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The Contemporary Relevance of Hegel's Concept of Punishment

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The numerous attempts that have been undertaken to reform the system of criminal law have been characterized, from the first, by a single theme: the need to bid "farewell to Kant and Hegel."[1] And this is because the Hegelian theory of punishment – for it is largely with Hegel that we shall be concerned here – is said to represent an "invalid and frankly unintelligent, and thus ultimately also inhumane, almost mechanistic metaphysics reminiscent of the old systems of celestial mechanics."[2] For the essential burden of this theory is "the idea of some remorselessly prevailing and mechanical justice that functions on its own and quite transcends the realm of human beings themselves, one that as it were automatically redresses the violation of the legal order by retaliating with like for like."[3] This kind of interpretation effectively reduced Hegel's theory to the formula of "the negation of the negation" and thus repudiated it as immoral or unchristian, as one that essentially violated the idea of human dignity. In short: "As far as the philosophy of punishment is concerned, Hegel has nothing or almost nothing to say to an age that wishes to reflect and to act in a more precise and sober fashion in such matters."[4] For what, after all, could our age have to learn from such "irrational and intellectually extravagant excesses and the dubious character of such epistemological, logical and moral conceptions?"[5]

In the first instance, anyone remotely familiar with Hegel's philosophy is tempted to respond in similar (and crude) measure to such a damning judgment, since it clearly has nothing to do with the theory of punishment that is actually propounded by Hegel. It may well be that such

retaliatory theories exist, and that they may appeal to Hegel for support. But that alone cannot justify such an essentially superficial critique of Hegel himself.

Yet, on *further* reflection, it is obvious that interpreters who take this line are not generally making a philosophical claim at all. The interest that motivates them is an essentially practical one. They are arguing for a penal code that is not defined by abstract notions of retaliation and does not operate in a mechanically inhumane fashion but which is just and preserves the human dignity of the offender. They are thus actively campaigning for something that was actually also an essential concern for Hegel, too, and indeed from the time of his earliest writings.

That is why it is also, and indeed especially, necessary to demonstrate the relevance of Hegel's theory of punishment to those who have offered the interpretations outlined above.

I. The Systematic Site of Hegel's Concept of Punishment

The first task here is to locate the systematic site of the concept of punishment in Hegel's *Philosophy of Right*. This task is essential, given the distinctive character of the book to which Hegel himself explicitly alludes in the "Preface": "It is certainly true that the primary difference between the present outline and an ordinary compendium is the method that constitutes its guiding principle. But I am here presupposing that the philosophical manner of progressing from one topic to another and of conducting a scientific proof – this entire speculative mode of cognition – is essentially different from other modes of cognition" (*TW* VII, 12; ET: p. 2).

We cannot enter here into closer discussion of the specific character of "speculative" thinking in Hegel's sense. But it should be noted from the first that such thinking necessarily implies a systematic exposition of the subject matter in question: there are no "parts" here that could properly be isolated one from another, but only fluid "moments" of the whole that stand essentially within a context of reciprocal mediation. That is why Hegel presents us not with any concepts that we could simply take away with us like so many fixed and finished items of thought, but rather onlywith certain *argumentational contexts* that can properly be grasped only as a complex whole.

For legal thought in general – as a "compiling" approach characterized precisely by the desire for fixed and finished concepts[6] – this Hegelian

feature is itself a stumbling block, which is why jurists have generally treated and "purified" the *Philosophy of Right* in accordance with their own criteria. The most popular approach in this respect is to limit one's attention to the first part – the domain of "abstract right" – since it is already surely obvious that positive right or law is intrinsically abstract and general in character. In support of this, one can appeal to §488ff. of the *Encyclopaedia of the Philosophical Sciences*, which simply designates the relevant part under the title of "Right," but also to the fact that no system of jurisprudence (as a science of right) would know what to do with the domains of "morality" or "ethical life," at least if it wished to avoid falling back into the antiquated tradition of natural law. And there is obvious textual support for this approach as far as modern jurisprudence is concerned, since Hegel speaks explicitly of "crime" and "punishment" precisely in §90ff. of the *Philosophy of Right*. The proper site of his theory of punishment would seem to be located in the context of these paragraphs and the elucidations there provided.

Given the aforementioned systematic character of speculative thought, however, this narrowly juridical interpretation must be rejected, and initially on the basis of a very simple argument. For Hegel also speaks about crime and punishment in the two other parts of the *Philosophy of Right*: in the Remark to §120 (on the concept of responsibility), in the Remark to §132 (on juridical accountability), in §209ff. (on the administration of justice), and in §260ff. (on constitutional law), for example. But there are also more important philosophical arguments to consider: for Hegel the concept of "Right" signifies every actually existing form of the free will (cf. *Rph* §29) and thus also includes the domains of morality and ethical life, whereby morality, just like abstract right, reveals itself as one-sided (and thus as equally "abstract"), thus requiring to be sublated and integrated into the domain of ethical life.

The unique character of the *Philosophy of Right* must therefore be recognized from the first: the work does not present us with a legal philosophy in the usual (or traditional juridical) sense of the term – and in this respect one need only compare the works of Radbruch, Coing, or Henkel. Hegel's book can be grasped only within the overall context of the *Encyclopaedia* (and thus of Hegel's entire philosophy). That is to say: the *Philosophy of Right* acquires its own systematic place only within the context of the concept of "free spirit" (*EPW* §481), of the free (thinking) will, or, as Hegel briefly puts it, of *freedom*. The *Philosophy of Right* thus presupposes the entire development of subjective spirit up to and into "universal self-consciousness" (for "Reason" in this sense cf. *EPW* §387ff.). That is why

the free will is also identical with the universal rational will – at once that of the individual human being, that of the community, and that of all human beings.

Thus, "free will" in Hegel is not simply the same as the freedom of the human will as arbitrary freedom. And the *Philosophy of Right* therefore also transcends the alternatives of "individual" and "community." Hegel is concerned neither with individualism nor with the negation of the individual in favor of the social totality (in accordance with the slogan "From Hegel to Hitler"[7]). The decisive passages as far as this question is concerned cannot be found in the *Philosophy of Right* itself but, rather, are presupposed there as the prior basis of right. In this connection, one should examine the mediated development of desiring, recognizing, and universal self-consciousness, and the resultant transformation of self-consciousness when it recognizes itself as "reason" proper (*TW* X, 213 ff., §424ff.; ET: *Hegel's Philosophy of Mind*, p. 165ff.).

It is obviously impossible to explore the matter further here.[8] It should simply be noted that the *Philosophy of Right* properly commences only with the concept of the free will and presents the actualization of this concept of freedom, which itself leads to the various configurations (the actual forms of realization) that constitute the individual stages of development up to and including the concept of world history. Each of these configurations is an actually existing form of the free will, and thus, in the terminology of §29 of the *Philosophy of Right*, a form of "Right" itself, up to the point where "the realm of actualized freedom, the immanently self-produced world of spirit" (ibid., §46) has become actual in the state.

This developmental exposition of the concept of freedom, in Hegel's understanding of philosophy, cannot be articulated or supplied through an external method (like that of any special or particular science), but can arise only as *the self-determination of the concept* (and thus as an essentially internal development): "The method must lie within the concept itself. The concept is active and develops itself, while we merely look on, allow the process to happen and grasp its determinations accordingly" (*VPR*4, 158). The self-development of the concept thus involves its own principle of movement which presents itself as a threefold process of advance: the concept first posits itself immediately or, as Hegel puts it, only implicitly or "in itself" (not yet posited for itself and through itself); the concept also arrives immanently at the limit of this its first determination and is thus "thrown" back on itself (the level of reflection into itself); but the concept must also recognize the limit of this mere being "for itself" and thus discover its entire and proper content in the unity of these sublated

moments (in being in and for itself). The concept has thereby now become through its own activity what it always already was.

These remarks provide little but a brief sketch of the central claim of Hegel's philosophy, but they already imply an important conclusion: the steps we have outlined also trace the self-actualization of the concept of the free will (of freedom), and this is consequently also what determines the developing exposition of the individual shapes of its actual determinate existence.

It is also worth expressing this difference between Hegel's approach and juridical philosophies of right in a terminologically precise fashion by avoiding concepts that can be interpreted in a double manner, that is, concepts that also possess a specifically juridical significance (such as "property," "contract," but also "crime" and "punishment"). This principle also should hold for the characterization of the three fundamental "parts" of the *Philosophy of Right*: in the following discussion they will therefore be described and presented as the respective spheres of the personal, of the subjective, and of the ethical will (or the spheres of the person, of the subject, and of objective spirit[9]).

The first part – which Hegel, surely following Kant's terminology here, calls that of "abstract right" – presents the actualization of the free will merely in an immediate form, that is, only "in itself" and not expressly out of itself: it is merely *personal* will, the will of a person that initially gives itself actual existence [*Dasein*] solely in and through an external thing [*Sache*]. Mediated in this way through the commodity character (and value) of things, the person then realizes himself in a common will, albeit a will that is only superficially common in the final analysis (not a will that is truly universal, and thus not one that is expressly free in and of itself). This insufficiency on the part of the merely personal will, which is nonetheless an actual form of the free will (although precisely in its immediacy), and thus the insufficiency of this immediacy, becomes evident at the level of "wrong" [*Unrecht*] as the denial of right. It is quite true that wrong – as the expression of the particular individual will that challenges all universality of will in general (and even its realization as personal will) – can itself be negated, but only through the agency of "avenging justice," that is, only in turn through another particular will (namely, that of the injured party) that itself thereby posits a new wrong, and so on. The sphere of the person has thereby encountered its own limit; such immediacy cannot represent the final word in the actualization of the free will; and the contradiction implicit in vengeance must itself be resolved. This contradiction can be resolved through the requirement of "a justice

freed from subjective interest and subjective form and the contingency of power – that is, a *punitive* rather than an *avenging justice*. *Primarily*, this constitutes a requirement for a will that, as a particular and *subjective* will, also wills the universal as such" (*Rph* §103).

The second sphere of actualization – which Hegel designates as "Morality" – is consequently that of the *subjective will*, of the subject (hence the "primarily" in the preceding quotation). We are no longer concerned here with the actualization in the external domain of things or of a common will, but rather with a process of reflection-into-self [*Reflexion auf sich selbst*]. Man here makes an object of himself, wills himself as a person, wills all things as an "immanent interconnection" (*VRP*4, 300). Passing through the concepts of "purpose" and "guilt," "intention" and "welfare," the development leads us to "conscience" and the human being as "pure inwardness" (*Rph* §139). The free will has thus become entirely "for itself": "Conscience, practical reason, is spirit that is at home with itself, which relates to the practical domain. . . . Conscience is the sacred and inviolable site of the human being, it is the pure certainty of myself" (*VPR*4, 361).

This absolute inwardness also leads in turn to the limit of the subject and thus reveals the abstractness and one-sidedness of the latter: for conscience is "merely subjective, is insufficiently objective, whereas the first sphere (that of the 'person') was too objective, was an entirely external matter. Here, on the other hand, there is too little objectivity, for if I abstractly will only myself, then there is no difference, no objective standing, presented here" (*VPR*4, 165). The sphere of the subject thus involves only the formal moment of conscience as abstract self-determination. Since it is also capable, as such, of degenerating into a mere form or semblance (as hypocrisy or bad conscience, for example), it must be sublated in "true conscience" (*Rph* §137), just as the first sphere of personhood as the immediate actualization of the will was also formerly sublated. Both spheres are mediated in the unity of a will that expressly in and of itself (conscientiously and for itself) simultaneously actualizes itself in accordance with its own concept, and thereby also assumes external form precisely as such.

And the expression "sublated" here must be understood in its fullest sense (and thus its manifold signification): the abstract spheres are recognized as one-sided and thereby negated as far as their claim to articulate the essential and definitive truth is concerned, but they are simultaneously taken up (and preserved) within the third sphere, recognized now as moments of the latter and thereby simultaneously elevated to a higher

level. This ensures that they are not merely relinquished in the unfolding process of development but rather integrated within the mediated whole that results.

This *ethical* will – the third sphere that Hegel characterizes as "ethical life" – is objective spirit in the full and proper sense, the actualization of free spirit as the realm of freedom. Once again in immediate form, this ethical will presents itself initially as the *family* (the institution of marriage) that still rests merely on the sensuous foundation of feeling and an intimate unity of love and mutual trust in which the individuals concerned are not conceived as independent "persons." Hence it is necessary for "the natural dimension to enter the realm of the understanding; this is the chapel in which the natural is purified, in which the form of thought is attained" (*VPR*4, 417). "The form of universality is brought about through civil society, and is entirely necessary if the spirit is to exist as free spirit" (*VPR*4, 483). For the free will, as we have already seen, is essentially a thinking, rational, and universal will.

Here *civil society* takes up the (sublated) moments of the person and the subject into itself and its own abstract form. Civil society is the proper site of cultivation [*Bildung*] (the casting off of particularity) and of the thinking understanding [*des denkenden Verstands*] that defines universal perspectives, albeit perspectives that are here subject entirely to the interests of particular individuals or particular groups. That is why civil society "affords a spectacle of extravagance and misery as well as of the physical and ethical corruption common to both" (*TW* VII, 341; *Rph* §185).

In spite of this, civil society is a sphere that allows for the formation and cultivation of universality, the division of labor, and the "system" of needs (*TW* VII, 346; *Rph* §188 Remark). Individuals desire simply to pursue their own interests, but thereby discover their actual dependence on one another. "This show [*Schein*] of universality within particularity is precisely the interesting and essential thing that is considered here" (*VPR*4, 475). In other words: civil society is necessary only for this reason, and thus only in the "interest of the Idea" of freedom (cf. *TW* VII, 343; *Rph* §187) as this rational form of universal will. One could thus say that true universality realizes itself gradually by means of, or more precisely through, the human interests pursued within civil society.

Individuals thus desire to satisfy their respective needs in a reliable and secure fashion. Consequently, they formulate universal and publicly promulgated laws and institute civil courts to ensure the observance of the latter. At the same time, this kind of "legal constitution" [*Rechtsverfassung*]

(*TW* VII, 306; *Rph* §157) represents a further step in the actualization of the free will. This external realization of the will is even more clearly expressed at the level of the regulatory and welfare functions of the community. Finally, the "ethical returns to civil society as an immanent principle; and this constitutes the determination of the corporation" (*TW* VII, 393; *Rph* §249). The corporation, it is true, also pursues its own interests, but it grasps its overall end and purpose as a unified one and thus represents something like a "second family."

This effectively posits the transition to the *state*, which makes unity as such into its end and purpose and is determined by Hegel precisely as the will that wills this unity. The state is actualized freedom, the actual existence of free will, universal rational will in its own actual form, the will that unfolds in the legal order as the shape of "existing justice" and as "the actuality of freedom in the development of all its rational determinations" (*TW* X, 332; *EPW* (*Philosophy of Mind*), §539).

For Hegel, therefore, the state is understood primarily not as an external "power," as a "people," or as a geographical "domain," but rather as the ethical will of human beings that is simultaneously actual in existing form as an order of laws and customs. The state therefore does not essentially confront human beings as an alien power, but rather possesses its own "mediated existence in the self-consciousness of the singular individual, in the knowing and acting of the latter" (*TW* VII, 398; *Rph* §257). The state is at once true conscience and essential (substantial and conceptualized) freedom (cf. *TW* VII, 255; *Rph* §137), and is so precisely as the "customary practice" [*Sitte*] of the individual (cf. *TW* X, 304; *Philosophy of Mind* §485).

One could also put this in another way: for Hegel it is only the actualization of the free will in this sense that properly counts as the "state," and thus also provides the appropriate criterion for grasping the legitimacy (the rationality) of those power structures that have presented themselves as states in the course of history.

The legal order, as this "actuality of freedom," is thereby related to the legal constitution that is mediated through civil society inasmuch as the establishment of specific positive laws (and of the courts) is required to secure the domain of particular interests. At the same time, a certain tension is posited along with the concept of "positive" law or right: the latter owes its "positive" character to civil society and thus to the struggle between particular interest groups, but possesses its authentic actuality only as actualized freedom (which one could also describe as "justice" in this connection). Which regulations are therefore just

(and express the will of the state) and which simply serve the individual interests of powerful groups in the domain of civil society is something that must be constantly examined afresh.

We cannot here provide more than such a brief consideration of the *Philosophy of Right*, one that does not claim to offer an overall interpretation, but simply aims to emphasize just how "unjuridical" a work this is, and therefore how difficult it is to apply it fruitfully in relation to specific legal and juridical questions. For this would constantly require a laborious process of translation beforehand.

But it should already have become evident that our question concerning the significance of Hegel's concept of punishment cannot properly be answered simply by examining §90ff. of the *Philosophy of Right*. The essential burden of those paragraphs concerns the limitation (the abstractness) of the sphere of the purely personal will that encounters its own contradiction in the phenomenon of vengeance and is thereby forced beyond itself, into the sphere of the "subject." What interests us here is not such "avenging, but rather punishing justice" (*TW* VII, 197; *Rph* §103). Indeed, Hegel himself already has indicated expressly that we cannot yet speak of "punishment" as long as we remain within the sphere of the "person." For punishment "transpires in the state in a legally determined and orderly fashion by means of the courts. . . . Here, where we have yet to consider the state, the sublation of crime must be considered abstractly and as such. In this sphere of right in its immediacy the sublation of crime is still simply vengeance" (*VPR*4, 276; similarly *VPR*3, 307). This already implies that we also at least must consider civil society (as the location for the establishment of the courts from a systematic perspective; cf. *TW* VII, 373ff.; *Rph* §219ff.) and the state if we are to examine Hegel's concept of punishment in a genuinely fruitful manner.

We shall attempt such a further examination in what follows. In this connection, it will also be necessary to outline Hegel's concept of crime, together with that of punishment, and it is with the former that we begin.

II. Hegel's Concept of Crime

Any proper examination of Hegel's concept of crime must take the sphere of the "person" as its point of departure. The free will here realizes itself as immediate will first in an external object and second in a superficially "common" will. This actualization of the will is what is attacked by the

criminal will. The criminal will does not simply appropriate or remove the object in question, but rather fails to recognize personal will itself. Thus, the criminal will does not merely commit "harm," but rather denies the realization of the free will as such. "Through the criminal act I am not merely injured as a person in accordance with the fundamental determination that I here possess; but rather my capacity to bear right itself is hereby negated. . . . But through the criminal act I am not treated as a person; and personality is the fundamental determination, or right in itself. I am thereby [through the criminal act] not merely harmed, but the validity of myself [as a person] is attacked" (*VPR*3, 229ff.). The attack is directed therefore against an actually existing form of freedom (*VPR*3, 301: "Crime is always an attack on an actual existence [*Dasein*] of freedom").

Given the various possible ways in which a person can realize his or her freedom, there are quantitative and qualitative differences in the possible modes of injury and harm involved in this attack on right (cf. *TW* VII, 183; *Rph* §96). The criminal act is also dangerous in itself because it always transpires in a broader context. An arsonist, for example, who sets fire to a piece of wood in order to burn down a particular building, may under certain circumstances also endanger an entire series of buildings. Or to take another example: "The case of street robbery [in addition to normal theft] disrupts the general domain of human communication, and renders it insecure; this further effect also produced by the act is something that inheres in the latter. The sense of security and safety that is presupposed in using the highway, something that is more extensive [than the theft of property], is also jeopardized here, and this is therefore a qualitative feature of the criminal act itself. In crime therefore the mediated aspect of representation is involved, since the overall context can also be represented in our minds. Thus we represent the highway to ourselves as the safest of places" (*VPR*4, 279).

But this already involves reference to the sphere of civil society: "since property and personality have legal recognition and validity in civil society, crime is no longer an injury merely to a *subjective infinite* but to the *universal* cause whose existence is inherently stable and strong" (*TW* VII, 372; *Rph* §218).

The danger that crime poses for society thereby acquires significance for the question concerning the quantitative and qualitative range involved in violated right (cf. *TW* VII, 184; *Rph* §96 Remark) – and initially in the manner we have already suggested: the potential dangerousness increases the negative significance of the criminal act. "On the other hand

the power of society has now become sure of itself, and this reduces the external *importance* of the injury and so leads to greater leniency in its punishment" (*TW* VII, 372; *Rph* §218). "If society is secure, and a peaceful condition prevails, crimes are thereby demoted to cases of individual acts. If the laws are upheld, then crime has not really damaged society as such" (*VPR*4, 550).

"But danger has another side to it. . . . If I commit a crime, I do not merely perform an act that is supposedly valid for me, but as a thinking being I perform something universal, I thereby set up a law [*Gesetz*] that is to be binding, that not merely possesses validity for me but is supposed to be posited [*gesetzt*] as a universal form of actual existence. . . . Anyone who performs acts at all, does something, as a thinking human being, which is to count as valid in general. From this perspective, the danger in question is a determination that belongs to one's act as such" (*VPR*4, 280ff.). A criminal act embodies a bad example: "an example because it is, certainly, an individual case, but it does not possess the character of being simply an individual case, but has the significance of an exemplary act, of a universal. The universal is what is essential here" (*VPR*4, 549). But if civil society is sure of itself and the laws are generally recognized, then the criminal act does not obviously present itself as an exemplary case, as an encouraging example to follow: "Then I do not infer from the existence of crime that it is also supposed to embody the existence of my evil will, but it becomes rather a quite particular affair, and the side through which the crime might become more dangerous also equally well can be disregarded under the law-governed conditions of civil society" (*VPR*4, 551).

This aspect of potential danger as far as civil society is concerned constitutes a necessary moment of crime because it represents less a particular violation of right than the violation of the penal *law* itself, since right in general, as we saw, must assume a "positive" form in this sphere. Only what is covered by the penal code may be properly punished, and only in this context may the dangerousness of an act also be considered. Acts that cannot be subsumed under the regulations of the penal code, however contemptible they might be, are not in themselves punishable and are not crimes (*VPR*4, 537).

But everything so far discussed here merely presents *one* (and the more external) side of crime. And we should not overlook the fact that crime also has *another* side to it, namely, the "subjective moral quality that touches on the higher distinction as to whether an event or deed is an act at all, and concerns the subjective nature of the latter" (*TW* VII, 184; *Rph*

§96 Remark). In this context, "moral" simply signifies acting in the sphere of "morality" (of the subject). For the crime is not merely an external occurrence, but also an act that arises out of the inner reality of the human being (of the subject) and the inner conviction of the latter. Despite this, the penal law is not essentially concerned with the entire sphere of the subject and takes no account of conscience. And it cannot actually do so, for otherwise it would be entirely compromised by the abstract character of this sphere. The subjective conviction of the individual cannot be made into a criterion relevant to legal judgment.

In addition, legal right must be applied and under certain circumstances enforced. "Consequently, the law of the state must not attempt to extend power over attitudes, for in the moral domain I exist for myself and force has no significance here" (*VPR*3, 328; cf. also *TW* VII, 365; *Rph* §213).

Hegel also introduces the concept of "*legal responsibility*" and expressly in connection with the "right of objectivity" in relation to the subjective conscientious will (namely, in *Rph* §132 Remark). For the sphere of the subject as such is formal and abstract: "and the *right of the rational* – as the objective in relation to the subject [thus] remains firmly established." And for this reason, similarly, "in the *state*, as the *objectivity* of the concept of reason, *legal responsibility* must not stop at what the individual considers to be in conformity with his reason or otherwise, or at his subjective insight into rightness or wrongness. . . . In this objective field, the right of insight applies to insight into *legality* or *illegality*, that is, into what is *recognized* as right, and is confined to its primary meaning, namely, *cognizance* in the sense of *familiarity* with what is legal and to that extent obligatory" (*TW* VII, 245ff.; *Rph* §132 Remark).

We hereby leave the sphere of civil society and arrive at the sphere of the state (and the legal order) as the realm of actualized rational freedom. This step is not merely justified from the perspective of the overall structure of the *Philosophy of Right*, but also corresponds to Hegel's understanding of positive law as described above. For in relation to penal law, it follows that its regulations are not merely imperatives of the most powerful interest group in the context of civil society, but equally are a form of "custom." As imperatives such regulations can command a certain "external validity" only insofar as they simply "concern the abstract (i.e., intrinsically external) rather than the moral or ethical will" (*TW* X, 326; *Philosophy of Mind* §530). As custom, on the other hand, they represent the rational character of the will and thus the authentic form of validity.

The tension within the concept of positive (penal) law also permits, in connection with the idea of "legal responsibility," a solution for the problem concerning the actual *consciousness of wrong*, one that more or less corresponds to the currently prevailing view in the field of criminal justice and has itself been enshrined in law. This is the recognition that ignorance or error concerning the law is no defense. "Through the public character of the laws and the universality of customs, the state removes the formal aspect that attaches to the right of insight" (*TW* VII, 246; *Rph* §132 Remark). It suffices here that the law in general has been publicly promulgated (*TW* VII, 368; *Rph* §215). This does not hold for the purely positive detailed legal determinations that do not presuppose universal custom as their background and general support. Here cases of ignorance or error may be significantly relevant, and legal responsibility for crime must be ascertained in a different manner (e.g., by insisting on a specific legal duty to be familiar with the law in the exercise of a specific occupation).

It should also be noted that Hegel understands "crime" in principle as a deliberate offense. Yet this concept of legal responsibility, oriented as it is to the "right of objectivity," can also be fruitfully developed in relation to offenses of deliberate default and negligence (an approach I have attempted to develop in my aforementioned postdoctoral dissertation in terms of various "forms of responsibility").

III. Hegel's Concept of Punishment

The different moments of the concept of punishment correspond to the individual moments of the concept of crime.[10] Here, too, therefore we must start with the sphere of the "person." As the negation of personality (and thus of an actually existing form of the free will), crime reveals itself as a will that opposes the very concept of will, and thus as a will that assails its own actuality (qua concept), that thus destroys itself as will. It is quite true that such a criminal will actively manifests itself inasmuch as it gives itself actual existence, for example, in the harm or violation it exercises on something. But since it is a negation of its own concept, the "true relationship" that is involved here shows that "the crime produces only an intrinsically nugatory existence" (*VPR*3, 308). Hence theft, for example, is an act that does not properly correspond to the concept of human action itself, any more than a diseased body properly corresponds

to the concept of the living body (cf. *TW* VIII, 323; *Encyclopaedia Logic* §172 Addition).

Nonetheless, the violation in question is "a positive external existence" (*TW* VII, 185; *Rph* §97) and the intrinsically nugatory will of the criminal has acquired actual existence. This will therefore likewise must be negated in an external manner if its nugatory character is to be revealed as such and the free will is to be shown as reestablished in actual existence. "It is therefore the criminal's own will that has to be violated. Now this will is an actually existing will in general, and it can be violated only in relation to its otherwise external existence. . . . This actually existing will of the criminal is what is claimed here, and what itself must be attacked. . . . And this involves the fact that any punishment must make itself felt in some way to the criminal. If the punishment is not felt, then the criminal's actually existing will is not violated in this, that is, he has already relinquished that which is touched, that which we thought to have violated, and it has become quite indifferent to him, something from which he has already withdrawn his will." Hence Hegel can say: "What he wishes to retain is what must be attacked" (*VPR*4, 285).

The manifestation of the nugatory character of the crime, which also reveals itself in actual existence as the mere semblance or "show" that it always was as the negation of its own concept, is not something alien that befalls the criminal act from an external source. On the contrary: "Nothing reveals itself in punishment but what already lies in the crime [i.e., in the criminal will]" (*VPR*4, 282). Hegel elaborates this famous idea as follows (and it is necessary to notice the precise terminology employed): "Right is the actual existence of the will; here we now have two kinds of will: one is the universal will, the inwardly universal will, the intrinsic right that right itself should have actual existence, that freedom should have actual existence. The other will is the particular will of the criminal, which also has actual existence; this is also will, and is also free. These are the two sides in accordance with which right must transpire. On the one hand, right should transpire in itself; that which is in itself right is different from the will of the criminal, right in itself stands opposed to the will of the criminal as particular will. In itself the will of the criminal is also the universal will, for *that* right should transpire is also his own will. The other side, however, is his will in its particularity; he is free in this and this freedom, too, should acquire affirmative right, not merely right over against the will of the criminal but right in the sense of the will of the criminal, for he is free and actual existence must also be accorded to

his will. . . . The first aspect is thus right over against his will, the second is right in accordance with his will" (*VPR*4, 283). That is to say: "Freedom is itself, with its actual existence, and freedom is the particular freedom of the subjective will of the criminal – and right must transpire with regard to both" (*VPR*4, 288).

"This appears to be a contradiction," as Hegel says (*VPR*4, 283). But it is a contradiction that lies in crime itself and is resolved in punishment. In the first place, right must transpire with regard to freedom, to the will in itself. "As a human being every individual is free will, and thus his right transpires for him in accordance with the intrinsically free will" (*VPR*4, 289). Because crime is an expression of will, it must be regarded from the perspective of the concept of the *will*. Because the criminal is a human being, he must be considered from the perspective of the concept of the *human being* (as free will). "It is the highest honor a human being can encounter that reason itself is revealed as binding on the criminal, that he is treated in accordance with its determinations rather than in terms of any lower relations" (*VPR*4, 288). From the perspective of the concept of the criminal as will (as human being), crime as the negation of this concept must be canceled, and its nugatory and purely apparent existence must be revealed precisely as the right of the criminal human being himself. Thus, punishment initially presents itself as the intrinsic right of the criminal, as the actual existence of his freedom.

But right must also transpire with regard to the right of the subjective will of the criminal, that is, to the will that has violated right and posited wrong. Now according to Hegel, this subjective will must also be regarded as the will of a rational thinking human being, a being that can be regarded no longer simply as a purely individual entity, but as one that possesses the sense of the universal. "As the expression of a rational being the act embodies something intrinsically essential, something intrinsically universal; or the act has thereby set up a law. As the action of a rational being this is no empty and indifferent singular event, but a law, a universal determination . . . rather has been set up in the process" (*VPR*3, 315), one under which the criminal also can be subsumed. "What is a right for one human being in relation to others, what is binding for him, is also binding for the others in relation to him. In this regard the criminal also receives his own right, and not merely his right in itself; his will [also] acquires actual existence in accordance with what his particular will itself has posited" (*VPR*4, 289). In this connection, the criminal's own will must not be taken in relation to its entire content, since he cannot be treated as a rational being by making an irrational will (which is what crime is) into

the law. On the contrary, "this law is merely formal, the rational is merely potential or in itself. . . . As far as the rational character of the irrational act is concerned, there only remains the formal rationality that the act set up something universal. It is this universal, which it has itself set up, that allows the will to be violated [in turn]. . . . The act of the criminal as this universal sets up the permission as such to violate the will. This is what the criminal has expressed through his own deed" (*VPR*3, 316). The punishment is therefore also the criminal's own right insofar as one treats him as a rational and thinking human being. "It is an honor that man encounters here, that is, that what the human being does as a free being is recognized as such, that he is not subjected to an alien law, but only to his own" (*VPR*4, 289ff.).

The ultimate reason for the justice and necessity of punishment lies in the concept of the will, of the human being as such, of freedom, all of which must acquire concrete existence. This is "the side of right as right, the side of the will that should have concrete existence in accordance with its freedom; and thus this concrete existence, once violated, must be reestablished, the wrong that has transpired be undone" (*VPR*4, 288). The idea of punishment – its "inner nature" – can be grounded only in the light of that freedom and thus also of the freedom of the criminal who is honored as a rational (and thus ultimately free) being (*VPR*4, 291).

What essentially must be emphasized here is the following: Hegel's theory claims to represent the only humane theory of punishment in the sense that it corresponds to, or follows directly from, the concept of the human being (of the human will), or expressed in modern terms, the only theory of punishment that also does justice to the human dignity of the criminal and is thereby just in general. Since it is widely believed today, as the quotations we have supplied clearly show, that Hegel's theory does not qualify as such an account, I should like here to expand further on these ideas

The decisive thing in Hegel's eyes is that "the concept and criterion of punishment should be derived from the [criminal] act itself" (*TW* VII, 191; *Rph* §100 Remark). We should not treat those aspects that are alien to the act itself – such as moral improvement, deterrence, and so forth – as the essential character of punishment. This does not mean that Hegel regards these traditional interpretations of the purpose of punishment as entirely irrelevant. For Hegel, too, they are indeed "of essential significance, but they presuppose the justified claim that punishment is something that is *just* in and for itself" (*TW* VII, 188; *Rph* §99 Remark). In fact, as we shall show, Hegel himself supported the idea of resocializing the offender,

but he refused to identify the *concept* of punishment with this aspect. For Hegel distinguishes between the concept of punishment (the nature of punishment) and the various purposes that can and should be served by the threat, the adjudication, and the application of punishment: such purposes presuppose the original concept of punishment.

Punishment can be understood conceptually as a kind of repayment only to the extent that it is intrinsically grounded in the act of crime itself. Hence the criminal ultimately punishes himself and the justice of punishment can consist only precisely in this. Every other attempted justification of punishment violates the idea of human dignity, interpreted under certain circumstances whether as an individual act of vengeance or as a defensive measure on the part of society, and thus fails to take the criminal seriously precisely as a human being.[11]

In this connection, one should consider Hegel's well-known attitude to Feuerbach's theory of punishment: "Right and justice must find their ultimate ground and site in freedom and the will. The making of threats does not address freedom at all, but only unfreedom, just as when we raise a stick to a dog. In this case one is therefore treating a human being like a dog, and not in accordance with his honor and freedom" (*VPR*4, 311ff.; cf. *Rph* §99 Addition).

Hegel's theory of punishment is therefore not really a theory of retaliation, and not in the sense of the principle of "an eye for an eye, a tooth for a tooth," either. It is quite true that he demands an equivalence between the crime and the punishment, and consistently, too, since the latter is only the ultimate manifestation of the former. But this equivalence must be determined with regard to general value[12] and not in accordance with the precise harm or injury inflicted (Hegel explicitly describes the latter thought as "absurd"; *VPR*3, 321). The criterion here is the violation of the freedom that the criminal has negated both as the actually existing freedom of another and as that which belongs intrinsically to him- or herself.

Every punishment therefore is, in accordance with its essence, a free punishment (including capital punishment and financial punishment). Hence every attempt to construct a theory of punishment can begin only with the idea of freedom, rather than some kind of harm or evil (such as the sensuously perceptible injury). Hegel sees the principal failing in traditional interpretations of punishment precisely in the fact that they attempt to determine punishment *conceptually* in terms of evil or harm. For from this perspective, it is in fact irrational "to will an evil merely because another evil is already present" (*TW* VII, 187; *Rph* §99 Remark).

It is quite true that punishment is also an evil that is inflicted on the criminal, but this feature flows from the concept of freedom, as we showed above.

Hegel is perfectly clear that this approach does not itself provide a specific measure for determining the manner and the gravity of punishment: the idea of equivalent "value" can be regarded only as a general guideline. The precise determination of punishments remains a question of purely positive law and itself cannot be grounded by philosophy, that is, grounded in the concept (*TW* VII, 193 and 367; *Rph* §§101 and 214 Remarks).[13]

In other words, the relevant passages in the section on "Abstract Right" concern only the concept of punishment – as the manifestation of the nugatory character of the criminal will and as the reestablishment of the actual existence of the free will – but say nothing at all concerning the kind and degree of punishment appropriate or the precise way in which punishment is applied. These passages do explicitly refer us to the institution of the courts, that is, to the domain of "penal justice" (*TW* VII, 197; *Rph* §103), where further conceptual determination of judicial punishment is required.

But, as the earlier reference to the purely positive aspect of determining punishment implies, this involves the further sphere of civil society and the state. For the "penal code is therefore primarily a product of its own time and of the current condition of civil society" (*TW* VII, 372; *Rph* §218 Remark). At this point, we should turn back to our earlier account of the concept of crime: for in relation to the universal legal recognition and validity of the person the criminal now assumes the aspect of *dangerousness* to society in general. On the one hand, the potential magnitude of the crime is increased; on the other – once civil society is firmly established – the external importance of infringement of the law is reduced. This last point has particular consequences as far as punishment is concerned: "By virtue of the strength of society itself crime assumes the role of something merely subjective, that appears to have arisen less from the firm and steady will than from the natural impulses and particular aspects of the agent. In society the will is firm, is familiar with the laws, familiar with the fact that everything transpires as founded on the presence of right. If a crime is committed, it is ascribed not to the firm and steady will but to passion and the natural aspect of the will. This removes something of the responsible character that attaches to the crime. On this perspective the significance of crime is lessened, and the corresponding punishment is lessened likewise. Crime is thereby posited as something that possesses no

validity in itself, as something insignificant, and the punishment is reduced accordingly. For it is simply the invalid character of crime that is posited through punishment. But in society crimes already possess no intrinsic validity" (*VPR*3, 663ff.). It is quite true that the criminal must continue to be regarded as a rational agent, and we must therefore recognize the way in which the law is posited in and through his own act. "But in a society that is firmly established this aspect of the positing of law through crime is so weak that the reduction [of penal law] also can be measured in terms of that weakness" (*VPR*3, 664; cf. also *VPR*4, 280ff.).

In a securely established social order, the criminal act can be seen within a broader perspective: "a human being is born with this character, is marked by these passions and these states, is mistaken with regard to basic principles: these are all kinds of circumstances that are to be considered in a concrete case of crime, and are used in order to excuse a crime" (*VPR*4, 286ff.). We shall return to this problem below.

The prevailing order and security of society also gives rise to a further feature of punishment: *the moral improvement of the criminal*. Generally, this aspect of Hegel's theory of punishment is entirely overlooked, and although Hegel himself did not express it so clearly in the *Philosophy of Right*, it is certainly suggested there. The Griesheim transcript of Hegel's lectures is clearer in this regard: "If the social order is sure of itself, crime does not affect the basis of representation in general, does not assume this form of existence, does not function as a typical act [*Exampel*]. . . . I do not infer from the existence of crime that this must also embody . . . an existence of my own will. It has thus become an entirely singular universal. . . . If we now therefore behold the existence of the crime in the will of the criminal [alone], there are two sides within the will itself to be considered: one is the abstract will, the will of the individual as such, the other is the will of inwardness in itself" (*VPR*4, 551). That is to say, the first side concerns the criminal will as such, the will that has here assumed sensuous existence. In this regard, punishment must reveal the nugatory character of this will and exercise an effect on the sensuous reality of the will. "Second, however, the will is also something inward in a concrete sense: it determines itself, it is free in and for itself, is the intrinsically universal in relation to any specific limitation which it has assumed. . . . It is thus considered as the will that mediates itself with itself, that determines itself through its own inner representation and can also transcend the act of crime, that is, the will can give itself a different determination, and its first determination [as criminal act] sinks down to become a particular moment. In this manner . . . we encounter an inner

sphere of representation itself where the determination of evil itself can be sublated. . . . It is this actual existence [of the criminal act] that can be sublated, and the court, the penal judgment can regard such a sublation as its own purpose. That is, it can desire to improve the criminal, can make this its own purpose" (*VPR*4, 552 ff.). "Under the conditions of society the aim and purpose of improvement can enter into the question of punishment. It is important that it does so, and is even necessary" (*VPR*4, 553).

In accepting the aim of improvement into its concept, punishment simultaneously acquires a deeper content, becomes "a higher way of destroying the evil will" (*VPR*4, 550) than it ever could be either in the sphere of "abstract right" or in that of civil society. The sublation of the criminal will thus properly transpires in the sphere of the state.

The latter is also the sphere of (objective) spirit. In his very early writings, Hegel had already paid central attention to the problem of the relation between "spirit" and "punishment" and had elaborated a theory of "reconciliation" on the basis of these reflections, albeit only with reference to "moral punishment," which he strictly distinguished from legal punishment as an expression of right (cf. especially the early essay "The Spirit of Christianity and Its Fate": *TW* I, 274ff.; ET: p. 182ff.). In the early writings, Hegel was clearly still heavily influenced by Kant's philosophy (with its distinction of legality and morality) and this is here reflected in the fact that law in the juridical sense can appear only as a dead, alien, external, and abstract principle that, with cold necessity, inevitably demands punishment in response to crime. Juridical punishment under the sway of this conception was essentially characterized in turn by the principle of retaliation: "an eye for an eye, a tooth for a tooth." All thought of reconciliation is here excluded (*TW* I, 331ff. and 339ff.; ET: pp. 218ff. and 225ff.).

By the time he came to write the *Philosophy of Right*, Hegel had abandoned this particular point of departure for analyzing the problem: punishment is now (at least also) a problem pertaining to ethical life itself. This becomes particularly clear if we compare Hegel's mature theory of punishment with his treatment of "moral punishment" in the very early writings. There moral punishment was described as something that is not external at all since the "act is the punishment in itself; however much I have seemed to have injured alien life through my deed, it is just as much my own life that I have injured" (*TW* I, 305). The ("moral") punishment here is not the effect of an alien law, but rather "the equal return of the act to the perpetrator of the crime himself, a power that he himself has armed,

an enemy that he himself has armed, an enemy that he himself made into his enemy" (*TW* I, 343; ET: p. 230; cf. also *SS*, 41ff.; ET: p. 131ff.). But it is clear that this account is essentially congruent with the concept of *legal* punishment as Hegel develops it in the *Philosophy of Right*.

We may also compare the discussion in the *Essay on Natural Law* that also anticipates Hegel's later critical analysis of punishment: "If punishment is understood as coercion, it is posited merely as a specific determinacy and as something purely finite, carrying no rationality in itself. It falls wholly under the common concept of one specific thing contrasted with another, or as an item with which something else – the crime – can be purchased. The state as judicial power trades in specific wares, called crimes, for sale in exchange for other specific wares [punishments], and the legal code is its price-list" (*WBN* in *TW* II, 480; ET: p. 139).

Given the similarity of approach in the early writings, it is possible to draw on Hegel's remarks on "moral punishment" in order to develop the concept of punishment presented in the *Philosophy of Right* in relation to the sphere of spirit in general. In the essay "The Spirit of Christianity and Its Fate," Hegel begins from a consideration of the injunction of Jesus: "Judge not lest you be judged." Thus to place another human being under the judgment of the law is interpreted as essentially a loveless act. "This subsumption of other human beings under a concept that is revealed in the law may be called a weakness on the ground that the one who judges is not strong enough to accept them wholly as they are, but must separate them out, cannot endure their independence, takes them not as they are but as they ought to be.... But with this act of judging he has recognized a law and subjected himself to its bondage, has set up for himself also a criterion of judgment; and through the loving concern with which he would remove the mote from his brother's eye he has himself fallen below the realm of love itself" (*TW* I, 335; ET: p. 222). In this case one treats the other no longer as a human being but as a criminal.

In his essay "Who Thinks Abstractly?" (1807), Hegel undertook to describe this relationship in terms of the concepts of "concrete" and "abstract": "It is essentially abstract thinking when nothing whatsoever is seen in the murderer other than this abstract fact that he is a murderer, when every other human thing about him is eliminated through this one single quality" (*WDA* in *TW* II 578; ET: p. 463). Someone who is truly familiar with human beings, on the other hand, will think in a more concrete manner: "he will consider the path on which the life of the criminal has taken shape, discover a poor education in his past, and a poor family

relationship between the father and mother, some terrible hardship endured by this man for the sake of a relatively minor offense, which in turn embittered him toward the social order, an original reaction against the latter that served only to drive him out of it and has now brought him into a position where he thinks he can survive only through crime" (*TW* I, 578).

The idea of *reconciliation* actualized through love is a crucial concept in Hegel's theory of punishment in the early writings. In this context, just as with his account of "moral punishment," it is the individual and his conscience that stand at the center of Hegel's interest. Here Hegel employs the concepts of "fate" and, above all, "life," with the latter term being assimilated to the concept of "spirit" in his later writings. In fact, it is quite possible to appropriate the insights of these early writings in relation to the realm of objective spirit, the life of the ethical will in the state. For the intrinsic "majesty of spirit" harbors the capacity for "realizing the power of the spirit to render undone what is done, to annihilate the act of crime in forgiveness and forgetting" (*Rph* §282). "What has been done the spirit can make undone in the spirit, so that it no longer exists in the spirit" (*VPR*4, 684). "In the state man can thus make undone what has been done" (*VPR*4, 287).

It is in the concept of reconciliation that we find *the deepest concept of punishment* (and also the deepest concept of right as ethical will). But reconciliation should be considered here not simply as a process of resocialization. For it represents not merely the reintegration of the criminal into the social process of labor, but also his readmission into the community as such. But there is even more involved here: it is the reconciliation of the criminal with himself insofar as his criminal act also injured him as a rational and free human being. "A criminal who is punished may well regard the punishment inflicted on him as a limitation on his freedom; in fact, however, the punishment is not an alien power to which he is subjected, but simply the manifestation of his own will, and insofar as he recognizes this, he thus relates to it as a free being" (*TW* VIII, 304; *Encyclopaedia Logic* §158 Addition). "Punishment is thus the re-establishment of freedom, and it is true both that the criminal remains free, or rather has made himself free, and that the one who punishes has acted in a rational and free manner" (*WBN* in *TW* II, 480; ET: p. 139).

Yet there is still a difficulty. Are we still talking about the juridical concept of punishment here, or have we not already passed beyond the limits of positive right and law, beyond the limits of what is possible

(and permissible) for the latter? Is it anything more than coincidental that Hegel should already have mentioned religion (the spiritual domain) and divine mercy in relation to the problem concerning the improvement of the criminal? (*VPR*4, 550 and 553).

Closer reflection reveals that the emphasis on reconciliation through love transcends and dissolves the realm of positive law and right, and thus prematurely overleaps a necessary mediating stage in the self-actualization of the free will. The *Philosophy of Right* has clearly and unambiguously demonstrated the necessity for the "positive" character of law, and the dissolution of the latter also would endanger ethical freedom itself. "Justice becomes something indeterminate that falls victim to arbitrariness" (*VPR*4, 288).

Once again, we are confronted here with an *inner conflict* within the concept of positive law and right: in this case it leads to the distinction between justice and clemency. As Hegel had already observed in his early writings: "An avenger can forgive, can relinquish the pursuit of vengeance; a judge can cease to behave as a judge, can pardon [the offender]. But in that case justice is not satisfied" (*TW* I, 339; *FS* [ET]: p. 226).

The Hegelian concept of "clemency" [*Gnade*] should not simply be identified with the modern concept of a "pardon" [*Begnadigung*], although Hegel himself seems to suggest this in §282 of the *Philosophy of Right*. Yet in the Remark to §132, Hegel brings out the difference. The sphere of clemency involves all those features connected with the particularity of the crime: momentary loss of control, passion, "in general what is described as the strength of sensuous motives" (*TW* VII, 247; *Rph* §132 Remark). Here Hegel includes such things as "psychological conditions and moral considerations" (*VPR*3, 350) and generally "all the circumstances that are to be considered in a concrete case of crime and that may be used to excuse the crime in some way" (*VPR*4, 286ff.), that is, character traits, passions, mistakes, and so on. In modern terminology, we would describe these as attenuating circumstances that might provide grounds for exculpation or the reduction of punishment and that would affect the process of conviction and sentencing. This would be the natural place, for example, to consider conditional and commuted sentencing, and so on. Hegel does not himself make these distinctions because they had not yet been elaborated in the legal systems of his time.

Hegel holds that the courts are not in a position to pardon offenses precisely because they do not stand completely within the realm of "spirit" (*VPR*3, 326; *VPR*4, 287ff.). Hence it is only the princely ruler, representing the "majesty of the spirit," who is in a position to grant a pardon.

Such a view is untenable and actually contradicts Hegel's own insights in this domain. For in relation to the settled and securely established reality of civil society, the phenomenon of crime already appears in its natural aspect, in terms of "natural impulses," and is punished less severely precisely for that reason (*VPR*3, 663ff.). Thus, a form of mercy is already being exercised in this context. In addition, the domain of jurisdiction itself forms part of the executive power and thus of rational will within the state (*Rph*, §287, in *TW* VII, 457). It is not intrinsically necessary, therefore, that only the head of state can in principle exercise mercy. The legal system could bestow this power perfectly well on the judge, as has often been done in modern codes of criminal law.

Taken together, these points all indicate the necessity of distinguishing between the *concept* (the essence) of punishment and the specific *modalities* of conviction and sentencing. From a conceptual perspective, punishment can be understood only as retribution for a crime committed, as the consequence of crime that can be conceptualized properly only in relation to the latter. But this implies nothing substantive with respect to any particular punishment. In this regard it is other considerations, which come together in the idea of "mercy," that play a decisive role. The criminal should not simply be abandoned but should be given an opportunity for reintegration into society and the community of the state as a whole.

Since general philosophical considerations cannot predetermine precisely how the idea of mercy and the concept of punishment should relate to one another in a particular fashion, this represents a task that must constantly be addressed anew by the individuals who constitute the community of the state. But the continuing tension between these two perspectives cannot itself be eliminated. As Hegel says: "All these considerations, of reformation, of deterrence, and so on, are important, but punishment must always and above all retain the quality of justice; [the concept of] punishment as punishment must not be relinquished, although the kinds of punishment can themselves be modified in such a way that those other ends may also be realized" (*VPR*4, 554).

It should also finally be noticed that Hegel mediates the concept of punishment by reference to the will of the criminal, who has set himself in opposition to lawful right (and thus to himself). For this reason, the argument here applies only to intentional offenses. For offenses of negligence, punishment must therefore be determined in a different way, and the idea of educating and deterring the offender will play a central role here.

IV. The Contemporary Significance of Hegel's Theory of Punishment

By way of conclusion I should like to indicate the contemporary relevance of Hegel's theory of punishment.[14] As we have expounded it here, this theory would seem in the first instance to correspond to the "unified theory" of punishment that prevails in contemporary legal thought. In this respect, Hegel's theory would already present itself as an essentially "modern" one. But closer examination also reveals the relevant differences between these theories and actually demonstrates the superiority of the Hegelian concept of punishment. The features of retribution, of general and special deterrence, that are simply presented as isolated and juxtaposed elements in the "unified theory," are developed in Hegel's account as organic moments of the concept itself. It is this which first bestows on his theory a unity that is more than a result of unifying other one-sided theories. That is to say, retribution, general, and special deterrence are all required not because each of these features is inadequate on its own (and thus needs uniting with the others), but rather because they all arise out of the concept of punishment itself.

In addition, the difference between the *concept* and the *purpose* of punishment is also clarified here: it is untenable to present theories of retribution and deterrence (as "absolute" and "relative" theories of punishment) on a single level and then compare them in terms of their respective purposes. It is rather the case that punishment, conceptually regarded, is retaliation, while considered in relation to conviction and sentencing it also serves the purposes of general and special deterrence. The contemporary relevance of Hegel's theory and hopefully also the future direction of legal thinking lies in this restriction of such purely "functionalist" approaches, oriented solely to instrumental ends, and their effective integration within the total movement of conceptual thought.

V. Summary Recapitulation

Hegel's concept of punishment (of crime) should not simply be extrapolated, as it is in most current interpretations, from the section on "Abstract Right" in the *Philosophy of Right*. For the concept acquires its essential content only through the proper development of the concept of freedom (of the free will) in the forms of its own external realization. In the first place, therefore, crime and punishment should not primarily be grasped

as "evils" or in terms of infringement and threat, and so on, but must be interpreted explicitly from the perspective of the concept of freedom (and thus of the concept of the human being as such). In the second place, it is also necessary to examine the specific spheres covered in the *Philosophy of Right* (personal will, subjective will, objectively ethical will) and elucidate their significance for the question of crime and punishment in general.

Such examination reveals how crime initially presents itself as a self-contradiction within the will. This will, although as a form of personal will it already represents a concrete existence of freedom, negates itself (and not merely the freedom of others) in violating the actualized forms of freedom. At the same time, crime violates the interests of civil society and of right in general (since personality is legally recognized and protected in the domain of civil society and the state). On the one hand, the criminal act hereby acquires a greater dangerousness, while on the other, once laws are universally recognized in society, it can be regarded as less important in itself (and in relation to the sense in which it sets a poor example and serves to encourage further crime). In addition, crime is a violation of lawful will in the state, something that is of considerable significance for the question concerning the general consciousness of right and wrong that Hegel pursues and expounds in his theory of "legal accountability."

It follows that the concept of punishment is initially to be interpreted as retribution: punishment actualizes the self-contradiction of the criminal by manifesting the nugatory character of the criminal will precisely through its sublation and thus revealing it as a deficient form of freedom. The particular way in which this is accomplished (not through vengeance but through criminal justice as expressed in the form of courts and laws) depends on the prevailing historical conditions of civil society (and the state). Where the laws are universally recognized and accepted, the designation of crime as a deficient form of freedom (i.e., the purpose of general deterrence) needs to occur only in an effectively declaratory fashion. The function of punishment (of sentencing) in reforming and improving the criminal himself (i.e., the purpose of individual deterrence) thus moves into the foreground. In the domain of right as an expression of will in the state, the idea of reconciliation, already developed by Hegel in his earliest writings, now comes to acquire significance: the criminal is not simply to be regarded (abstractly) as a violator of right, but also to be recognized as a human being who may have been led into crime through particular deficiencies of background and education. The criminal therefore is not to be abandoned, but must be given the opportunity for reintegration into the community of the state. In this context, we must pay attention to Hegel's concept of "clemency," which involves several features that find

equivalent formulation in modern criminal law as specific grounds for exculpation, exemption, or commutation and for conditional sentencing or remission, and so on. Every age is continually called on afresh to find appropriate concrete form for this interplay between (abstract) justice and (concrete) "mercy" (understood in this context as a specific acknowledgment of the individuality of the agent).

Considered as a whole, therefore, punishment is thus conceptualized by Hegel as a form of retribution (as negation of the criminal will) that through applied threat, conviction, and sentencing is also to fulfill the purposes of general and special deterrence. At the same time the deepest ground of punishment – the reconciliation of the criminal with humanity (with the concept of the human being that is embodied both in him- or herself and in those who constitute the community of the state) – is thereby brought to light as something that continues to remain a postulate that governs the actuality of existing positive law and right.

Notes

1. So runs the title of an essay by U. Klug in J. Baumann, ed., *Programm für ein neues Strafgesetzbuch* (1968), p. 36ff. A similar line is pursued in the following contributions, for example: U. Klug, "Phänomenologische Aspeke der Strafrechtsphilosophie von Kant und Hegel," in *Festschrift für G. Husserl* (1969), p. 212; F. Bauer, "Strafrecht, Wertordnung und pluralistische Gesellschaft," in B. Schwarz, ed., *Menschliche Existenz und moderne Welt* (1967), vol. 1, p. 597ff.; H. P. Kühlwein, *Grundlegung zu einer Kritik der Strafrechtstheorien* (1968), p. 34ff.; P. Noll, *Die ethische Begründung der Strafe* (1962), and "Strafe ohne Metaphysik?," in J. Baumann, ed., *Misslingt die Strafrechtsreform?* (1969), p. 48ff.; G. Patzig, *Ethik ohne Metaphysik* (1971), p. 127ff. Cf. also note 9 below.
2. P. Noll, *Strafe*, p. 49.
3. P. Noll, *Begründung*, p. 6.
4. U. Klug, *Abschied*, p. 36.
5. Ibid., p. 41.
6. For this whole question, cf. my essay "Juristisches Denken und Hegels Rechtsphilosophie," in *Österreichisches Zeitschrift für öffentliches Recht* (1978), p. 5ff.
7. This is the title of a book by H. Kiesewetter (1974).
8. On this, cf. P. Bockelmann, *Hegels Notstandslehre* (1935), p. 21f.; O. K. Flechtheim, *Hegels Strafrechtstheorie* (1975), p. 82ff.; K. H. Gössel, *Über die Bedeutung des Irrtums im Strafrecht*, vol. 1, pp. 182ff., 204ff.; W. Heinemann, "Zur Dogmengeschichte des Rechtsirrtums," in *Zeitschrift für die gesamte Strafrechtswissenschaft* 13 (1893): pp. 371, 430f.; R. Honig, *Die Einwilligung des Verletzten* (1919), p. 51ff.; G.-J. Kuhlmann, "Das Bewusstsein des

Rechtswidrigkeit von Feuerbach bis zu den Hegelianern," diss., Kiel, 1954, p. 43ff.; E.-J. Lampe, *Das personale Unrecht* (1967), pp. 13ff., 73ff., 230; H. Mayer, "Kant, Hegel und das Strafrecht," *Festschrift für K. Engisch* (1969), pp. 54, 76; P. A. Piontkovskii, *Hegels Lehre über Staat und Recht und seine Strafrechtstheorie* (1960), pp. 134ff., 224ff.; J. Sander, "Die Begründung der Notwehr in der Philosophie von Kant und Hegel," diss., Rostock, 1939, p. 37ff.; R. Schmidt, "Die 'Rückkehr zu Hegel' und die strafrechtliche Verbrechenslehre," *Gerichtssaal* 81 (1913): 241, 259ff.; E. Sulz, *Hegels philosophische Begründung des Strafrechts* (1910), p. 5ff.; O. Tesar, *Die symptomatische Bedeutung des verbrecherischen Verhaltens* (1907), p. 155ff.; R. Tompert, "Wahrscheinlichkeitsurteil und Handllungsunrecht," diss., Bonn, 1961, pp. 32ff., 54ff.; P. Vogel. *Hegels Gesellschaftsbegriff* (1925), pp. 40off., 102f. This does not include all those contributions that touch on one aspect or another of Hegel's concept of crime (such as "act" or "responsibility"). Cf. note 9 below.

9. On this, in addition to the works named above, cf. E. Bitzer, "Die Akzentverschiebungen im Staatsdenken Hegels," diss., Bonn, 1952, p. 99ff.; F. Von Bülow, *G. W. F. Hegel, Recht, Staat, Geschichte* (1970), p. 277ff.; G. Dulckeit, *Rechtsbegriff und Rechtsgestalt* (1936), p. 124ff.; R. Falckenberg, *Die Realität des objektiven Geistes bei Hegel* (1916), p. 20f.; K. Fischer, *Hegels Leben, Werke und Lehre* (1972), pp. 279ff., 702ff.; O. K. Flechtheim, "Die Funktion der Strafe in der Rechtstheorie Hegels," in *Von Hegel zu Kelsen* (1963), p. 9ff.; also O. K. Flechtheim, "Zur Kritik der Hegelschen Strafrechtsphilosophie," in *Archiv für Rechts- und Sozialphilosophie* 54 (1968): 539ff.; G. Göhler, "Dialektik und Politik in Hegels frühen politischen Schriften," in *Hegel: Frühe politische Schriften* (1974), pp. 337, 517ff.; N. Hartmann, *Die Philosophie des deutschen Idealismus* (1974), p. 514ff.; R. Von Hippel, *Deutsches Strafrecht* (1925), vol. 1, p. 307ff.; H. Kiesewetter, *Von Hegel zu Hitler* (1974), p. 3f.; J. Kopper, *Die Dialektik der Gemeinschaft* (1960), p. 39ff.; K. Larenz, "Vom Wesen der Strafe," in *Zeitschrift für deutsche Kulturphilosophie* 2 (1936): 26, 43ff.; G. Lasson, "Einleitung," in *Hegel: Grundlinien der Philosophie des Rechts* (1911), p. LIff.; B. Liebrucks, *Sprache und Bewusstsein*, vol. 3, pp. 110ff., 219ff., 466ff., 527ff.; R. Marcic, *Hegel und das Rechtsdenken im deutschen Sprachraum* (1970), and "Hegel und das Recht," in G. K. Kaltenbrunner, ed., *Hegel und die Folgen* (1970), p. 181; also R. Marcic, *Geschichte der Rechtsphilosophie* (1971), p. 321ff.; H. Marcuse, *Reason and Revolution* (1941); M. E. Mayer, "*Besprechung von Jellinek*, *Die sozialethische Bedeutung*," in *Deutsche Juristenzeitung* (1909), p. 1273; H. Mayer, *Strafrecht: Allgemeiner Teil* (1953), p. 32ff.; T. Miskell, "Hegels Lehre vom abstrakten Recht," diss., Freiburg/Breislau, 1972, p. 159ff.; Ch. Schefold, *Die Rechtsphilosophie des jungen Marx von 1842* (1970), p. 188ff.; E. Schmidhäuser, *Vom Sinn der Strafe* (1963), p. 19ff.; E. Schmidt, *Einführung in die Geschichte der deutschen Strafrechtspflege* (1965), p. 294ff.; W. Schulz, *Philosophie der veränderten Welt* (1972), p. 758ff.; H. Seeger, "Die Strafrechtstheorien Kants und seiner Nachfolger," in *Festschrift zum 50: Doktorjubiläum von A. F. Berner* (1892), vol. 1, p. 16ff., 30ff.; G. Sodeur, "Vergleichende Untersuchung der Staatsidee Kants und Hegels," diss., Erlangen, 1893, p. 20; H. Wenke, *Hegels Theorie des objektiven Geistes* (1927), p. 108ff.

From a Marxist perspective, cf., apart from P. A. Piontkovskii (note 8 above), J. Lekschas, *Der Mensch in der Hegelschen Strafrechtstheorie und im sozialistischen Strafrecht, Staat und Recht* (1970), p. 1616; Lekschas, "Vorwort," in P. A. Piontkovskii, *Hegels Lehre über Staat und Recht und seiner Strafrechtstheorie* (1960), vol. 5, p. XXVff.; P. A. Piontkovskii, *Über die Hegelsche Rechtsphilosophie, Staat und Recht* (1956), pp. 964, 970f.; also P. A. Piontkovskii, "Zur Frage der politischen Wertung der Hegelschen Rechtsphilosophie," in *Studien zu Hegels Rechtsphilosophie in UdSSR* (1966), pp. 1ff., 5ff.

10. Cf. *TW* IV, 225, where Hegel says that it lies "in the absolute will of the criminal that he be punished." This also implies a distinction over against the use of "punishment" as a means for educating children: cf. *TW* VII, 326; *Philosophy of Right*, §174.

11. Hegel thus describes "deterrent" theories of punishment as "mechanical" (cf. *TW* VII, 251; *Encyclopaedia Logic*, Addition to §121). It is interesting to note that the same objection has been raised against his own theory.

12. Hegel appears to make an exception in this connection: "An individual life is something quite different, for this involves the entire sphere of existence, and here the retaliation must be precisely measured accordingly. The death penalty is thus decreed for murder" (*VPR*3, 322). "As a murderer the criminal sets up the law that life is not to be respected. He pronounces the universal through his deed; but he thereby also pronounces for himself punishment by death" (*VPR*3, 318ff.). But this position does not necessarily follow in the overall context of Hegel's philosophy. For such punishment should not merely be seen as an automatic consequence of sentencing. Hegel himself cites a case in which a murderer would have to be punished with incarceration: that is, if the offender committed the murder only in order to be executed. For in that case the carrying out of the death sentence would not challenge the will of the criminal (*VPR*4, 285). But then Hegel also adds: "In more recent times we have become more lenient in this connection, insofar as the attitude to punishment can depend on the level of education and culture of a people" (*VPR*3, 322). This already would seem to imply that the threat and use of the death penalty is also dependent on the actual condition of civil society. Cf. also the following note.

    Finally, the idea of improving and reforming the criminal would appear to suggest the possible replacement of the death penalty through punishment by incarceration (*VPR*4, 553).

13. As far as the determination of punishment in detail is concerned, Hegel says explicitly that philosophy itself can provide no criteria here. For not everything outside the self-actualization of the concept can be regarded as a case of merely contingent existence. Hegel recognizes that there are domains where final decisions are required but which "lie beyond the concept as determined in and for itself and thus leave a certain range for further determination that must be decided differently, now on one ground and now on another, and which is therefore insusceptible to a secure and final decision" (*VPR*4, 553). Here it is external contingency or the play of arbitrary will that decides the matter or, alternatively, those "reasons" that human beings are capable of

developing through other kinds of argument (cf. *TW* VIII, 61ff.; *Encyclopaedia Logic*, Remark to §16). In addition to the question of defining particular punishments, Hegel also mentions the precise determination of taxation levels in this connection (*TW* VIII, 61; *Encyclopaedia Logic*, ibid.; for this entire issue, cf. *TW* VII, 93, 366ff.; *Rph*, Remarks to §§101 and 214). But these points also hold good for the question of capital punishment, which philosophy cannot actually derive from the concept in relation to civil society and the state (cf. note 12 above).

14. It is not possible to pursue the question of the contemporary relevance of Hegel's concept of crime any further here, but the question is one that can certainly be developed in a number of fruitful ways. In this connection, we should not concentrate solely on the concept of (legal) accountability that I made central to the discussion in my aforementioned postdoctoral dissertation. For example, the claims of Hassemer (*Theorie und Soziologie des Verbrechens* (1973), p. 130ff.) concerning the social grounds for the further extension of property law and the reflections of Arzt (*Der Ruf nach Recht und Ordnung* (1976)) could certainly find significant support in Hegel's work.

III

ETHICAL LIFE