Finally, certain options remain open to the theorist wishing to forge a justificatory link between punishment and victims' rights. Most obviously, the claim passed over at the outset of this article – that punishment *is* the victim's right, might have legs independently of the already considered contingency that *if* punishment restores the breached right, then the victim has a right that the criminal be punished. Personally however, I am suspicious of the straight claim that victims have rights to the punishment of criminals, not least because it sounds like a blatant and politically expedient appeal to bloodlust. But this is not to say that someone else could not take the claim and analyse it within a framework of rights to, say, psychological satisfaction or closure and develop a plausible thesis that the crime victim has a right to see his assailant punished. Alternatively, the way remains open for more convincing accounts of either how punishment restores right or why punishment is a necessary feature of the reaffirmation of right. In either case I would suggest that Hegel's analysis of the wrong inherent to crime is a persuasive starting point. If punishment is to *restore* the breached right then it remains to be shown how coercion of the offender actually achieves this. If on the other hand, the function of punishment is to *reaffirm* right it remains to be shown why coercion – even to the extent of coercing the offender into listening to the reaffirmation – is a necessary part of the process. And if coercion *can* be justified in the name of reaffirming breached rights it would remain to be shown that the particular types of coercion currently found in our penal system – imprisonment, fine, community service, probation – are actually relevant to the reaffirmation of victims' rights.

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Notes

- 1 Perhaps if the implications of these two connections were followed to their logical limits they would collapse into one another, so that *if* punishment is necessary in order to restore my violated right *then* I must also have a right that you, the criminal, be punished. However, I choose the second claim as the focus of this article because the claim 'punishment *is* the victim's right' could be read as meaning that the victim has a right that the criminal be punished *for the sake of the suffering*. There are philosophical objections to basing a system of punishment on any such claim, including the fact that it reduces punishment to revenge. Even if the two posited connections

do collapse into one another, at least by starting with the second, I am committed only to the entailment that 'the victim has a right that the criminal be made to suffer *for the sake of restoring the violated right*'. I do not have space to develop the argument, but I find a theory that demands suffering for the sake of an attained benefit more plausible than a theory that demands suffering for its own sake.

- 2 Some, observing the conceptual leap of faith taken by Kant and Hegel, accuse them of intuitionism. This can involve the claim that they never analysed the move from crime to punishment at all, or that the move rationalizes (or masks) an atavistic blood lust (Hawkins, 1944: 207; Camus, 1961: 142). I argue that their failure lies not in intuitionism but in an inability to demonstrate the substantive sense in which punishment restores rights.
- 3 Hegel, unlike some modern retributivists, does not let the metaphysical understanding of crime blind him to the fact that crime is also an attack on a particular victim (1967: 67–8; also Stillman, 1976: 172; see Duff, 1986: 212 and Murphy, 1992: 47–8 for criticism of contemporary retributivists on this score).
- 4 I argue elsewhere (Brown, 1998: 111–67) that this argument applies *mutatis mutandis* to the modern school of 'benefits and burdens' theories even though it rejects the notion that punishment restores anything specific to the direct victim of the offence. These theories strike the balance between the criminal and law-abiding members of society. However, it is still unclear what is returned to the law abiding in the process of punishment. This does not necessarily mean that the theories fail to justify punishment but it does mean that they fail insofar as they rely on the analogy of a debt being repaid to society (see Morris, 1971; Murphy, 1979; Sadurski, 1985; Sher, 1987).
- 5 Compare to Day (1978: 504) who suggests that making a criminal return stolen goods *is* retribution.
- 6 In Hegel there are actually three senses of 'freedom'. These are the animalistic, empirical freedom to do what one wants; the formal freedom to engage in moral deliberation; the true freedom, realized when one consistently brings formal freedom to bear over one's animal tendencies. I may spend my money on beer, giving in to my animal tendencies, or I may spend it on my child's education, thus (for the sake of example) exercising my formal freedom. In so doing I may realize 'true' freedom. However, when the criminal pre-empt me by stealing my wallet he thwarts my animal freedom, my formal freedom (regarding the money, at least) and, therefore, to some extent my ability to realize true freedom. Despite the complication in Hegel, it remains true that crime attacks aspects of freedom that are my 'right', since I have rights to exercise formal freedom and realize true freedom. Therefore, Kant and Hegel's different understandings of freedom have little bearing because for the current analysis to follow it is only necessary that crime is conceived as an attack against right. Nevertheless, I am indebted to one of the anonymous reviewers of an original draft of this article for bringing this point about Hegel's definition of freedom to my attention.
- 7 Other attempts have been made to explain this step in Hegel's theory. These have generally fallen foul of one of two faults. Either they take the retrograde step of considering Hegel's theory in purely materialistic terms, i.e. a return to something like Kant's debtor–creditor model (Honderich, 1969: 45; Day, 1978: 502–4) or else resort to a circular argument whereby right is defined stipulatively as that which, when breached, gives rise to punishment (Doyle, 1969: 163–7; Cooper, 1971: 163).

- 8 This description was specifically of Hegel's theory.
- 9 Forcing someone to *compensate* the victim of their actions can be justified by direct application of Kant's analogy (see text to notes 4 and 5). However, the types of loss most obviously demonstrable and compensatable – such as pain, loss of earnings, loss of amenities – are commonly dealt with in other areas of the law. Therefore, von Hirsch's suggestion tends to strip the criminal law of any unique function *other* than the denunciation it delivers. For this reason the addition of compensation to censure does not affect the criticisms I am levelling at a system that merely denounces criminals.

References

- Anderson, J.L. (1999) 'Annulment retributivism: A Hegelian theory of punishment', *Legal Theory* 5: 363–88.
- Benn, S.I. and R.S. Peters (1959) *Social principles and the democratic state*. London: George Allen & Unwin.
- Bosanquet, B. (1951) *The philosophical theory of the state*. London: Macmillan.
- Bradley, F.H. (1962) *Ethical studies*. Oxford: Clarendon Press.
- Brown, S.P. (1998) 'The moral justification of retributive punishment by reference to the notion of balance', unpublished PhD. thesis, University of Sheffield.
- Byrd, B.S. (1989) 'Kant's theory of punishment: Deterrence in its threat, retribution in its execution', *Law and Philosophy* 8: 151–200.
- Camus, A. (1961) *Resistance, rebellion and death*. London: Hamish Hamilton.
- Cooper, D.E. (1971) 'Hegel's theory of punishment', pp. 151–67 in Z.A. Pelczynski (ed.), *Hegel's political philosophy: Problems and perspectives*. Cambridge: Cambridge University Press.
- Day, J.P. (1978) 'Retributive punishment', *Mind* 87: 498–516.
- Doyle, J.F. (1969) 'Justice and legal punishment', in H.B. Acton (ed.), *The philosophy of punishment*, pp. 159–71. London: Macmillan.
- Duff, R.A. (1986) *Trials and punishments*. Cambridge: Cambridge University Press.
- Findley, J.N. (1958) *Hegel: A re-examination*. Aldershot: Gregg Revivals.
- Finnis, J. (1980) *Natural law and natural rights*. Oxford: Clarendon Press.
- Hawkins, D.J.B. (1944) 'Punishment and moral responsibility', *Modern Law Review* 7: 205–8.
- Hegel, G.W.F. (1967) *Hegel's philosophy of right*, trans. with notes by T.M. Knox. Oxford: Oxford University Press.
- Honderich, T. (1969) *Punishment: The supposed justifications*. Harmondsworth: Penguin Books.
- Inwood, M. (1992) *A Hegel dictionary*. Oxford: Blackwell.
- Kant, I. (1991) *The metaphysics of morals*, trans. with notes by M. Gregor. Cambridge: Cambridge University Press.
- Matravers, M. (undated) 'Hegel's theory of punishment revisited', in *Morrell Studies in Toleration*, Discussion Paper Series No. 107, Department of Politics, University of York.
- Morris, H. (1971) 'Persons and punishment', in S.E. Grupp (ed.), *Theories of punishment*, pp. 76–101. Bloomington, IN: Indiana University Press.
- Murphy, J.G. (1979) *Retribution, justice and therapy: Essays in the philosophy of law*. Dordrecht: D. Reidel Publishing Co.

- Murphy, J.G. (1992) *Retribution reconsidered: More essays in the philosophy of law*. Dordrecht: Kluwer Academic Publishers.
- Nozick, R. (1981) *Philosophical explanations*. Oxford: Clarendon Press.
- Posner, R.A. (1980) 'Retribution and related concepts of punishment', *Journal of Legal Studies* 9(1): 71–92.
- Rawls, J. (1969) 'Two concepts of rules', in H.B. Acton (ed.), *The philosophy of punishment*, pp. 105–14. London: Macmillan.
- Sadurski, W. (1985) *Giving desert its due: Social justice and legal theory*. Dordrecht: D. Reidel Publishing Co.
- Scheid, D.E. (1983) 'Kant's retributivism', *Ethics* 93: 262–82.
- Sher, G. (1987) *Desert*. Princeton, NJ: Princeton University Press.
- Steinberger, P.J. (1988) *Logic and politics: Hegel's philosophy of right*. New Haven, CT: Yale University Press.
- Stillman, P.G. (1976) 'Hegel's idea of punishment', *Journal of the History of Philosophy* 14: 169–82.
- Ten, C.L. (1987) *Crime, guilt and punishment: A philosophical introduction*. Oxford: Clarendon Press.
- Von Hirsch, A. (1986) *Past or future crimes: Deservedness and dangerousness in the sentencing of criminals*. Manchester: Manchester University Press.

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