

**FROM PUNISHMENT TO RECOGNITION: TOWARD A HEGELIAN THEORY OF  
CRIMINAL JUSTICE**

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# FROM PUNISHMENT TO RECOGNITION: TOWARD A HEGELIAN THEORY OF CRIMINAL JUSTICE

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Many philosophers take it that the aim of a philosophical account of punishment is that of justifying the practice of punishment, understood as a form of harsh treatment inflicted on a person by the state because that person has violated some provision of the criminal law. In punishing, the state treats persons in ways that are *prima-facie* unjustified. The philosophical problem of punishment, as many philosophers understand it, is that of overcoming this *prima-facie* presumption against the justice of our punishment practices.

Understanding the philosopher's task as that of justifying our punishment practices is misguided. Instead of seeking to develop theories that can justify our punishment practices, philosophers should concern themselves with answering the following question: "What are the proper goals of a criminal justice system?" In understanding philosophical accounts of punishment as responding to this question we do not prejudice the issue in favor of the *status quo*. In this work, I provide an answer to this reformed question that relies on the conception of punishment articulated by Hegel in his *Philosophy of Right*.

I contend that a well-functioning criminal justice system should seek to repair the various types of physical, psychological, and normative harms caused by acts of crime, thereby restoring a particular community to its pre-crime state. I understand punishment not as an act in which the state inflicts harsh treatment on the criminal, but one in which the state *recognizes* the criminal by coercing him in a way that allows him to aid in the restoration of his community and puts him in a position to become a free, self-conscious member of his community. I contend, therefore,

that we should understand punishment not as a form of harsh treatment, but as a form of recognition.

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## Introduction

Many philosophers take it that the aim of a philosophical account of punishment is that of justifying the practice of punishment, understood as a form of harsh treatment inflicted on a person by the state because that person has violated some provision of the criminal law. In punishing, the state treats persons in ways that are *prima-facie* unjustified. The philosophical problem of punishment, as many philosophers understand it, is that of overcoming this *prima-facie* presumption against the justice of our punishment practices.<sup>1</sup>

I, however, think understanding the philosopher's task as that of justifying our punishment practices is misguided. Instead of seeking to develop theories that can justify our punishment practices, philosophers should concern themselves with answering the following question: "What are the proper goals of a criminal justice system?" In understanding philosophical accounts of punishment as responding to this question, we do not prejudice the issue in favor of the *status quo*. In this work, I provide an answer to this reformed question that relies on the conception of punishment articulated by Hegel in his *Philosophy of Right* (hereafter "PR").

I contend that a well-functioning criminal justice system should seek to repair the various types of physical, psychological, and normative harms caused by acts of crime, thereby restoring a particular community to its pre-crime state. I understand punishment not as an act by which the state inflicts harsh treatment on the criminal, but one by which the state *recognizes* the criminal by coercing him in a way that allows him to aid in the restoration of his community and, as we shall see, puts him in a position to become a free, self-conscious member of his community. One

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<sup>1</sup> Finkelstein (2011), p.324, n.23.



of the aims of this work is that of inspiring a shift in our understanding of punishment. We should not understand punishment as a form of harsh treatment, but as a form of recognition.

The conception of recognition I articulate in this work is derived primarily from Hegel's PR and *Phenomenology of Spirit* (hereafter "PS"). As mentioned, the conception of punishment I advocate is inspired by Hegel's remarks on crime and punishment in the PR. Before outlining the arguments and claims contained in this document, I will say a bit about the PR as a work of philosophy and the role that the PR plays in this work.

First, while the PR is an elegant and compelling work of political philosophy, it is not a comprehensive presentation of Hegel's political thought and he did not intend the work to be taken as such. Instead, Hegel wrote the PR as a handbook to accompany his lectures on political philosophy.<sup>2</sup> As such, the text is condensed and fragmented. Because of this, it is sometimes necessary to reference Hegel's other works to get a clearer understanding of the positions advocated in the PR. This fact is reflected throughout this work.

Second, my aim in this work is not that of providing an interpretation of Hegel that completely captures his thoughts on crime and punishment. Because of the fragmentary nature of Hegel's remarks in the PR, I do not believe that such a task can be completed. Rather, my aim in this work is that of articulating a conception of punishment that is consistent with Hegel's thought and incorporates what I take to be his most profound insights. In this way, I do not take myself to be presenting Hegel's conception of punishment, but rather a *Hegelian* conception of criminal justice.

This work is organized as follows. In Chapter 1, I explain why Hegel takes it that persons can only be self-conscious, and thus free, in relation to other free persons. In doing so, I explain

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<sup>2</sup> Hegel (2008), p. vii.

the connection between freedom, recognition, and self-consciousness in Hegel's thought. For Hegel, persons are only free to the extent that they act on the right reasons. The right reasons, for Hegel, are those that stem from a particular normative status. And, as Hegel explains, to be the subject of a normative status is to be a self, and one can only be a self to the extent that one is *recognized* as such by other selves. To be a self and to treat oneself as such—to govern one's actions by certain norms—is to be self-conscious, and thus free.

Crucially, Hegel believes that self-consciousness is only possible in circumstances in which one is recognized by those one recognizes. Hegel uses the term *Sittlichkeit* (ethical life) to label the situation in which persons *actually* achieve self-consciousness in being recognized by those whom they also recognize. I conclude Chapter 1 with a discussion of ethical life.

In Chapter 2, I articulate a Hegelian conception of crime. Hegel understands crime as a disruption of ethical life that threatens to undermine the freedom of all. I argue that crime not only harms the victims of crime, and the criminal's community, but also the criminal himself. In this chapter, I also explain how Hegel believes the content of the criminal law is to be determined and argue that our contemporary determinations of criminal law—particularly the criminal law's *actus reus* and *mens rea* requirement—can be understood in recognitive terms.

Additionally, in Chapter 2 I articulate a Hegelian conception of action and responsibility that both complements the understanding of these concepts in contemporary criminal law and allows us to understand how both the individual and the recognitive community can achieve self-consciousness and self-knowledge. I conclude the chapter with a discussion of civil disobedience, which I understand as an act in which a person violates the criminal law in order to bring his community to a greater degree of self-consciousness.

In Chapter 3, I articulate and defend the Hegelian, restorative conception of punishment. I argue that Hegel's discussions of wrongdoing and punishment in the PR and in the PS support a restorative conception of criminal justice, one on which the state punishes in order to repair the various types of harms caused by crime. The restorative penalty seeks to bring the criminal into conversation with his victim in order both ask for and receive forgiveness from the victim and to work to make his victim whole. Hegelian restorative justice aims, in part, to put the criminal in a position to achieve self-consciousness and receive forgiveness from his victim and his community.

In this chapter, I also discuss how a community committed to restorative justice should treat dangerous, incorrigible criminals, criminals who suffer from weakness of will, criminals who violate the law out of economic need, and criminals who commit acts of civil disobedience. I argue further that in responding to various types of crime, the recognitive community further specifies the content of its norms and comes to know itself.

In Chapter 4, I discuss alternative theories of punishment, arguing that the Hegelian conception of punishment is superior to each. In the chapter, I discuss retributivism, deterrence theory, and the social contract justification of punishment. I argue that the retributivism is generally problematic from the Hegelian perspective because it does not understand the criminal as potentially self-conscious, as a potential member of a community structured by relations of reciprocal recognition.

I argue that deterrence theory is flawed in that it fails to treat the criminal as rational, as capable of recognizing and responding to the right reasons for action. Additionally, I argue that the social contract justification of punishment is problematic because it rests on a mistaken understanding of the state. The contractualist claims that we should understand political

obligations as arising from a real or hypothetical contract; but, as Hegel argues, the notion of a contract presupposes a certain level of normativity and political obligation. The social contract justification of punishment also requires that the state treat criminals as if they were incapable of acting on the right reasons.

The Hegelian theory of punishment I argue for in this work is grounded in a robust understanding of personhood and freedom and requires that the state view the criminal as a full person, as at least potentially self-conscious. We have reason to reform our criminal justice practices in light of the Hegelian theory and my hope is that this work will serve as a first step in a collective effort to do so.

## Chapter 1: Hegel on Recognition, Freedom, and Ethical Life

### I. The Project of the *Philosophy of Right*

In the PR, Hegel seeks to explain what must be the case if persons are to be free, in the broadest sense of that term. Hegel thinks of persons as entering the world with a set of desires given by nature. For instance, almost all persons desire to eat, avoid pain, and experience pleasure. Of course, a person's desires can be more specific—one can desire to not just eat, but to eat *this* piece of cake, or to own *that* particular car. One does not act freely, for Hegel, in simply acting on one's desires. Hegel, like Kant, conceives of freedom, in part, as the ability to act for *reasons*, and not simply on impulses. More will be said about this below.

Hegel believes that if we are to be free we must "purify" our natural impulses by *thinking* about which of those impulses we should act on.<sup>3</sup> In §19 of the PR, Hegel writes:

In the demand for the *purification* of impulses there lies the general notion that they should be freed both from their form as immediate and natural determinations.... To grasp them like that, proceeding out of the concept of the will, is the content of the philosophical science of right.<sup>4</sup>

The PR, then, is a work aimed at bringing the reader to understand what it is to be free, what it is to not act simply on impulse, but for the *right* reasons. Key to understanding Hegel's conception of what it is to act on the right reasons is understanding the relationship he sees between the concepts of freedom, self-consciousness, and recognition.

For Hegel, to act on the right reasons is to act in accord with the norms by which one is bound. And, for Hegel, one can only be bound by norms if one is *recognized* as being bound by those one recognizes. To be recognized by others as being bound by norms, for Hegel, is to be a self. To be self-conscious, then, is to recognize *oneself* as being bound by norms, as being

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<sup>3</sup> Hegel (2008), pp. 40-41.

<sup>4</sup> *Ibid.*

permitted *to* and prohibited *from* doing certain things. For Hegel, to recognize oneself in this way, to act on the reasons one recognizes oneself as being bound by, is to be free.

For Hegel, then, there is an intimate relationship between the concepts of freedom, self-consciousness, and recognition. There can be no freedom without self-consciousness, and no self-consciousness absent recognition. I will have much more to say about the relationship between these concepts below.

In the PR, as well as the PS, Hegel explicates his conception of freedom in accord with his general view about the nature of concepts. Hegel believes that concepts become contentful in being employed in actual judgments, in being "actualized." He also believes that one can only come to understand a concept by understanding the history of its actualization—in understanding, that is, how that concept has developed out of less complex forms. Hegel expresses these views in the introduction to the PR. He writes:

[t]he subject-matter of the philosophical science of right is the *Idea of right*, i.e. the concept of right together with the actualization of that concept.<sup>5</sup>

And later:

[t]he shapes which the concept assumes in the course of its actualization are indispensable for the knowledge of the concept itself.<sup>6</sup>

While Hegel speaks of the "actualization" of a concept, he does not believe that one must understand the *actual* history of a particular concept to understand that concept, but that one must at least have in view a *reconstructed* history of a concept to fully understand the version of the concept that he wishes to advocate. In the PR, Hegel presents a reconstructed history of the concept of freedom in order put the reader in a position to understand why freedom should be understood in terms of self-consciousness. Hegel believes that this method of presentation allows

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<sup>5</sup> *Ibid.*, p.17.

<sup>6</sup> *Ibid.*

the reader to both understand the concept of freedom as self-consciousness and why the concept of freedom he advocates is superior to the less-developed versions.

In this chapter, I will rely on Hegel's reconstructed history of the concept of freedom to explicate the notion of freedom as self-consciousness. While I follow Hegel's discussion in the PR, I make additions to Hegel's discussion where necessary. In section II, I explicate Hegel's concept of recognition, relying on the work of Robert Brandom. In section III, I present Hegel's objection to the classical compatibilist's conception of freedom and explain Hegel's notion of freedom as self-consciousness as distinct from classical compatibilism. And, in section IV, I explain why Hegel takes it that this conception of freedom necessitates that persons own both their bodies and external property, and explain what it is to own one's body and to own external property. In section V, I conclude the chapter by explaining Hegel's notion of ethical life (*Sittlichkeit*)<sup>7</sup>, which is a social situation in which persons come to *identify* with those norms by which they are recognized as being bound.

In what follows, we will see that for Hegel, the simplest notions of freedom necessitate a community structured by relations of reciprocal recognition, ethical life (*Sittlichkeit*), to be fully coherent. However, this Hegelian story about freedom will only make sense against the background of Hegel's concept of recognition.

## II. Brandom on Hegel on Recognition

Understanding Hegel's notion of freedom as self-consciousness requires that one understand Hegel's concept of recognition. In "The Structure of Desire and Recognition: self-consciousness and self-constitution," Robert Brandom develops an account of Hegel's concept of recognition

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<sup>7</sup> I follow Knox (2008) in translating "Sittlichkeit" as "ethical life." Note that we get the term "Sittlichkeit" from the root "Sitte," meaning norms, ethos, or mores. As such, I could equally translate "Sittlichkeit" as "normative life."

that allows us to understand why self-consciousness (or, having a coherent conception of oneself) requires that one be recognized by those one recognizes. I take Brandom's account of the Hegelian concept of recognition to be instructive and, as such, I will rely on an understanding of it throughout this work.

Brandom gives us a basic account of what it is to recognize someone. For Brandom, "[t]o recognize someone is to take her to be the subject of normative statuses, that is, of commitments and entitlements, as capable of undertaking responsibilities and exercising authority."<sup>8</sup> To take someone to be the subject of normative statuses is to take it that their sayings and doings can be assessed in normative terms, that the terms "good," "bad," "right," "wrong," "authorized," or "unauthorized," can be used to characterize their deeds. Also, to take it that someone is the subject of normative statuses is to take it that they can be called on to *justify* their actions. In short, to recognize another is to take her to be "in the space of reasons," to borrow Wilfrid Sellars' phrase.

To illustrate, as a recognized person, A's assertion "I am in Boston" will be taken as a commitment, a commitment which also entitles her to claim that she is in Massachusetts. A is able to commit herself to this first claim because she is recognized as having the authority to do so. This authority also entails responsibilities. In the case under consideration, A's asserting and committing is also her undertaking the responsibility to *justify* her claim (in the appropriate circumstances) and to not commit herself to a claim that is inconsistent with her original claim, to not commit herself to the claim that she is in Florida, for example.

Brandom also provides a general account of what one must specifically *do* in order to *count as* recognizing another. For Brandom, to recognize another is to treat that other's

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<sup>8</sup> Brandom (2007), p. 136.



commitments as normatively authoritative for oneself.<sup>9</sup> To continue with the above example, B counts as recognizing A if B takes A's commitment to the claim that she is in Boston as a reason to take on this commitment himself. To be sure, to treat another's commitments as normatively authoritative for oneself is not to simply take on all of that other's commitments. The reason provided by a recognized person's commitment is a *defeasible* reason. B is not rationally bound to take on A's commitment, but he is bound, by his commitment to recognize A, to treat A's commitment as a reason to be so committed himself.

To treat another's commitments as normatively authoritative for oneself is to take a stance toward that other in light of the norms she has committed herself to and to *actually* hold her accountable for her actions in light of those commitments. To do this is to demand that that other justify her commitments, to criticize her for undertaking commitments she is not entitled to, and to praise her for undertaking commitments she *is* entitled to. In short, to recognize another, to treat her commitments as normatively authoritative for oneself, is to treat that other as an occupant of the space of reasons.

Note that recognition is not an all or nothing affair, but comes in degrees. Person's commitments can be afforded more or less weight in the deliberations of others and one can be held more or less responsible for one's commitments. Additionally, *failures* of recognition can be more or less severe. As I explain in Chapter 2, Hegel wishes us to understand crime as a subclass of these failures. And, as I explain in Chapter 3, Hegel takes it that criminal penalties are to be responsive to the degree to which a criminal fails to recognize his victim.

Brandom distinguishes between two *types* of recognition: simple recognition and robust recognition. To simply recognize another is to take her to be the subject of *some* normative

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<sup>9</sup> *Ibid.*, p. 141.

status. To robustly recognize another is to recognize her as one who simply recognizes others. In other words, to simply recognize someone is to take her to be in the space of reasons. To robustly recognize someone is to take her to be able to give and ask for reasons for claims about which persons are in the space of reasons. Thus, all who are robustly recognized are simply recognized (are recognized as being in the space of reasons), but not all who are simply recognized are robustly recognized (or recognized as capable of reasoning about which persons are in the space of reasons).

To illustrate, A simply recognizes B in taking it that at least some of her deeds are to be assessed using normative terms. A takes it that B's assertion "I own a black shirt," is her committing herself to a certain claim, a claim that she can either be (or not be) entitled to commit herself to. A is a simple recognizer. As a simple recognizer, A herself makes claims about the normative statuses of others. That is, A is in a position to say that B is not entitled to commit herself to the claim that she (B) owns black shirt because she does not, in fact, own a black shirt.

One can also assess the claims A makes as a simple recognizer in normative terms. One can take it that A was wrong to claim that B is not entitled to her claim. One who makes this judgment recognizes A as a simple recognizer, and, as such, robustly recognizes A.

Utilizing the concept of robust recognition, Brandom explains why one must be robustly recognized by one who one robustly recognizes in order to have a coherent conception of oneself, in order to be self-conscious. As Brandom explains:

It is a formal fact that *if* a relation is both symmetric and transitive, then it is also reflexive, and hence is an equivalence relation. That is, if  $\forall x \forall y [xRy \rightarrow yRx]$  and  $\forall x \forall y \forall z [xRy \& yRz \rightarrow xRz]$ , then  $\forall x [xRx]$ . For we can just apply the transitivity condition to the symmetry pairs  $xRy$  and  $yRx$  to yield  $xRx$ . So *if* recognition were (for some reason) *de jure* transitive – if it were part of the nature of recognition that one is committed to recognizing anyone recognized by someone one

recognizes – *then* achieving *de facto* symmetry of recognition would suffice for achieving *de facto* reflexivity of recognition.<sup>10</sup>

For Brandom, robust recognition is a *de jure* transitive relation. He claims that "[r]ecognizing someone as a recognizer is acknowledging the authority of his or her recognitions for one's own: recognizing whomever he or she recognizes." This seems wrong, however, in light of my rendering of Brandom's conception of recognition.

As stated above, to recognize another is take that other to be the subject one or several normative statuses. In recognizing another, one takes it that that other has the authority to commit herself to claims. This general authority, however, does not entail entitlement to any *specific* claim. Given this fact, it appears that robust recognition cannot be *de jure* transitive.

For robust recognition to be *de jure* transitive, it must be the case that *all* of the judgments regarding who counts as a robust recognizer made by the one who is robustly recognized must be taken to be true. If A robustly recognizes B and must take it that *all* of B's judgments regarding who counts as a robust recognizer are true and B recognizes C as a robust recognizer, then A robustly recognizes C. But, in robustly recognizing another one is not required (conceptually) to regard as true all of that other's judgments on matters of recognition.

One who is robustly recognized could be wrong in taking it that some particular person is a robust recognizer. One who is robustly recognized is taken to have the *authority* to commit herself to claims about who is a robust recognizer, but this authority is not equivalent to her entitlement to any specific claim about who is a robust recognizer. Robust recognition is not *de jure* transitive.

The judgments of one who is robustly recognized must, however, be treated as *potentially* correct. One who is robustly recognized is the subject of normative statuses and, as such, her

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<sup>10</sup> *Ibid.*, pp. 137-138.

judgments can be assessed as either correct or incorrect. Her judgments are such that they *could be* correct.

Given the understanding of recognition under consideration, robust recognition cannot be *de jure* transitive, but robust recognition can be *de facto* transitive. One can decide to robustly recognize all those who are robustly recognized by persons one robustly recognizes, thereby establishing *de facto* transitivity of recognition.

To illustrate, A robustly recognizes B, she takes it that B is in a position to commit herself to claims about which persons are robust recognizers. In addition, A decides to also robustly recognize all those who are robustly recognized by B. Assume B robustly recognizes C. In practical terms, A's robustly recognizing C because C is robustly recognized by B, is A's being willing to take C to be committed to true claims about which persons are robust recognizers based solely on B's word. That A has decided to robustly recognize those robustly recognized by B means that she need not confirm for herself that those robustly recognized by B should be so recognized. In this instance, A *trusts* B's judgment.<sup>11</sup> That any robust cognitive relation is *de facto* transitive is a matter of the robust recognizer trusting the persons(s) she robustly recognizes with respect to certain judgments.

If we take it that any robust cognitive relation is at most *de facto* transitive, we can still reach the conclusion that Brandom wishes to draw—that is, that self-consciousness is only possible if one is recognized by those one recognizes. To start, we must observe that if it is the case that a robust cognitive relation between two individuals is *de facto* symmetric and *de facto* transitive, it is also *de facto* reflexive. If A robustly recognizes B, and B robustly recognizes A,

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<sup>11</sup> Note that my use of "trust" here is distinct from Hegel's use of the term discussed below. Hegel distinguishes between trusting a set of norms and identifying with those norms. Here I use trust to demarcate an attitude one can take with respect to the judgments of others, whereby one takes on those judgments without dispute.

and A robustly recognizes anyone who B robustly recognizes, A robustly recognizes herself. To be sure, in robustly recognizing herself, A also simply recognizes herself. She recognizes herself as being in the space of reasons and as able to reason about who else is in the space of reasons.

I said above that Brandom's concept of recognition allows us to understand why self-consciousness is only possible if one is recognized by those whom one recognizes. However, I did not fully explicate the concept of self-consciousness. I now turn to that task.

For Hegel, to be self-conscious is to be *for* oneself what one is *in* oneself. This simply means that the person who is self-conscious is what she takes herself to be, that she *treats herself as* what she in fact is. As Brandom explains, "...to be a self, a subject, a consciousness – for Hegel as for Kant – is to be the subject of *normative* statuses: not just of desires, but of *commitments*."<sup>12</sup> At the most basic level, then, self-consciousness is a matter being a self and treating oneself as a self. It is a matter of simply recognizing oneself, as treating oneself as the subject of a normative status. Brandom labels this type of self-consciousness "simple self-consciousness." Additionally, for Brandom, in robustly recognizing oneself, one achieves "robust self-consciousness."<sup>13</sup>

We see, then, that in being recognized by those whom one recognizes, and whose *recognizings* one takes to be transitive, one is able to recognize oneself and, thus, achieve both simple and robust self-consciousness. Additionally, as Brandom and Hegel argue, *de facto* cognitive relations are *necessary* for self-consciousness. I now explain why one cannot achieve self-consciousness absent the recognition of others.

Self-consciousness is a matter of *being* the subject of a normative status and *treating oneself as* the subject of a normative status. To achieve self-consciousness absent the recognition

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<sup>12</sup> *Ibid.*, p. 147.

<sup>13</sup> *Ibid.*, p. 148.

of others, then, would be to determine for oneself that one is the subject of a normative status and to determine for oneself what counts as treating oneself as the subject of that status. One would necessarily fail in one's attempt to achieve self-consciousness in this way because one's conception of oneself, thus formed, would be incoherent.

To sign a contract for the sale of goods is to undertake a *commitment* to perform a certain action: to pay for or deliver the goods specified in the contract. In signing the contract, one becomes the subject of a normative status. Likewise, in purchasing a ticket to a concert, say, one becomes *entitled* to attend the concert. In purchasing the ticket, one also becomes the subject of a normative status. As Brandom explains in *Making it Explicit*, "[t]here were no commitments before people started treating each other as committed; they are not part of the natural furniture of the world. Rather they are social statuses, instituted by individuals attributing such statuses to each other, recognizing and acknowledging those statuses."<sup>14</sup>

However, if one were the sole determiner of whether one was the subject of a particular normative status, or normative statuses in general, there would be no distinction between *actually being* the subject of a normative status and *thinking that* one was the subject of a normative status. In this case, any performance that one *thought* was the signing of a binding contract would *be* the signing of a binding contract. And, likewise, any piece of paper one *thought* was a valid ticket would *be* a valid ticket. But if this were the case, as Wittgenstein famously observed, talk of right and wrong would become unintelligible.<sup>15</sup> In the same way, one cannot be the sole determiner of whether one is *treating oneself as* one who is the subject of a normative status. It must be possible that one could be mistaken in this regard.

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<sup>14</sup> Brandom (1998), p. 161.

<sup>15</sup> See Wittgenstein (2001), §258.

We can also understand the incoherence of one's attempt to achieve self-consciousness absent the recognition of others in terms of force and content. The normative *force* of any commitment—the fact that one is bound by that commitment—is dependent on the stance one takes toward that commitment. One is only bound by the commitments one has undertaken. It is up to A whether she will commit herself to be bound by the norms specified in a particular contract. However, if one is to genuinely *bind* oneself by undertaking a commitment, the *content* of that commitment must not be solely dependent on the attitudes of the individual who undertakes the commitment. If A is to truly bind herself by signing a contract, it must not be solely up to A what counts as fulfilling the terms of that contract. As Brandom puts it,

If not only *that* one is bound by a certain norm, but also *what* that norm involves—what is correct or incorrect according to it—is up to the one endorsing it, the notion that one is *bound*, that a distinction has been put in place between what is correct and incorrect according to that norm goes missing.<sup>16</sup>

If one is to achieve self-consciousness, it cannot be the case that both the force and content of one's commitments is dependent on one's attitudes.

For Hegel, while the force of one's commitments is dependent on one's attitudes, the content of those commitments is dependent on the attitudes of others—particularly, those others whom one recognizes. What one is committed to is determined by what those one recognizes take one to be committed to. That A is obligated to perform some particular action given that she has signed a particular contract is matter of others taking it to be the case that she is so obligated. In this way, Hegel is able to account for the difference between the source of a norm's force and the source of its content that must obtain if one is to have a coherent conception of oneself as being bound by norms.

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<sup>16</sup> Brandom (2007a), p.15.

And, for Hegel, that one is bound by a certain norm is not only a matter of the content of that norm being dependent on the attitudes of others. To be bound by a norm, for Hegel, is also for others to treat one as being bound by *actually* holding one responsible for acting in accord with the norm. For Hegel, to be bound by a norm is to be bound in a very concrete sense in that persons reference the norm in approving and disapproving of one's actions.

More will be said about this in later chapters, but one need not conceive of the norms one has committed oneself to, and by which one is bound, as static. The content of any commitment is something that can be negotiated within cognitive communities. Here, I simply wish to emphasize the point that one can only count as binding oneself by a norm if the content of that norm is independent of one's attitudes.

In recognizing others as authorized to determine the content of one's commitments, and as entitled to normatively assess one's actions in light of those commitments, one is able to guide one's own behavior in light of those commitments. In recognizing the authority of others, one is able to be and treat oneself as the subject of a normative status. Any conception of oneself formed absent the recognition of others is incoherent.

Of course, in drawing this conclusion I am ignoring various forms of Platonism, whereby the content of one's commitments is determined simply by the "meaning" of the words one employs in undertaking those commitments. I take it that the work of Wittgenstein,<sup>17</sup> Quine,<sup>18</sup> Sellars,<sup>19</sup> Kripke,<sup>20</sup> and Charles Travis<sup>21</sup> puts us, as contemporary philosophers, in a position to

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<sup>17</sup> See Wittgenstein (2001).

<sup>18</sup> See Quine (1964).

<sup>19</sup> Sellars (1997), and Sellars (2007).

<sup>20</sup> Kripke (1982).

<sup>21</sup> Travis (2008).



safely ignore platonic conceptions of meaning. Brandom and Hegel are correct to assert that one cannot achieve self-consciousness absent the recognition of others.

From Brandom, then, we get an understanding of self-consciousness as necessarily involving cognitive relations which are *de facto* symmetric, transitive, and, thus, reflexive. We get a better understanding, that is, of what Hegel means when he writes that "[s]elf-consciousness exists in and for itself when, and by the fact that, it so exists for another; that is, it exists only in being acknowledged..."<sup>22</sup>

In the next section, I explain Hegel's understanding of the relationship between self-consciousness and freedom.

### III. Hegel on Freedom

Hegel takes it that one is only able to act freely to the extent that one is and treats oneself as the subject of a normative status—to the extent, that is, to which one is able to act on the reasons by which one recognizes oneself as being bound. For Hegel, then, one is only able to act freely to the extent that one is self-conscious in the manner articulated above. In this section, I explicate Hegel's conception of freedom as self-consciousness. To be clear, I do not provide a thorough defense of Hegel's conception of free action in this section. My aim is to bring the reader to a better understanding of what Hegel's conception of free action amounts to. In the next section, I explain why Hegel believes that this conception of freedom must be supplemented with an account of property ownership.

Recall that Hegel's goal in the PR is to bring the reader to an understanding of his conception of freedom by critiquing and supplementing less-developed conceptions of freedom.

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<sup>22</sup> Hegel (1977), p. 111.

Hegel's conception of freedom as self-consciousness, however, can be seen as a development of Kant's notion that freedom consists in acting in accord with the Categorical Imperative (CI).<sup>23</sup>

For Kant, in acting we presuppose that we act on reasons, that our deliberations about what we should do can determine what we in fact do. The presupposition that we act on reasons is also the presupposition that our bodily movements are not simply determined by our impulses, or some other force that is not our reasoning. As Kant puts it, we must act "under the idea" of freedom.<sup>24</sup>

Also, for Kant, the free person is the person who acts on reasons of which she is the author. The free person, for Kant, is autonomous—her actions are not determined by impulse or the reason of another. Kant believes, however, that reasons are common to all, that a reason for one is a reason for all. Thus, Kant believes that to act on reasons of which one is the genuine author is to act in accord with the CI, one formulation of which is "act only in accordance with that maxim [reason] through which you can at the same time will that it become a universal law."<sup>25</sup>

Hegel's objections to Kant's conception of freedom as acting in accord with the CI will be more fully articulated below. Here I simply wish to explain how Hegel transforms this conception of freedom, understanding freedom as self-consciousness.

Hegel too believes that freedom consists in acting on reasons of which one is the author, but believes that Kant's formulations of the CI lack determinate content because they are not supplemented by the notion of a normative status. For Hegel, one acts freely to the extent that

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<sup>23</sup> Here I assume some familiarity with Kant's moral philosophy.

<sup>24</sup> Kant (1997), p. 53.

<sup>25</sup> *Ibid.*, p.31.

one acts on reasons by which one recognizes oneself as being bound, to the extent, that is, that one treats oneself as the subject of some normative status.

Thus, a Hegelian reformulation of the CI could be "act only in accordance with those reasons that are consistent with the norms that constitute a particular normative status." As we shall see below, for Hegel even this reformulation of the CI must be supplemented by a conception of property ownership.

Following Kant, Hegel assumes a compatibilist position with respect to the free will/free action debate. Hegel's concern in the PR is to articulate his version of compatibilism that requires a form of self-consciousness that is only possible within a recognitive community.

Hegel begins his discussion of free action in the PR by pointing out the deficiencies of a simple compatibilist notion of freedom: freedom as the ability to act on one's desires. Of this conception of freedom, Hegel writes:

If we hear it said that the definition of freedom is the ability to do what we please, such an idea can only be taken to reveal an utter immaturity of thought, for it contains not even an inkling of the free will in and for itself, of right, ethical life, and so forth.<sup>26</sup>

Hegel understands compatibilism as a theory on which persons are free if they are not simply compelled to act by their desires, but are able to act as they please. Against this conception of freedom, Hegel argues that the mere fact that one is able to act as one pleases does not entail that one acts freely, because in doing what one pleases one need not act on reasons that have their origins in one's conception of oneself. In other words, for Hegel, in doing what one pleases, one has not necessarily rendered one's actions free from determination by merely natural desires.<sup>27</sup>

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<sup>26</sup> Hegel (1998), p. 37.

<sup>27</sup> Note that I use the locution "merely natural desires," to distinguish these desires (i.e. the desire for food, clothing, pleasure, etc), from the desire for recognition. The desire for recognition is a

In "Freedom of the Will and the Concept of a Person," Harry Frankfurt develops a sophisticated version of compatibilism, one that is most similar to the version of compatibilism that Hegel argues against.<sup>28</sup> In demonstrating how Hegel's arguments work against Frankfurt's compatibilism, I hope to make Hegel's position more clear to contemporary readers.

Frankfurt draws a distinction between first-order and second-order desires. For Frankfurt, a first-order desire is simply a desire to *do* a particular thing (for example, the desire to smoke a cigarette is a first-order desire). We can understand first-order desires as given by nature, as part of the natural world. Second-order desires, for Frankfurt, are desires *about* one's first-order desires. Specifically, a second-order desire is the desire that some first-order desire be effective (or ineffective). One may have a first-order desire to smoke a cigarette, but a second-order desire that one's desire to smoke a cigarette not actually move one to smoke.<sup>29</sup>

Classical compatibilists hold that one is free if one is *physically* able to act on one's first-order desires. For the classical compatibilist, the person who has a first-order desire to smoke is free if her hands are not constrained, say, or if she is not otherwise physically incapable of smoking a cigarette. Frankfurt believes that the classical compatibilist's account of free action is deficient because, among other things, it does not reference *psychological* constraints on free action.

For Frankfurt, the person who smokes despite her second-order desire to not have her first-order desire to smoke be effective, does not act freely. This person's ability to act freely is constrained by her addiction to nicotine. The person who is able to act freely is the person who is able to make her first-order desires comply with her second-order desires. For Frankfurt, the

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natural desire, but it is not *merely* a natural desire, because, as will be explained below, the presence of this desire is necessary to institute genuine normative statuses.

<sup>28</sup> See generally Frankfurt (1971).

<sup>29</sup> *Ibid.*

person who has a second-order desire to not smoke and actually refrains from smoking does so freely. Also, for Frankfurt, the person who has a second-order desire to exercise and also manages to exercise does so freely. The person who acts freely, for Frankfurt, is the person who acts free from internal conflicts. Frankfurt thinks that what makes us persons (or selves) is our ability to have second-order desires, to reflect on and make determinations about our first-order desires.

From Hegel's perspective, Frankfurt's account of free action is defective for two reasons. First, Frankfurt's compatibilism does not allow one to allay the worry that one's actions are determined by merely natural desires and impulses. This is so because for Frankfurt it need not be the case that persons who act freely form their second-order desires in accord with a procedure. As Frankfurt writes:

...I do not mean to suggest that a person's second-order volitions necessarily manifest a *moral* stance on his part toward his first-order desires. It may not be from the point of view of morality that a person evaluates his first-order desires. Moreover, a person may be capricious and irresponsible in forming his second-order volitions and give no serious consideration to what is at stake. Second-order volitions express evaluations only in the sense that they are preferences. There is no essential restriction on the kind of basis, if any, upon which they are formed.<sup>30</sup>

For Frankfurt, it only need be the case that the person who acts freely has second-order desires and that these desires are in accord with her first-order desires. That the free actor's second-order desires are formed irrationally, or as a result of coercion or manipulation, is not of concern to Frankfurt. Thus, the person who acts freely in Frankfurt's sense need not be autonomous in Kant and Hegel's sense. Frankfurt's free actor is not necessarily free from determination by merely natural desires.

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<sup>30</sup> *Ibid.*, p.13, n. 6.

Second, Frankfurt's compatibilism is problematic from Hegel's perspective because it is too individualistic. While both Hegel and Kant believe that freedom consists in acting on reasons of which one is the author, both philosophers supplement this autonomy, this *independence*, with a conception of the free person's necessary *dependence* on norms that are binding on others. For Kant, one's autonomy, one's freedom, consists in conforming one's action to the CI. For Hegel, one's autonomy consists in acting on reasons that attach to some particular normative status, and which are normatively authoritative for others.

For Frankfurt, however, one acts freely simply if one acts free from internal conflict. Frankfurt's free agent only needs to look internally to determine whether she acts freely. From Hegel's perspective, this picture of freedom is necessarily problematic because Hegel takes it that free action requires that one recognize another's judgments as normatively authoritative for oneself. For Hegel, one does not act freely simply because one believes that one acts freely. Hegel believes that one's freedom consists, in part, in the judgments of others.

As stated, for Hegel, one only acts freely to the extent that one is and treats oneself as the subject of at least one normative status, to the extent that one has achieved self-consciousness. Hegel takes it that free will consists in acknowledging one's commitments and entitlements, in exercising authority and in accepting responsibility for what one has committed oneself to.

In short, the free will, for Hegel, is the will that is able to *think*, to give and ask for reasons and adjust commitments as the result of deliberation. In § 21 of the PR, Hegel writes:

In having universality, or itself *qua* infinite form, for its object, content, and aim, he will is free not only *in* itself but *for* itself also...this process of supersession or elevation to universality is what is called the activity of *thought*. The self-consciousness which purifies its object, content, and aim, and raises them to this universality effects this as thinking *asserting* itself in the will. Here is the point at

which it becomes clear that it is only as thinking intelligence that the will is genuinely a will and free.<sup>31</sup>

In speaking of "universality," Hegel means to refer to the norms that constitute a particular recognitive community and give content to one's conception of oneself. Of course, more will be said about the nature of these norms in what follows.

This conception of free will satisfies Hegel's constraint that a conception of freedom must be one on which free persons are not thought of as dependent on merely natural desires. As a self-conscious being, one need not be simply compelled to act on one's desires, but can ask oneself whether one is entitled to perform a certain action, whether that action can be justified. And that one is a self, the subject of a normative status, is not a natural, but a social fact. Likewise, as we have seen, that one is self-*conscious* is a social fact.

At this point, one may wonder why Hegel's conception of self-consciousness also deserves to be counted as a conception of freedom. That is, one may wonder how Hegel overcomes the original worry that we are not free because we live in a world in which our natural desires simply *compel* us to act in this way or that. In order to allay this worry, I will say something more about what it means to be in the space of reasons, to be, that is, the subject of normative statuses.

To be in the space of reason is, in part, to be authorized to commit oneself to the truth of certain propositions by making *assertions*. In so committing oneself, one becomes *entitled* to the propositions that follow from the propositions that one asserts, but also becomes responsible for *justifying* one's assertions. And, the process of justification is just the process by which persons demonstrate that they are entitled to the propositions that they assert. The *point* of this activity is

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<sup>31</sup> Hegel (1998), p. 41.

to discern the truth about a particular matter by *thinking about* the propositions one is inclined to believe and assert.

We can compare this state of affairs to one in which one is *not* in the space of reasons. Persons enter the world inclined to believe and assert any number of propositions. Some examples: "The earth is flat." "*That* plant is edible." "Air travel is more dangerous than driving." To be in the space of reasons is to be authorized (and, in some cases, obligated) to think with others about whether such propositions are true. One who is not in the space of reasons is not able to think about what she is inclined to assert in terms of normative statuses. She is not able, that is, to think about whether she is entitled to assert that the earth is flat, or what she must do to justify this claim. She simply asserts the claims that seem true to her. She is compelled to believe and assert certain claims, but she does not have *reasons* to do so.

In the same way, being the self-conscious subject of normative statuses, being in the space of reasons, gives one reasons to act such that one need not be compelled to act on one's desires. One who is in the space of reasons can ask herself whether she is *entitled* to do this or that, whether her actions can be *justified*, and, consequently, is not simply compelled to act on her strongest desire. As such, Hegel's conception of self-consciousness is a conception of freedom.

One can see more clearly what Hegel's theory of freedom amounts to by comparing it to that of P.F. Strawson. In "Freedom and Resentment," Strawson argues that free will is compatible with causal determinism because having a free will is a matter of being a fit subject for certain "reactive attitudes," namely: gratitude, praise, resentment, blame, guilt, and forgiveness.<sup>32</sup> For Strawson, one has free will if and only if one is responsible for what one does.

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<sup>32</sup> See generally, Strawson (1962).



And one's responsibility, for Strawson, is a matter of being a member of a community in which one is *held* responsible by being regarded as a fit subject for the reactive attitudes. Strawson's idea is not that there is a close link between one's being responsible for what one does and one's being held responsible. Rather, he believes that one's being held responsible *constitutes* one's responsibility.

For Strawson, if we are to understand responsibility (and, free will) we must understand the forms of life in which adopting certain reactive attitudes toward others is appropriate. As Strawson points out, we not only live with other people, but we also form personal relationships with them. The reactive attitudes, for Strawson, arise out of these personal relationships. They express "...how much we actually mind, how much it matters to us, whether the actions of other people—and particularly *some* other people—reflect attitudes towards us of good will, affection, or esteem on the one hand or contempt, indifference, or malevolence on the other."<sup>33</sup>

As Strawson explains, the reactive attitudes are suspended in certain circumstances. If it is found out that the person whom we come to resent for committing some prohibited action acted out of duress, or that her action was an accident, we withhold our resentment and excuse the action. Additionally, the reactive attitudes are suspended in cases in which we judge that the person who committed the prohibited act is outside of the moral community and, thus, not deserving of resentment or blame. Children and the mentally insane fit into this category—they are not able to enter into full, meaningful personal relationships and are thus not fit subjects for the reactive attitudes. Such persons are viewed objectively, as in need of treatment, instead of from a personal or moral point of view.

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<sup>33</sup> *Ibid.*, p.4.

Strawson argues that the fact that one of our personal relations was causally determined to steal, say, is not relevant to the issue of whether she is a fit subject for the reactive attitudes. The practice of holding others responsible, for Strawson, is not justified by a belief in metaphysical freedom, nor is it undermined if it turns out that persons do not have metaphysical freedom. For Strawson, the practice of holding others responsible “neither calls for nor permits, an external ‘rational’ justification.”<sup>34</sup> Strawson thinks that our practice of holding others responsible expresses fundamental human concerns. According to Strawson, we care that persons are judged to be benevolent or malevolent, kind or cruel, and we could not stop so caring even if we came to believe that causal determinism is true.<sup>35</sup>

Thus, for Strawson, our practice (or form of life) is what makes it the case that persons have free will and the practice itself is important because it expresses fundamental human concerns.

Strawson has much in common with Hegel on the issue of human freedom. Both he and Hegel believe that our actual ways of treating and regarding one another is what makes it the case that we are free. Both philosophers also believe that our practices express fundamental human concerns. But, Hegel and Strawson differ in two fundamental respects.

First, for Hegel, in recognizing another, one need not have emotional reactions to that other's violation of a norm. As articulated above, to recognize someone is to take her to be the subject of a normative status. This recognition does not require that persons come to *resent* those they take to have violated some norm, but only that they *acknowledge that* such persons have violated some norm by which they are bound. While Strawson stresses the importance of

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<sup>34</sup> *Ibid.*, p. 23.

<sup>35</sup> As I explain in Chapter 4, Erin Kelly, a deterrence theorist, embraces this Strawsonian conclusion, but argues that we need not treat persons, qua their status as citizens, as capable of acting on moral reasons and as fit subjects for the reactive attitudes.

*reactive* attitudes, we can read Hegel as stressing the importance of *reflective* attitudes, those attitudes involved in affording a person certain normative statuses.

Second, for Strawson the form of life that involves resentment, praise, and blame is important because expresses the fundamental human need to evaluate the actions and attitudes of others. Hegel may agree that our recognitive practices also express this need, but this expression is not of central concern for Hegel. For Hegel, our recognitive practices are *necessary* to institute genuine norms. Without recognition, for Hegel, there are no normative statuses, no status that one can be resented for having. To be sure, Strawson need not disagree with Hegel on this point, but that recognitive attitudes institute normative statuses is not central to his account of freedom.

While Strawson is right to think that free will and responsibility must be understood in relation to human practices, his theory lacks some of the features that make Hegel's picture of freedom and responsibility compelling. Hegel not only explains what we do, but why what we do is *essential* to who we are and our conception of ourselves as free.

#### IV. Hegel on Freedom and Property

While Hegel believes that persons are free only to the extent that they are and treat themselves as the subjects of normative statuses, he believes that this conception of freedom, while correct, is incomplete because it lacks content. This is so because Hegel believes that this bare conception of freedom does not contain an explication of *which* statuses are constitutive of freedom or what must be the case if persons are to be the subjects of those statuses.

Hegel believes that one's having the status of property owner is a necessary component of freedom and provides content to the conception of freedom as self-consciousness. In §41 of the PR, Hegel writes:

A person must translate his freedom into an external sphere in order to exist as Idea.... The rationale of property is to be found not in the satisfaction of needs but

in the supersession of the pure subjectivity of personality. In his property a person exists for the first time as reason. Even if my freedom is here realized first of all in an external thing, and so poorly realized, nevertheless abstract personality in its immediacy can have no other existence save one characterized by immediacy.<sup>36</sup>

Hegel believes that persons must own property if their freedom is to be actual, concrete, and contentful. In the first instance, Hegel believes, property ownership is not justified by its ability to satisfy human needs, but because it gives content to the concept of freedom.

For Hegel, property is fundamentally a medium through which one expresses one's commitments. For Hegel, by expressing one's commitments in a particular medium, one is able to both see one's commitments actualized in the world, and give others the opportunity to respond to one's commitments by undertaking, criticizing, or disagreeing with those commitments. This is why Hegel believes that one must own property if one's freedom is to be actual and contentful. It is in how one's commitments are responded to by others and oneself that the normative statuses, adherence to which constitutes one's freedom, become contentful and more determinate over time.

Hegel's general characterization of property allows him to distinguish between one's body as form of property and what I will call *external* property. Hegel believes that one can come to own both one's body and particular items in the world, external property. Common to both forms of property is the fact that one's ownership must be recognized if it is to be actual. In § 51, Hegel writes:

Since property is the *embodiment* of personality, my inward idea and will that something is to be mine is not enough to make it my property; to secure this end occupancy is requisite. The embodiment which my willing thereby attains involves its recognizability by others.<sup>37</sup>

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<sup>36</sup> Hegel (1998), p. 57.

<sup>37</sup> *Ibid.*, p.65.

For Hegel, one does not count as owning a particular thing just because one believes that one owns it. Others must recognize one's ownership and, thus, one's authority to control some item as one's property. To put the point another way: while control is a natural state, *ownership* is a normative status.

In order to make clear why Hegel wishes to think of property as a medium through which one expresses one's commitments, I will say a little about what it is to own, and to be entitled to own, one's body and external property. I will discuss the ownership of external property first.

In being entitled to own external property, one is entitled to commit oneself to the claim that some item is one's own. In controlling and using an item as one's property, one commits oneself to a claim that can be recognized by others—particularly, the claim that the item in question is one's own. Thus, the very act of controlling and using an item as one's own is the expression of a commitment. And, to be clear, the items in one's control become one's property in being recognized as such.

As the *owner* of an item, one is entitled to use that item as one pleases and prevent others from controlling or using it. One's status as the owner of some item also entitles one to transfer or dispose of that item as one sees fit. Each action one performs in relation to one's external property is the expression of a commitment. Particularly, each action is the expression of one's commitment to the claim that the action in question is consistent with one's status as entitled to own external property, and one's status as the owner of some *particular* piece of external property.

When one owns a house, one can live in the house, allow others to live in the house, and alter the house in various ways. One can exclude others from one's house and can sell one's

house to whomever one pleases. Each of these actions is the expression of a commitment. The house in this instance becomes a medium through which one expresses one's commitments.

As will be articulated in more detail below, Hegel's conception of bodily ownership differs from his conception of external property ownership in several ways. For Hegel, one does not necessarily *take* control of one's body. On Hegel's view, one controls one's body to the extent that one's bodily movements reflect one's desires. As he writes, "...I possess [control] my life and body, like other things, only in so far as my will is in them."<sup>38</sup> One who controls her body is able to go for a walk, say, when she feels so inclined.

By contrast, as the *owner* of one's body, one is *entitled* to move one's body as one pleases. One who owns her body is also entitled to prevent others from controlling or harming her body, and to sell her labor. In other words, persons who own their bodies are afforded a certain degree of bodily autonomy, that is, the authority to determine which laws will govern one's bodily movements.

Also, as the owner of one's body, one is generally authorized to commit oneself to certain courses of action. The paradigm case of committing oneself to a course of action is that of promising. In promising, one undertakes a commitment to perform a certain task at some time in the future. One who owns her body is authorized to promise to, say, help her neighbor build a fence. This promise is intelligible because the promisor is entitled to move her body as she pleases, to perform the actions necessary to build the fence. That one owns one's body is, in part, a matter of being authorized to undertake such commitments and entitled to fulfill them.

As is the case with one's actions as the owner of external property, in performing actions as the owner of one's body, one is committing oneself to the claim that those actions are

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<sup>38</sup> *Ibid.*, p.62.

consistent with one's status as the owner of one's body. In promising to perform a certain action, one is not only committing oneself to that course of action, but, again, to the claim that that action is consistent with one's status as the owner of one's body.

Clearly, then, one's body and one's external property are media through which one expresses one's commitments, through which one articulates what it is to be the subject of some particular normative status, and, thus, are media through which one is able to achieve self-consciousness and, thus, act freely.

In the remainder of this section, I will argue for the following three Hegelian claims: (1) one must have control over one's body if one is to recognize oneself as the subject of *any* normative status, (2) if one is to recognize oneself as entitled to own anything, one must recognize others as owning their bodies, and (3) if one is to recognize oneself as entitled to own external property, one must recognize others as entitled to own external property.

In § 47 of the PR, Hegel expresses the idea that one must control one's body if one is to recognize oneself as the subject of any normative status. There he writes:

As a person, I am myself an immediate individual; if we give further precision to this expression, it means in the first instance that I am alive in this bodily organism which is my external existence ...the *real precondition of every further determined mode of existence* (my emphasis).<sup>39</sup>

Here Hegel expresses the idea, articulated above, that in most cases persons do not have to take control of their bodies. In the standard case, one's desires just are reflected in one's bodily movements. What must be explained is why Hegel believes that one must control one's body if one is to attain self-consciousness as the subject of a normative status.

Recall that to recognize oneself as the subject of any normative status, one must recognize another as the subject of a normative status—one must, that is, recognize that other's

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<sup>39</sup> *Ibid.*, p.62.

commitments as reasons to so commit oneself. To coherently recognize oneself as the subject of some particular normative status is to commit oneself to a commitment of another—particularly, it is to commit oneself to that recognized other's claim that one is the subject of that particular status.

The first step toward recognizing oneself, then, is to recognize another. For this initial cognitive act to serve as a basis for coherent self-recognition, it must be motivated by a particular desire: the desire for recognition. This desire is simply the desire to be seen as one sees oneself, to be treated as the subject of a normative status.

Cognitive acts *not* motivated by this desire will not allow one to coherently recognize oneself because the judgments of those who are recognized by these acts will not be normatively authoritative for the recognizer. To see why the cognitive acts in consideration here must be motivated by a desire for recognition, consider the following case.

Assume that A wishes to be recognized as a good singer. She already thinks herself a good singer, but as we saw above, in order for her self-conception to be coherent it must be the case that what constitutes quality singing is not completely up to her. Assume that A, motivated by the desire to be recognized as a good singer, recognizes B as authorized to determine what constitutes good singing.

In this circumstance, B's judging that A's singing is not up to par constitutes a reason for A to alter her singing in order to meet B's standard. Her failure to live up to B's standard will result in B not recognizing her. By failing to live up to B's standards, A undermines her own desire for recognition. Motivated by a desire for recognition, A's cognitive acts bind her to certain norms—the norms constituted by B's judgments with respect to her singing. Once these norms are in place, A can coherently recognize herself as a good singer.



Now, assume that A's recognition of B is *not* motivated by a desire to be recognized as a good singer. Here, A sings, but does not care to have her singing recognized as good. Though A recognizes B as competent to determine what constitutes good singing, she does not concern herself with B's judgments with respect to *her* singing. In this circumstance, B's judgments with respect to her singing do not constitute reasons for her to alter her singing. That A is not bound by any norms with respect to her singing entails that she will be unable to coherently recognize herself as a good singer. Thus, in order for A's cognitive acts to serve as a basis for her self-recognition, these acts must be motivated by a desire for recognition. And, generally, if one's cognitive acts are not motivated by a desire for recognition, one will not be able to coherently recognize oneself.

We see, then, that the cognitive acts in question, those that will serve as a basis for coherent self-recognition, must be motivated by a desire for recognition. And, recall, that to control one's body just is to have one's desires reflected in one's bodily movements. If both these premises are true, it is also true that in order to recognize another, where that cognitive act is motivated by a desire for recognition, one must be in control of one's body. Even the simple act of asking another what she thinks of one's singing requires that one have control over one's body. Absent this control, one could not count as making a claim, asking a question, as *doing* something.

We are now in a position to see why one must have control over one's body if one is to recognize oneself as the subject of *any* normative status, claim (1) above. Recognizing oneself as the subject of a normative status requires that one recognize another. And, recognizing another requires that one have control over one's body. Therefore, recognizing oneself as the subject of a normative status requires that one have control over one's body.

One may be suspicious of the claim that normative statuses can arise from natural states. In order to counter this suspicion, I will say something about the relationship between the natural states of desiring and being in control in the sense of having one's desires reflected in some object, and the normative status of being authorized to make commitments. In understanding this relationship, we understand the relationship between the natural and the normative, between desire and reason(s), in Hegel's thought.

The desire for recognition, like the desires for food, clothing, and shelter, is a natural desire. With any natural desire there comes a set of instrumental norms. These norms are simply statements of the means by which the desire may be satisfied. If one desires food, one *should* eat. If one desires clothing, one should craft or purchase clothing. And, if one desires recognition, one should recognize another. However, this last norm is distinct from the former two in the following way: satisfaction of the desire for recognition requires that one interact with and grant authority to another self.

The authority that one grants in seeking to satisfy one's desire for recognition is the authority to make commitments of a certain type. Once this authority is granted, one can be bound by the norms that constitute a particular normative status. And, as we have seen, one maintains this status, in part, by continuing to treat others as selves, as the subjects of normative statuses. We see, then, that one's normative statuses arise out of one's natural desire for recognition. And this desire gives rise to reasons, reasons which exist only relative to one's ongoing desire to maintain one's normative status—one's desire, that is, to be a certain type of person.

I said above that Hegel believes that one must own property if one's freedom is to be actual and contentful because it is in how one's commitments (expressed through one's property)

are responded to by others and oneself that the normative statuses, adherence to which constitute one's freedom, become contentful and more determinate over time. When one comes to own one's body, one's desires, as expressed in one's actions, are understood as one's commitments. In running a mile, one commits oneself to the claim that running a mile is consistent with one's status as the owner of one's body.

Without control over and ownership of one's body, one could not say or do anything that would count as one committing oneself to a claim. One's body, then, is an essential medium through which one expresses one's commitments.

One's external property, however, does not enjoy this status. While persons do express their commitments through the use of external property, one can be the subject of normative statuses in social circumstances in which persons are not recognized as entitled to own external property.

While the institution of external property ownership need not exist if persons are to express commitments and be the subjects of normative statuses, this institution has *become* a means by which persons express commitments and thus represents a development of the concept of freedom as self-consciousness. We need not have developed the institution of external property ownership, but the institution provides a further medium through which persons may express their commitments and give content their conception of themselves as free.

As I will now argue, if one is to maintain one's status as the owner of one's body or as the owner of external property, one must also treat oneself as responsible in certain ways.

Specifically, I will argue for (2) if one is to recognize oneself as entitled to own anything, one must recognize others as owning their bodies, and (3) if one is to recognize oneself as entitled to own external property, one must recognize others as entitled to own external property.

As stated above, one can only be the subject of a normative status if one is recognized as such by those who one recognizes as authorized to make such judgments. Recall that to recognize another is to treat that other's commitments as authoritative for oneself. Consequently, to recognize another as a property owner is to treat as normatively authoritative that other's commitment to the claim that some item is her property by *treating* that item as her property and assessing her actions in light of the norms of property ownership. A takes on B's claim that the car is hers by treating B as the owner of the car, as authorized to use the car in various ways, and responsible not to use it in others. To treat another as the owner of some item is, among other things, to not interfere with her legitimate use of the item. A recognizes B as the owner of the car by not stealing the car or preventing her from using it in some other way. But, and this is crucial, one can only understand another's actions as acts of recognition if one recognizes that other as owning her body.

To illustrate, A's not interfering with B's use of B's car will not count as A *recognizing* B as authorized to use the car if A is B's slave. We can assume that the slave controls her body, but she is not *entitled* to move her body as she pleases. Practically, this means that the slave will suffer some type of punishment if she deviates from the commands of her master. Most of the slave's bodily movements are performed under coercive threat. The slave, then, does not own her body. The bodily movements of the slave do not reflect her commitments, but those of her master. The slave is neither entitled to act, nor is she responsible for her actions. She is commanded.

The actions of the slave cannot count as acts of recognition, in part, because to recognize another is to treat that other's commitments as normatively authoritative for oneself, but the slave is unable to take on commitments—her actions simply reflect the commitments of her master.<sup>40</sup>

The same goes for infants and non-human animals. Neither infants nor non-human animals can recognize others as property owners because neither can undertake commitments. Neither infants nor non-human animals, nor slaves own their bodies Hegel's sense and, thus, their actions cannot count as concrete acts of recognition.

We are now in a position to see why one cannot recognize oneself as a property owner if one does not recognize others as owning their bodies. If one is to *be* a property owner, one must be recognized as such by persons who are capable of doing so, persons who own their bodies. This holds for one's status as the owner external property and one's status as the owner of one's body. Just as one who does not own her body cannot recognize one as the owner of one's house, one who does not own her body cannot recognize one as the owner of one's body.

Since recognizing oneself as a property owner requires that one be recognized by those who one recognizes as capable of recognizing one as a property owner—those who one recognizes as owning their bodies—and absent reciprocal recognition, one cannot coherently recognize oneself as being the subject of any normative status, one must recognize others as owning their bodies if one is to recognize oneself as owning anything.

Another example may serve to make this point clear. Assume A is one of only three people who exist in the world. In this imagined world, only A, B, and C are capable of being the subjects of normative statuses. Assume that A does not recognize B and C as owning their

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<sup>40</sup> In §21 of the PR, Hegel writes: "The slave does not know his essence, his infinity, his freedom; he does not know himself to be an essence; and he lacks this knowledge of himself because he does not *think* himself." For Hegel, the slave is simply a tool of her master. Hegel (1993), p. 42.

bodies. B and C are A's slaves, and, as such, they are not authorized to act without A's permission. A, however, takes herself to *own* her copy of the *Phenomenology of Spirit*. A can only own her copy of the PS if she is recognized as owning it. In this world, only B and C can perform actions that count as their recognizing her ownership. However, since the actions of B and C do not reflect their own commitments, but those of A, their actions have the same normative significance that A's actions have. B and C's not interfering with A's use of her book has the same normative significance as A's *using* her book. Both actions only reflect A's commitments.

A is unable to coherently recognize herself as the owner of the book because in this situation there can be no distinction between A's *believing* that she owns the book and her *actually* owning the book. The actions of B and C cannot count as an independent standard of correctness for A's judgment that she is the owner of the book. Because A does not recognize B and C as owning their bodies, she cannot recognize herself as owning the copy of the PS, or anything else for that matter.<sup>41</sup>

In this situation, A is like the singer who thinks of herself as talented because she is surrounded by people whom she has paid to applaud her singing. Just as the applause in this situation cannot have the significance that the singer wishes it to have, that B and C do not interfere with A's property cannot have the significance that A wishes it to have. Only persons who are not paid to applaud can give meaningful praise, and only those who are entitled to undertake commitments that are distinct from one's one can recognize one as a property owner.

Recall that recognizing another as owning her body is a matter of *treating* that other in certain ways. To recognize another as owning her body is to treat her as authorized to commit

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<sup>41</sup> Recognize too that A cannot recognize herself as owning B or C either. Here, A *controls* B and C, but she does not *own* them.

herself to certain courses of actions, entitled to move her body as she desires, and responsible to respect the external property and body of others. What *this* amounts to, that is, which concrete acts count as acts of recognition and which count as failures to recognize, I will address in detail in Chapter 2. For now, I simply wish to establish that to achieve self-consciousness as the owner of anything, one must *do* something with respect to others, namely, one must treat others as owning their bodies.

Recognize too that the conclusion that one must recognize others as owning their bodies if one is to recognize oneself as the owner of anything, is just a specific application of the conclusion of Hegel's famous discussion of "Lordship and Bondage" in the PS.<sup>42</sup> Explicating the sections in which Hegel discusses the defective lord-bondsman (master-slave) relationship is beyond the scope of this project, but, briefly, Hegel's aim in this discussion is to demonstrate that no genuine norms can exist in a situation in which cognitive relations are not reciprocal. As Hegel argues in the PS, the master cannot be what he takes himself to be, that is, authoritative, if he does not recognize the slave as authoritative as well.

Thus far I have established that if one is to recognize oneself as owning anything, one must recognize others as owning their bodies. I will now argue for the conclusion that if one is to recognize oneself as owning external property, one must recognize others as entitled to own external property. In order to illuminate the Hegelian argument for this conclusion, I put it in contrast with a Kantian argument for a similar conclusion.

The Kantian can argue that it is morally impermissible to steal or otherwise disrespect the property rights of others by appealing to universal law formulation of the CI: "I ought never to

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<sup>42</sup> See Hegel (1977), pp. 111-119.

act except in such a way that I could also will that my maxim should become a universal law."<sup>43</sup> For Kant, stealing is morally impermissible because one cannot consistently will that all rational persons steal in order to achieve their private ends. In a world in which all rational persons acted on this reason, there could be no external property because, for Kant, the very concept of property requires that others are not entitled to take one's property at will.<sup>44</sup>

Kant believes that persons are bound by reason itself to conform their actions to the CI. To understand this claim, we must first understand what Kant means by "reason." Kant understands persons as being bound, by rationality, to engage in two activities with respect to their commitments. First, for Kant, persons are obligated to criticize their beliefs by checking them for coherence. The belief that one can fall off of the edge of the earth is incompatible with the belief that the earth is round. As Kant correctly points out, we are rationally bound to commit ourselves to either one or neither of these beliefs because they are incompatible. Second, Kant holds that we are obligated by rationality to acknowledge that we are committed to those claims that follow from the claims to which we are committed. Brandom labels these obligations "critical" and "ampliative," respectively.<sup>45</sup> For Kant, reason is constituted by the demand to critically reflect on and amplify one's beliefs.

Kant believes that the demands of morality must be binding on all rational beings—binding, that is, on all who are bound to criticize and amplify their beliefs. As such, he concludes that it is only morally permissible to act on those reasons that *all* rational beings could act on without undermining the social institutions they rely on in so acting. He concludes, then, that acts that constitute failures to recognize others as entitled to own external property are morally

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<sup>43</sup> Kant (1998), p.44.

<sup>44</sup> *Ibid.*, p. 45.

<sup>45</sup> Brandom (2007a), p. 1.



impermissible because it could not be the case that (1) all rational beings act on the reasons that motivate these acts and (2) there exists an institution of external property ownership.

Hegel, however, is suspicious of this Kantian argument because he believes it unjustifiably presupposes that a system of external property ownership *should* exist. For Hegel, the universal law formulation of the CI does not entail the justified existence of any particular system of external property and, as such, does not entail that persons are obliged to recognize others as entitled to own external property. As Hegel writes:

[t]he absence of [a system of external] property contains in itself just as little contradiction as the non-existence of this or that nation, family, etc., or the death of the whole human race.<sup>46</sup>

As Lottenbach and Tennenbaum correctly point out, Hegel's point here is that nothing in Kant's CI rules out the possibility of persons taking the destruction of the institution of external property or any other morally objectionable end as their end, thus justifying all types of intuitively immoral actions as consistent with the CI.<sup>47</sup>

For example, assume A wishes to abide by the CI but also desires to steal B's car in order to go joy riding. Of course, the maxim "I will steal whenever doing so will bring me short-term pleasure," cannot be universalized without contradiction and, thus, cannot be used to justify A's proposed action. However, the maxim "I will steal in order to do away with the institution of external property," can be universalized and, thus, can justify A's stealing as consistent with the CI. As Lottenbach and Tennenbaum write:

The formula of universal law cannot tell us why we should not switch to such another maxim once we realize that our original one cannot be universalized. If the original maxim for the proposed action proves non-universalizable we have

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<sup>46</sup> Hegel (1998), p.130.

<sup>47</sup> Lottenbach (1995), pp. 223-224.

two options: we can either adopt a universalizable maxim that does not countenance the action or another universalizable one that does.<sup>48</sup>

Hegel's point is that (Kantian) reason will not allow us to determine which of these two options we should choose.

Hegel does believe that persons are obliged to recognize others as entitled to own external property if they are to so recognize themselves. However, Hegel does not believe that appeal to the CI will allow us to establish this conclusion. As Hegel continues in the above-quoted passage:

...if it is already established on other grounds and presupposed that property and human life are to exist and be respected, then indeed it is a contradiction to commit theft or murder; a contradiction must be a contradiction of something, i.e. of some content presupposed from the start as a fixed principle.<sup>49</sup>

Hegel believes that a system of external property ownership—one in which persons mutually recognize one another as entitled to own external property—is necessary to give content to his conception of freedom as self-consciousness. However, as we have seen, Hegel's conception of freedom as self-consciousness can be made contentful by a social circumstance in which persons recognize one another as entitled to own their bodies.

Hegel, I think, failed to realize the need for an *argument* establishing the claim that owners of external property must recognize others as entitled to own external property if they are to so recognize themselves because he believed that any social institution that gives content to the notion of freedom as self-consciousness must be one in which persons recognize one another as the subject of *some particular* normative status, but failed to recognize that the status of being entitled to own one's body could serve this role.

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<sup>48</sup> *Ibid.*, p. 224.

<sup>49</sup> Hegel (1998), p. 130.

In other words, Hegel failed to realize the need for an argument establishing the claim that owners of external property must recognize others as entitled to own external property if they are to so recognize themselves because he believed the commitments and responsibilities that give content to the notion of freedom as self-consciousness *must* be commitments and responsibilities that stem from a social institution in which persons mutually recognize one another as entitled to own external property.

To develop a Hegelian argument for this conclusion, one must show that either *de jure* or *de facto*, one's status as an external property owner will be undermined by one's failure to so recognize others.

It is not the case that, *de jure*, one must recognize others as entitled to own external property if one is to so recognize oneself. All that is required to recognize oneself as the owner of external property is that one is recognized as such by persons who one recognizes as owning their bodies. A situation in which one recognizes oneself as the *only* person entitled to own external property is not *necessarily* deficient, as is the scenario in which one wishes to self-identify as a property owner, while treating all others as slaves.

We can better see that this is the case by reflecting on the following scenario: A wishes to recognize herself as the *only* person who is entitled to own external property. A recognizes others as owning their bodies, and recognizes them as entitled to make determinations about who is entitled to own external property. In turn, everyone recognizes A, and *only* A, as entitled to own external property. In this scenario, no one steals from A, but A is entitled to take control of any object she pleases. As such, A is entitled to take control of and own the hammer B uses to build his house, as B is not entitled to *own* the hammer. A is not a master, and others are not slaves.

All are authorized to make commitments, but only A is authorized to commit herself to the claim that some item is her property.

If it is to be the case that one *must* recognize others as entitled to own external property if one is to so recognize oneself, it must be the case that those who one recognizes as authorized to determine whether one is an external property owner only confer this status on those who recognize others as entitled to own external property. That is, it must be the case, *de facto*, that the status of external property owner is only conferred on those who recognize others as external property owners.

Recall that one need not conceive of the content of any norm as static. The content of the norms that constitute any normative status is something that can be negotiated within recognitive communities.

With this in mind, the following story can help us to understand how it could come about that the status of external property owner is only conferred on those who recognize others as external property owners. Assume the social situation described above. A is recognized as entitled to own external property but does not so recognize others. B and his compatriots pursue their projects with the knowledge that A is entitled to take control of and own any and all tools necessary to complete those projects.

One day, B and his compatriots realize that there is no reason that A should be authorized to commit herself to the claim that some item is her property, while others are not. They reason that since A and her projects are no more important than their own, it should not be the case that only A should be entitled to own external property.

They realize too that A is only so entitled because she is recognized as entitled. In other words, they realize that the recognitive asymmetry between A and everyone else exists because

they allow it to exist. As a result of these thoughts, they petition A for recognition.

Understandably, A refuses their petition. She enjoys her status as the only person entitled to own external property.

As a result, B and his compatriots decide that they will conscientiously violate the current norms of property ownership in order to protest what they take to be an unjust property regime and to encourage A to take their concerns seriously and renegotiate the content of the current norms. B and his compatriots physically block A's access to his house and tools, and refuse to hand over the property in their control when demanded to do so by A.

As a result of these protests, which we should recognize as acts of civil disobedience, A decides to renegotiate the norms of external property ownership. As a result of these negotiations, the norms of external property ownership are altered, making it the case that *all* persons are entitled to own external property and that persons must recognize others as entitled to own external property if they are to so recognize themselves.

Of course, the social institution of external property need not develop in this way. That there are external property owners at all and that particular persons are afforded this status is a contingent matter. The preceding story is just an illustration of how a symmetric recognitive institution *could* develop out of an asymmetric one.

In the story I have told about how B and his compatriots become recognized as entitled to own external property, B and his compatriots violate the norms of external property. These violations are acts of civil disobedience, and are thus crimes. I will articulate a Hegelian conception of civil disobedience in the following chapter, but I note here that certain crimes are vehicles through which persons can alter the norms that constitute their recognitive communities.

If it is to be the case that, *de facto*, owners of external property must recognize others as entitled to own external property if they are to so recognize themselves, those owners of external property who fail to meet this standard must be treated differently by those whom they recognize. The community of external property owners must, that is, either temporarily or permanently deprive those who violate the norms associated with property ownership of their entitlement to own all or part of their external property.

In most countries, including the United States, those external property owners who fail to so recognize others *are* (at least temporarily) deprived of their entitlement to own external property through imprisonment. Thus, in those countries that utilize imprisonment as a form of punishment for theft and other crimes against property, it is the case that, *de facto*, one must recognize others as entitled to own external property if one is to so recognize oneself. More will be said about the justice of imprisonment as a form of punishment in Chapter 3.

Those who wish to recognize themselves as owning anything must, *necessarily*, recognize others as owning their bodies. It is only a contingent fact, however, that those who wish to recognize themselves as owning external property must so recognize others. That a system of reciprocal recognition exists with respect to external property is, in many cases, the result of a past *struggle* for recognition between those entitled to own property and those not so entitled.

I have now completed my argument for the general claim that to recognize oneself as a property owner, one must recognize others as property owners. I have shown that one cannot recognize oneself as a property owner by simply controlling and using one's body or some item in the world. To be a self-conscious property owner is to be authorized to make certain

commitments, to be entitled to act in certain ways, but also responsible to respect the property of others.

We now have in view the full picture of Hegel's notion of freedom as self-consciousness. To be a self, for Hegel, is to be the subject of normative statuses, and to be self-conscious, to be free, is to be recognized as a self by those one robustly recognizes. Recognizing another is a matter of *treating* her as authorized, responsible, committed, and entitled in the ways outlined above. Persons who are self-conscious in this way have *reasons* to act in this way or that and are not simply compelled to act on their strongest desires.

In the remainder of this chapter, I will explain Hegel's notion of ethical life (*Sittlichkeit*), which is the situation in which a group of persons achieve self-consciousness through mutual recognition.

## V. Ethical Life

Hegel critiques the conception of freedom as the ability to do what one pleases as immature because it does not reference, among other things, ethical life. We are now in a position to understand the connection between freedom and ethical life in Hegel's PR. Of ethical life, Hegel writes:

Ethical life is the *Idea of freedom* in that, on the one hand, it is the living good—the good endowed in self-consciousness with knowing and willing and actualized by self-conscious action—while, on the other hand, self-consciousness has in the ethical realm its foundation in and for itself and its motivating end. Thus ethical life is the concept of freedom *developed into the existing world and the nature of self-consciousness*.<sup>50</sup>

For Hegel, then, ethical life is self-consciousness (i.e. freedom) actualized in the world. It is a situation in which persons *actually* recognize one another as the subjects of normative statuses.

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<sup>50</sup> Hegel (2008), p. 154.

And, this recognition is not merely cognitive, as we have seen, but is manifested in the way persons treat one another.

Hegel also has much to tell us about the attitudes of persons who participate in ethical life and their relation to the norms by which they are bound. Of the norms that govern ethical life, Hegel writes:

...they are not something alien to the subject. On the contrary, his spirit bears witness to them as to *its own essence*, the essence in which he has a *feeling of his selfhood*, and in which he lives as in his own element which is not distinguished from himself. The subject is thus directly linked to the ethical order by a relation which is closer to identity than even the relation of faith or trust.<sup>51</sup>

In other words, for Hegel, persons who participate in ethical life are not alienated from, but identify with, the norms by which they are bound. Hegel later writes:

Faith and trust emerge along with reflection; they presuppose the power of forming ideas and making distinctions. For example, it is one thing to be a pagan, a different thing to believe in a pagan religion.<sup>52</sup>

It is important that we be clear about what Hegel means when he says that participants in ethical life do not trust or have faith in the norms that govern ethical life, but *identify* with those norms. To make clear the notion of identification with norms, I will first explain what it is for a person to be alienated from a set of norms, and then explain what it is to have faith in or trust those norms. The nature of the identity relation will emerge in contrast to these other relations that a person can have to a set of norms.

To be alienated from a set of norms is simply to not view those norms as binding.<sup>53</sup> Put another way, to be alienated from a set of norms is to be alienated from a community, the community on which those norms are binding because they *take* them to be binding. To be

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<sup>51</sup> *Ibid.*, p. 155.

<sup>52</sup> *Ibid.*

<sup>53</sup> Recognize too that alienation, like recognition, is not an all or nothing affair. One can be more or less alienated from a norm or set of norms.



alienated from the norms of external property ownership, then, is to take it that one is entitled to take control over any and every item in the world, regardless of another's claim that that item is her property. The person alienated from the norms of external property takes her desire to control a particular item as authoritative, she does not acknowledge the authority of the norm that items that are recognized as the property of others should be respected as such. As Brandom puts it "[a]lienation is not identifying with...normative statuses, not acknowledging the authority of norms over one's attitudes [desires] by being willing to sacrifice attitudes for norms." I must still explain, of course, what it is to sacrifice one's attitudes for norms.

Hegel claims that participants in ethical life have a relationship to the norms that constitute ethical life that is distinct from that of faith or trust. I take it that faith and trust are *cognitive* states. To have faith in, or trust a set of norms is to *believe* that adherence to that set of norms is highly likely to bring about some result. In most cases, this result will be the satisfaction of some or all of the faithful person's desires. In other words, the person who has faith in a set of norms, in most cases, believes that adherence to that set of norms is likely to make her life better by facilitating the satisfaction of many of her desires.

For example, A's faith in the norms of external property ownership consists in her belief that adhering to those norms will allow her to, say, pursue her desire to paint portraits unencumbered by the worry that her easel and brushes could be taken away from her at any time.

A, in this case, perceives a difference between the norms of external property ownership and herself. That is, she believes that she could give up those norms and still continue to be the person she currently takes herself to be. A recognizes herself as a person who wishes to paint portraits and sees the norms of external property as allowing her to maintain this identity. If A ceases to believe that adherence to the norms of external property ownership will facilitate the

satisfaction of her desires, she will likely give them up, thus becoming alienated from this set of norms.

Things are different with the person who *identifies* with a set of norms. First, identity is not a cognitive state, but a *recognitive* state. To identify with a set of norms is to be self-conscious as the subject of the normative status that is constituted by those norms. And, to be self-conscious as the subject of a normative status, recall, is to treat oneself a certain way. Specifically, to be self-conscious as the subject of a normative status is to take it that one is obligated to *sacrifice* one's attitudes (or desires) in order to adhere to the dictates of a particular set of norms. To identify with a set of norms, then, is to be willing to sacrifice one's attitudes for those norms.

Persons who identify with a set of norms do so in a very literal sense. The person who identifies with the norms of bodily ownership takes it that she simply *is* the subject of a certain normative status—the status of being the owner of her body. For her, there is no distinction between who she is and the norms she identifies with. As such, the person who identifies with a set of norms takes it that she will cease to exist if it becomes the case that she is no longer the subject of the normative status that is constituted by those norms. Because of this, she is willing to risk her biological life in order to maintain her normative status. She reasons that either she maintains her normative status or she ceases to exist, regardless of the status of her biological life.

To illustrate, if A identifies with the norms of bodily ownership, if she takes herself to be entitled to own her body, she will recognize others as so entitled because she understands her own entitlement as turning on her treatment of others. She cannot both recognize herself as entitled to own her body and treat all others as slaves. A, then, will refrain from committing acts

which constitute her failure to recognize others as owning their bodies. In committing such acts, she would undermine her own status as the owner of her body.

If A identifies with the norms of bodily ownership, she will refrain from physically harming others even in situations in which she has a strong desire to do so. She is willing to sacrifice her desires for the norms of bodily ownership. In fact, A would rather risk her biological life than lose her normative status. She would rather risk death than relinquish her status as the owner of her body, and this means that she would rather die than commit acts that would seriously undermine this status. Put another way, she would rather die than murder another. In murdering, A not only fails to recognize her victim but also threatens to undermine the recognitive relations that constitute her community and thus her status as the owner of *her* body. In undermining the status of her victim, A risks completely undermining her own status, and thus risks the death of the person she takes herself to be.

Participants in ethical life, then, gain a sense of self, which is also a loss of self. As Hegel writes:

When I will what is rational, then I am acting not as a particular individual but in accordance with the concepts of ethical life in general. In an ethical action, what I vindicate is not myself but the thing. But in doing a perverse action, it is my particularity that I bring on to the centre of the stage.... When great artists complete a work, we can say: *that* is how it must be; that is, the artist's particularity has completely disappeared and no mannerism is detectable in it.... But the worse the artist is, the more we see in his work the artist, his particularity, his arbitrariness.<sup>54</sup>

In ethical life, persons become selves by being the subjects of normative statuses, statuses that require that they sacrifice some of their particular desires in order to comply with the norms that govern their community. Their subjectivity becomes conceptually tied to the norms of the

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<sup>54</sup> Hegel (1998), p. 37.

community, as the norms of the community exist because individuals identify with them. Ethical life is, as Hegel puts it, the "'I' that is 'We' and the 'We' that is 'I'."<sup>55</sup>

In the next chapter, I will develop an understanding of the phenomenon of crime that is based on this conception of freedom, self-consciousness, and ethical life.

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<sup>55</sup> Hegel (1977), p. 110.

## Chapter 2: Crime

### I. Introduction

In the previous chapter, I articulated Hegel's conception of freedom as self-consciousness. There, we saw that for Hegel to be free is to be self-conscious as the subject of a normative status. And, to be self-conscious in this way is to be treated as, and to treat *oneself* as, the subject of a normative status. In other words, to be free for Hegel is to be recognized and to recognize oneself.

Hegel understands ethical life as the circumstance in which a group of persons recognize one another and thus are able to achieve self-consciousness. In ethical life, persons identify with, and are not alienated from, the norms by which they are bound. Participants in ethical life achieve self-consciousness, and thus freedom, in conforming their actions to the dictates of certain norms.

To be sure, a recognitive community can be more or less complex. A small group of persons who identify with and informally negotiate the content of a certain set of norms constitutes a recognitive community in which each individual is able to achieve self-consciousness. Likewise, a recognitive community can be a fully developed, modern nation-state that is governed by a constitution and negotiates its norms through a sophisticated formal procedure. In both cases, the recognitive community, ethical life, exists so as to allow persons to achieve self-consciousness.

For Hegel, crime exists as a disruption of ethical life. Crime, for Hegel, is a specific instance in which one fails to recognize another as the owner of her body or as entitled to own external property. In this chapter, I articulate and develop the Hegelian conception of crime,

demonstrating that crime is a phenomenon that must be addressed if the recognitive relations that constitute ethical life are to be maintained.

In section II, I both interpret and discuss some implications of Hegel's three major claims regarding crime. In this section, I also discuss several types of criminal activity that Hegel fails to address in the PR. In section III, I explain Hegel's thoughts on how the content of the norms of bodily ownership and external property is determined within a recognitive community. In section IV, I discuss the American Law Institute's Model Penal Code, demonstrating that our contemporary determinations of the content of the norms of bodily ownership and external property can be interpreted in Hegelian terms. In section V, I make explicit the Hegelian conception of action and responsibility implicit in section IV, in order to both make this conception clear for the reader and to provide the framework for a discussion of communal action—the action of the recognitive community itself—and communal self-consciousness. Section VI, I provide a Hegelian conception of communal action and communal self-consciousness. Finally, I articulate a conception of civil disobedience in section VII. I discuss civil disobedience in the last section of the chapter because the conception of civil disobedience I articulate presupposes many of the conclusions argued for in the preceding sections.

## II. Hegel on Crime

Essential to developing a Hegelian conception of crime is getting clear on what Hegel means in claiming that crime (1) "infringes right as right," is a (2) "negatively infinite judgment in its full sense"<sup>56</sup> and is (3) "inherently...null and void."<sup>57</sup>

I will address claim (1) first. When Hegel claims that crime infringes right as right, I take him to mean that criminal acts threaten to undermine the recognitive relations that constitute

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<sup>56</sup> Hegel (1998), p. 98.

<sup>57</sup> *Ibid.*, p. 100.

ethical life. For Hegel, crimes are not only committed against individuals, but against communities.

In the previous chapter, I distinguished two normative statuses that serve to give content to Hegel's notion of freedom as self-consciousness: the status of being the owner of one's body and the status of being entitled to own external property. In the previous chapter, I also demonstrated that one must recognize others in certain ways in order to maintain these statuses. Specifically, persons who wish to recognize themselves as the subject of either normative status must recognize others as owning their bodies. Additionally, I demonstrated that persons who wish to recognize themselves as entitled to own external property must recognize others as so entitled.

Here I will understand a crime as a specific instance in which one fails to recognize another as owning her body, or as entitled to own external property. In order to vindicate Hegel's claim that crimes are committed against both individuals *and* communities, it must be shown that criminal acts serve to undermine not only the normative statuses of the victims of crime, but also threaten to undermine the recognitive relations that constitute ethical life.

Against the background of what I have said thus far, it should be clear how criminal acts undermine the normative statuses of victims. Criminal acts serve to undermine the normative statuses of victims because persons who commit crimes fail to recognize their victims as owning their bodies or as entitled to own external property. And, persons are only the subjects of these statuses to the extent that they are so recognized.

It is less clear, however, how criminal acts threaten to undermine the recognitive relations that constitute ethical life. In this section, I argue that crimes against individuals are also crimes against recognitive communities because in committing criminal acts, recognized individuals

provide *prima facie* reasons for others to commit criminal acts. If members of the criminal's community take these reasons to be good reasons, and thereby act on them, the recognitive relations that constitute the community will be undermined.

Note first that a criminal act is not only a specific instance in which one fails to recognize another as owning her body, or external property, but is also an act of alienation. Recall that to be alienated from a set of norms is to not view those norms as binding. The individual who is alienated from the norms of bodily ownership is unwilling to sacrifice his desires for those norms. He is unwilling, for instance, to sacrifice his desire to assault his annoying neighbor for the norm that requires that persons who own their bodies be allowed to use their bodies unimpeded. The criminal's assault on his neighbor, then, is an act of alienation. Alienation, that is, from the norms of bodily ownership.

Next, recall what it is to recognize another. To recognize another is to treat that other's commitments as normatively authoritative for oneself. To use the example from the previous chapter, B counts as recognizing A if B takes A's commitment to the claim that she is in Boston as a reason to take on this commitment himself. Here, A recognizes B as a knower by treating her as authorized to make claims about how things are, by taking her commitment to some claim as a defeasible reason to believe that claim.

In committing a crime, in showing oneself to be alienated from a certain set of norms, one commits oneself to a view about how things are. In particular, one commits oneself to the claim that the norms that one violates are not binding, that one need not sacrifice one's desires for those norms. Given that one is recognized, one's taking this stance toward a set of norms provides a defeasible reason for those by whom one is recognized to take a similar stance toward the norms.



To illustrate, given that A is recognized by B as having the authority to commit herself to claims about how things are with respect to norms, A's act of theft gives B a defeasible reason to steal as well. Of course, B need not act on this reason, but given that he recognizes A, this reason exists for him nonetheless.

If the members of a given community decide to *act* on the reasons generated by a recognized member's acts of alienation, the community itself will cease to exist. Acts of alienation from the norms of bodily ownership and external property ownership are acts in which one person fails to recognize another the subject of these normative statuses. Since recognitive communities are *constituted* by adherence to recognitive norms, large-scale failure to adhere to these norms just is the destruction of the community. Therefore, criminal acts are threats to the existence of recognitive communities—threats, that is, to the recognitive relations that constitute ethical life.

Peter Steinberger comes close to correctly articulating the Hegelian conception of crime as infringing right as right. He writes:

... it[crime] is an attack on the person's property rights, a denial that he has such rights, hence an attack on his very person-hood. But further, the criminal's choice of a victim is presumably accidental and contingent; it is thus not your particular right to property that he is denying, but rather the right to property per se.<sup>58</sup>

Steinberger is right to say that for Hegel crime is an attack on the right to property, per se, but mistaken in thinking that criminal acts undermine rights (or normative statuses), generally, because the criminal's choice of victim is "accidental and contingent." Steinberger's thinking here is that if the victims of crime are chosen arbitrarily, then the criminal can be seen as not attacking a particular person, but the very idea that persons are the subjects of normative statuses.

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<sup>58</sup> Steinberger (1983), p. 860.

But, if we took this to be Hegel's position, we would also have to read Hegel as claiming that criminals who victimize a certain class of persons (for example, the homeless), or target their victims for a particular reasons (for example, the woman who assaults her cheating partner) do not thereby threaten to undermine the recognitive relations that constitute a particular community. This would be an odd view to attribute to Hegel.

Hegel is best read as I suggest, as advocating the position that criminal acts threaten to undermine recognitive relations not because all victims of crime are chosen arbitrarily (which, of course, is not the case), but because the criminal's act of alienation exists as a reason for others in his community to act similarly.

For Hegel, that the criminal infringes right as right is what distinguishes him from the tortfeasor, or the person who commits a civil wrong. Hegel takes it that the tortfeasor respects the norms of the community, but is mistaken about what those norms require. Hegel believes that the tortfeasor, unlike the criminal, recognizes the authority of the law and is willing to accept a court's condemnation of his action. For Hegel, the tortfeasor is guilty of "non-malicious wrong."<sup>59</sup>

The distinction that Hegel draws between the criminal and the tortfeasor is not accurate. In general, there is no reason to believe that the tortfeasor respects the norms of bodily ownership or external property ownership any more than the criminal. And, at least in modern American law, a single act can be considered both a tort and a crime. For instance, the murderer is both guilty of the crime of murder and the tort of wrongful death. Whether a person is considered a criminal or a tortfeasor is, in many cases, a context-sensitive matter. The distinction

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<sup>59</sup> Hegel (1998), pp. 94-96.

Hegel draws between the criminal and the tortfeasor is a useful one, as we shall see below, but it is not accurate.

While there are several factors that distinguish criminal from civil law in the American context, the following two factors are typically taken to be the most salient. First, while a civil suit is filed and pursued by a private party, a criminal case is filed and pursued by the state. The civil trial redresses *private* wrongs, or violations of tort law, while the criminal trial redresses *public* wrongs, or violations of criminal law. Though, as we know, one act can be considered both a private and public wrong. Second, those found guilty of violating tort law are usually just required to compensate their victims financially. On the other hand, those found guilty of violating a criminal law are punished.

As I explain below, Hegel takes it that the content of the criminal law and civil law—what counts as a public wrong and what counts as a private wrong—is to be determined by the legislative and judicial bodies of the state. As I argue in Chapter 3, the Hegelian should advocate a theory of punishment on which criminals are to be made to repair the harm caused by their crime. In this way, the Hegelian, restorative criminal penalty is similar to the typical civil penalty. In this work, however, I do not explain the relationship between the criminal justice system and the system of civil justice in the ideal Hegelian state. My primary goal is that of articulating a Hegelian theory of criminal justice.

Now that we know what Hegel means in claiming that crime infringes right as right, we are in a position to understand what Hegel means when he says that crime is a "negatively infinite judgment in its full sense." In the passage in the PR in which Hegel makes this claim, he writes:

[crime is] a negatively infinite judgment in its full sense, whereby not only the particular (i.e. the subsumption of a thing under my will) is negated, but also the universality and infinity in the predicate 'mine' (i.e. my capacity for rights).<sup>60</sup>

Before explicating this passage, I will quote the majority of Hegel's discussion of the negative infinite judgment in his *Science of Logic* (hereafter "SL"). Having this passage in view will allow us to better understand Hegel's conception of crime in the PR. At § 1382 of the SL, Hegel writes:

But this [the negative infinite judgment] is a nonsensical judgment. It is supposed to be a judgment, and consequently to contain a relation of subject and predicate; yet at the same time such a relation is supposed not to be in it. [...]. Examples of negatively infinite judgments are easily obtained: determinations are negatively connected as subject and predicate, one of which not only does not include the determinateness of the other but does not even contain its universal sphere; thus for example spirit is not red, yellow, etc., is not acid, not alkaline, etc., the rose is not an elephant.... These judgments are correct or true, as the expression goes, but in spite of such truth they are nonsensical and absurd. Or rather, they are not judgments at all.<sup>61</sup>

Hegel continues:

A more realistic example of the infinite judgment is the evil action. In civil litigation, something is negated only as the property of the other party, it being conceded that it should be theirs if they had the right to it; and it is only the title of right that is in dispute; the universal sphere of right is therefore recognized and maintained in that negative judgment. But crime is the infinite judgment which negates not merely the particular right, but the universal sphere as well, negates right as right. This infinite judgment does indeed possess correctness, since it is an actual deed, but it is nonsensical because it is related purely negatively to morality which constitutes its universal sphere.<sup>62</sup>

Hegel takes over the category of the infinite judgment from Kant's "table of judgments," found in his *Critique of Pure Reason* (hereafter "CPR").<sup>63</sup> In the table of judgments, Kant seeks to categorize all possible judgments. For Kant, judgments can differ in a quantity, quality, relation, and modality. What Kant means by each of these distinctions is not of primary concern in this

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<sup>60</sup> *Ibid.*, p.98.

<sup>61</sup> Hegel (1991), p. 641.

<sup>62</sup> *Ibid.*

<sup>63</sup> Kant (1965), p. 107.

work. To begin to understand Hegel's negative infinite judgment, we only need to understand the ways in which Kant believes that judgments can differ in quality. For Kant, judgments can differ qualitatively by either being affirmative, negative, or infinite. The affirmative judgment, for Kant, is of the form "All Fs are Gs." The negative judgment is of the form "No Fs are Gs." And, the infinite judgment is of the form "All Fs are non-Gs."<sup>64</sup>

This latter judgment is "infinite," for Kant, because it is consistent with an *infinite* number of affirmative judgments with respect to Fs.<sup>65</sup> For instance, in committing oneself to the claim "All dogs are non-feline," one leaves open the possibility of consistently committing oneself to an infinite number of other claims about dogs.

In the CPR, Kant does not consider the negative infinite judgment. And, if one were to rely strictly on Kant's categories, the negative infinite judgment would be of the form "No Fs are non-Gs," which is logically equivalent to "All Fs are Gs," Kant's affirmative judgment. Hegel, however, wishes to understand the negative infinite judgment as a special type of negative judgment. For Hegel, the negative infinite judgment is a negative judgment in which one denies that some particular thing (or *type* of thing) bears a certain property, where that property is of a class of properties, each member of which cannot be intelligibly predicated of that thing.

Hegel's examples of the negative infinite judgment are, "the spirit is not red," "the rose is not an elephant," and "the understanding is not a table." Hegel thinks that one fails to make sense in asserting a negative infinite judgment. He believes that such claims are not claims at all. Hegel does not make explicit his reasons for thinking that this is the case, but he appears to rely on the idea that in denying that something bears a certain property, one also commits oneself to

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<sup>64</sup> *Ibid.*, p. 108.

<sup>65</sup> *Ibid.*

the claim that thing does bear some property that is of the class of properties of which the denied property is a member.

For instance, Hegel seems to believe that in committing oneself to the claim that the spirit is not red, one also commits oneself to the claim that the spirit is *some* color. Likewise, on this interpretation of Hegel, in committing oneself to the claim that the rose is not an elephant, one also commits oneself to the claim that the rose is a type of animal. As we shall see, Hegel believes that these claims are not false, but unintelligible.

I think it is helpful to understand Hegel as claiming that to commit oneself to a negative infinite judgment is to make a category mistake. And to make a category mistake, in Gilbert Ryle's sense of the term, is to assert of a thing in one category what can only be intelligibly said of things in another category.

In *The Concept of Mind*, Ryle provides a clear example of a speaker who makes a category mistake. Ryle uses the example of a visitor to Oxford University who, after being shown a number of the university buildings, asks "But where is the University?"<sup>66</sup> This speaker assumes that Oxford University is another building, in addition to the buildings that he has seen. He is unaware that a university is the complex way in which a set of buildings, administrators, and faculty members are organized.

For Hegel, just as one who claims that the university is a type of building makes a category mistake, one who claims that the spirit is not red, and is thus colored, or that the rose is not an elephant, and is thus a type of animal, makes a category mistake. Here I ignore the issue of whether Hegel is correct in his analysis of "the spirit is not red," and "the rose is not an elephant." Settling the issue of what *actually* follows from a negative infinite judgment is beyond

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<sup>66</sup> Ryle (2000), p.16.

the scope of this work. My primary aim in this section is to provide a plausible interpretation of Hegel's claims about the nature of crime.

Hegel thinks that to assert a negative infinite judgment, to make a category mistake, is to fail to make sense. It is not clear what it would mean for spirit (*Geist*), the collective human activity of making and revising judgments, to be colored. Activities are not colored. Likewise, it is not clear what it would mean for the university to be a building. The university is an institution, and institutions are not made of brick and mortar. In most contexts, one who makes a category mistake fails to make an intelligible claim.

Hegel's more fundamental point is that those who assert negative infinite judgments fail to make sense because they ignore the norms that allow persons to make sense in asserting negative judgments. Negative judgments only make sense when the subjects and predicates of those judgments bear a certain relation to one another. For the negative judgment to be intelligible, the subject must be the type of thing that can intelligibly be ascribed properties included within the class of which the predicate is a member.

In other words, for Hegel, to make sense in asserting that a thing does or does not bear some property, one must adhere to the norms that dictate which categories of properties that thing *could* intelligibly bear. To assert a negative judgment while not adhering to these norms is to make a negative infinite judgment, to make a category mistake, and, thus, to fail to say something intelligible.

For Hegel, crime is a negative infinite judgment. Admittedly, Hegel is being somewhat metaphorical in making this claim. Hegel means to tell us that a crime is *like* a negative infinite judgment in that the criminal act is unintelligible for the same reason that the assertion of a

negative infinite judgment is unintelligible. Both acts are unintelligible because they are performed in defiance of the norms that make similar acts intelligible.

As an example of an act that is a *negative* judgment, Hegel provides the case of the judgment of a civil court. The civil court judges that one party does not have property rights in a particular item. Here, the court concludes that the item is not the property of one party by appeal to general legal principles. Implicitly, the court claims that the losing party would have been granted property rights in the item in question had the facts been different. Thus, in making this judgment, the court affirms the applicable property law. The court's judgment that the item in question is the property of one party, and not the other, is intelligible.

Hegel contrasts this case with that of the thief who seeks to establish property rights in some item by theft. The thief makes a negative judgment, the judgment that the item in question does not belong to the party from whom he steals. But the thief does so *by* stealing. To understand why Hegel thinks that such an act constitutes a negative *infinite* judgment, recall that for Hegel the criminal act constitutes a commitment to the claim that the norms one violates in so acting are not binding on oneself. Thus, the thief, in stealing, commits himself to the claim that the norms of property ownership are not binding. Yet, the thief relies on these norms in claiming that some item is his property. The thief, then, is committed to a claim like the following: "This item is my property, yet the norms of external property ownership are not binding on me."

Yet, as we saw in the previous chapter, one must abide by the norms of external property ownership if one is to recognize oneself as a property owner—that is, one must recognize others as entitled to own external property if one is to so recognize oneself. The thief, in stealing, rejects the norms that would make his ownership of the stolen property intelligible. In this way, he makes a negative infinite judgment, a category mistake. He asserts of a *thing* in one category (the



item which comes under his control by theft) what can only be *said* of a thing in another category (that this item is his property). One can only come to own property in performing acts that are consistent with the norms of property ownership.

Another example may help to make Hegel's point more clear. Assume that A assaults B out of anger. For Hegel, in so acting, A makes a negative infinite judgment. First, in assaulting B, A commits himself to the claim that the norms of bodily ownership are not binding. Yet, in assaulting B, A also commits himself to the claim that he is authorized to so act, that he owns his body. As I demonstrate in the previous chapter, one must recognize others as owning their bodies if one is to so recognize oneself. Thus, A, in assaulting B, commits himself to the claim that he owns his body *and* the claim that the norms of bodily ownership are not binding. A, then, makes a category mistake, a negative infinite judgment. He asserts of a thing in one category (the assault by which he fails to recognize B as owning her body) what can only be said of a thing in another category (that he is entitled to perform this act).

Crime, for Hegel, is "...in its concept immediately self-destructive because it is an expression of a will which annuls the expression or determinate existence of a will."<sup>67</sup> In other words, crime, for Hegel, is an action that purports to be in accord with some normative status, but is in fact a commitment to the claim that the norms that constitute that status are not binding on the criminal. For Hegel, it makes little sense to conceive of oneself as the subject of some particular normative status, yet reject the norms that constitute that status. On Hegel's view, in rejecting these norms, one makes a negative infinite judgment. As we shall see in the next chapter, one of the aims of punishment for Hegel is to get the perpetrator of a crime to recognize this fact.

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<sup>67</sup> Hegel (1998), p. 97.

Of course, we will have to address the case of the criminal who does not conceive himself as the subject of *any* normative status. The acts of *this* type of criminal do not at first glance appear to be unintelligible as negative infinite judgments. I address this class of criminal below.

Thus far, I have provided an interpretation of two of Hegel's claims about crime: (1) crime "infringes right as right," and (2) a criminal act is a "negatively infinite judgment in its full sense."<sup>68</sup>

I will now explain what Hegel means in saying that crime is (3)"inherently...null and void."<sup>69</sup> In § 97 of the PR, where Hegel makes this latter claim, he writes:

The infringement of right as right [crime] is something that happens and has positive existence in the external world, though inherently it is null and void.<sup>70</sup>

Hegel also articulates this idea in §500 of his *Encyclopedia of the Philosophical Sciences* (hereafter "Encyclopedia"), writing:

As an outrage on right, such an action [crime] is essentially and actually null. In it the agent, as a volitional and intelligent being, sets up a law—a law, however, which is nominal and recognized by him only—a universal which holds good *for him*, and under which he has at the same time subsumed himself by his action.<sup>71</sup>

In these passages, I take Hegel to mean that a criminal act is null and void in the same sense in which he takes the negative infinite judgment, the assertion of a category mistake, to be unintelligible. He believes that neither the criminal act nor the negative infinite judgment should be afforded any normative significance because both acts ignore the norms which make similar acts intelligible.

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<sup>68</sup> *Ibid.*, p. 98.

<sup>69</sup> *Ibid.*, p. 100.

<sup>70</sup> *Ibid.*

<sup>71</sup> Hegel (1971), pp.110-111.

For Hegel, the criminal act is null and void, or unintelligible, in two related ways. First, as articulated above, the criminal act is unintelligible because in acting, the criminal wishes to conceive of himself as the subject of some normative status, yet also rejects the norms that constitute this status. Second, the criminal act is unintelligible because the criminal, in acting, wishes to be the *sole determiner* of which actions are in accord with the normative status of which he conceives himself a subject. As I argue in Chapter 1, in the case in which one is the sole determiner of which actions are in accord with some normative status, talk of normativity—of one's being right or wrong about the normative content of some status—becomes unintelligible. This is the unintelligibility that Hegel speaks to in the above-quoted passage from the Encyclopedia.

It is easy to make the mistake of thinking that Hegel means to express the thought that criminal acts are null and void because they are implicit assertions of *false* normative claims. The perpetrator of a crime does commit himself to the claim that he can be the subject of some particular normative status, while also not abiding by the norms that constitute that status. But, for Hegel, this claim is not false, but nonsensical. For Hegel, normative claims can only be judged true or false against the assumed background of ethical life.

The plaintiff in a civil dispute can be wrong in claiming that some particular item is her property only because she takes herself to be bound by the norms of property ownership. The thief's claim to a particular item is nonsensical because the thief, in stealing from another, implicitly rejects the norms that would make his property ownership intelligible. For Hegel, then, criminal acts are null and void not because the criminal commits himself to a falsity in so acting, but because his acts constitute negative infinite judgments. For Hegel, the commitments implicit in criminal acts are, taken together, unintelligible.

In "Annulment Retributivism: A Hegelian Theory of Punishment," Jami L. Anderson makes the mistake of interpreting Hegel as claiming that criminal acts are null and void in that they implicitly commit the perpetrator of a crime to a false normative claim. She writes:

The criminal, in assaulting his victim, denies that his victim is a free being and asserts that she is instead a *thing*...an object to use and manipulate for *his* purposes. But a person is not, properly speaking, a thing. Therefore, the criminal will is contrary to what is right, and it is, consequently, a "nullity."<sup>72</sup>

Anderson is correct in stating that for Hegel persons are not simply things. For Hegel, as we have seen, persons are the subjects of normative statuses. However, Anderson's interpretation of Hegel's "null and void" claim does not allow us to make sense of the distinction Hegel draws between the losing plaintiff in a civil case and the thief. For Hegel, the losing plaintiff is wrong in thinking that some item is her property; she is committed to a false normative claim. Hegel distinguishes this case from the case of theft, stating that the thief's action, his claim, is null and void.

If Anderson's interpretation is correct, then Hegel is committed to the claim that both the losing plaintiff and the thief are committed to false normative claims, but if Hegel were so committed, he would either claim that both the claims of the thief and those of the losing plaintiff are null and void, or that the claims of each are simply false. Hegel does not make either of these latter claims. Therefore, we have reason to believe that Anderson's interpretation is incorrect.

We make better sense of Hegel in interpreting him as I suggest, as claiming that criminal acts are null and void not because they are implicit commitments to false normative claims, but because they are unintelligible.

We now have in view the foundations of the Hegelian conception of crime. For Hegel, crimes infringe right as right in that they threaten to undermine the recognitive relations that

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<sup>72</sup> Anderson (1999), p. 374.

constitute ethical life. Crimes, for Hegel, are negative infinite judgments in that they constitute category mistakes. The criminal attempts to make a commitment *as* the subject of some normative status *by* violating the norms that constitute that status. Criminal actions, for Hegel, are null and void because they are unintelligible as negative infinite judgments. For Hegel, the criminal cannot do what he takes himself to be doing. His criminal acts, then, are null and void because unintelligible.

a. *Crime constitutes a harm to the criminal*

Above I explained how criminal acts threaten to undermine the recognitive relations that constitute ethical life. I explained, that is, how crimes harm communities as well as the victims of crime. I will now explain how, given Hegel's view, a crime constitutes a harm to the criminal himself. Hegel does not explicitly express the ways in which criminal acts constitute harms to the criminal, but his position on this topic can easily be inferred from his conception of crime. For Hegel, it seems, the criminal harms himself in two related ways in committing a criminal act.

First, since crime infringes right as right—since, that is, crimes threaten to undermine the recognitive relations that constitute ethical life—the criminal act exists as a threat to the criminal's freedom. As we saw in the first chapter, persons are only free to the extent that they are self-conscious, and self-consciousness is only possible within ethical life. The criminal cannot be what he takes himself to be if he is not so recognized, and his ability to be recognized is exactly what he threatens in committing a criminal act. In committing a crime, the criminal threatens to undermine his own identity.

Second, since crime is unintelligible as a negative infinite judgment, the criminal involves himself in an absurdity of which he is unaware (unaware, that is, at least at the time he commits the criminal act). The criminal attempts to make a commitment as the subject of some

normative status by violating the norms that constitute that status. He is conceptually bound to fail in his attempt to do so. His act of alienation fails by necessity. To the extent that he takes himself to have succeeded, the criminal is blind to himself and the meaning of his action(s).

The criminal puts himself in the position of Hegel's Master, regarding only his will and his judgments as normatively significant. He believes that he can treat others (or their external property) as instruments of his will, yet also be the subject of some particular normative status. Allegorically, Hegel's Master learns that he can only be the subject of a normative status to the extent that he recognizes the slave as an equal. Up to this point, the Master is necessarily blind to himself. Given Hegel's view, to act as a Master, to commit a crime, is necessarily to do harm to oneself.

*b. What of the criminal who does not want to be the subject of a normative status?*

In articulating his conception of crime, Hegel assumes that the criminal wishes to conceive of himself as the subject of some normative status. One point Hegel stresses, as we have seen, is that one cannot conceive of oneself as the subject of a normative status and take it that one is not bound to abide by the norms that constitute that status. However Hegel, at least in his discussion of crime, does not address the criminal who has no desire to be the self-conscious subject of a normative status. In this section, I explain why even *this* criminal is subject to Hegel's criticisms.

We can easily imagine a criminal who has no desire to recognize himself as the subject of a normative status. Take, for instance, the thief who does not wish to conceive of himself as a property owner, but instead embraces the notion that there is no property, that persons should only be permitted to control what they can take control *of* by force or coercion. Or, take the assailant who does not take it that he *owns* his body, but believes that he is only entitled to the

bodily autonomy that he can secure by force. For both these criminals, to employ a familiar phrase, might makes right.

This type of criminal, then, does not wish to make commitments as the subject of some normative status. This criminal only uses the terms "permitted," "responsible," and "right," ironically—he wishes to act outside of the normative realm. This criminal is alienated in an extreme sense. Not only is he alienated from the norms that constitute some particular normative status, he is alienated from the very concept of a normative status.

This criminal does, however, conceive of himself as an instrumental reasoner. He takes it that he should be committed to undertaking the means necessary to achieve his ends. When he determines that he should have a car, say, he takes it that he should acquire the car by theft. When he determines that his annoying neighbor should feel pain, he takes it that he should inflict this pain. He takes it that his reasons for action do not stem from a normative status, but from what Kant calls the "hypothetical imperative," the principle that one ought to will the necessary means to the ends that one has set for oneself.

What this criminal does not realize, however, is that the status of instrumental reasoner *is* a normative status. If this criminal wishes to coherently recognize himself as an instrumental reasoner, he must recognize (and be recognized *by*) others.

As we saw in a different context in the previous chapter, if what counts as acting as an instrumental reasoner is determined solely by the criminal, then there can be no distinction between the criminal's *thinking* that he is an instrumental reasoner and his *actually being* an instrumental reasoner. In other words, for this criminal's conception of himself as an instrumental reasoner to be coherent, there must be a distinction between his merely *believing* that he is adhering to the norms of instrumental reason and his actually adhering to those norms.

In "The Normativity of Instrumental Reason," Christine Korsgaard contends that "willing an end just is *committing* yourself to realizing the end."<sup>73</sup> For Korsgaard, the normativity of the norms of instrumental reason can only be explained if we understand willing a particular end as a normative act—that of undertaking a commitment. I think that this is exactly right.

The instrumentally rational person at least commits herself to undertaking the means that are necessary to the realization her desired end. And, as I argue in Chapter 1, one only counts as *binding* oneself in making a commitment if the source of the *force* of that commitment is distinct from the source of the commitment's *content*. For Hegel, the content of our commitments—what counts as adhering to the commitment, and what counts as deviating from the commitment—is determined by the judgments of those we recognize. For Hegel, other people bind us by *actually* praising or critiquing our actions in light of our prior commitments.

Note too that failure to adhere to the norms of instrumental reason is an all-too-common phenomenon. Given that A has determined that she should save money for her upcoming vacation, she fails as an instrumental reasoner in spending all of her money on clothing. Here A sets the end of saving money, yet fails to adhere to her commitment to save. This failure is something for which A can be blamed. And, if A has achieved full self-consciousness, the failure is something for which she will likely blame herself. Blame from members of A's recognitive community is, in part, what constitutes the fact that she is bound by a norm, and is what makes intelligible her self-criticism.

To coherently recognize oneself as an instrumental reasoner, then, one must be a member of a recognitive community; one must be recognized as such by those one recognizes. The criminal who has no desire to be the subject of a normative status cannot escape the demand that

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<sup>73</sup> Korsgaard (2008), p. 57.



he act in accord with the norms that constitute *some* normative status by conceiving of himself only as an instrumental reasoner. To be an instrumental reasoner is to be the subject of a normative status.

I have argued that the instrumental reasoner must recognize others if she is to recognize herself as such. However, I have said nothing about what form this recognition must take. As I argued in the previous chapter, if one is to recognize oneself as entitled to own anything, one must recognize others as owning their bodies. I also argued that if one is to recognize oneself as entitled to own external property, one must recognize others as entitled to own external property. A moment's reflection will allow us to realize that one must also recognize others as owning their bodies if one is to recognize oneself as an instrumental reasoner.

As I explain in the previous chapter, to recognize another is to treat that other's commitments as normatively authoritative for oneself. And, to treat another's commitments as normatively authoritative for oneself is to take that other's commitment as a defeasible reason to be so committed oneself. Additionally, to treat another's commitments as normatively authoritative for oneself is to demand that that other justify her commitments, to criticize her for undertaking commitments she is not entitled to, and to praise her for undertaking the commitments she *is* entitled to. To recognize another, then, is something that one *does* (with one's body). Recognizing requires that one make commitments by saying and doing.

Recall that one cannot be recognized by one's slave because the slave does not own his body. While the slave can physically do many things, he cannot do so with impunity. He is bound to act out the wishes of his master on pain of harsh treatment. The slave's bodily movements, then, do not reflect his own commitments, but those of his master. The actions of one's slave have the same normative significance as one's own actions and, as such, cannot count

as acts of recognition. The slave must be recognized as capable of undertaking commitments of his own if his bodily movements (his sayings and doings) are to count as acts of recognition.

Coerced recognition is no recognition at all. Not only must one recognize others as owning their bodies if one is to so recognize oneself, one must recognize others as owning their bodies if one is to recognize oneself as the subject of *any* normative status. And, as a consequence, one must recognize others as owning their bodies if one is to recognize oneself as an instrumental reasoner. One cannot intelligibly recognize oneself as bound by one's commitments as an instrumental reasoner if one is not actually bound by others (others who afforded some degree of bodily autonomy, that is). Consequently, and perhaps surprisingly, one threatens to undermine one's own identity as an instrumental reasoner in undertaking the means to restrict the bodily autonomy of another.

I have provided an argument for the claim that one must recognize others as owning their bodies if one is to recognize oneself as an instrumental reasoner. However, I have not established that one must recognize others as entitled to own external property if one is to recognize oneself as an instrumental reasoner. What I must demonstrate is that even the criminal who does not wish to recognize himself as entitled to own external property must recognize others as so entitled if he is to recognize himself as an instrumental reasoner. In demonstrating this latter fact, I will complete my argument for the claim that Hegel's critiques of the criminal who desires to conceive of himself as a property owner, broadly construed, also apply to the criminal who does not have this desire.

In the previous chapter, I argued that, *de facto*, one's status as an external property owner will be undermined by one's failure to recognize others as entitled to own external property. It is just the case that the status of external property owner is only fully conferred on those who

recognize others as entitled to own external property. Through imprisonment (and other forms of punishment), thieves are at least temporarily deprived of their entitlement to own and control external property.

The fact that thieves are routinely punished by imprisonment also makes it the case that one must recognize others as entitled to own external property if one is to recognize oneself as an instrumental reasoner.

To recognize oneself as an instrumental reasoner is, in part, to self-consciously commit oneself to bringing about one's desired ends. Given that most thieves steal in order to achieve some further end, and that thieves are routinely punished, in undertaking the means to deprive another of her external property one runs afoul of one's commitment to achieve the end to be realized in stealing. Because we punish thieves, the thief fails to adhere to his commitment to realize whatever end he seeks to realize by stealing. Admittedly, however, his failure as an instrumental reasoner in this respect is a highly contingent matter.

A variation of an example used above will help to clarify these points. Say A wishes to have money to spend while on her upcoming vacation. Instead of saving her money, A decides to steal from her employer. Assuming that law enforcement officials in A's community are vigilant, A will most likely be arrested and charged with the crime of theft. If convicted, A could face prison time. In stealing from her employer, A makes it highly likely that she will not be able to take her planned vacation, and thus, obviously, will not be able to spend money while on her vacation. A must avoid prison if she is to achieve her end. In stealing from her employer, A runs afoul of the norms of instrumental reason.

We have already seen that if one's commitments as an instrumental reasoner are to be intelligible, their content must be determined by the judgments of those one recognizes. We have

simply decided to make it the case that one's ends *in* stealing cannot be fulfilled *by* stealing. Contingently, one must recognize others as entitled to own external property if one is to recognize oneself as an instrumental reasoner.

We see, then, that in failing to recognize others as owning their bodies, or as entitled to own external property, one runs afoul of the norms of instrumental reason. The criminal who does not wish to conceive of himself owning his body or as an external property owner is bound to respect the bodies and property of others. Even the criminal who takes himself to be alienated from the very concept of a normative status makes a negative infinite judgment, which is inherently null and void, in committing a crime.

*c. Weakness of will and criminal activity*

Unfortunately, Hegel only conceives of the criminal as a person who is alienated from the norms embraced by members of his community. In the PR, Hegel does not explicitly contemplate the possibility of a weak-willed criminal—that is, a criminal who identifies with the norms of his community, yet consistently acts on his immediate desires, instead of acting in accord with the norms. The weak-willed criminal is *willing* to sacrifice his desires for norms, but for whatever reason he is unable to. "The spirit indeed is willing, but the flesh is weak."<sup>74</sup>

Here, I do not enter into the ongoing debate about how to define weakness of will. I will simply understand a case of weak-willed action as one in which a person decides (in some sense of the word "decide"), absent external coercion, to act on reasons that are not in accord with his values. Here I simply take it that weak-willed action, so described, is possible.

Examples of this type of criminal are easy to come by: the unwilling kleptomaniac who cannot stop stealing items from the grocery store, the pedophile who continues to harm children

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<sup>74</sup> Holy Bible: New King James Version (2000), Matthew 26:41.

despite his (self-proclaimed) strong desire to be different, the pacifist who flies into a violent rage and severely assaults the stranger who insults him. It seems that many criminal acts are not acts of alienation, but reflect the criminal's momentary (or longstanding) inability to act in accord with his values.

Recalling Hegel's critiques of criminal action, the weak-willed criminal does not infringe right as right. His criminal acts are not acts of alienation and do not provide others with defensible reasons to act similarly. The weak-willed criminal may even actively advise others to *not* act as he does.

Additionally, the weak-willed criminal does not make a negative infinite judgment in committing his crime. He does not attempt to make a commitment as the subject of a particular normative status by violating the norms that constitute that status. He is aware that he cannot rightfully acquire property by stealing. He is also aware that he cannot maintain his status as the owner of his body and assault others. Thus, his criminal act is not unintelligible (not unintelligible in Hegel's sense, that is). His act is intelligible, yet contrary to his values.

For Hegel, in the standard case the acts of the criminal are null and void because they are unintelligible. But, since the weak-willed criminal's act does not constitute a negative infinite judgment, since his act is intelligible, it is not null and void. The weak-willed kleptomaniac steals, yet realizes the bindingness of the norms of external property ownership. He does not believe that he has a *right* to his stolen property. His affirmation of the norms of external property ownership does have normative significance, even if he fails to comply with those norms.

The major criticisms of criminal action Hegel articulates in the PR are generally inapplicable to the case of the weak-willed criminal. The weak-willed criminal regrets his

criminal acts. He feels alienated not from the norms that constitute his community, but from the values implicit in his criminal activity. He wishes to be different, but is unable to act on the reasons he identifies with. He is unable to treat himself as the subject of some particular normative status. In a sense, the weak-willed criminal is very conscious of his lack of self-consciousness (though, of course, he need not be able to describe his condition in this way in order to *be* in this condition).

While Hegel does not discuss the possibility of weak-willed criminal action in the PR, the account of self-consciousness I take Hegel to be committed to also commits him to the claim that the weak-willed criminal is at most partially free. Recall that to be free for Hegel is to be, and to treat oneself *as*, the subject of some normative status. To treat oneself as the subject of a particular normative status is to both assess one's actions in relation to the norms which constitute that status, and to act in accord with those norms. The weak-willed criminal is not completely free because while he is able to critique his actions by referencing the norms embraced by members of his community, he is unable to *act* in accord with those norms.

The weak-willed criminal does not act freely (in Hegel sense), and his acts do not constitute threats to the recognitive relations that constitute the community of which he is a member, but his actions do harm others nonetheless. A regretted assault is still an assault. The weak-willed criminal does not threaten to undermine the norms operative in his community, but the physical and psychological well-being of individual members of his community. The harm the weak-willed criminal inflicts is more natural than normative. Seemingly unable to avoid acting on his desires, he is like a force of nature.

Notice, I say that the harm the weak-willed criminal inflicts is *more* natural than normative. I say this because weak-willed criminal action does represent at least a *partial* failure

to recognize. Recall that recognizing another requires that one not only take it that that other is the subject of some normative status, but also that one *treat* that other as the subject of a status. The weak-willed thief takes it that he does wrong in stealing, he takes it that his victim is entitled to own external property. He may even apologize for stealing. But he steals nonetheless. He fails to *fully* treat his victim as entitled to own external property. He recognizes the person he steals from in apologizing for or denouncing the theft, but fails to recognize her in stealing. Likewise, the weak-willed assailant fails to recognize his victim in restricting her bodily autonomy, even though he judges his action impermissible. Just as the weak-willed criminal's freedom is partial, his actions represent a partial failure to recognize others.

In the PR, Hegel is in part concerned with explaining which types of social relations and institutions are necessary for persons to be free as self-conscious. As a result, his discussion of crime focuses on those crimes that are direct and clear threats to the freedom of all—crimes that are also acts of alienation from norms. However, as I read Hegel, he is committed to a view about weak-willed criminal action: the weak-willed criminal is at most partially free, and the harm caused by this criminal's actions is more natural than normative. I will discuss the substantive upshot of this view in Chapter 3.

#### *d. Crime and poverty*

Given Hegel's overall aim in the PR, we can understand why he fails to consider the person who steals out of economic need. In Chapter 3, I will address the question of whether poor person's failure to adhere to the norms of external property ownership always constitutes a punishable offense. In this chapter, I will continue to refer to the poor thief as a "criminal," noting that his status as a criminal is in question.

Like the weak-willed criminal, the criminal who acts out of economic need (as I imagine him) is not alienated from the norms embraced by members of his community. He commits his crime because he believes he must do so in order to survive. He takes it that the continuance of his biological life requires that he commit a crime of some sort.<sup>75</sup>

The criminal who acts out of economic need understands that he must respect the bodily autonomy of others if he is to coherently conceive of himself as owning his body. He refrains from assaulting others or taking the property of others by force. He is easily able to adhere to the norms that constitute his status as the owner of his body.

However, he is not easily able to adhere to the norms that constitute the status of the owner of external property. His level of need practically necessitates that he take from others and he is unwilling to sacrifice his biological life to adhere to the norms of external property ownership. In stealing, then, he manifests his inability to participate in the system of external property.

Like weak-willed criminal acts, crimes motivated by severe economic need are at most partial failures to recognize others as entitled to own external property. The father who steals food and clothing from a local store takes it that the store owner is entitled to own and sell the property he steals, but also takes it that the needs of his family take precedence over the store owner's entitlement to her property.

Also, like the weak-willed criminal, the criminal who steals out of economic need is not able to fully recognize himself as entitled to own external property because he is unable to

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<sup>75</sup> In the next chapter I consider two types of criminals who act out of economic need. However, at this stage in my argument I will only discuss one type given that my aim in this section is to merely flag criminal acts committed by the poor as a problem for the Hegelian account of crime.



adhere to the norms that constitute this status.<sup>76</sup> He recognizes that if he is to participate in the system of external property, he must also adhere to certain norms, but he also realizes that his poverty will not allow him to seriously consider participation in this system. He is therefore unable to experience freedom as a person entitled to own external property.

Thus, while Hegel does not consider the criminal motivated by economic need, he is committed to a view about this type of criminal. His acts of theft are at most partial failures to recognize, and he is unable to achieve freedom as a person entitled to own external property. In Chapter 3, I will have more to say about this type of criminal will discuss how he should be treated by his recognitive community.

*e. Victimless crime*

Hegel also does not discuss so-called "victimless" crimes in the PR. Victimless crimes bear this label because, it is argued, they at most harm the criminal. On the common understanding, victimless crimes are not committed against anyone, they do not constitute a failure of recognition. The use and sale of illegal drugs and prostitution are the most common crimes that fall into this category.

Much could be said about this category of crime from the Hegelian perspective. A more expansive Hegelian theory of criminal justice should address the issues of whether victimless crimes are in fact victimless, and whether the activities that constitute victimless crime should be

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<sup>76</sup> For instance, the impoverished criminal is unable to adhere to the norms requisite to maintain certain contractual relationships. Persons who contract for the exchange of goods agree that once the terms of the contract are executed, each party will refrain from interfering with the other's legitimate use of the goods exchanged in contract. However, the impoverished criminal is unable to commit himself in this way. He cannot give another a firm assurance that he will not be forced to steal the exchanged property in order to preserve his life.

The impoverished criminal, then, is unable to make firm commitments as a party to a contract for the exchange of goods, and is thus unable to fully recognize himself as entitled to own and control external property.

criminalized at all. However, I will not address these questions in this work, saving a full discussion of victimless crime from the Hegelian perspective for another work. Here I only wish to articulate a Hegelian theory of criminal justice that treats of the core criminal activities, those that unquestionably constitute failures of recognition.

### III. The Content of the Criminal Law

Thus far, I have attempted to explain and justify Hegel's claims about the nature of crime. One prominent feature of Hegel's conception of crime is that the criminal act is unintelligible because it is an act by which one seeks to make a commitment *as* the subject of a normative status *by* violating the norms that constitute that status. However, I have said very little about the content of the norms that the criminal violates. Particularly, I have said very little about how the content of these norms is to be determined.

Contemporary American criminal law statutes specify nearly all crimes in terms of two elements: *actus reus* and *mens rea*. Literally, these terms mean "guilty act," and "guilty mind," respectively. To be held liable for violating a criminal statute, it must be shown that one has committed a prohibited act, with the correct state of mind. The first requirement stems from the widespread moral intuition that persons ought not be held criminally liable for thoughts alone. Thus, an act is necessary for criminal liability. The second requirement reflects the intuition that persons should only be held liable for the results they *intend* to bring about. Though, as we shall see below, contemporary criminal practice recognizes liability for some consequences that are not specifically intended.

Hegel's core conception of crime is subject to much indeterminacy. It is far from clear which acts count as failing to recognize another as owning her body, or as entitled to own

external property. This indeterminacy can be understood as indeterminacy with respect to both *actus reus* and *mens rea*.

To illustrate, A jumps out from his hiding place, shouts, and startles B. Subsequently, B trips and falls, bumping her head on the ground. It is not clear whether A fails to recognize B as owning her body in this case. It is not clear that one who owns her body is entitled to move through the world free from *all* injuries caused by the actions of others. One may legitimately doubt whether A fails to recognize B in this instance because one doubts that the nature of A's *act* constitutes a failure to recognize.<sup>77</sup>

Assuming that the nature of A's act constitutes a failure to recognize, one may also legitimately doubt that A has failed to recognize B in this instance because one doubts that A acts with a culpable mental state. Recall that for Hegel, the criminal is alienated from a certain set of norms. The criminal act is an act of alienation, for Hegel. The criminal believes that she need not sacrifice her immediate desires to adhere to the norms that govern persons in his community.

In the case under consideration, A does not *know* that B will be injured as the result of his action, and does not *intend* this specific result. A could in fact believe that he is in no way entitled to cause an injury to B. For these reasons, one may doubt whether A's act is, in fact, an act of alienation from norms. In other words, one may doubt whether A acts with a culpable mental state.

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<sup>77</sup> See also Pallikkathayil (2010), p 21: "[T]he mere idea that one must be able to control one's body might pick out a core of protections but leaves the precise contours of one's right to one's body indeterminate. So, for example, would playing my music in your vicinity so loudly that it gives you a headache count as violating your right to your body?"

We see, then, that indeterminacy with respect to what counts as a failure to recognize can be understood in terms of *actus reus*, *mens rea*, or both. In this section, I will both explain how the content of each of these categories is to be determined, consistent with Hegel's conception of crime, and demonstrate that our actual determinations of *actus reus* and *mens rea* can be understood in recognitive terms.

Hegel believes that the above-mentioned indeterminacy problems must be solved politically. Particularly, Hegel believes that indeterminate norms are to be made more determinate by a legislative body. At § 298 of the PR, Hegel writes that "[t]he legislature is concerned with the laws as such in so far as they require fresh and extended determination...."<sup>78</sup> Earlier, he writes that the legislature is to be granted the power to "determine and establish the universal."<sup>79</sup> Hegel is clear that the content of the norms that constitute ethical life, the universal, is to be determined *within* ethical life.

We should not, however, interpret Hegel as claiming that the legislature is permitted to determine the content of the community's norms in any way it pleases. Hegel believes that the legislative body is bound to enact laws that give content to his conception of recognition. Provided the conception of recognition outlined in Chapter 1, this demand amounts to the claim that the legislature is bound to at least give content to the concept of bodily ownership. This is so because persons must be recognized as owning their bodies, and recognize others as owning their bodies, if they are to be the subject of any further normative statuses.

Thus, while Hegel believes that it is a conceptual truth that mutual recognition is necessary to institute genuine norms, he also believes that the bulk of what this recognition amounts to, and which norms constitute the normative statuses operative in a given recognitive

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<sup>78</sup> Hegel (1998), p. 284.

<sup>79</sup> *Ibid.*, p. 259.

community, must be determined politically. In this way, Hegel's understanding of criminal law integrates the insights of the classical versions of natural law theory and legal positivism.

For the natural law theorist, there is a conceptual connection between law and morality. As the theory goes, binding or valid laws must contain some moral content by necessity. The theory is summed up well by the slogan “an unjust law is no law at all,” which is usually attributed to Saint Augustine, the paradigmatic natural law theorist.<sup>80</sup> Natural law theorists differ, of course, on the nature of the moral content that is a conceptually necessary for valid law.

On the other hand, the classical legal positivist holds that there is no conceptual connection between law and morality. For the legal positivists, a law is valid if it is *posited* by a person or body that has the authority to make law. Thus, for the legal positivist, if the king is authorized to make law, any rule he declares to be legally binding *is* legally binding. Legal positivists differ, however, on the nature of the authority necessary to posit valid law.<sup>81</sup>

For Hegel, a legislative body recognized as having the authority to posit law must articulate the content of the criminal law, but this body is also constrained to posit law that gives content to his conception of recognition. Thus, for Hegel, the posited law must contain some moral content to be valid. Of course, more can be said about the relation between Hegel and the legal positivists and natural law theorist, but doing so would require that I deviate from the main aim of this work.

Interestingly, in "Deriving Morality from Politics: Rethinking the Formula of Humanity," Japa Pallikkathayil argues that Kant is best interpreted as holding the view that indeterminacy problems that arise in his moral philosophy are to be solved politically. Recall Kant's humanity

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<sup>80</sup> See Saint Augustine (2010), p.10. There, Saint Augustine writes, “...a law that is not just does not seem to me to be a law.”

<sup>81</sup> See Hart (1997). Though a legal positivist, Hart does contend that a system of laws must contain *some* moral content.

formulation of the CI: "So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means."<sup>82</sup> As Pallikkathayil points out, it is far from clear what it would mean to treat someone merely as a means.

Pallikkathayil points out that Kant distinguishes between internal freedom and external freedom. For Kant, persons achieve internal freedom by acting in accord with the CI. Persons achieve external freedom, however, by physically directing their own actions, and not simply having their bodies moved by other persons. For Kant, as Pallikkathayil argues, the state is needed to establish external freedom, because the state both determines the scope of one's rights and enforces those determinations.<sup>83</sup> Pallikkathayil claims that Kant believes that in so determining the scope of our rights, the state gives content to the CI. She concludes that for Kant, "the content of many of our moral duties depends on the results of political philosophy and, indeed, on the results of actual political decision making."<sup>84</sup>

In the previous chapter, I argued that Hegel takes it that Kant problematically assumes the justified existence of certain social institutions in articulating the content of the CI. However, given Pallikkathayil's interpretation of Kant's moral and political philosophy, we need not see the two philosophers as diverging dramatically on the issue how the content of our political norms is to be determined.

In addition to holding that the content of the criminal law must be posited, Hegel realizes that this content becomes more determinate in being *applied*. In § 213 of the PR, Hegel writes:

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<sup>82</sup> Kant(1997), p. 38.

<sup>83</sup> Pallikkathayil (2010), p. 23.

<sup>84</sup> *Ibid.*, p. 1.

Right gains determinate existence [*Dasein*] in the first place when it has the form of being posited [as law]; it also becomes determinate in content by being *applied*...to the material of civil society...<sup>85</sup>

Hegel envisions two mechanisms by which the content of the norms that constitute ethical life is determined: (1) a legislative body *posits* criminal laws, and (2) the content of those laws is made more determinate in being applied to individual cases by an administrative or judicial body. In this way, the recognitive community comes to learn the content of the norms by which it is bound in codifying and applying those norms.

Hegel's core insight in this area is that the content of the norms that constitute ethical life, violations of which are to be considered crimes, is to be articulated according to a political procedure. That A's punching B counts as an assault is a matter of the recognitive community of which they are members *counting* the action as an assault. For Hegel, then, achieving self-consciousness is partly a matter of having knowledge of the evolving norms that govern the recognitive political community of which one is a member.

*a. Actus reus and mens rea*

Hegel believes that criminal law must be posited and applied, consistent with his conception of recognition. What constitutes a failure to recognize, a crime, can be understood as indeterminate with respect to both *actus reus* and *mens rea*. And, the categories of *actus reus* and *mens rea* are made more determinate by a legislature that posits the criminal law, and administrative and judicial bodies, which apply the law.

In this section, I explain how our contemporary determinations, with respect to *actus reus* and *mens rea*, can be understood in terms of Hegelian recognition. In articulating a recognitive interpretation of our contemporary categories of *actus reus* and *mens rea*, I provide a

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<sup>85</sup> Hegel (1998), pp. 201-202.

basis from which to argue that our contemporary punishment practices should be reformed in light of the Hegelian, restorative conception of punishment, articulated below in Chapter 3. Clearly, if our contemporary understanding of crime cannot be understood in terms of recognition, it will be difficult to make the case that our punishment practices should be reformed as an extension of a recognitive conception of crime.

*i. Actus reus*

I regard the American Law Institute's Model Penal Code (hereafter "MPC"), as a comprehensive statement of the contemporary, American conception of criminal law.<sup>86</sup> Thus, I will refer to the MPC throughout this section. The task of understanding our contemporary conception of *actus reus* in terms of recognition is relatively straightforward. In fact, the MPC divides crimes into two major categories: crimes against the person, and crimes against property. Thus, the MPC treats as salient the categories of crime that correspond to the normative statuses that Hegel takes to be central to our conception of ourselves as free.

As stated, property owners are entitled to use their property in a number of ways. As a property owner, one is entitled to have one's will reflected in one's property. The person who owns her body is entitled to raise her arm when she pleases, and the owner of a house is entitled to sell the house if she so pleases. And this just means that the property owner is entitled to *control* her property.

Crime, for Hegel, is an action by which one denies another's entitlement to control her property. The criminal aims to have his will reflected in the property of her victim. For Hegel, then, one element of crime is the loss of control, or at least the threat of a loss of control, of some item that one is entitled to control.

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<sup>86</sup> See MPC § FOREWARD.



Clearly, on this Hegelian conception of crime, while all crimes involve a loss (or threatened loss) of control, not all instances in which one loses control of one's property constitute crimes. No crime is committed when A drops and breaks the vase she has recently purchased. The loss of control is necessary, yet not sufficient, for the occurrence of a crime.

The *actus reus* element of most of the crimes enumerated in the MPC reflect this aspect of the Hegelian conception of crime. The *actus reus* element of murder is "[causing] the death of another human being,"<sup>87</sup> of assault "[causing] bodily injury to another."<sup>88</sup> And one satisfies the *actus reus* element for theft if one "unlawfully takes, or exercises control over, movable property of another...."<sup>89</sup> Additionally, crimes of conspiracy, criminal threats, and attempt crimes are specified in relation to acts that cause a loss of entitled control.

Understandably, Hegel does not explicitly consider crimes of omission in the PR. His broad aim in this work is to demonstrate that genuine freedom is only possible within a community structured by relations of mutual recognition. However, we can easily understand crimes of omission in terms of the Hegelian framework I have articulated thus far.

Hegel's discussion of crime focuses mainly on the negative duties that constitute particular normative statuses, theft being his primary example. However, crimes of omission highlight the positive duties that constitute particular statuses. Traditionally, most U.S. jurisdictions have refrained from criminalizing failures to rescue.<sup>90</sup> In most states, it is not a crime fail to rescue a drowning child, even if doing so is well within one's power, and would not pose a significant risk to one's own safety. However, many state criminal statutes do recognize positive duties that attach to various social statuses. For instance, doctors and nurses employed

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<sup>87</sup> MPC § 201.1(1).

<sup>88</sup> MPC § 211.1 (1) (a).

<sup>89</sup> MPC §223.2(1).

<sup>90</sup> See Silver (1985).

by nursing homes are required to take reasonable measures to maintain the health their elderly patients, and wage earners are legally obligated to pay state income taxes.

I will not discuss particular statutory crimes of omission here. My goal here is simply to illustrate that this category of crime can be understood in recognitive terms. The thief attempts to make a commitment *as* a property owner *by* violating the norms that constitute this status. The wage earner who fails to pay his income taxes, however, attempts to *maintain* his status as a wage earner *while* failing to conform to the norms that constitute this status. In the same way, the nursing home doctor who neglects his elderly patients attempts to maintain his status as a doctor while failing to fulfill the duties that attach to his status as a doctor.

Hegel's claims that crimes infringe right as right, are negative infinite judgments, and are null and void, can be most easily applied to crimes that involve action, rather than inaction. However, the criminal who fails to act does show himself to be alienated from the norms that constitute his community. In this way, his inaction can be understood as an infringement of right as right.

Additionally, while crimes of omission are not negative infinite judgments in the sense that the criminal in this case attempts to make a commitment as the subject of some status, by violating the norms which constitute that status, they can be said to be negative infinite judgments in that they involve an implicit rejection of the norms that constitute a status the criminal wishes to maintain. And, in this way, the criminal's failure to act creates a state of affairs that is unintelligible. The criminal's desire to maintain a status while failing to undertake

the actions that are constitutive of that status is unintelligible and, thus, lacks normative significance.<sup>91</sup>

Criminal acts and criminal omissions are different in nature. Though, from a normative perspective, they are the same. Both involve a failure to comply with the norms that constitute some particular status, and, thus, undermine the criminal's ability to be recognized, and recognize herself, as a subject of that status.

I conclude, then, that our contemporary determinations of *actus reus* can be understood in recognitive terms.

*ii. Mens rea*

For Hegel, the standard crime is an act in which one fails to recognize another, attempting to make a commitment *as* the subject of a normative status *by* violating the norms that constitute that status. Hegel, then, understands the criminal as possessing a certain mental state. Generally Hegel understands the criminal's mental state is that of mastery. The criminal, for Hegel, takes it that only his judgments are normatively authoritative, that he is the sole determiner of the content of the norms by which he is bound. In this section, I will argue that we can understand our contemporary categories of *mens rea* as capturing four distinct ways of understanding the attitude that is constitutive of mastery.

The MPC recognizes four categories of *mens rea*: purposeful, knowing, reckless, and negligent. According to the MPC, § 2.02 (a):

A person acts *purposely* with respect to a material element of an offense when:

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<sup>91</sup> The crime of child abandonment presents an interesting challenge for this understanding of crimes of omission. The mother who abandons her young child does not seek to maintain her status as a mother and thus cannot be understood as seeking to maintain this status while failing to care for her child. The mother who abandons her child, it seem, can be seen as wishing to maintain a more general status—that of a responsible citizen, say—while neglecting her duties as a mother. In this way, her abandonment can be seen as a negative infinite judgment.

- (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
- (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.<sup>92</sup>

And according to MPC, § 2.02 (b):

A person acts *knowingly* with respect to a material element of an offense when:

- (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
- (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.<sup>93</sup>

The meaning of these definitions can be more easily grasped in relation to the specification of an actual crime. According to the MPC, a person is guilty of criminal homicide if he "purposely, knowingly, recklessly or negligently causes the death of another human being..." and is guilty of murder if he commits criminal homicide purposefully or knowingly.<sup>94</sup>

If A shoots B with the intent that B die from the bullet wound, A purposefully commits criminal homicide, and is thus guilty of murder. If A shoots B, knowing that it is practically certain that B will die from the bullet wound, A knowingly commits criminal homicide, and is thus guilty of murder.

The MPC understands recklessness and negligence as less culpable mental states. MPC, § 2.02 (c) specifies the requirements for a reckless action:

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct.<sup>95</sup>

And, according to MPC, § 2.02 (d):

A person acts *negligently* with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct.<sup>96</sup>

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<sup>92</sup> MPC § 2.02 (a).

<sup>93</sup> MPC § 2.02 (b).

<sup>94</sup> MPC § 210.1

<sup>95</sup> MPC § 2.02 (c)

<sup>96</sup> MPC, § 2.02 (d)

The MPC understands manslaughter as criminal homicide committed recklessly, and negligent homicide is, clearly, criminal homicide committed negligently. Assume A throws a heavy boulder from his third-story window, consciously ignoring the likelihood that his action will cause the death of a pedestrian walking below on the sidewalk. A's boulder strikes and kills B. Here, A commits manslaughter. In a similar scenario, A commits negligent homicide if he throws the boulder ignorant of the risk his action poses to the safety of others.

In order to demonstrate that we can think of the categories of *mens rea* as capturing four distinct ways of understanding the attitude of Hegel's master, I must make the case that the criminal who acts either purposefully, knowingly, recklessly, or negligently, evinces the belief that only *his* attitudes matter, that only his commitments are normatively authoritative.

We can most easily understand the criminal who acts purposefully as exhibiting the attitude of mastery. The purposeful criminal *sets out* to either restrict the bodily autonomy of his victim or restrict his victim's ability to use his external property. In other words, the purposeful criminal commits himself to bringing it about that another's bodily autonomy is restricted, or that another's control of her external property is restricted.

Recall that to commit oneself to realizing a certain end is to exercise a type of authority. In making a commitment one binds oneself by the norms implicit in one's commitment. And, we can only understand another as attempting to bind himself by a particular norm if we also take it that *he* takes it that he is authorized to so bind himself. In the same way, we can only understand another as making an assertion if we also take it that he takes it that what he asserts is true. In making an assertion, one implicitly commits oneself to the truth of a claim. In similar fashion, in committing oneself to realizing an end, one implicitly commits oneself to the view that one is *authorized* to commit oneself to the realization of that end.

Thus, in committing himself to restricting the bodily autonomy of another, or another's use of her external property, the purposeful criminal implicitly commits himself to the view that he is *authorized* to make such commitments. However, in the standard case, the purposeful criminal takes it that his authority to make these illicit commitments derives from his attitudes. In other words, he takes it that he is authorized to make illicit commitments because he *takes himself to be* authorized. The standard purposeful criminal believes that he can authorize himself to commit himself to the realization of an illicit end. To see that this is the case, we can simply draw out attention to the fact that assailants and thieves do not (typically) *ask* for their victim's for permission.

In fact, the purposeful criminal sets ends for himself that require that he *ignore* the commitments of his victim. The assailant ignores his victim's claim to bodily autonomy. And, the thief actively ignores his victim's claim to some piece of external property. In the standard case, then, the criminal takes it that he can authorize himself to pursue illicit ends, which require that he actively ignore the commitments of others.

As we have seen, to be in this state—to believe that one is authorized to undertake a commitment as the subject of some normative status simply because one takes oneself to be so authorized, to believe that one is entitled to actively ignore the commitments of others—is to exhibit the attitude that is constitutive of mastery. The purposeful criminal, then, exhibits the attitude that is constitutive of mastery.

We can extend this analysis to draw the conclusion that the knowledgeable criminal exhibits the attitude of Hegel's master. The knowledgeable criminal commits himself to realizing

an end that he *knows*<sup>97</sup> will require that he bring it about that another's bodily autonomy is restricted, or that another's control of her external property is restricted.

The knowledgeable criminal also implicitly commits himself to the view that he is authorized to undertake the means to realize his end. Though, unlike the purposeful criminal, his end itself need not be that of restricting the bodily autonomy of another or restricting another's control of her external property.

For instance, assume that A burns down a crowded office building in order to destroy documents that contain proof that he engaged in insider trading. A burns down the building, knowing that doing so will cause the death of many of the building's inhabitants. Here, A's aim in burning down the building is that of destroying the incriminating documents, yet he *knowingly* causes the deaths of the building's inhabitants.

A, in this case, commits himself to the realization of an end that he knows will result in the restriction of the bodily autonomy of others. And, as we saw above, A takes it that he is *authorized* to undertake the means necessary to realize this end. As is the case with the purposeful criminal, the knowing criminal takes it that he need not consult others to determine whether he is *actually* authorized to undertake the means to realize his end. The arsonist in this case does not ask for permission to burn down the building.

While the knowledgeable criminal's end need not be illicit, the means he undertakes to pursue his end are illicit. Undertaking these means requires that he fail to recognize other's claims to bodily autonomy or external property ownership. He takes it that he is authorized to undertake his illicit means simply because he believes himself to be so authorized. In this way, the knowledgeable criminal exhibits the attitude that is constitutive of mastery.

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<sup>97</sup> The knowledgeable criminals *knows* that his action will bring about a particular result in the sense that he is *practically certain that* his action will bring about this result.

The reckless criminal only differs from the knowledgeable criminal in that he does not *know* that the means he undertakes to pursue his end will result in the restriction of the bodily autonomy of another, or the restriction of another's control of her external property. He only knows that in undertaking these means he greatly increases the likelihood that one or both of these results will obtain.

The criminal who commits manslaughter, for example, consciously disregards the fact that his action will likely cause the death of another. He commits himself to so acting despite this risk, and thereby fails to properly consider his victim's claim to bodily autonomy.

To illustrate, imagine that A, a gun owner, decides to practice his shooting on a target located in the middle of the crowd. He is fully aware that it is highly likely that one of his bullets will miss the target and hit an innocent bystander. He aims and shoots anyway. Here A actively ignores the commitments of others, their self-conception as owners of their bodies. In acting recklessly, A takes only his commitments to be normatively authoritative, and, as such, exhibits the attitude of mastery.

Unlike the purposeful criminal, the reckless criminal does not set out to harm others (or their external property), and, unlike the knowledgeable criminal, the reckless criminal does not, in pursuit of some further end, commit himself to a course of action that he *knows* will result in such harm. The reckless criminal does, however, commit himself to a course of action that he knows will *likely* result in harm to others or their property. Like the purposeful criminal and the knowledgeable criminal, the reckless criminal takes it that he is authorized to pursue this reckless course of action simply because he *takes* himself to be so authorized. The reckless criminal, then, acts as a master.



The greatest challenge to understanding our contemporary *mens rea* categories in terms of mastery is presented by the phenomenon of negligent criminal acts. The negligent criminal neither intends harm, nor is he aware of the high likelihood that his actions will cause harm to others or their property. Unlike the master in Hegel's paradigm case, the negligent criminal does not intend to force his will on others, he is not even aware of the impact his actions will have on others.

However, according to the MPC, the negligent criminal *should* be aware of the risk that his actions pose to the well-being of others. In the above-cited section concerning negligence, the MPC continues:

The risk [presented by the negligent act] must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.<sup>98</sup>

On the MPC view, the negligent criminal is culpable for failing to perceive the risk created by his act. In other words, the negligent criminal's culpability lies in the fact that he does not take time to consider how his actions will affect the well-being of others.

The construction worker who carelessly throws heavy cinder blocks from his fifth floor location *would have known* the risk this action poses to the well-being of others had he taken time to think before acting. The negligent criminal commits himself to certain courses of action without considering how those actions will affect others. While he does not intend harm, he does not properly consider the claims and commitments of others in deliberating about how to act. He only treats his needs and desires as worthy of consideration, and, in this way, exhibits the attitude of mastery.

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<sup>98</sup> MPC § 2.02 (d).

To be clear, the negligent criminal does exhibit the attitude of mastery, but to a lesser degree than the purposeful, knowledgeable, and reckless criminal. While these latter three criminals take themselves to be authorized to pursue actions that they know will (or will likely) harm others simply because they take themselves to be so authorized, the negligent criminal does not have the other's interests in view, so to speak. The negligent criminal's fault comes only in that he takes it that he need not consider how his actions may affect others in order to determine whether he is authorized to pursue those actions.

Both Hegel and the MPC understand the criminal as being guilty of a type of normative solipsism. The MPC, however, allows us to understand this solipsism, this attitude of mastery, in a more nuanced way. Simply put, the MPC allows us to understand that mastery is a matter of degree. The criminal who acts purposefully fully intends to harm his victim, while the negligent criminal simply (yet culpably) fails to consider his victim's commitments. On the MPC view, the purposeful criminal is (in many cases) more culpable than the knowledgeable criminal, who is more culpable than the reckless criminal, who, in turn, is more culpable than the negligent criminal. This gradation in culpability corresponds to the degree of mastery each class of criminal exhibits in acting.

To be sure, Hegel does believe that certain criminal acts are worse than others.<sup>99</sup> But he says very little about what makes one particular crime worse than another, or what makes one criminal more culpable than another. The MPC allows us to distinguish the degrees of mastery involved in criminal wrongdoing in a more sophisticated manner.

While the MPC allows us to understand the attitude of mastery in a more nuanced way, Hegel allows us to understand the MPC's *mens rea* categories as unified by the norms of

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<sup>99</sup> See Hegel (1998), p.99.

recognition. Hegel allows us to understand, that is, why both the calculating murderer and the grossly negligent driver should be conceived as criminally culpable. For Hegel, both persons exhibit the attitude of mastery, an attitude that is contrary to the very idea of a recognitive community. As we have seen, Hegel believes that the question of which actions should be criminalized is a political question. But, for Hegel, the category of criminal action, the category that the MPC seeks to illuminate, must be understood in relation to the attitude of mastery.

The MPC's conception of *mens rea* and Hegel's conception of mastery complement one another. And, we can understand the MPC's *actus reus* requirement as capturing an aspect of the Hegelian conception of crime. Crime, for Hegel, and in the MPC, involves the loss of control (or the threatened loss of control) of some item that one is entitled to control. Both Hegel and MPC treat one's entitled control of one's body and one's external property as normatively salient. I conclude, then, that our contemporary categories of *actus reus* and *mens rea* can be understood in recognitive terms.

#### IV. Hegel on Action and Responsibility

While our contemporary categories of *actus reus* and *mens rea*, as specified in the MPC, can be understood in recognitive terms, the MPC also reflects an understanding of action and responsibility that Hegel takes to be distinctly modern.

For Hegel, the fact that we have a conception of *mens rea*, that is, the fact that we have the very idea that one should only be held responsible for those of one's bodily movements that are accompanied by a culpable mental state, should not be taken as a matter of course. In §118 of the PR Hegel writes:

The self-consciousness of heroes (like that of Oedipus and others in Greek tragedy) had not advanced out of its primitive simplicity either to reflection on the distinction between deed [Tat] and action [Handlung], between the external event and the purpose and knowledge of the circumstances, or to the subdivision of

consequences. On the contrary, they accepted responsibility for the whole compass of the deed.<sup>100</sup>

For Hegel, the deed (Tat) is what happens as a result of one's bodily movements. And, for Hegel, the action (Handlung) is those features of what happens as a result of one's bodily movements that one is *responsible* for. For Hegel, the notion that there should be a distinction between Tat and Handlung, that one should only be held responsible for only *some* of the effects of one's bodily movements—those effects one intends to bring about—is a particularly modern innovation.

Oedipus kills his father and marries his mother. This is his deed. He is unaware that the man he kills is his father, or that the woman he marries is his mother. He only *intends* to kill a quarrelsome stranger he encounters on the road to Thebes and to marry the queen of Thebes. So described, this is his action (Handlung). Oedipus, however, holds himself responsible for the deed. As a pre-modern individual, Oedipus is not able to distinguish between deed and action. He does not have available the notion that the scope of his responsibility should be restricted relative to the results he specifically intends. Oedipus's heroism necessitates that the scope of his responsibility *not* turn on facts about his intentions.

Hegel contends that we moderns have innovated the "right of knowledge." In the PR, § 117 Hegel writes:

The will's right...is to recognize as its action, as to accept responsibility for, only those presuppositions of the deed of which it was conscious in its aim and those aspects of the deed which were contained in its purpose. The deed can be imputed to me only if my will is responsible for it—this is the right to know.<sup>101</sup>

The right of knowledge, for Hegel, restricts the scope of one's responsibility to those aspects of the deed that one intends to bring about in acting or those aspects of the deed that are the result

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<sup>100</sup> Hegel (1998), p. 118.

<sup>101</sup> Hegel (1998), p. 117.

of one's pursuit one's purpose in acting. From the perspective of the right of knowledge, Oedipus should not be held responsible for killing his father and marrying his mother because he lacks knowledge of the character of his action, so described. He neither intended to kill his father and marry his mother, nor did these outcomes, so described, result from his pursuit of any purpose he had in acting.

Consideration of the following case will allow us to gain a greater understanding of the scope of the right to knowledge. A offers his houseguest, B, a bottle of water. Unknown to A, the bottle of water was contaminated with cyanide at some point during the bottling process. B drinks the water and dies. In this case, the right to knowledge bars A from responsibility. A had no way of knowing that the bottle of water was contaminated and did not intend to serve B contaminated water. Nor did B's death result from any action taken by A in pursuit of some further purpose he had in acting. A is barred from responsibility for B's death by the right to knowledge.

Though Hegel takes the right to knowledge to be an important innovation, he warns his reader to not make the mistake of taking the right to knowledge as a reason to conceive of action in terms of intention alone. To do this would be to think that an agent's action is complete once she commits herself to realizing some end, and to think that what happens as a result of her pursuing this end is simply the deed. To think of action in this way is to restrict the scope of the agent's responsibility to the results she specifically intends, regardless of what actually results from her intentional bodily movements.

At several points in the PR and PS, Hegel expresses the idea that an action should not be understood in terms of the agent's intentions alone. In §118 of the PR, Hegel writes:

The consequences, as the shape proper to the action and immanent within it, exhibit nothing but its nature and are simply the action itself; therefore the action

can neither disavow or ignore them.... It is because of this that it is to the advantage of the criminal if his action has comparatively few bad consequences...and that the fully developed consequences of a crime are counted as part of the crime.<sup>102</sup>

An addition to PR §118, inserted by Hegel's student Eduard Gans, expresses this Hegelian sentiment well:

It happens of course that circumstances may make an action miscarry to a greater or lesser degree. In a case of arson, for instance, the fire may not catch or alternatively it may take hold further than the incendiary intended. In spite of this, however, we must not make this a distinction between good and bad luck, since in acting a man must lay his account with externality. The old proverb is correct: 'A flung stone is the devil's.' To act is to expose oneself to bad luck. Thus bad luck has a right over me and is an embodiment of my own willing.<sup>103</sup>

In Hegel's view, the full action, what one is ultimately responsible for, consists of both the agent's intentions in acting and (some of) the results of agent's intentional bodily movements. In the case of criminal action, the Hegelian view is the same as the view expressed in the MPC: the full criminal action consists of both *mens rea* and *actus reus*.

What I am calling the "full action," the unity of intention and result, of *mens rea* and *actus reus*, Hegel labels the "Sache selbst," which has been translated as "the very heart of the matter,"<sup>104</sup> and "the thing that matters."<sup>105</sup> Hegel believes that there are no clear criteria that will allow us to determine which of the consequences that result from one's pursuit of one's purpose in acting should be included in our account of the full action. In § 118 of the PR Hegel writes:

[t]o determine which results are accidental and which necessary is impossible...among the consequences [of an action] there is also comprised something interposed from without and introduced by chance, and this is quite unrelated to the nature of the action itself.<sup>106</sup>

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<sup>102</sup> Hegel (1998), p. 118.

<sup>103</sup> *Ibid*, p. 118.

<sup>104</sup> Hegel (1977), p.237.

<sup>105</sup> Hegel (2010), p.345.

<sup>106</sup> *Ibid*, p. 117.

For Hegel, then, the full action consists of both intention and result, but there exist no formula that will allow us to balance the contribution of each of these elements in our final judgment about the scope of an agent's responsibility.

While Hegel believes that we cannot, *a priori*, establish criteria that will allow us to determine which of an action's consequences should be taken to be part of the full action, the MPC gives us some guidance on this issue. Of those consequences not specifically intended by the criminal, the MPC understands the criminal as being responsible for those he either knew would obtain, knew were likely to obtain, or *should have known* were likely to obtain. In short, the MPC understands the criminal as being responsible for those consequences that are foreseeable.

Of course, which consequences persons should know will result from their actions, and which consequences are foreseeable, cannot be determined *a priori*. Hegel would agree, I think, that just as the content of the norms that constitute ethical life are to be determined through a political process, determinations about the scope of one's responsibility in acting must be made by legislative, judicial, and administrative bodies, through a process of discussion and negotiation.

Hegel believes that achieving self-consciousness is partly a matter of having knowledge of the evolving norms that govern one's cognitive community. With respect to action, a parallel point holds. For Hegel, knowing what one has done—what one is ultimately responsible for—is a matter of knowing what members of one's cognitive community will *take* one to have done, and what those persons will *hold* one responsible for.

To think that one is the sole determiner of what it is that one has done, and thus what one is ultimately responsible for, is to involve oneself in an incoherence of the same type that I

earlier associated with one's thinking that one can unilaterally determine whether one is the subject of a particular normative status. As we have seen, if no distinction exists between what one has done, and what one *takes* oneself to have done, then talk of one's correctly assessing the nature of one's actions, and the scope of one's responsibility, becomes unintelligible.

This way of thinking about action and responsibility prevents individuals from unilaterally expanding or contracting the scope of their responsibility. The arsonist cannot escape responsibility for burning down the house by claiming that he only intended to burn a small section of wood attached to the house.<sup>107</sup> Likewise, a would-be hero cannot *take on* more responsibility than his community is willing to attribute. If A negligently kills B, he cannot unilaterally make himself (legally) responsible for paying for the psychological treatment of B's grieving friend.

Both the MPC and the Hegel provide a conception of human action that mediates between the Scylla of the contracted conception of action, on which the agent is only responsible for those results she intends to bring about, and the Charybdis of the heroic conception of action, on which the agent is responsible for *all* the effects of her action.

## V. Action and Self-Knowledge

Hegel also believes that there is a close connection between action and self-knowledge. For

Hegel, one comes to know what one is, in part, by acting. In the PS, §401, Hegel writes:

...action simply translates an initially implicit being into a being that is made explicit....Consciousness must act merely in order that what it is *in itself* may become explicit *for it*; in other words, action is simply the coming-to-be of Spirit as *consciousness*. What the latter is *in itself*, it knows therefore from what it *actually* is. Accordingly, an individual cannot know what he [really] is until he has made himself a reality through action.<sup>108</sup>

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<sup>107</sup> Hegel makes this very point in §119 or the PR. Hegel (1998), p. 119.

<sup>108</sup> PS, sec. 401.



And, in §140 of the Encyclopedia, Hegel writes:

From what has now been said, we may learn what to think of a man who, when blamed for his shortcomings...appeals to the (professedly) excellent intentions and sentiments of the inner self he distinguishes therefrom. There certainly may be individual cases where the malice of outward circumstances frustrates well-meant designs.... But in general even here the essential unity between inward and outward is maintained. We are thus justified in saying that a man is what he does; and the lying vanity which consoles itself with the feeling of inward excellence may be confronted with the words of the Gospel: "By their fruits ye shall know them.'... if a daub of a painter, or a poetaster, soothe themselves by the conceit that their head is full of high ideals, their consolation is a poor one; and if they insist on being judged not by their actual works but by their projects, we may safely reject their pretensions as unfounded and unmeaning.<sup>109</sup>

For Hegel, then, one comes to learn what one actually is (a good father, a murderer, a talented painter, or a liar, for example) in acting. Hegel believes that in appraising one's actions one is able to determine whether one is the type of person one takes oneself to be. And as we have seen, one can only have a coherent conception of what one has *done* if one exists as a member of a recognitive community. True self-knowledge, for Hegel, is thus inextricably linked to one's membership in a recognitive community.

This general point about self-knowledge applies specifically to one's knowledge of oneself as free. As we know at this point in the story, Hegel takes it that one's freedom consists in one's being and treating oneself as the subject of a normative status. Freedom and self-consciousness are two sides of the same coin. For Hegel, one can only come to know that one is free, that one is and treats oneself as the subject of a normative status, in acting. Recognizing *that* others assess one's actions by the standards associated with a normative status puts one in a position to know that one is the subject of that status. And, recognizing that those assessments are positive puts one in a position to know that one is free, since freedom consists in abiding by the standards associated with a normative status. On this conception of freedom, one cannot

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<sup>109</sup> Hegel (1971), p. 211.

simply introspect to determine whether one is in fact free. This determination can only be made through assessing one's actions as a member of a recognitive community.

The following case illustrates the connection between the concepts of action, self-knowledge, and self-consciousness in Hegel's thought. Assume A takes himself to be a good father. A takes it that his freedom is constituted, in part, by his adherence to the norms that constitute this status. A's conception of himself as a good father is only coherent to the extent that he performs actions that persons in his community take to be constitutive of good fatherhood. And, A can only coherently understand his actions as consistent with his status as a good father to the extent that he recognizes the authority of others to determine what it is that he has in fact done.

Assume that A parents as a strict disciplinarian in order to prepare his children for the harsh realities of adult life. However, instead of being prepared for adult life, A's children develop crippling psychological scars as the result of his parenting techniques.

In this case, if members of A's community determine that A has psychologically damaged his children—an act which is contrary to the norms which constitute the status of good father—A cannot simply point to his good intentions to preserve his self-conception. A learns what he is through acting and having those actions assessed by those he recognizes. And, the members of A's community are bound by the right of knowledge to not hold A responsible for *all* the results of his actions. The community recognizes A's understanding of his actions as authoritative, yet not dispositive.

From Hegel, we get a conception of self-knowledge on which one's knowledge of oneself, of what one is *in* oneself, is not immediate, but mediated by one's actions and the judgments one's recognitive community. To understand one's agency, and thus oneself, as

constituted in part by the judgments of others is to take on the heroic conception of agency, the conception embraced by Oedipus, but to do so in distinctly modern way.

Before concluding this section, I will briefly argue against an alternative interpretation of the discussion of action and responsibility in Hegel's PS and PR. In *Hegel's Practical Philosophy*, Robert Pippin argues that Hegel believes that one's recognitive community not only determines what one has done and thus the scope of one's responsibility, but also what one *intended* to do. Pippin contends that for Hegel,

...we cannot determine what actually was a subject's intention or motivating reason by relying on some sort of introspection, by somehow looking more deeply into the agent's soul.... Only as manifested or expressed can one (even the subject herself) retrospectively determine what must have been intended.<sup>110</sup>

Pippin takes it that the passages quoted at the beginning of this section provide evidence that Hegel embraces this view about intentions. For Pippin, when Hegel claims that "an individual cannot know what he [really] is until he has made himself a reality through action,"<sup>111</sup> he means to say that an individual cannot know what his intention is until he has acted.

Pippin recognizes that this view is counterintuitive, but holds that this is in fact Hegel's position. I will not rehearse the details of Pippin's argument for this claim here. I will simply point out that Pippin's interpretation is not *forced* on us by Hegel's words. We could interpret Hegel's talk of the agent coming to know what she really is as referring to the process by which an agent comes to learn about her intentions, as Pippin suggests. Or we could understand Hegel's phrase as referring to the process by which the agent learns whether she in fact adheres to the norms that constitute some normative status, as I suggest. Of course, I think that there are

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<sup>110</sup> Pippin (2008), p. 156.

<sup>111</sup> Hegel (1977), p.239.

reasons to prefer my reading of Hegel. However, here I will only rehearse one reason to prefer my interpretation to that of Pippin.

Hegel is interested in finding an intermediate position between the ancient, heroic conception of agency and the modern, restricted conception of agency. The core idea to be preserved in the heroic conception of agency, at least as expressed in Sophocles' *Oedipus the King*, is that one can be held responsible for results that one did not specifically intend. That there is a mismatch between intention and result does not bar one from responsibility on the heroic conception of agency. Hegel wishes to preserve the ancient idea that the agent's intentions alone do not determine the scope of her responsibility.

However, this idea becomes distorted if we interpret Hegel as Pippin suggests. On Pippin's reading, there can be no stark contrast between what the agent intends to do and what she in fact does. For Pippin's Hegel, the agent's intentions are determined by the judgments of persons in her recognitive community.<sup>112</sup> For Pippin's Hegel:

...the unfolding of the deed and the reception and reaction to the deed are considered a constitutive element of the deed, of what fixes ultimately what was done and what turned out to be a subject's intention.<sup>113</sup>

The latter portion of this claim, of course, is what I will take issue with.

The heroic agent consciously sets out do some specific thing, causes a result she did not intend, but is nonetheless responsible for this unintended result. This seemingly paradoxical interplay between intention, result and ultimate responsibility is what makes Oedipus's story tragic. However, if we do away with the contrast between intention and result, the story loses its tragic element. Oedipus, I take it, is a tragic hero because he accepts responsibility for *all* the

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<sup>112</sup> Pippin (2008), pp. 151-152.

<sup>113</sup> *Ibid.*, p. 152.

results of his action, even those he does not intend, not because he accepts these results as a manifestation of his original intention in acting.

In short, Pippin's interpretation of Hegel on action and responsibility distorts the core idea that Hegel wishes to preserve from the heroic conception of agency: the idea that the scope of one's responsibility is not determined solely by one's intentions.

## VI. Hegel and Communal Self-Knowledge and Communal Freedom

We can summarize the main claim advanced in the above section as follows: one can only come to know what one is in oneself (whether criminal or law-abiding citizen) through assessing one's actions, an activity which necessarily involves one's recognition of the authority of members of one's community to determine what it is that one has done.

The same point applies with respect to a particular recognitive community's knowledge of itself: a recognitive community learns what *it* is in itself through assessing both its laws and policies and its *application* of those laws and policies. A community that turns a blind eye to assault is a community that does not value the bodily autonomy of its members. Likewise, a community that arbitrarily restricts certain members from owning external property is a community that does not embrace egalitarian principles.

As we have seen, the free, self-conscious individual conforms her actions to the dictates of a normative status she has chosen to identify with. The self-conscious community creates and applies law consistent with an identity that it has chosen for itself. Both the self-conscious individual and the self-conscious community act in accord with the values they purport to embrace.

To be sure, when I speak of the recognitive community being conscious of itself, I do not mean say that the community is sentient or exists as a disembodied mind. As I explain in Chapter

1, Hegel understands self-consciousness as a social status, not a natural state. For Hegel, the community's self-consciousness is no more a matter of sentience than is the self-consciousness of the individual. The recognitive community is just a group of persons who recognize one another. The acts of the recognitive community supervene on the actions of individual members of the community. The recognitive community becomes self-conscious and gains self-knowledge through the activities of its members *as* members of the community. It is Hegel's non-Cartesian conception of self-consciousness that allows us to think of both the individual and the community as capable of achieving this status.

However, this conception of the self-consciousness and self-knowledge of recognitive communities gives rise to a problem. As we have seen, in the individual case self-consciousness and self-knowledge are only possible *within* a recognitive community. Persons must recognize others in order to recognize themselves and to know what they are in themselves. Given this, it is not immediately clear how a recognitive community, as a collection of recognized and recognizing individuals, can itself achieve self-consciousness or come to know itself. Here, I label the problem of determining how the community can achieve self-consciousness and come to know itself the "problem of communal self-consciousness."

Hegel appears to offer a solution to this problem in the PR. In §331 of the PR, Hegel writes:

...every state is sovereign and independent in relation to others. It is entitled in the first place and without qualification to be sovereign from their point of view, i.e. to be *recognized* by them as sovereign.

He continues:

A state is as little an actual individual without relations to other states as an individual is actually a person without a relationship with other persons.<sup>114</sup>

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<sup>114</sup> Hegel (1998), p. 311.

We could read Hegel here as advocating a straightforward solution to the problem of communal self-consciousness: recognitive communities achieve self-consciousness and self-knowledge in recognizing and being recognized by other recognitive communities. On this view, that one's community is egalitarian, say, is determined by the attitudes of another community and one's community comes to know that it is egalitarian in having its self-conception affirmed by that other community.

This interpretation, however, would be mistaken. In §331, Hegel only claims that a community can gain a certain *type* of self-consciousness through recognition by other communities: self-consciousness as sovereign.

Hegel is right to hold that a state can only coherently recognize itself as sovereign if it is recognized as such by other sovereign states. Just as is true in the individual case, the sovereignty, or autonomy, of communities just is the state of being recognized as entitled to self-legislate. One community recognizes another as sovereign by not interfering (militarily or otherwise) with its internal affairs. The sovereign community is sovereign in relation to other communities. Thus, a community's self-consciousness as sovereign requires recognition from other communities.

Hegel's remarks in the PR only provide a partial solution to the problem of communal self-consciousness. Solving this problem requires that we develop a conception of communal self-consciousness that allows us to understand how a community can coherently recognize itself not just as sovereign, but as the subject of any number of normative statuses. The community legislates for itself and wishes to understand itself as a community that lives up to the values embodied in its laws. A community that *only* recognizes itself as sovereign does not recognize itself as a community that is committed to some particular set of values.

It is tempting to think that this problem can easily be remedied by amending the conception of communal self-consciousness currently under consideration. Instead of simply holding that a community's status as sovereign requires the recognition of other communities, the thought goes, we can expend Hegel's view to include *all* normative statuses. On this amended view, a community's status as egalitarian, democratic, or merciful, for instance, is secured by the recognition of other communities.

While attractive, this amended view does not offer a satisfactory solution to the problem of communal self-consciousness. If we understand all communal self-consciousness as requiring the recognition of other communities we run into two conceptual problems. First, since communities are individuated, in part, by the norms and values they embrace, distinct communities are not in a position to bind one another by norms. Second, if we embrace a conception of communal self-consciousness that requires the existence of distinct communities, we must conclude that the belief that there could be a single, self-conscious community is incoherent. This latter conclusion, however, is highly counter-intuitive.

For Hegel, communities are individuated by the values they embrace, as specified, in part, in the laws posited by the community's legislative body.<sup>115</sup> The values embraced by a community are reflected in a *distinctive* set of norms and positive laws that are binding on the members of the community. And though distinct communities may embrace *some* similar values, and posit similar laws, the *total* set of laws binding on a community will be distinctive, and will be integrated in a way that is reflective of the community's identity. And this is the case even when the values and posited laws embraced by separate communities are specified using similar language. American democracy is distinct from Athenian democracy, French patriotism is

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<sup>115</sup> Hegel also believes that a community's values are expressed in its artistic productions and religious traditions. See Hegel (2008), pp. 320-323.



distinct from Spartan patriotism, and Soviet Marxism is distinct from Cuban Marxism, for instance.

Given that each community is bound by a distinct set of norms, each community can at most view the norms of other communities from what H.L.A Hart labels the *external* perspective. To view a set of norms from the external perspective is to not view those norms as binding and thus to not guide one's behavior by one's understanding of those norms. (To be clear, to be alienated from a set of norms in Hegel's sense is to view those norms from the external perspective, in Hart's sense. Hegel and Hart rely on the same concept.) At most, persons who view norms from the external perspective can *predict* how persons who are guided by those norms—persons who view the norms from the internal perspective—will act in a given circumstance.<sup>116</sup>

Crucially, for Hart, persons who view a set of norms from the external perspective do not reference those norms to criticize the behavior of others. Occupying the external perspective with respect to the norms of community B, community A does not bind community B by those norms by praising and criticizing community B's laws and policies by referencing those norms. At most, community A can predict how community B will behave given the norms members of community B embrace.

Given that communities are individuated by the values they embrace and that each community must view the norms of other communities from the external perspective, individual communities cannot look to other communities to bind them by the values and norms they have committed themselves to. In other words, communities are not in a position to bind one another by certain norms because each community is committed to a distinct set of norms. Since a

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<sup>116</sup> Hart (1997), p. 56.

community can only achieve self-consciousness if it is genuinely bound by norms, and communities are not in a position to bind one another, positing reciprocal recognition among distinct communities cannot solve the problem of communal self-consciousness. At most, communities are able to recognize one another as sovereign, as Hegel suggests.

The above argument is sufficient to establish the conclusion that communal self-consciousness cannot be established through reciprocal recognition among communities, but holding that communal self-consciousness requires the existence of other communities gives rise to another problem. If we hold that the existence of other communities is required for any given community to achieve self-consciousness (and, of course, self-knowledge), we must conclude that the belief that there could be a single, self-conscious community is incoherent.

However, the notion that there could be a single state, perhaps a world governing body, which is genuinely bound and guided by norms does not seem incoherent. And while we need not reject counter-intuitive results simply because they are counter-intuitive, we should only endorse counter-intuitive conclusions when necessary. Thus, we should reject the theory that at least two states must exist if any state is to achieve self-consciousness if we can find a workable alternative theory.

Additionally, Hegel thinks that Geist, the world spirit, the community constituted by all the distinct communities and their activities, is single. As evidenced in his corpus, Hegel believes that there is nothing outside of Geist. For Hegel, then, there is at least one community that can achieve self-consciousness absent the recognition of an outside community. We should be reluctant to embrace a Hegelian theory of communal self-consciousness that requires us to reject one of Hegel's core beliefs. For the foregoing reasons, we should seek a conception of communal self-consciousness that does not require the existence and recognition of separate communities.

In *Tales of the Mighty Dead*, Brandom offers an interpretation of Hegel's thoughts on communal self-consciousness that meets the above criteria.<sup>117</sup> On Brandom's reading of Hegel, the community becomes self-conscious in recognizing and being recognized by past and future versions of *itself*.

For Brandom, the self-conscious community makes the determination that it will bind itself by certain norms and recognizes the authority of its past and future selves to determine the content of those norms. In turn, future versions of the community recognize the present community as bound by certain norms in both referencing the present community's understanding of those norms to determine how *it* will act, and judging the present community's actions according to the dictates of the norms, as determined the community's employment of the norms in the more distant past.

On Brandom's view, the present community recognizes the authority of the past community to determine the content of the norms it binds itself by in taking the past community's judgments with respect to the content of those norms to be authoritative. On this view, the present community recognizes the past community's authority to determine the content of the norms of external property ownership in taking the past community's decision adopt the concept of intellectual property, say, as a reason to treat persons as entitled to "own" certain types of ideas.

Additionally, on Brandom's interpretation of Hegel, the present, self-conscious community also recognizes the future community's authority to determine whether it has acted in accord with the norms by which it is bound—the norms adopted by the same community in the more distant past. But, and this is crucial, the future community is also bound by the present

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<sup>117</sup> Brandom (2002), pp. 229-234

community's understanding of a given norm in that it must take this understanding into account in determining how *it* will employ the norm.

To continue the example from above, assume the self-conscious future community decides to bind itself by the norms of external property ownership. In doing so, it recognizes the authority of the present and past community to determine the content of these norms. In recognizing the present community's authority, the future community must take the present community's understanding of intellectual property into account in determining how it will employ the norms of external property ownership. Additionally, in making this determination, the future community must determine whether the present community employed the concept of intellectual property, as an extension of the concept of external property, in a way that is correct according to the way the community understood that concept in the more distant past.<sup>118</sup>

The future community, in recognizing the present and past community's authority, must take their understandings of intellectual property into account in determining how it will act, and, as should be obvious at this point, the correctness of the future community's actions, with respect to the norm in question, is determined by a version of the community located in the more distant future.

For Brandom's Hegel, then, a community becomes self-conscious in recognizing the authority of a past version of itself to determine the content of some norm by which it wishes to bind itself. The present community looks to the past community's understanding of the norm to guide its current behavior. The future community determines that the present community understands and applies the norm correctly. The present community recognizes these later judgments as authoritative. The present community, then, becomes self-conscious through

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<sup>118</sup> Brandom (2002), pp. 229-234

recognizing the authority of past and future versions of itself. The present community, on this understanding of communal self-consciousness, lets history be both the source of its norms and the judge of its actions.

I find Brandom's conception of communal self-consciousness compelling, but problematic for two related reasons. First, in the individual case I understand recognition as something that takes place between actual persons who are contemporaries. A and B recognize one another in treating one another as the subjects of certain normative statuses. If for some reason A becomes unable to treat B as the subject of some normative status (by administering the norms that constitute that status), A will also be unable to recognize B in a way that will allow B to achieve self-consciousness. In this situation, B can at most *imagine* A's treating him as the subject of a normative status, or as affirming his commitments as the subject of some status. But the recognition that will ground B's self-consciousness must be actual and not merely virtual, or imagined.

To be sure, the self-conscious individual need not consult an external authority to determine the propriety of each of his commitments as the subject of a normative status. B still counts as bound by a particular norm if he, at times, regulates his behavior based on his own judgments about what A would require of him as the subject of some status. The *actual* judgments of A, however, determine the facts about what B is required to do as the subject of a normative status. A administers the norms that constitute B's status and that B is bound by a norm or set of norms cannot be established solely through B's acting on his beliefs about what A would require of him. Bindingness requires actual, and not imagined, recognition.

On Brandom's conception of communal self-consciousness, the recognition received by the present community must be wholly imagined recognition. This is so because the past version

of the community no longer exists, and the future version of the community does not yet exist. At most, the present community can imagine what the past community would say about its policies, or what the future community will say about its policies. But this imagining does not amount to actual recognition from either the past or the future versions of the community. On Brandom's conception, the present community is not bound in any real sense by either community and thus is unable to achieve genuine self-consciousness.

Second, Brandom's conception of communal self-consciousness is problematic because it does not allow us to understand how a community comes to know itself. Recall that individuals and communities come to know what they are in themselves in acting and reflecting on other's judgments of those actions. Since, on Brandom's view, a community's actions are judged by a *future* version of itself, the present community is not in a position to know what it has done, what it is in itself. The knowledge of what the present community is in itself, however provisional, only exists after that community has ceased to exist. At most, the present community can predict how it will be judged by future generations, but such predictions do not amount to self-knowledge.

These two problems arise because Brandom seeks to preserve the two-person model of recognition in his account of communal self-consciousness. The model only works, however, if the two recognizing persons are contemporaries. Since recognition is, in part, a way of treating another—a form of giving and asking for reasons—persons who recognize one another must be in close temporal proximity. A's past self is not in a position to genuinely recognize her, and, in the same way, a past version of the community is not in a position to recognize the present community.

To be sure, all recognition takes place in time and because of this any conception of communal self-consciousness and self-knowledge on which the community recognizes itself will be committed to the idea that the community that recognizes will be a past or future version of the recognized community. The temporal proximity of the two communities distinguishes the two-person model of communal self-consciousness from the one-person model. Brandom takes it that the future version of the community exists in the distant future and, as such, can be understood as a separate person, a future generation.

On the one-person model of communal self-consciousness I articulate below, the past, present, and future versions of the community are contemporaries, such that it is misleading to even refer to them as such. I take it that the community can achieve self-consciousness and gain self-knowledge by itself, without delay, within a single generation.

The problem of communal self-consciousness, as articulated here, is the problem of determining how a community, understood as a collection of individuals and their actions, can be genuinely bound by norms and know that it acts in accord with those norms given that, for Hegel, an individual can only be bound by a norm and know that she acts in accord with that norm if she exists as a member of a community.

What we are in search of is a solution to the problem of communal self-consciousness that will allow us to understand how a single community can achieve both self-consciousness and self-knowledge. Such a solution, it seems, has been hidden in plain sight. The cognitive community is a group of individuals who identify with, bind one another by, and negotiate the content of a certain set of norms. As I will explain, the cognitive community is able to achieve both self-consciousness and self-knowledge by being structured in this way.

To achieve self-consciousness, a community must not only make commitments, but be genuinely bound by those commitments. The community is a self to the extent that it is genuinely bound by certain commitments—that is, to the extent that it is the subject of one or several normative statuses—and self-conscious to the extent that it acts in accord with the dictates of those commitments.

To solve the problem of communal self-consciousness we must first note that the community is not an individual, but an abstraction. As such, the community need not achieve self-consciousness in the same way the individual achieves self-consciousness—that is, by being bound by a distinct other. We must understand the community as achieving selfhood and self-consciousness in a unique manner.

It is best to think of the community as achieving selfhood through the process by which its members negotiate to determine the content of the norms to which they have committed themselves. In a community in which negotiation is encouraged and facilitated by social institutions, no one person (or group of persons) is able to determine the content of a given norm. Each community member's take on the norms is subject to criticism. In a recognitive community, the content of the norms is determined collectively. In this way, the community itself is bound by the results of the process by which the content of its norms is determined.

On the theory under consideration, the community becomes a self through the process of negotiating the content of its norms. We can understand the community as achieving self-consciousness by acting in accord with the negotiated content of its norms. And, the members of the community determine whether the community acts in accord with the content of its norms. The community, then, achieves *self-knowledge* by reflecting on its own assessments of its actions. The community need not wait for history—a future version of the community—to



determine significance of its actions. In this way, the community binds *itself* by norms and it able to determine for itself whether it acts in accord with those norms, whether it is in fact free.

As we saw in Chapter 1, the individual cannot coherently bind herself by a norm because if both the force of her commitment to that norm—*that* the individual is bound by the norm—and content of the norm—what counts as adhering to that norm—are determined by the same individual, it makes no sense to say that the individual is genuinely bound. However, this worry about incoherence does not arise with respect to the conception of communal self-consciousness under consideration. The community is only a self in a metaphorical sense. It commits itself to norms and determines their content, but this is not problematic because the activities of commitment and determination are conducted by *groups* of recognized and recognizing persons.

Clearly, much more could be said about the nature of the policies and institutions necessary for a community to bind itself by norms. But such a discussion would cause us to deviate even further from the central concern of this chapter: the meaning of crime within a community structured by relations of reciprocal recognition. However, I will remark that if a community is to genuinely bind itself by norms, individual members of the community must be permitted to negotiate the content of the community's norms and to protest any of the community's actions they take to be in violation of those norms.

Given the conception of crime and communal self-consciousness I offer in this chapter, I have reason to discuss the role of civil disobedience within a recognitive community. Civilly disobedient acts are both crimes and acts of protest. As such, it is not immediately clear how these acts should be understood in light of the Hegelian framework presented thus far. I now turn to the task of articulating a Hegelian conception of civil disobedience.

## VII. Civil Disobedience

Hegel fails to consider criminal acts that constitute acts of civil disobedience in the PR. In this section, I will take as a starting point John Rawls' discussion of civil disobedience in *A Theory of Justice*. While I agree with much of what Rawls says about civil disobedience, my aim in this section is to define civil disobedience in a way that is more consistent with Hegel's understanding of crime. Here, I only aim to articulate a conception of civil disobedience. I will explain how a recognitive community should respond to acts of civil disobedience in Chapter 3.

In his discussion of civil disobedience, Rawls seeks to explain the role of civil disobedience within a well-ordered and nearly just society.<sup>119</sup> Thus, Rawls does not seek to explain which forms of political protest would be justified in a radically unjust society. My starting point is similar to that of Rawls. In this discussion, I assume a society structured by relations of reciprocal recognition, one in which persons are afforded a degree of bodily autonomy and are recognized as entitled to own external property.

Rawls offers a simple and compelling definition of civil disobedience, one that captures many of the features we take to be essential to the concept. For Rawls,

...civil disobedience [is] a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government.<sup>120</sup>

Rawls understands the civilly disobedient criminal act as one that expresses disapproval of some law or policy. Civil disobedience is a crime of protest.

Rawls points out that the civilly disobedient act itself need not constitute a violation of the law that is protested.<sup>121</sup> A civilly disobedient criminal may illegally block access to a public

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<sup>119</sup> Rawls (1999), p. 319.

<sup>120</sup> *Ibid.*, p. 320.

<sup>121</sup> *Ibid.*, p. 320.

government building to protest her community's tax policies. This criminal need not violate the tax law itself in order to protest that law in a civilly disobedient manner. Rawls thus distinguishes between direct and indirect civil disobedience. To conscientiously violate a law in order to protest that law is to engage in *direct* civil disobedience. To violate a law that is distinct from the law one wishes to protest *in order to* protest that law is to engage in *indirect* civil disobedience.

For Rawls, civilly disobedient criminal acts have four distinguishing features. These acts are public, nonviolent, conscientious (yet political), and illegal. I will discuss each of these features of Rawls's definition, explaining how each should be understood in relation to the Hegelian conception of crime outlined above.

Rawls points out that acts of civil disobedience are necessarily contrary to law.<sup>122</sup> The civilly disobedient criminal deliberately violates the law as an act of protest. This point is uncontroversial. What must be determined is how these illegal acts should be understood in light of Hegel's discussion of crime in the PR.

Rawls also claims that civil disobedience is a conscientious, yet political act. For Rawls, while acts of civil disobedience are motivated by an individual's sense of justice, they are political in the sense that they reference and are guided by one's understanding of the content of the political principles adhered to by persons in one's community. As Rawls writes:

[C]ivil disobedience is a political act not only in the sense that it is addressed to the majority that holds political power, but also because it is an act guided and justified by political principles... In justifying civil disobedience one does not appeal to principles of personal morality or to religious doctrines, though these may coincide with and support one's claims; and it goes without saying that civil disobedience cannot be grounded solely on group or self-interest. Instead one

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<sup>122</sup> *Ibid.*, p. 320-321.

invokes the commonly shared conception of justice that underlies the political order.<sup>123</sup>

For Rawls, the civilly disobedient criminal acts out of conscience, but his conscience is constituted by his take on the proper interpretation of the norms by which he takes himself to be bound.

Like Rawls, I conceive of civil disobedience as a conscientious, yet political act. While the civilly disobedient criminal disagrees with one or several laws adopted by his government, he forms his conception of justice based on his understanding of the norms that bind him and persons in his community. He is self-conscious in Hegel's sense because he recognizes that the norms by which he is bound are necessarily public norms.

For Rawls, since civil disobedience is an expressive act, it is necessarily a public act. He writes:

Not only is it [civil disobedience] addressed to public principles, it is done in public. It is engaged in openly, with fair notice; it is not covert or secretive. One may compare it to public speech, and being a form of address, an expression of profound and conscientious political conviction, it takes place in the public forum.<sup>124</sup>

For Rawls, then, civil disobedience is like public speech. The civilly disobedient criminal wishes to address members of his community in order to encourage them to think differently about the norms by which they govern themselves.

I agree with Rawls that acts of civil disobedience are necessarily public. And, we can see this aspect of civil disobedience as especially important in light of the Hegelian conception of crime articulated above. Recall that for Hegel crime "infringes right as right," in that individual acts of crime provide *prima facie* reasons for those who recognize the criminal to act similarly.

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<sup>123</sup> *Ibid.*, p. 321.

<sup>124</sup> *Ibid.*

Individual crimes, then, exist as threats to the existence of the criminal's recognitive community.

The civilly disobedient criminal, however, does not wish to threaten the existence of his community. He simply wishes to protest one or several of the laws that are binding on persons in his community. And, he takes it that the law he violates is binding on him until repealed by his community's legislative body. His act is not meant to serve as an act of alienation, but as an act of protest.

However, if his act is to serve this expressive function, it must be public. The civilly disobedience criminal must announce both what he is doing and why he is doing it. Otherwise, his act can be understood as an act of alienation, thereby threatening the existence of his recognitive community.

It is perhaps most imperative that acts of *indirect* civil disobedience are committed publically. One's violation of a law in order to express disapproval of a distinct law is only coherent if one publically announces that one's violation of the first law is to serve this expressive function. Absent a public articulation of the meaning of her civilly disobedient act, the act of the criminal who engages in indirect civil disobedience will only express alienation from the law violated, not the law he seeks to protest. The meaning of acts of direct and indirect civil disobedience must be articulated and thus these acts must be committed publically.

For Rawls, civil disobedience is nonviolent for two, related reasons. First, Rawls takes it that the use of violence interferes with the expressive purpose of the civilly disobedient act. For Rawls,

[t]o engage in violent acts likely to injure and to hurt is incompatible with civil disobedience as a mode of address.... civil disobedience is giving voice to conscientious and deeply held convictions; while it may warn and admonish, it is not itself a threat.<sup>125</sup>

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<sup>125</sup> *Ibid.*

I think that Rawls is exactly right on this point and that his thinking here can be more completely articulated in Hegelian terms. Rawls's thought is that civilly disobedient acts that threaten the bodily autonomy of others will likely obscure the view the civilly disobedient criminal seeks to express in acting because violent acts, in most cases, constitute violations of norms that most civilly disobedient criminals should identify with. The norms of bodily autonomy underlie many of the claims the civilly disobedient criminal wishes to express in engaging in civil disobedience.

For example, A wishes to engage in civil disobedience in order to protest a law that permits women to terminate their pregnancies before a certain point in the fetus's development. A believes that life begins at conception and that all human life is deserving of protection. He therefore believes that all abortions should be outlawed. In protest of the law permitting abortion, A sets off a bomb in an abortion clinic, killing several innocent persons.

In this case, A obscures the message he wishes to express in so acting. In part, he wishes to express the view that all human life is deserving of protection, but he does so by interfering with the bodily autonomy of innocent persons in the most extreme fashion. The norms of bodily autonomy underlie the claim he wishes to express in destroying the abortion clinic. A's message is thus obscured by his means of expression.

The self-conscious, yet civilly disobedient criminal understands that the norms of bodily autonomy underlie all of the more particular norms that constitute his community. Therefore, he refrains from violating these norms even in engaging in a crime of protest.

Rawls also takes it that civil disobedience is nonviolent because in acting in a civilly disobedient manner one seeks to protest a particular policy or law, while expressing one's basic fidelity to law as such. As Rawls writes,

[i]t [civil disobedience] expresses disobedience to law within the limits of fidelity to law, although it is at the outer edge thereof. The law is broken, but fidelity to law is expressed by the public and nonviolent nature of the act...<sup>126</sup>

For Rawls, violence not only obscures the civilly disobedient criminal's message, but is also inconsistent with the civilly disobedient criminal's understanding of himself an individual who is bound by the norms articulated in his community's laws. The civilly disobedient criminal does not wish to protest the authority of his community's legislative body, but only one of the laws posited by that body.

Rawls is correct to think that violent acts hinder the civilly disobedient criminal's ability to express fidelity to the law, but he fails to fully articulate his reasons for adopting this view. Relying on the premise that the norms of bodily autonomy underlie all of the more particular norms that constitute ethical life, I will construct an argument for the claim that violent crimes of protest are in tension with the expression of fidelity to law.

To express fidelity to law as such is to express one's belief that the overall normative structure that constitutes one's community is just and deserving of respect. To respect the normative structure of one's community is to identify with the norms guiding the community's legislative body and the process by which those norms are made more determinate. One who identifies with the normative structure of his community takes the legislature's positing some action as criminal as a sufficient reason to not engage in that action.

A legislative body can only legislate coherently if guided, in part, by the norm that recognized persons must be afforded a certain degree of bodily autonomy. There can be no coherent norms absent recognition, and no recognition absent bodily autonomy. Thus, any coherent legislative body will criminalize certain types of killings and assaults in order to

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<sup>126</sup> *Ibid.*, p. 322.

guarantee that members of the recognitive community are afforded the bodily autonomy necessary to recognize others. The norms of bodily autonomy underlie all of the more particular norms that constitute ethical life.

To violate the norms of bodily autonomy is to violate norms that the legislature (and the members of one's community) *must* take seriously. Thus, there is a tension between violent crimes of protest, which are aimed at causing physical harm to others, and the expression of fidelity to the law. In most cases, in violating the norms of bodily autonomy, one expresses disrespect for the norms that constitute one's community and a willingness to defy the authority of the legislative body tasked with determining the specific content of those norms.

Note that the characterization of civil disobedience as non-violent is consistent with the fictional genealogy of external property norms I offer in Chapter 1. There, I explain how it could have come about that one must recognize others as entitled to own external property if one is to so recognize oneself. According to the story I tell in Chapter 1, persons subject to a property regime in which only one person is entitled to own external property engage in non-violent acts of civil disobedience in order to encourage the individual entitled to own external property to renegotiate the norms of external property ownership. Thus, we can understand the norms of external property ownership as emerging from acts of civil disobedience that express fidelity to law as such.

Rawls also thinks that the civilly disobedient criminal accepts the legal consequences of his act. For Rawls, in accepting the penalty for his crime, the civilly disobedient criminal both express his fidelity to law as such and the politically conscientious nature of his act.<sup>127</sup> Rawls' thought is that in accepting punishment for his crime, the civilly disobedient criminal signals to

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<sup>127</sup> *Ibid.*



the majority that he does not violate the law out of mere self-interest or out of a desire to undermine the authority of the law as such.

Rawls is correct to point out that the civil disobedient criminal's acceptance of punishment serves an important expressive function. However, I wish to articulate a conception of the civilly disobedient criminal's reasons for accepting punishment that is informed by Hegel's understanding of crime.

The civilly disobedient criminal, as I understand him, is fully self-conscious. He is and treats himself as the subject of one or several normative statuses. In publically and conscientiously violating a law posited by his community's legislative body, he petitions the members of his recognitive community to alter or repeal a law he deems problematic. His crime is an expression of his disapproval of at least one of the norms embraced by his community. He sees his crime as a means to convince the members of his community to renegotiate and ultimately change the content of the one or several of the norms that constitute the community.

While the self-conscious, yet civilly disobedient criminal seeks to alter some of the norms that constitute his community, he also wishes to leave the community itself intact. He recognizes that he can only be the person he takes himself to be if he exists as a member of a recognitive community. He also recognizes that crime is a threat to the existence of his community. He recognizes, that is, that crime infringes right as right.

In order to prevent his civilly disobedient act from constituting a threat to his community's existence, the civilly disobedient criminal openly accepts the legal consequences of his crime. In doing so, he shows that he takes himself to be bound by the norm he violates in protest. Put another way, in accepting the penalty for his crime, the civilly disobedient criminal

expresses his disagreement with some of his community's norms, while also accepting the community's authority to posit norms that are genuinely binding on him.

Thus, while the civilly disobedient criminal's acceptance of punishment does express his fidelity to law and the conscientious nature of his act, as Rawls points out, the self-conscious, yet civilly disobedient criminal has a further reason to accept the legal consequences of his act. Accepting punishment allows the civilly disobedient criminal to violate the law without thereby undermining the authority of his community's legislative body. The civilly disobedient criminal wishes to change his community, he does not seek to threaten its existence.

Additionally, the self-conscious, civilly disobedient criminal views civil disobedience as a tactic of last resort. He first seeks to negotiate a change in the content of the norms that constitute his community. It is only when these attempts at negotiation are not met with sincerity, when his community fails to provide reasons for its refusal to adopt his proposed changes, does the self-conscious individual resort to civil disobedience. He is willing to accept the results of a fair and open process of negotiation, even if he disagrees with those results.

We now have in view a conception of civil disobedience informed by Hegel's discussion of crime in the PR. The civilly disobedient criminal engages in a public, nonviolent form of protest that involves the violation of a law posited by his community's legislative body. His protest is conscientious, yet political in that his objection to the law he protests is informed by his understanding of the norms that constitute his community. Because he recognizes that his self-conception turns on the continued existence of his community, he accepts the penalty for his crime in order to affirm the law-making authority of his community's legislature.

In the next chapter, I will complete my discussion of civil disobedience, explaining further how we should understand the function of punishment with respect to the crimes of the civilly disobedient.

## Chapter 3: Punishment

### I. Introduction

In the previous chapter, we saw that Hegel understands crime as a disruption of ethical life (*Sittlichkeit*). The criminal fails to recognize his victim as the subject of some particular status and thereby threatens to undermine the recognitive relations that constitute ethical life. In this chapter, I will consider Hegel's thoughts on how crime should be addressed within a recognitive community.

Recall that for Hegel crime (1) "infringes right as right," is a (2) "negatively infinite judgment in its full sense"<sup>128</sup> and is (3) "inherently...null and void."<sup>129</sup> Crime, for Hegel, infringes right as right in that criminals, in failing to adhere to the norms embraced by their community, expresses their alienation from those norms and thus give persons in their community reasons to act similarly, thereby threatening the existence of the community itself.

Additionally, we saw that for Hegel crime is like a negative infinite judgment (or a category mistake in Ryle's terminology). The person who makes a negative infinite judgment asserts of a thing in one category what can only be intelligibly said of things in another category. The person who asserts a negative infinite judgment fails to make sense because he ignores the norms that allow persons to make sense in asserting similar judgments.

Hegel believes that crime is like a negative infinite judgment in that crimes constitute a person's attempt to make a commitment *as* the subject of some particular status *by* violating the norms that constitute that status. Hegel believes that crimes are unintelligible for the same reason

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<sup>128</sup> Hegel (1998), p.98.

<sup>129</sup> *Ibid.*, p.100.

that negatively infinite judgments are intelligible: both actions constitute a rejection of the norms that would make similar acts intelligible.

Finally, a crime, for Hegel, is inherently null and void because (1) it constitutes a negative infinite judgment and, as such, is unintelligible and should not be afforded normative significance and because (2) the criminal, in acting, desires to be the *sole determiner* of which actions are in accord with the normative status of which he conceives himself a subject.

In Chapter 2, we also saw that Hegel's characterization of crime is incomplete because he fails to address the weak-willed criminal, the criminal who acts out of economic need, and the civilly disobedient criminal. In this chapter, I will consider how these classes of criminal should be treated within a recognitive community, thereby extending Hegel's conception of criminal justice.

In Chapter 2, I explain that for Hegel the content of the norms that constitute ethical life is to be determined by a legislative body. There I also illustrate that our contemporary categories of *actus reus* and *mens rea*, the core elements of crime, can be understood in terms of recognition. The criminal act, as *we* understand it, is an act in which one fails to recognize another.

Finally, in Chapter 2 we saw that for Hegel both the individual and the community gain self-knowledge through acting. The individual learns whether she has acted in accord with the norms of some particular status in taking note of how her action is judged by those she recognizes. Similarly, the community learns whether it adheres to the norms that it purports to embrace by assessing its actions and, particularly, its *assessments* of the actions of individual community members. For Hegel, individuals and communities learn what they are in themselves, whether saint or sinner, in acting.

In this chapter, I present a Hegelian conception of criminal justice. In section II provide an interpretation of Hegel's remarks on punishment, arguing that we should understand Hegel as supporting a restorative conception of punishment. In section III, I consider how the Hegelian, restorative conception of punishment should understand the role of the state and the criminal justice system in relation to several non-standard cases. In section IV, I explain the relationship between punishment and communal self-consciousness. And, in section V, I explain how the phenomenon of civil disobedience should be understood from the Hegelian, restorative perspective.

## II. Hegel on Punishment

### a. *Punishment as authorized coercion*

Hegel uses the term coercion to mean either physical coercion or volitional coercion. Physical coercion involves one's physically taking control of another's body or property. Both pushing another to the floor and stealing another's wallet are acts of physical coercion. Volitional coercion involves one's threatening harm to another's body or property in order to get that person to act, or refrain from acting, in a certain way. The criminal who forces his victim to hand over her purse at gunpoint engages in volitional coercion.

Clearly most crimes are coercive. But punishment is also coercive. In punishing, the state either takes physical control of the criminal's body or threatens harm to the criminal's body or property in order to get him to act in a particular way. Imprisonment is a form of physical coercion, and the threat of prison or fines is a form of volitional coercion.

Hegel believes that the state is authorized to coerce in this way because crime constitutes an attack on the community's norms, and thus the community. Thus, for Hegel, punishment is justified as a form of communal self-defense. In §94 Hegel writes:

Abstract right is a *right to coerce*, because the wrong which transgresses it is an exercise of force against the existence of my freedom in an external thing. The maintenance of this existence against the exercise of force therefore itself takes the form of an external act and an exercise of force annulling the force originally brought against it.<sup>130</sup>

Hegel takes it that punishment annuls crime and thus preserves the community's norms. Of course, much more must be said about how punishment annuls crime, how crime's annulment serves to preserve the community's norms, and what form punishment must take if it is to serve this function. First, however, I will explain the distinction Hegel makes between punishment and revenge.

*b. Punishment versus revenge*

At the outset of the discussion of criminal justice in the PR, Hegel makes a crucial distinction between legal punishment and revenge. For Hegel, legal punishment constitutes an affirmation of the laws of a given community, while revenge only affirms the status of an individual. The person who seeks revenge seeks to avenge a *personal* injury, while the person (or community) that seeks to punish seeks to address a violation of the *law*.

Hegel claims that legal punishment is only possible after courts of law have been established. In §220 of the PR, in the context of a general discussion of the proper function of courts of law, Hegel writes:

Instead of the injured party, the injured *universal* now comes on the scene, and has its proper actuality in the court of law. It takes over the pursuit and the penalizing of crime, and this pursuit consequently ceases to be the subjective and contingent retribution of revenge and is transformed into the genuine reconciliation of right with itself, i.e. into *punishment*.<sup>131</sup>

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<sup>130</sup> Hegel (1998), p. 98.

<sup>131</sup> *Ibid*, p. 209.

For Hegel, punishment takes place within ethical life, and is an affirmation of the norms that constitute ethical life. Absent relations of reciprocal recognition, and institutions that apply and determine the content of the community's norms, there can be no punishment.

In fact, Hegel believes that an act of mere revenge *is* a crime, which itself could be responded to by an act of revenge. Hegel argues that if the form of justice were revenge, there would be no just responses to crime, simply an infinite progression of crime. In §102 Hegel writes:

...revenge, because it is a positive action of a particular will, becomes a new transgression; as thus contradictory in character, it falls into an infinite progression and descends from one generation to another *ad infinitum*.<sup>132</sup>

What must be explained, of course, is why Hegel thinks that punishment is the "genuine reconciliation of right with itself," and not a disguised form of revenge.

*c. Punishment as repairing the damage done by crime*

As I discuss below, Hegel understands crime as causing several types of harm. The criminal infringes right as right, undermines both his status and that of his victim, and causes his victim physical and psychological harm. Left unaddressed, crime will destroy a community. Ultimately, punishment is the process by which a community repairs the damage done by crime, thereby preserving the recognitive relations that constitute the community.

Hegel believes that some crimes are worse than others and that a community's punishment regime should be sensitive to this fact. He objects to the "[s]toic view that there is only one virtue and one vice," and "the laws of Draco which prescribe death as a punishment for every offence."<sup>133</sup> He believes that both conceptions of crime and punishment fail to take seriously the qualitative nature of crime, and instead focus only on the fact that all crimes

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<sup>132</sup> *Ibid.*, p. 106.

<sup>133</sup> *Ibid.*, p.99.



constitute a failure of recognition. Below I articulate the ways in which crimes can vary in severity.

While Hegel believes that a punishment must be proportional to the crime it punishes, he does not believe that proportionality requires qualitative identity. Hegel is opposed to talion law, which punishes murder by death, and assault by assault, for example.<sup>134</sup>

Hegel believes that punishments need not be qualitatively equal to the crimes they punish, but equivalent in *value*. In §101 of the PR, Hegel writes:

This identity [between a crime and its punishment] rests on the concept, but it is not an equality between the specific character of the crime and that of its negation; on the contrary, the two injuries are equal only in respect of their intrinsic character, i.e. in respect of their *value*.<sup>135</sup>

And later:

*Value* [is] the inner equality of things which in their outward existence are specifically different from one another in every way.<sup>136</sup>

A view like the one Hegel advocates in §101 would allow us to make sense of the idea that imprisonment can be a fitting or just punishment for theft, for instance. But to fully understand the view Hegel endorses in these passages, we must first get clear on how Hegel understands the concept of value.

In §63 of the PR, Hegel discusses the concept of value in relation to external property.<sup>137</sup> There, he equates the value of a thing to its usefulness, or utility. Hegel is thus able to claim that while two things may differ in certain respects, they may be of equal value. For example, a

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<sup>134</sup> *Ibid.*, pp. 103-105.

<sup>135</sup> *Ibid.*, p. 104.

<sup>136</sup> *Ibid.*, p. 105.

<sup>137</sup> *Ibid.*, pp. 74-75.

wooden chair and a plastic chair differ qualitatively, but may be of equal value in that they can be used for the same purposes.

In §63, Hegel also claims that a situation can arise in which one owns the use of a thing, but not its value. The feudal tenant, Hegel claims, owns the use of certain items in that he is permitted to use those items to satisfy his needs, but does not own the value of the objects he is permitted to use because he is not able to sell or trade those objects for products that are of equal value. For Hegel, then, the value of a thing is distinct from its qualitative properties and can be assigned to persons who do not physically possess the valued object.

In his discussion of value in relation to crime and punishment, Hegel directs the reader to §77 of the PR, in which he discusses the nature of value in relation to the objects exchanged in a contract for the sale of goods. There he writes:

Since in real contract each party retains the same property with which he enters the contract and which at the same time he surrenders, what remains identical throughout as the intrinsic property in the contract is distinct from the external things whose owners change when the exchange is made. What remains identical is the *value*, in respect of which the objects of the contract are equal to one another whatever the qualitative external differences of the things exchanged. Value is their *universal* aspect.<sup>138</sup>

Hegel thinks that we need a conception of value if we are to understand contractual relationships. For Hegel, there is a sense in which parties to a contract for the sale of goods do not gain or lose property after the terms of the contract have been fulfilled. Hegel believes that while each party exchanges a different concrete good or service, the exchanged items are equal in value, or utility.

As Marx later realized,<sup>139</sup> Hegel's conception of value is underdeveloped in many respects. Hegel realizes that if two items that differ qualitatively are to be considered equal, there must be something about those items that is distinct from their qualitative features that can serve

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<sup>138</sup> *Ibid.*, p. 86.

<sup>139</sup> Marx (1992), pp. 125-153.

as a basis of comparison. Hegel recognizes the need for a theory of value. However, Hegel's conception of value as utility does not allow us to understand how two items that are used for completely different purposes—cows and lumber, for instance—can be of equal value. Marx famously develops Hegel's conception of value, drawing a distinction between use-value, or utility, and exchange-value, or what a good can be exchanged for in a market, and is thus able to address this problem.<sup>140</sup>

Though we must view Hegel's conception of value as underdeveloped, it does allow us to better understand his conception of punishment. Returning to that conception, Hegel tells us that punishments and the crimes that they punish can be of equal value. Given Hegel's conception of value, we can understand Hegel as holding the view that a punishment and the crime it punishes can be of equal value in that the punishment can serve to fully repair the damage done by the crime.

For Hegel, the punishment and crime can be exchanged, so to speak, without the community itself suffering a net loss. Hegel believes that after the terms of a contract for the sale of goods have been fulfilled, the parties to the contract are as they would have been had the contractual exchange not taken place. This is so because, on Hegel's conception, the goods they exchange are of equal value. In a similar fashion, Hegel believes that after the criminal is punished, the community is as it would have been had the crime not taken place.

We can get a better understanding of Hegel's take on the relationship between crime and punishment by consulting a few passages from the PS. Toward the end of the PS chapter entitled "Spirit," Hegel claims that Spirit, understood as a community of recognized and recognizing

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<sup>140</sup> *Ibid.*

persons, has the ability and authority to repair the damage done by crime (or "evil," in the language of the PS). At §667 of the PS Hegel writes:

Spirit, in the absolute certainty of itself, is lord and master over every deed and actuality, and can cast them off, and make them as if they had never happened.<sup>141</sup>

Later, at §669, Hegel writes:

The wounds of the Spirit heal, and leave no scars behind. The deed is not imperishable; it is taken back by Spirit into itself, and the aspect of individuality present in it, whether as intention or as an existent negativity and limitation, straightway vanishes.<sup>142</sup>

In these passages, Hegel indicates that the action the community takes in response to crime must be one that serves to make the community whole. Hegel tells us that the crime is not imperishable. As a negative event, as an event that causes harm, the crime does not last forever. Hegel indicates that the community has the authority to take on the crime and transform it in a way that does away with its negative character, thereby healing the wounds caused by the crime.

As I indicate in Chapter 2, the crime initially causes harm of four types. First, as an action taken by a recognized member of the community, a crime carries a certain amount of normative weight. It provides a reasons for others to commit a similar crime, thereby threatening the existence of the norm(s) the criminal violates.

Second, the crime undermines one or several of the normative statuses of its victim. The victim of assault is the owner of her body, but her status as such is undermined by her assailant. Likewise, the victim of theft is entitled to own external property, but her status as such is undermined by the person who steals her property.

Third, most crimes cause some type of physical or psychological harm. The victim of assault suffers bodily harm and, in most cases, suffers some degree of psychological harm

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<sup>141</sup> Hegel (1977), p.406.

<sup>142</sup> *Ibid.*, p. 407.

brought about by feelings of disrespect, fear, and vulnerability. Likewise, the victim of theft is harmed in that she is deprived of her property. And, like the victim of assault, the victim of theft may suffer psychological harm in the form of fear and a feeling of vulnerability.

Finally, as we saw in Chapter 2, the criminal harms himself in two ways in committing a crime. Persons are only free to the extent that they are self-conscious, and self-consciousness is only possible within ethical life. Because crime threatens to undermine the recognitive relations that constitute ethical life, the criminal act exists as a threat to the criminal's freedom.

Additionally, since crime is unintelligible as a negative infinite judgment, the criminal involves himself in an absurdity of which he is unaware. The criminal attempts to make a commitment as the subject of some normative status by violating the norms that constitute that status. He is conceptually bound to fail in his attempt to do so, and to the extent that he takes himself to have succeeded, the criminal is blind to himself and the meaning of his actions.

As we saw in Chapter 2, the MPC allows us to understand the Hegelian conception of crime in a more nuanced way. Particularly, the MPC allows us to understand that crime can vary in severity in terms of *actus reus* and *mens rea*.

In most cases, the criminal act (*actus reus*) is one that causes the victim to lose control of something that she is entitled to control. This thing is typically her body or a piece of external property. This loss of control can vary in degree, corresponding to the amount of damage done to the victim's body or property.

Likewise, the MPC's *mens rea* requirement reflects varying degrees of criminal culpability. On the MPC view, the purposeful criminal is (in many cases) more culpable than the knowledgeable criminal, who is more culpable than the reckless criminal, who, in turn, is more culpable than the negligent criminal. This gradation in culpability corresponds to the degree of

mastery each class of criminal exhibits in acting. The view that crimes vary in severity and that punishments should be sensitive to this fact is expressed in Hegel's PR and in a more nuanced form in the MPC.

Given that the criminal provides reasons for members of his community to commit crimes, the amount of damage done by a crime is partly a function of the extent to which members of the criminal's community take the criminal's reason(s) for action to be good reasons. On this conception, an act of petty theft that is regarded as wrong by most of the members of the criminal's community will be considered less of a harm than a similar act that is regarded as just.

Because punishments must be tailored to repair the damage done by crime, and the damage done by a crime is partly determined by the attitudes of persons in the criminal's community, Hegel believes one cannot determine *a priori* which punishments are appropriate for particular crimes. At §218 of the PR, Hegel writes:

If society is still unstable in itself, then an example must be made by inflicting punishments, since punishment is itself an example over against the example of crime. But in a society which is internally strong, the commission of crime is something so feeble that its annulment must be commensurable with its feebleness. Harsh punishments, therefore, are not unjust in and for themselves but are related to contemporary conditions. A criminal code cannot hold good for all time, and crimes are only semblances of reality which may draw on themselves a greater or lesser degree of repudiation.<sup>143</sup>

Hegel understands the stability of a given community in terms of the attitudes of its members with respect to the law. In a stable community, persons respect the law because they view adherence to the law as constitutive of their personhood. On the other hand, Hegel understands widespread alienation from the law as the defining feature of an unstable community. And, as indicated in the passage quoted immediately above, Hegel believes that proper punishments are determined relative to the stability of the community in which they are inflicted.

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<sup>143</sup> Hegel (1998), p. 207.

For Hegel, the just punishment must be designed to achieve several goals. Given the four types of damage done by crime, we can understand the just punishment, the punishment that heals the wounds caused by crime, as an act in which the state coerces the criminal in a way that demonstrates that the criminal's reason for action should not be taken as a good reason, affirms the victim's status as the owner of her body or as entitled to own external property, repairs the physical and psychological damage done to the victim of crime, and repairs the damage the criminal does to himself in committing a crime. Hegel believes that one can only determine which punishments will achieve these ends in relation to a given community.

To summarize, Hegel believes that a punishment must reflect the severity of the crime it punishes. The crime and punishment must be of equal value in the sense that the punishment repairs the damage done by the crime. The degree of damage done by a particular crime is partly a function of the attitudes of members of the community in which the crime is committed. Hegel concludes that because of this we cannot determine *a priori* how a particular type of crime should be punished.

#### *d. Forms of punishment*

Somewhat surprisingly, Hegel has little to say about what form(s) punishment must take if it is to serve the purpose of repairing the damage done by crime. The claims Hegel does make concerning forms of punishment are restricted to §101 of the PR. And there Hegel only implicitly claims that fines and imprisonment are acceptable, yet not necessary forms of punishment. Hegel claims that these punishments can be seen as fitting or justified if we move away from a talion conception of law and understand crimes and punishments as potentially

equivalent in value.<sup>144</sup> In this section, I supplement Hegel's discussion of punishment, arguing that restorative punishments are best suited to repair the damage done by crime.

As I discuss below, Hegel takes it that punishment is a form of recognition. For Hegel, the criminal is honored as rational in being punished. Given that Hegel believes that punishment is a form of recognition, a Hegelian conception of punishment should not endorse individual punishments that constitute gross failures of recognition.

Hegel believes that though the criminal violates the norms that constitute one or more of his normative statuses, he is still to be considered a member of the community. Though the criminal undermines his status, his criminal act does not give persons in his community reason to permanently deprive him of his status as the owner of his body or as entitled to own external property. For Hegel, one of the end goals of punishment is the criminal's achieving self-consciousness.

Given this goal of punishment, we can specify at least two categories of punishment that constitute gross failures of recognition. First, the state fails to recognize the criminal in inflicting a punishment that permanently deprives the criminal of his ability to achieve self-consciousness. Forced slavery and execution are punishments that fit this category. The slave, as we have seen, is commanded and, as such, is unable to take on commitments of his own. Unable to take on

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<sup>144</sup> In an addition to §101, Hegel's student Eduard Gans writes:

Now although requital cannot simply be made specifically equal to the crime, the case is otherwise with murder, which is of necessity liable to the death penalty; the reason is that since life is the full compass of [a human being's] existence, the punishment here cannot simply consist in a *value*, for none is great enough, but can consist only in taking away a second life. Hegel (1998), p. 106.

According to Gans, Hegel believes that murder must be punished by death because no other punishment can serve to repair the damage done by an act of murder. However, this claim is not Hegel's and is not reflected in the text of the PR. Therefore, I do not consider it an essential element of Hegel's theory of punishment.



commitments of his own, the slave is unable to recognize another person, which is necessary if he is to achieve self-consciousness. And, clearly, persons cannot achieve self-consciousness after their biological lives have ended. Thus, forced slavery and execution are punishments that constitute gross failures of recognition on the part of the state.

Second, the state fails to recognize the criminal in punishing him in a way that causes permanent, or semi-permanent, physical or psychological damage. Hand amputation, severe beating, torture, and many forms of imprisonment are punishments that fit this category. Inflicting any punishment in this category hinders the criminal's ability to achieve full self-consciousness within his community. The maimed criminal is only capable of a certain amount of bodily autonomy, and the psychologically damaged criminal is restricted in the type of life goals he can reasonably pursue. As a general matter, a punishment that is also a form of recognition does not hinder the criminal's future ability to achieve self-consciousness.

While Hegel does not make any solid commitments regarding the issue of what form punishment should take, having a more concrete conception of punishment in view will allow us to make better sense of many of the claims that Hegel makes about punishment in the PR. Additionally, a complete Hegelian theory of punishment should put us in a position to critique current punishment practices. Absent an endorsement of one or several forms of punishment, the theory cannot serve this purpose.

I contend that penal measures that have been grouped under the term "restorative justice," best fit the Hegelian conception of punishment in that they are best suited to repair the damage done by crime. Restorative approaches to criminal justice seek to bring criminals and their victims together to discuss the nature of the offense in question, offer and accept apologies, and

determine what penalty would serve to either make the victim whole or directly benefit the criminal and victim's community. As Michael Wenzel writes:

Restorative punishments are more constructive and meaningful in that they oblige the offender to do something for the victim (or, alternatively, to victims of similar offenses), provide some service to the community, or take part in an educational program.<sup>145</sup>

Restorative penalties seek to repair the damage caused by crime, as opposed to traditional punishments that are primarily aimed at inflicting harm on the criminal.<sup>146</sup>

Many advocates of restorative penalties take on the Hegelian idea that crime essentially involves the breach of values shared by criminal and victim. These advocates understand crime as undermining those values and punishment as a means by which shared values are reaffirmed.

In "Justice through consensus: Shared identity and the preference for a restorative notion of justice," Wenzel writes:

...an offence is the violation of a value consensus and disregard for a collectively shared view of what is right and wrong. Here, the essential meaning of the offence is the violation of shared values, which is likely to go hand in hand with feelings of disappointment or sadness in those affected by the transgression. In order to restore justice, the social consensus needs to be re-established and the values reaffirmed.<sup>147</sup>

Thus, while not employing the concept of recognition, restorative justice theorists understand norms as grounded, in part, by communal consensus such that crime serves to undermine a community's values.

Crucially, the restorative approach to punishment encourages criminals and victims to give and ask for reasons. Typically, a state-appointed mediator facilitates the discussion between

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<sup>145</sup> Wenzel (2008), p. 377.

<sup>146</sup> *Ibid.*, pp. 376-377.

<sup>147</sup> Wenzel (2009), p. 911. See also: Miller and Vidmar, N. (1981).

criminal and victim in a space in which both parties feel comfortable.<sup>148</sup> The criminal is given an opportunity to explain why he committed his crime, and to offer an apology. The victim is given an opportunity to discuss the impact of the crime on her life and accept the criminal's apology. The restorative approach to punishment allows criminals and victims to both literally and figuratively enter a space of reasons.

Restorative penalties most often involve some combination of community service and the payment of restitution. These penalties can serve as an alternative to prison or can be part of a criminal sentence which includes prison. Within the Hegelian framework, prison ideally serves a coercive purpose as the punishment of last resort for criminals who refuse to participate in the restorative process. Less ideally, a prison sentence can serve as a step toward healing the wounds created by crime by allowing the criminal the time and space to reflect on his crime while also participating in a dialogue with his victim in a structured and supervised setting. As mentioned above, prison must not be such as to cause permanent, or semi-permanent, psychological damage to the criminal. Whether prison can be structured in a way that is acceptable from the Hegelian perspective is ultimately an empirical question.

The restorative justice model can be engineered to address the four types of harm caused by crime. First, restorative penalties can address the criminal's infringement of right as right. In an addition to §218 of the PR, Gans writes that punishment is “an example over and against the example of crime.”<sup>149</sup> Hegel believes that punishment is, in part, an expression of disapproval. In punishing, the state expresses the view that the criminal's reason for action is not a good reason, that the criminal's example should not be followed. The restorative penalty, in that it is a response to the criminal's action as reason-providing, serves this expressive function.

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<sup>148</sup> See Wenzel (2009).

<sup>149</sup> Hegel (1998), p. 208.

Second, the criminal undermines one or several of the normative statuses of his victim. A restorative penalty may require the criminal to pay restitution or render some service to his victim (or his victim's family), or work toward genuinely apologizing for his crime. Each of these actions allows the criminal to reaffirm the normative status he undermines in committing a crime because each action constitutes an act of recognition. In returning stolen money, helping his victim recover from an assault, or simply apologizing for his crime, the criminal recognizes his victim as the owner of her body or as entitled to own external property.

Third, the restorative penalty can go some way toward repairing the physical and psychological harm caused by crime. As already mentioned, a restorative penalty may require the criminal to pay restitution or otherwise help his victim to recover lost property or recover from bodily injury. The restorative penalty may also allow the victim to recover from psychological harms caused by feelings of disrespect or vulnerability. Restorative justice encourages the victim to engage with the criminal, explaining the harm the criminal has caused, and listening to the criminal's explanation of the circumstances that led him to commit his crime.

Ideally, this process ends in an offered and accepted apology. These small acts of recognition may allow the victim to both regain the sense of dignity and respect that was taken away by the criminal and feel less vulnerable to further acts of crime. Of course, the extent to which a restorative penalty will yield these benefits is a matter to be determined empirically.

Forth, the criminal harms himself in two ways in committing a crime. The criminal undermines the recognitive relations that constitute ethical life, thereby undermining his own freedom. Additionally, the criminal involves himself in an absurdity of which he is unaware in attempting to make a commitment as the subject of some normative status by violating the norms that constitute that status. To the extent that the restorative penalty expresses disapproval of the

criminal's action, the criminal's reasons are shown to be bad reasons, thereby negating the effect that those reasons would have if left unaddressed. Thus, part of the harm the criminal does to himself, to his freedom, is addressed by the restorative punishment.

The criminal cannot maintain any normative status and interfere with the bodily autonomy of others. Nor can the criminal maintain his status as entitled to external property and steal from others. The criminal undermines his own status in failing to recognize others. As I have mentioned, one of the goals of punishment is to make the criminal aware that his status as the owner of his body, or as entitled to own external property is contingent on his behavior. The restorative penalty can be designed to advance this goal.

Recall that it is a contingent fact that persons must recognize others as entitled to own external property if they are to so recognize themselves. Because of this, the state must punish to make it the case that persons who wish to recognize themselves as entitled to own external property must respect the external property of others. Punishments that at least temporarily deprive criminals of some or all of their property serve to link the status of the external property owner to certain forms of property recognition.

In requiring thieves and others who violate the property rights of others to pay restitution to their victims, the restorative penalty both connects the status of external property owner to certain forms of property recognition and demonstrates to the individual criminal that he must respect the property of others if he is to be fully entitled to own property.

The relationship between the criminal's status and his recognition of others should be made explicit to the criminal as well. The state, in the person of a judge or another third party tasked with mediating conversations between the criminal and his victim, should explain to the criminal why he must pay restitution and why his crime is ultimately absurd and unintelligible. If

all goes well, the absurdity of the criminal's action becomes apparent to him as he is made to make his victim financially whole.

Persons *must* recognize others as owning their bodies, and be recognized *as* owning their bodies, if they are to be the subject of any further normative status. The criminal undermines his status as the owner of his body and as entitled to own external property in forcibly restricting the bodily autonomy of others. Given that there is a necessary connection between the criminal's self-consciousness and his respect for the bodies of others, the state need not punish to establish this fact.

Though punishment is not necessary to establish the absurdity of a violation of the norms of bodily ownership, the restorative punishment can make the criminal aware of the true nature of this type of crime. As is the case with respect to crimes against external property, the state should make explicit to the criminal the relationship between his respect for the bodies of others and his ability to recognize himself. The state need not articulate this point with the amount of detail found in the PR or the PS, but it should convey the simple point that criminal is only a free citizen of the state because other free citizens treat him as such and that his crime undermines the ability of others to treat him in accordance with his own self-conception as free and authoritative.

Admittedly, the average criminal may not fully comprehend the state's explicit appeal to Hegelian doctrine, or even a simplified version of the doctrine. While the criminal may be able to easily grasp an explicit articulation of the relationship between his status as the owner of external property and his respect for the property of others, he may find the connection between his respect for the bodies of others and his self-consciousness more difficult to understand.

The restorative penalty, however, may allow the criminal to understand the importance of recognition through interaction with his victim. In talking with his victim, the criminal learns

how his crime has negatively impacted the victim herself and the victim's family and community. More specifically, through conversation the criminal learns exactly how his crime has undermined his victim's bodily autonomy.

As part of the conversation, the victim should be encouraged to express her outrage and anger toward the criminal. The victim, at least in the initial stages of the conversation, acts as a judge, blaming the criminal for what he has done and asserting that the criminal is not, and has never been, authorized to restrict her bodily autonomy. In doing this, the victim explicitly denies the criminal the authorization he assumes in committing his crime. The aim of this process is to push the criminal to realize that he is not in fact authorized to violate the bodies of others and that authorization in general must come from those he recognizes.

The hope is that this initial stage of the conversation will allow the criminal to recognize and confess his error and prompt him to ask for the victim's forgiveness. The victim, in turn, should forgive the criminal, recognizing him as member of the community.<sup>150</sup>

In the PS, Hegel offers a thoughtful and penetrating account of confession and forgiveness. In Hegel's allegorical account, the wrongdoer, the criminal, comes to reject the attitude of mastery, declaring that neither he nor his victim is the sole determiner of the content of the norms that constitute their community. This is the criminal's confession.

For Hegel, the victim's forgiveness consists in her accepting the criminal's confession by declaring that she and the criminal are equals in that neither party has sole authority over the content of the community's norms. The victim realizes that she too could have violated one or several of the community's norms and, as such, it is a contingent matter that she is the victim and

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<sup>150</sup> Of course, the victim of murder will not be able to participate in this stage of the restorative process. In the case of murder, when possible, the criminal should be made to dialogue with his victim's family.

the criminal stands in need of forgiveness.<sup>151</sup> In forgiving in this way, the victim recognizes the criminal.<sup>152</sup>

However, allegorically, the victim fails to forgive the criminal and instead continues to judge the criminal as if she (the victim) had sole authority over the content of the community's norms and thus could not fail to adhere to those norms.<sup>153</sup> In this circumstance, the victim fails to realize that it is not she who determines the content of the norms, but all of the members of the community, through an ongoing process of negotiation. In failing to forgive, the victim also fails to appreciate the fact that the community has both the authority and the ability to heal the wounds caused by crime. Allegorically, the victim stands in the way of the criminal's redemption, his transition from the attitudes of mastery and alienation to that of identification with the norms by which he is bound.<sup>154</sup> In this section of the PS, Hegel intends to convince the reader that both the criminal's crime and victim's unwillingness to forgive are contrary to ethical life.

Admittedly, the conception of forgiveness Hegel relies on in the PS is distinct from our ordinary notion of forgiveness. For Hegel, to forgive is to confess one's position with respect to a set of norms, to claim that one could fail to adhere to those norms since the content of the norms

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<sup>151</sup> I say that it is a contingent matter that the victim is the victim and the criminal is the criminal. Of course, how contingent these facts are will vary from case to case. The victim could have been the one who violated the community's norms, but this fact does not entail the conclusion that the victim would have committed a crime in some nearby possible world, so to speak. It could very well be the case that much about the victim's circumstances would have to be different for it to be the case that she commits a crime. My and Hegel's point, however, is that the victim should recognize that because she is not the sole determiner of the norms that constitute her community, there is some possible world in which she violates the criminal law. In that world, she would want the criminal to forgive her and, as such, should forgive the criminal in this world.

<sup>152</sup> Hegel (1977), p.405.

<sup>153</sup> *Ibid.*, pp. 405-406.

<sup>154</sup> *Ibid.*



is distinct from one's subjective *take* on that content. To forgive is to admit to the wrongdoer that one is also a (potential) sinner, so to speak.

However, we tend to think of forgiveness as an act in which one determines that one will no longer judge the wrongdoer. To forgive in this sense is to treat the wrongdoer as if his transgression never took place. In fact, it is forgiveness of this type that the victim offers the criminal as part of the restorative justice process. The criminal, in recognizing error of his ways and taking measures to repair the damage done by his crime, puts himself in a position to be forgiven by the victim.

The type of forgiveness offered by the victim to the criminal and the type of forgiveness Hegel discusses in the PS are related in this way: in forgiving the criminal, in agreeing to no longer blame the criminal for his transgression, the victim manifests the attitude that she (the victim) is also subject to the community's norms and may fail in light of those norms. In forgiving, the victim expresses to the criminal that she too is a sinner and, as such, is not entitled to forever judge the criminal.

In being recognized through forgiveness, the criminal is welcomed back to the community he distanced himself from in committing his crime. He is welcomed back as an individual who understands his place within the community, one who identifies with the norms by which he is bound. The conversation between criminal and victim—the process of criminal's enlightenment, confession, and ultimate forgiveness—is designed to put the criminal in a position to grasp the Hegelian conception of self-consciousness in an immediate and visceral manner.

While Hegel says very little about forms of punishment, the restorative conception of punishment fits well with Hegel's beliefs about the proper function of punishment and fills an

essential gap in Hegel's theory of criminal justice. Restorative punishments aim to repair the harm done by crime and can be designed to repair the four types of harm I associate with the Hegelian conception of crime.

Now that we have in view a rough conception of what form punishment must take if it is to heal the wounds caused by crime, we can make better sense of other claims Hegel makes about punishment in the PR.

*e. Punishment as the "negation of the negation" and the "actualization of right"*

Hegel claims that punishment is a negation of crime that is also an actualization of right. Here I provide an interpretation of these two claims in light of the conception of restorative justice provided above. For Hegel, punishment negates (or cancels) crime, which is itself an attempt to negate the norms that regulate the recognitive relations that constitute ethical life. In an addition to §97 of the PR, Gans writes:

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.<sup>155</sup>

Recall that Hegel understands an act of crime as a negative infinite judgment. For Hegel, the criminal attempts to make a commitment as the subject of some normative status by violating the norms that constitute that status. The criminal denies the authority of the norms that would make his commitment intelligible. The criminal's act is null and void and, as such, is not "something positive," something that should be afforded positive normative significance.

For Hegel, *that* crime is a negative infinite judgment is manifested in how crime is responded to by the criminal's community. Punishment is the means by which the community "negates" the crime, showing it to lack positive normative significance. The restorative

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<sup>155</sup> Hegel (1998), p.100.

punishment negates crime by expressing the view that the criminal's reason for action is not a good reason, that the criminal's example should not be followed. The restorative penalty, in that it is a response to the criminal's action as reason-providing, makes explicit the fact that the crime lacks normative significance.

Hegel believes that punishment, as the negation of the negation that is crime, is also the actualization of right, or Spirit exercising its authority to heal the wounds caused by crime. In §97 of the PR, Gans adds:

The *manifestation* of [crime's] nullity is that the annihilation of the infringement also comes into existence. This [punishment] is right actualized, the necessity of right mediating itself with itself by annulling what has infringed it.... Right in its actuality... annuls what infringes it and therein displays its validity and proves itself to be a necessary, mediated, existence.<sup>156</sup>

Here, Hegel expresses the idea that the community not only has the authority to punish, but *must* punish if it is to exist. In expressing the view that the criminal's reasons are not good reasons, the state negates the crime, and thus preserves its existence as a community structured by norms.

In §97, Hegel also expresses the idea that right does not exist immediately, but must mediate *itself* through its response to crime. In order to understand what Hegel means here, we have to understand the distinction Hegel makes between immediate and mediate existence. In lieu of a full discussion of the immediate/mediate distinction in Hegel's thought, I will simply say that a thing exists in a mediated form if it exists *in relation to*, or in virtue of, something else, and exists immediately if it exists absent the existence of other things. As we know, Hegel is suspicious of the claim that self-consciousness exists immediately. For Hegel, one's self-consciousness necessarily exists in relation to another, one's self-consciousness is *mediated* by others.

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<sup>156</sup> *Ibid.*

Given this understanding of mediate existence, we can understand Hegel as holding the view that right only exists in relation to the community's acts of adjudication and enforcement. And, this is simply another way of expressing the idea that the community must punish, must repair the harms caused by crime, if it is to exist. For Hegel, then, right is a "necessary, mediated, existence."

f. *Punishment as willed by and owed to the criminal*

In the PR, Hegel claims both that the criminal wills his own punishment and that punishment is owed to the criminal, such that the community wrongs the criminal in not punishing. In §100 of the PR, Hegel writes:

The injury which falls on the criminal [punishment] is not merely just *in itself*—as just, it is *eo ipso* his will as it is in itself, an existence of his freedom, *his* right—but it is also a right *posited in the criminal himself*, i.e. in his objectively existent will, in his action. For his action is the action of a rational being and this implies that it is something universal and that by doing it the criminal has set up a law which he has explicitly recognized in his action and under which in consequence he should be subsumed as under his right.<sup>157</sup>

Unfortunately, Hegel provides little support for the two controversial claims contained in this section of the PR. Here I will construct a Hegelian argument for both the claim that the criminal wills his own punishment and a modified version of the claim that punishment is owed to the criminal. While controversial, both claims are essential to Hegel's conception of punishment.

One of Hegel's concerns in §100 is to demonstrate that punishment, understood as the negation of crime, is in some sense willed by the criminal. In demonstrating this, Hegel demonstrates that the criminal need not view punishment as an alien force that is opposed to his will, but as a product of his will, properly understood.

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<sup>157</sup> *Ibid.*, p.102.

In order to understand why Hegel takes this view, we should first note first that the criminal cannot rationally will the normative consequences of his action. He seeks to make a commitment as the subject of some normative status by violating the norms that constitute that status. And the normative upshot of his action is the elimination of a status that forms at least part of his self-conception. As we have seen, his action is unintelligible.

Additionally, as we saw in Chapter 2, the criminal cannot escape the normative realm. Even if he only wishes to conceive of himself as an instrumental reasoner, the criminal must understand himself as bound by certain norms. We also saw in Chapter 2 that if the criminal wishes to conceive of himself as an instrumental reasoner, he must both respect the bodily autonomy of others and, for contingent reasons, recognize others as entitled to own external property. The criminal wills the existence of at least one normative status—that of instrumental reasoner—and, though he may be unaware, is thus bound by the criminal law.

Given that punishment is a negation of crime which serves to preserve the norms the criminal violates, to the extent that the criminal wills the existence of the status the norms of which he violates, the criminal wills that crime be met with punishment. And, given this, the criminal wills that *his* criminal acts be met with punishment.

Clearly, most criminals are not aware that they will their punishment in committing a crime. Most criminals are alienated from the norms that constitute their recognitive community, and, as such, are unaware of the intimate connection between their behavior and the coherence and stability of their self-conception. But, at this point in the overall argument, this should not be seen as a problem. That one is self-conscious is a social fact. And that self-consciousness requires reciprocal recognition is a fact of which persons can be largely unaware. But, as I argue

above, one of the goals of punishment is to make the criminal aware that his personhood, the coherence of his self-conception, turns on the judgments of others.

I now turn to Hegel's claim that the criminal is owed punishment. To understand why Hegel holds this position, we must recall again how the criminal act infringes right as right. Given that recognized persons commit crimes, and recognition is a matter of treating another's commitments as normative for oneself, acts of crime give others *prima facie* reasons to commit similar acts. The criminal provides reasons for the entire recognitive community. This is what Hegel means when he says that the criminal's action is "universal."

As we have seen, if members of the criminal's recognitive community take the criminal's reason to be good a reason, they will take themselves to be permitted to commit similar crimes, thereby undermining at least some of the recognitive relations that constitute the community. This is the normative consequence of the criminal's action. The criminal implicitly wills that others take themselves to be alienated from the norms he violates.

Hegel claims that it is the criminal's right to be treated as he would if the consequences he implicitly wills in his action were to obtain. Hegel takes it that we are obligated to treat the criminal as if he were not the owner of his body or not entitled to own external property, since the criminal implicitly wills the non-existence of one or both of these statuses.

Though interesting, Hegel's argument for the claim that the criminal is owed punishment is not compelling. The argument relies on the premise that we are obligated to treat persons as they would be treated if the normative consequences of their actions (or intentions) obtained. But this principle is far from intuitive and Hegel provides no support for it. Even if the criminal acts with the explicit intention of bringing about anarchy, it does not directly follow that we are therefore obligated to treat him as he would be treated if there were no state and no law.

Additionally, given that Hegel takes it that punishment affirms the authority of the law, it seems odd that he would also hold that the state is justified in treating the criminal as if there were no legally recognized statuses. As I understand it, Hegel's argument for the claim that the criminal is owed punishment is not compelling and is in tension with his claim that punishment is a negation of crime that is also an affirmation of the law.

Better support for the claim that the criminal is owed punishment comes from Hegel's claim that punishment is a form of recognition, a claim that is also contained in §100. Hegel writes:

...punishment is regarded as containing the criminal's right, and hence by being punished he is honored as a rational being. He does not receive this due of honor unless the concept and measure of his punishment are derived from his own act.<sup>158</sup>

Hegel's idea is that the criminal is honored as a rational being in being punished because in punishing the community treats the criminal's action as reason-providing, and, thus, treats the criminal as rational. The criminal is punished because he is recognized as bound by and capable of acting on reasons, and thus providing reason for the members of his community to act on his reasons. In punishing, we respond to the criminal's action as rational and thus recognize him as a member of the community. Punishment, therefore, is a form of recognition.

We also honor and recognize the criminal through the process of adjudication. In determining that the criminal exhibited the attitude of mastery in causing harm to his victim—that is, in determining that the criminal's act meets the *mens rea* and *actus reus* criterion which allow us to consider his act a crime—we also recognize the criminal's action as reason-providing. To fail to recognize the criminal's action as criminal or to fail to punish him for his crime, is to fail to recognize the criminal as rational, and thus to dishonor him. It is in this sense that the

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<sup>158</sup> *Ibid.*, p.103.

criminal is owed a certain type of treatment by the state. If the state is to treat criminals as rational, it must assess their actions as reason-providing and punish when necessary.

To be sure, I do not believe that Hegel intends to or needs to commit himself to the claim that *each* criminal is owed punishment. Hegel is best read as advocating the view that criminals are owed treatment by a judicial system that recognizes them as rational through a process of adjudication that may culminate in punishment.

This reading of Hegel is supported by Hegel's claim that the state has the authority to pardon individual criminals. In §282, Hegel writes:

The right to *pardon* criminals arises from the sovereignty of the [state], since it alone is empowered to actualize spirit's power of making undone what has been done and wiping out a crime by forgiving and forgetting it.<sup>159</sup>

And later:

Pardon is the remission of punishment, but it does not cancel right. On the contrary, right stands and the one who is pardoned remains a criminal as before. Pardon does not mean that he has not committed a crime.<sup>160</sup>

Hegel believes that while the state is authorized to heal the wounds created by crime by coercing the criminal, it can, for practical reasons, choose *not* to exercise this authority with respect to certain criminals. There are many reasons a state may choose to pardon a criminal. A pardon may serve as an act of political goodwill toward a certain segment of the community, or it may serve as an expression of the state's current disapproval of the laws under which the criminal was convicted. Importantly, Hegel adds that a pardon neither means that the criminal has not committed a crime, nor does it mean the state would act unjustly in punishing. A pardon, for Hegel, is simply another exercise of the state's authority.

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<sup>159</sup> *Ibid.*, p.275.

<sup>160</sup> *Ibid.*



In "On the Right to be Punished: Some Doubts," John Deigh takes issue with a version of the Hegelian position outlined in this section. Understanding the Hegelian position as one on which each criminal is owed punishment, Deigh argues that if the criminal is owed punishment, the state wrongs the criminal in pardoning him against his wishes. But, Deigh contends,

...to hold...that pardoning a criminal against his wishes constitutes a wrong done to him is to deny that the authority of those responsible for meting out punishment includes discretion to forgo the sanction. And this should strike us as rather odd.<sup>161</sup>

Deigh concludes that the advocate of the Hegelian view cannot overcome this worry and, thus, we should not believe that criminals are owed punishment.

Presumably inspired by Hegel, Herbert Morris, in "Persons and Punishment," advocates a view on which each criminal is owed punishment, such that the state wrongs the criminal in pardoning. Morris explicitly claims that persons are entitled to not just a system of punishment, but also to actual punishment in cases in which they violate the criminal law.<sup>162</sup>

Morris's Hegelian view is Deigh's main target, but, as we have seen, we need not read Hegel as advocating the view that each criminal is owed actual punishment. And, in fact, Hegel's own discussion of criminal pardons speaks against Morris's position. There is no tension between the claim that criminals are owed a system of adjudication and punishment that treats their actions as reason-providing and the claim that the state does not wrong the criminal in deciding not to punish for practical reasons.

If the criminal has offered restitution to the victim on his own volition, or is fully aware of his error and is unlikely to reoffend, the state has reason to consider forgoing punishment. At most, the criminal is wronged if the state decides not to punish without reason, given that

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<sup>161</sup> Deigh (1984), p. 197.

<sup>162</sup> Morris (1968), p. 45.

restorative punishments offer the criminal an opportunity to confess, receive forgiveness, and rejoin the community as a self-conscious individual.

The dense argument that Hegel offers for the claim that the criminal is owed punishment is problematic in itself and is in tension with Hegel's broader understanding of the nature of punishment. My interpretation of Hegel's controversial claim better captures the spirit of §100 of the PR and better coheres with Hegel's other remarks on the nature of crime and punishment. For Hegel, the criminal wills his own punishment in that he wills the existence of the status the norms of which he violates. Hegel believes that the criminal is not owed actual punishment, but treatment within a system of adjudication and punishment that recognizes his actions as reason-providing.

*g. Punishment as forgiveness*

The restorative justice model offers the criminal an opportunity to ask for and receive forgiveness from the victim. The criminal's confession and subsequent forgiveness puts the criminal in a position to understand that he is connected to others through bonds of recognition, such that he cannot be what he takes himself to be if he fails to recognize others. One of the outcomes of a successful punishment is the criminal's achieving self-consciousness.

In achieving self-consciousness, the criminal becomes eligible for full membership within his community, such that the state is no longer takes itself to be justified in punishing him for his crime. In this sense, punishment acts as an avenue through which the state forgives the criminal, treating his deed as if it had never happened.

Understanding the punishment process as one avenue through which the state forgives the criminal gives us reason to question any punishment practice that permanently deprives the criminal of certain statuses. In many U.S. jurisdictions, a person convicted of a felony is not

permitted to serve as a juror.<sup>163</sup> Additionally, many jurisdictions deprive felons of the right to vote in local and national elections.<sup>164</sup> From the Hegelian perspective, these permanent deprivations are particularly troubling.

First, it is partially through the process of adjudication and punishment that the community determines the content of its norms. To permanently deprive convicted felons of the opportunity to serve as jurors is to permanently bar these persons from participation in a process that is essential to the determination of the norms by which they are bound. In promoting the practice of excluding felons from jury service, the state manifest the attitude of Hegel's hard-hearted judge who refuses to forgive the criminal, instead choosing to forever judge.

Second, the norms by which the criminal is bound are also product of an ongoing political process of which voting, at least in democratic nations, is an essential component. In voting, citizens express their approval or disapproval of the community's norms and the policy decisions of their representatives. Voting, then, is an essential vehicle through which citizens participate in the negotiation process which gives rise the community's norms. Again, to permanently deprive the criminal of the right to vote is to fail to fully forgive.

If we understand punishment as a form of forgiveness that is predicated on the criminal's achieving self-consciousness, the criminal, upon achieving self-consciousness, should not be deprived of the opportunity to participate in the process by which the community determines the content the norms that constitute his self-conception. To prevent the criminal from serving as a juror or to permanently disenfranchise the criminal is to fail to treat him as a self-conscious member of the community, and, thus, to fail to fully forgive him.

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<sup>163</sup> Kalt (2003).

<sup>164</sup> See Johnson-Parris (2003) and Uggen and Manza (2002).

### III. Punishment in Non-Standard Cases

#### *a. The incorrigible or dangerous criminal*

Clearly, not every criminal is a good candidate for participation in a restorative justice program. Some offenders suffer from undiagnosed mental disorders, or are psychologically damaged in a way that makes them unable to participate in an honest discussion with their victim or change their behavior as a result of such a conversation. Simply put, many offenders are simply incapable of achieving self-consciousness such that they can be welcomed back into the community and exist as a standing danger to persons within the community.

Once it is recognized that the criminal is, for all practical purposes, permanently alienated from the community's norms, the state can no longer aim to reintegrate the criminal back into the community, but instead must monitor and incapacitate him. In doing so, however, the state should afford the criminal some level of recognition since, regardless of his status within the community, he is a human being. Recognition of the incorrigible criminal requires not inflicting more pain or suffering on him than is necessary to prevent him from harming others. In treating the incorrigible criminal in this way, the state recognizes his biological life and well-being as valuable, though his life within the community has ended.

On the Hegelian conception of criminal justice, the harsh treatment and pain associated with the incapacitation of criminals should be seen as an unfortunate consequence of the fact that not all criminals are able to achieve self-consciousness.<sup>165</sup>

#### *b. Punishing the weak-willed criminal*

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<sup>165</sup> This position, of course, does not follow directly from anything I have said thus far about Hegel's conception of recognition, ethical life, or punishment. I articulate this position as a proposal that is at least consistent with the claims I have argued for thus far.

In the previous chapter, I discussed the criminal who suffers from weakness of will. This criminal recognizes that he can only be what he takes himself to be if he recognizes the bodies and external property of others, but commits crimes nonetheless because he is unable to control his impulses. His criminal acts do not constitute negative infinite judgments because he does not attempt to make a commitment as the subject of some normative status by violating the norms that constitute that status. He is well aware that he is not entitled to violate the criminal law. His crime, then, is not an act of alienation.

As I argue in Chapter 2, the weak-willed criminal is at most partially free. For Hegel, to be free is to be and to treat oneself as the subject of some normative status. To treat oneself as the subject of a particular normative status is to both assess one's actions in relation to the norms that constitute that status, and to act in accord with those norms. The weak-willed criminal is not completely free because while he is able to critique his actions by referencing the norms embraced by members of his community, he is unable to *act* in accord with those norms.

Additionally, since the weak-willed criminal repudiates his act, he does not provide members of his community *prima facie* reasons to act as he does. He holds the view that persons should not act as he does, and, as such, his act does not infringe right as right. Given that weak-willed criminal harms others, but does not endorse his harmful act, the harm he does to the community is more natural than normative.

The weak-willed criminal undermines the normative status of his victim, but the harm he causes the victim is less than that caused by the standard criminal who completely lacks self-consciousness. The weak-willed criminal fails to recognize his victim in harming her body or stealing or damaging her external property, but also recognizes his victim in repudiating his crime. At most, the weak-willed criminal's action constitutes a partial failure of recognition.

Thus, we must think differently about the four types of harm caused by crime when considering the weak-willed criminal. The weak-willed criminal does not infringe right as right, but he does undermine the status of his victim and cause his victim physical and psychological harm. Unlike the standard criminal, the weak-willed criminal is aware that he is not entitled to violate the criminal law and regrets having done so. The weak-willed criminal is at most partially self-conscious. He embraces the right values, but does not act on them.

The restorative punishment can be designed to address the harm caused by the weak-willed criminal. As in the standard case, the mediated conversation between the criminal and victim provides an opportunity for the criminal to recognize the victim in a face-to-face setting and ask for forgiveness. In doing this, the criminal affirms the victim's status and helps to repair some of the psychological damage caused by his crime. Additionally, in paying restitution and performing acts of community service, the weak-willed criminal repairs some of the physical damage caused by his crime.

In the standard case, the criminal both undermines his own freedom by infringing right as right and involves himself in an absurdity by making a negative infinite judgment. The weak-willed criminal does not harm himself in either of these ways. However, he does manifest his lack of freedom by failing to act on the right reasons. He is at most partially self-conscious. Restorative punishment aims, in part, to bring the criminal to a state of full self-consciousness. The weak-willed criminal's punishment must be designed with this fact in mind. The restorative penalty, then, must be designed to put the weak-willed criminal in a position to act on the norms he embraces.

In "Hegel's Theory of Punishment," J.M.E. McTaggart suggests that traditional, painful punishments can achieve this goal. McTaggart suggests that Hegel understands punishment as a

type of pain inflicted on the criminal with the aim of bringing the criminal to recognize the authority of the criminal law and repudiate his crime. Regarding cases of weak-willed criminal action, McTaggart writes:

[i]n these cases the moral law is, indeed, recognized,—for the offender knows he is doing wrong,—but not recognized with sufficient strength; for, if it was, he would abstain from doing wrong. And, therefore, the moral consciousness is strong enough to accept the punishment as justly incurred, though it was not strong enough to prevent the offender from incurring it.<sup>166</sup>

McTaggart believes that the weak-willed criminal accepts the state's authority to punish and, as such, does not view his punishment as an unjustified harm.

McTaggart believes that punishment serves to present the authority of the community's norms in a more vivid manner. The weak-willed criminal, in McTaggart's view, recognizes that he is bound by the criminal law, but does not recognize this fact in a way that motivates him to obey the law. McTaggart writes:

In this case [the case of the weak-willed criminal], the significance of the punishment is that it tends to produce that vividness in the recognition of the moral law, which the occurrence of the offence shows to have been previously wanting. The pain and coercion involved in punishment present the law with much greater impressiveness than can, for the mass of people, be gained from a mere admission that the law is binding.<sup>167</sup>

McTaggart recognizes that the authority of the law can be conceived propositionally. This is the conception of law that McTaggart associates with a mere admission that the law is binding. For McTaggart, punishment is a non-propositional way of presenting the authority of the criminal law.

For McTaggart, both the law-abiding citizen and the weak-willed criminal grasp the authority of the law propositionally. Both know that they are bound by the criminal law, and that

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<sup>166</sup> McTaggart (1896), p. 488.

<sup>167</sup> *Ibid.*

the state is authorized to punish violations of the law. This knowledge, however, does not compel the weak-willed criminal to obey the law and thereby act against his strong desire to disobey. McTaggart's claim, then, is that presenting the authority of the law in the form of punishment will likely cause the weak-willed criminal to both recognize the law in a more vivid and compelling manner and obey the law as a result of this recognition.

McTaggart, however, does not explain how this recognition through punishment is to occur. He only states that the pain of punishment "coincides" with criminal's recognition of the authority of the law.<sup>168</sup> McTaggart's thought seems to be that since the weak-willed criminal recognizes himself as bound by the criminal law, this fact becomes more vivid to him in being held accountable by the state through painful punishment. In other words, McTaggart believes that the weak-willed criminal fully recognizes the bindingness of the criminal in being bound by that state through punishment.

While interesting, McTaggart's conception of punishment in the weak-willed case suffers from a few major shortcomings. First, as a general matter, while McTaggart interprets Hegel as holding the view that pain is a necessary component of punishment, Hegel never makes this claim. Hegel only commits himself to the claim that punishments are necessarily coercive. At most, Hegel can be interpreted as holding that painful punishments are permissible.

Second, McTaggart does not explain why the pain associated with traditional punishments is a necessary component of a punishment that presents the authority of the criminal law in a vivid and compelling manner. If I am correct in my interpretation of McTaggart, he holds that the weak-willed criminal fully recognizes the authority of the law in being bound by

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<sup>168</sup> *Ibid.*



the state. But the state can bind the criminal without causing him pain. The state binds the criminal in simply criticizing his law violation.

Third, McTaggart assumes that the weak-willed criminal fails to comply with the criminal law because he possesses a merely propositional conception of the authority of the law. This assumption is unjustified. We can easily conceive of a weak-willed criminal who both feels the full weight of his legal obligations and is unable to act as he believes he ought. Many weak-willed criminals are pained by their criminal actions and struggle to obey the law.

McTaggart's conception of punishment in the weak-willed case is both internally flawed and problematic as an interpretation of Hegel. The restorative penalty, however, can be designed to put the weak-willed criminal in a position to act on the norms he embraces and, as I have argued, fits well with what Hegel says about punishment in the PR.

The restorative penalty outlined above must be altered only slightly to achieve the goal of bringing the weak-will criminal to self-consciousness. In engaging with the victim in conversation, the criminal learns about the harm that he has caused the victim and is chastised by the victim for causing this harm. In this way, the criminal comes to appreciate the damage done by his crime in an immediate way.

During the conversation, the victim explicitly denies the criminal's authority to violate the law. If it is the case that a *particular* weak-willed criminal fails to comply with the law because he possesses a merely propositional conception of the authority of the law, the conversation between the victim and criminal may allow the criminal to better appreciate the fact that his freedom turns on his recognition of others, and that his authority to act turns on other's recognition of his authority. The standard victim-criminal conversation, then, serves as a non-propositional presentation of the law's authority.

In this conversation, however, the criminal's confession must take a different shape. The weak-willed criminal recognizes that neither he nor his victim is the sole determiner of the norms that constitute the community, so this is a fact he need not confess. The weak-willed criminal confesses that while he is a spiritual being in that he recognizes himself as being bound by the community's norms, he is nonetheless also a natural being, and, as such, is subject to fail to act in accord with those norms due to the strength of his natural desires.

Crucially, the weak-willed criminal's confession must include a promise to take measures that will help him to control his natural desires and act in accord with the community's norms. These measures may include psychological counseling or drug treatment, and may be proposed by the criminal or required by the state. As part of his confession, the weak-willed criminal promises to work toward achieving full self-consciousness and puts himself in a better position to be forgiven by both the victim and the community.

The victim's forgiveness, in turn, is her confession that she too is a natural being and is thus subject to weakness of will. She forgives the criminal, recognizing that, as a natural being herself, she is not entitled to act as the criminal's judge forever.

The restorative punishment puts the weak-willed criminal in a position to achieve self-consciousness by both presenting the authority of the criminal law in a non-propositional manner and requiring that the weak-will criminal make a commitment to taking measures that will allow him to control his natural impulses.

### *c. Crime and poverty*

In Chapter 2, I also considered the criminal who breaks the law out of economic need. Like the weak-willed criminal, the poor criminal is not alienated from the norms embraced by members of his community. He commits his crime because he believes he must do so in order to survive.

He takes it that the continuance of his biological life requires that he commit a crime of some sort.

This criminal is able to adhere to the norms that constitute his status as the owner of his body, but he often fails to adhere to the norms that constitute his status as entitled to own external property. He recognizes others as entitled to use their property, but values his own survival over the maintenance of his victim's status as entitled to own external property. This criminal would be willing to compensate his victim if his economic circumstance were to change. Thus, he only partially fails to recognize others as entitled to own external property in stealing.

Like the weak-willed criminal, the criminal who steals out of economic need is not able to fully recognize himself as entitled to own external property because he is unable to adhere to the norms that constitute this status. He recognizes if he is to fully participate in the system of external property, he must identify with certain norms, but he also realizes that in his current situation he is unable to adhere those norms. He is unable to experience freedom as a person entitled to own external property.

In "Marxism and Retribution," Jeffrie Murphy argues that while justifications of state-sponsored punishment based in the idea of a social contract are both coherent and compelling, these justifications ignore concrete realities, including systemic poverty, which makes them largely inapplicable.<sup>169</sup> I will discuss contractualist justifications of punishment in greater detail in Chapter 4. Here I will simply provide an outline of the view in order to explicate Murphy's position.

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<sup>169</sup> See generally, Murphy (1973).

Social contract justifications of punishment claim that state-sponsored punishment is justified because, *ex-ante*, rational persons would agree to a system of personal rights and property rights protected by a system of punishments for rights violations. In punishing, according to the social contract justification, the state respects the criminal as rational in honoring the terms of a social contract he would agree to, *ex ante*, if he were fully rational. Murphy primarily, and perhaps problematically, associates this justification of punishment with Kant.

Murphy claims that while the social contract justification of punishment has many advantages over consequentialist justifications (which I also discuss in detail in Chapter 4), it is largely inapplicable to modern societies in part because of the phenomenon of systemic poverty. Murphy relies on the Marxist claim that crime is largely a result of the unequal distribution of opportunity and wealth within capitalist societies. Murphy writes:

...of the 1.3 million criminal offenders handled each day by some agency of the United States correctional system, the vast majority (80 percent on some estimates) are members of the lowest 15-percent income level-that percent which is below the "poverty level" as defined by the Social Security Administration. Unless one wants to embrace the belief that all these people are poor because they are bad, it might be well to reconsider [the Marxist] suggestion that many of them are "bad" because they are poor.<sup>170</sup>

While the statistics that Murphy cites are from 1967, in the United States there still exists a high positive correlation between a person's status as "poor," and the likelihood that he or she will commit a crime and face time in prison.<sup>171</sup>

Murphy contends that contractualist justifications of punishment are only applicable in situations in which the person punished can be understood as benefitting from the fulfillment of the terms of a hypothetical social contract. Persons who are poor and denied opportunities to

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<sup>170</sup> Murphy(1973), p. 237.

<sup>171</sup> See. Western (2010).

accumulate wealth, Murphy would contend, are not afforded the benefits of a system of property rights. With respect to the poor, Murphy contends, the state fails to fulfill the terms of the hypothetical social contract and thus is not entitled to require that poor persons fulfill their contractual obligations by respecting the property rights of others. Murphy writes:

[c]riminals typically are not members of a shared community of values with their jailers.... And they certainly would be hard-pressed to name the benefits for which they are supposed to owe obedience. If justice, as [the contractualist] suggest, is based on reciprocity, it is hard to see what these persons are supposed to reciprocate for.<sup>172</sup>

For Murphy, then, the typical poor criminal is not bound by the norms of external property ownership and the state does not have the authority to punish him for violating these norms.

In "Justice, Deviance, and the Dark Ghetto," Tommie Shelby reiterates many of Murphy's concerns. Like Murphy, Shelby adopts a contractualist conception of political obligation. He believes that genuine political obligations only exist in circumstances in which the state is structured and administered in a way that rational persons would contract for *ex ante*.

Shelby argues that given the systemic injustices faced by poor U.S. citizens living in ghettos—a disproportionate number of whom are non-white—these persons do not, from the contractualist perspective, act unreasonably in committing *certain* crimes against external property. Shelby clearly states that crimes against property that also restrict the bodily autonomy of others cannot be justified by appeal to systemic injustices. Regarding crimes that may legitimately be committed by the poor, Shelby writes:

...taking the property of others, especially when these others are reasonably well off, may be legitimate. Mugging someone at gunpoint may not show sufficient respect for the victim's personhood, but shoplifting and other forms of theft might be justified.<sup>173</sup>

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<sup>172</sup> Murphy (1973), p. 240.

<sup>173</sup> Shelby (2007), p. 152.

Shelby, then, goes further than Murphy in not only claiming that conditions of reciprocity do not obtain in the United States, but in also specifying which types of crimes the poor may reasonably commit when disadvantaged by an extremely unjust social order.

Shelby also goes further than Murphy in not only pointing out the correlation between poverty and incarceration, but in explaining *why* many poor people resort to crime. Shelby points out that several factors, including overt and institutional racism,<sup>174</sup> underfunded schools in working-class and poor neighborhoods, and an economy which is "not structured to sustain full employment at decent wages,"<sup>175</sup> create circumstances in which many poor persons are not able to escape poverty or even live comfortably according to the standards set and promoted by their community. As a result, Shelby explains, many poor persons turn to crime in order to meet their economic needs.<sup>176</sup>

Considering the arguments of Murphy and Shelby, we can develop the following general objection to punishment in cases in which poor persons violate the norms of external property ownership out of economic need: Political and legal obligations are based on a principle of reciprocity captured by the idea of a hypothetical social contract. Many modern states, and particularly the United States, violate the conditions of this hypothetical contract in that their institutions are not structured as to significantly benefit persons who are economically the least well-off—that is, the poor. As such, these persons are not obligated to obey many of the criminal

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<sup>174</sup>Shelby provides an instructive characterization of institutional racism. He writes, "... we can say that *institutional racism* exists when the administration or enforcement of the rules and procedures of a major social institution—say, the labor market or the criminal justice system—is regularly distorted by the racial prejudice or bias of those who exercise authority within the institution. Institutional racism can exist even when the *content* of the rules and procedures of an institution, when viewed in the abstract, is perfectly just, provided there is pervasive racial bias in the *application* of those rules and procedures." Shelby (2007), p.131.

<sup>175</sup>*Ibid.*, p.132.

<sup>176</sup>*Ibid.*

laws related to property ownership, and the state is not justified in punishing poor persons for violating these laws.

Of course, this objection will not work as a direct objection to the Hegelian justification of punishment that I advocate. This is so because the position I advocate does not rely on a contractualist conception of the state. In fact, Hegel explicitly rejects contractualist conceptions of legal obligation.<sup>177</sup>

We can, however, reconstruct the Murphy/Shelby objection in a way that does not rely on contractualism. It seems that both Murphy and Shelby would agree that it is unreasonable for a recognitive community require its members to sacrifice their biological lives or their basic comfort in order to adhere to the norms of external property ownership. Additionally, the objection goes, the community fails its poor members in not providing opportunities for them to acquire the wealth that would allow them to live comfortably. Thus, poor citizens are not bound to abide by the norms of external property, and the state is not justified in punishing them for failing to abide by those norms.

In light of the reformed Murphy/Shelby objection, we can specify two types of poor criminal: the poor criminal who steals in order to prolong his biological life, and the poor criminal who steals in order to sustain a comfortable life. Shelby, as we have seen, draws our attention to this second type of criminal.<sup>178</sup> Both Murphy and Shelby believe that neither type of poor criminal is bound by all of criminal laws aimed at protecting external property. I, however, believe that we must think differently about each type of poor criminal.

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<sup>177</sup> I pursue this issue in detail in Chapter 4.

<sup>178</sup> Of course, this second type of criminal, as Shelby imagines him, steals not only out of need, but because he takes it that those he steals from are not fully entitled to their external property because the social circumstances that allow them to retain this property are unjust.

First, I will consider the poor person who steals in order to preserve his life. I need to say a bit more about this category of thief. I assume that this poor thief is in a situation in which he needs to steal in order to survive because he exists in a society that is plagued by many of the ills that Shelby points to. This thief is undereducated, unable to find a decent job, and receives insufficient public assistance. He owns very little property and is not in a position to acquire the basic goods he needs to survive. I also assume that this type of poor thief does not steal from a person who is equally poor. He either steals from a wealthy person or a well-to-do corporation.

The harm done by the poor thief differs from that done by the well-off thief whose theft is motivated by greed. As I initially characterized the poor thief, he regrets that he must steal in order to survive. The poor thief, so described, literally wills that the harm done by his act be repaired. The poor thief repudiates his act and, as such does not provide reasons for others to act similarly. Additionally, like the weak-willed criminal, the poor thief is unable to achieve self-consciousness as an external property owner because, for natural reasons, he is unable to abide by the norms that constitute this status.<sup>179</sup> Lastly, the poor thief does cause his victim psychological and physical harm, but his act of theft only constitutes a partial failure of recognition because he does not take herself to be entitled to steal.

Before discussing how the state should address this first type of poor criminal, I will address Hegel's take on the person who steals out of dire need. Hegel believes that the poor person has a right to steal, such that his poverty serves as an affirmative defense to the crime of theft. We can understand an affirmative defense as a set of facts that, if proven by a defendant in

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<sup>179</sup> As I argue below, the state should not require that the criminal who steals in order to survive refrain from stealing. However, given that this criminal is unable to abide by the norms of external property ownership in his current circumstances, he is unable to buy into a system of external property and is thus unable to achieve self-consciousness as the owner of external property.



a criminal trial, will serve to mitigate or cancel the legal consequences of the defendant's act.<sup>180</sup>

Hegel does not use the term "affirmative defense" in his discussion of poverty and theft, but he does employ the concept.

Hegel believes that one's status as the owner of one's body is more fundamental than one's status as entitled to own external property. As such, he believes that a person may undermine another's status as entitled to own external property in order to preserve his own life.

In §127, Hegel writes:

In *extreme danger* and in conflict with the rightful property of someone else, this life may claim (as a right, not a mercy) a *right of distress*, because in such a situation there is, on the one hand, an infinite injury to someone's existence and the consequent loss of rights altogether, and, on the other hand, an injury only to a single restricted existence of freedom, whereby both right as such and the injured person's capacity for rights continue to be recognized, since the injury affects only *this* property of his.<sup>181</sup>

In an addition to §127, Gans writes:

To refuse to allow someone in jeopardy of his life to take such steps for self-preservation would be to regard him as being without rights, and since he would be deprived of his life, his freedom would be annulled altogether.<sup>182</sup>

For Hegel, then, the poor person's authorization to take possession of another's property is not a mere privilege, but fundamental authority that emanates from his status as the owner of his body.

Thus, for Hegel, the poor person's theft does not constitute a crime, but is an assertion of a fundamental authority.

For Hegel, poverty is an affirmative defense to the crime of theft. This view, however, is not reflected in the MPC.<sup>183</sup> And, within the American criminal justice system, it is generally accepted that poverty is not a defense to crime.<sup>184</sup> As Michele Gillman writes:

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<sup>180</sup> Black (1990), p. 18.

<sup>181</sup> Hegel (1998), p. 125.

<sup>182</sup> *Ibid.*

<sup>183</sup> Affirmative defenses to theft are enumerated in §223.1 of the MPC:

Courts have been reluctant to recognize economic hardship as creating conditions of necessity, reasoning that poor people usually have some alternatives other than committing crime. [...] The necessity defense is a difficult standard to meet, and there are no reported cases in which a poor person was acquitted on economic grounds under a necessity defense.<sup>185</sup>

American jurists, then, tend to believe that the American public welfare system is such that poor persons need not commit crime in order to survive. I will not explore the issue of whether the prevailing wisdom about the adequacy of the American public welfare system is correct, though I suspect that the assistance provided to poor U.S. citizens is far below what many would consider ideal.

Hegel recognizes extreme poverty as an affirmative defense to the crime of theft, the MPC rejects this view, and most American jurists believe that it is almost never the case that poor persons must steal in order to survive.

Given that one of the aims of criminal justice, on the Hegelian conception, is to bring the criminal to a state of self-consciousness, the Hegelian should not endorse legal rules that require would-be criminals to sacrifice their lives, and thus their ability to maintain or achieve self-consciousness, out of respect for another's status as entitled to own external property. Contra the MPC, I hold that extreme poverty should be an affirmative defense to the crime of theft in cases in which theft is *necessary* for the impoverished person to survive. And, though contemporary

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(3) Claim of Right. It is an affirmative defense to prosecution for theft that the actor:

- (a) was unaware that the property or service was that of another; or
- (b) acted under an honest claim of right to the property or service involved or that he had a right to acquire or dispose of it as he did; or
- (c) took property exposed for sale, intending to purchase and pay for it promptly, or reasonably believing that the owner, if present, would have consented.

The MPC, then, does not recognize poverty as an affirmative defense to theft.

<sup>184</sup> See Gilman (2013).

<sup>185</sup> *Ibid.*, pp. 507-508.

jurists believe that theft is almost never necessary for survival, this should not preclude the codification and availability of the poverty defense. We can understand the question of what level of poverty and need justify theft as a political one, to be decided by a community through a process of negotiation.

The impoverished person's theft, however, does cause harm, as specified above. The victim of theft suffers psychological and physical harm, and her status as property owner is undermined. Additionally, the poor thief manifests his inability to participate in the system of external property ownership. Punishment is not in order in this case, but the state can take measures to repair the harm created by the poor person's theft.

Before outlining how the state should work to repair the harm caused by the poor person's theft, I will address Hegel's discussion of poverty in the PR.<sup>186</sup> Hegel recognizes widespread poverty as a problem that must be solved by the state, but in the PR he admits his inability to articulate a workable solution to the problem of poverty. Hegel believes that the state must not only care for the poor, but must also work to ensure that the poor do not develop feelings of resentment toward the rich and the state itself. In §241, Hegel writes:

The public authority takes the place of the family where the poor are concerned in respect not only of their immediate want but also of laziness of disposition, malignity, and the other vices which arise out of their plight and their sense of injustice.<sup>187</sup>

We should lament the lax social analysis evident in this passage and the insensitive language Hegel uses to describe the poor. We need not think of poverty as arising from or giving rise to laziness, nor is it necessary to describe the poor as malignant. Though, the larger point Hegel makes in his discussion of poverty is a good one. Hegel believes that poverty is a public problem

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<sup>186</sup> For a discussion of the social conditions that gave rise to Hegel's understanding of poverty, see Pinkard (2001), pp.469-494.

<sup>187</sup> Hegel (1998), p. 220.

both because economic conditions created by the modern, industrial state give rise to poverty,<sup>188</sup> and because widespread poverty can cause the poor to resent the state and its laws, thereby threatening ethical life itself.

For Hegel, then, the state is obligated to solve the problem of poverty. This fact, it seems, should be reflected in the measures the state takes to repair the harm caused by the poor person's theft. The state can alleviate some of the physical and psychological harm caused by the theft in both compensating the victim for her loss and explaining to the victim that the thief will not be punished because he stole out of necessity, a necessity caused by the state's failure to combat poverty. Additionally, the state can work toward putting the poor thief in a position to achieve self-consciousness as the owner of external property by committing itself to taking measures to combat poverty. The state informs the thief that it has failed him in failing to take measures to alleviate the crippling poverty that gave rise to his theft.

In this case, the state confesses to and asks for forgiveness from the poor thief and his victim. The state confesses that it has failed to provide the social resources that would have eliminated the poor person's dire need, and promises to do more to aid the poor. In turn, the victim forgives the state in accepting that, as a member of the community, she is partially accountable for the state's failure. The victim makes a commitment to advocating for policies aimed at solving the problem of poverty. Additionally, the poor thief forgives the state by making a commitment to take advantage of the resources to be offered by the state, such that he will no longer have to steal in order to survive. In short, the process of confession and forgiveness in this case is a process by which the state, victim, and poor thief make a commitment to eliminate extreme poverty and the various types of harm that result from poverty.

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<sup>188</sup> *Ibid.*, pp. 219-221.

I will now consider the poor thief who steals not to survive, but in order to live a reasonably comfortable life. We can assume that this thief faces all of the societal pressures outlined by Shelby, and believes that many of the well-off members of his community possess their external property unjustly. He lives in a society that promotes a certain ideal of success and comfortable living, but is denied opportunities to reach this ideal. Shelby argues that this thief is justified in stealing in the pursuit of a more comfortable life. Hegel, however, would deny this thief the defense of poverty, as he does not steal to preserve his life.

Shelby's position, it seems, is unworkable because it justifies the thief's taking actions that threaten to undermine the system he ultimately wishes to buy into.<sup>189</sup> This type of thief attempts to make a commitment as a person entitled to own external property by stealing, and thus threatens to undermine the system of external property. This thief is distinct from the thief who steals to survive because this latter thief does not make a claim on the property he steals, but only on the life he preserves in stealing. This is the core reason for Hegel's treating these two thieves differently. The thief who steals to survive relies, however implicitly, on the relative importance of the normative statuses of which he takes himself to be the subject. The thief who steals to promote a certain level of comfort for himself simply undermines the norms that constitute a status of which he takes herself to be the subject.

Of course, if a poor thief steals in order to protest the system of external property, he should be considered a civil disobedient, and should be subject to the norms which attach to acts

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<sup>189</sup> Though this thief may take it that the person he steals from retains her property unjustly, he too wishes to enjoy the privileges afforded to persons who own external property within his community. This desire is manifested by the fact that the thief retains the property he steals and treats the property as if it were his own. He takes it that another would wrong him in taking his stolen property.

of civil disobedience.<sup>190</sup> I discuss how the state should respond to civil disobedience in section V.

The poor thief who steals in order to promote a certain level of comfort, then, is subject to punishment. This is the case even though this criminal's community is obligated to address the conditions that give rise to his poverty. In punishing this criminal, however, the state must acknowledge his economic situation and the fact that it has failed to adequately address the structural inequalities that set the occasion for his crime.

This poor criminal causes each of the four harms outlined in section II, and, as such, his punishment must be designed to repair each. As an expression of disapproval, the restorative punishment addresses the criminal's infringement of right as right. In paying his victim restitution, or performing some other service for his victim, the poor criminal both recognizes his victim and address the physical and psychological harm caused by his crime. In mandating these acts, however, the state must acknowledge that the criminal is poor and, as such, is limited in his ability to pay restitution and adjust his penalty accordingly. Additionally, the state must acknowledge its failure to address the conditions that set the conditions for the criminal's theft and, when appropriate, supplement the criminal's efforts to make the victim whole.

In this case, the conversation between the criminal and victim proceeds in much the same way as in the standard case. The criminal confesses that his is but one perspective on the community's norms, and the victim forgives in confessing the same. As in the case of the poor criminal who steals to survive, the state confesses its responsibility for the conditions that led to

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<sup>190</sup> Admittedly, the norms that govern acts of civil disobedience are only applicable within a nearly just society, one in which person are afforded a certain degree of bodily autonomy and are permitted to meaningfully participate in their community's political process.

the crime, and the victim and criminal forgive in agreeing to aid the state in addressing the conditions that give rise to thefts motivated by economic need.

Hegel recognizes poverty as an affirmative defense to theft, but only in a limited sense. The defense is grounded in an understanding of the relative importance of certain normative statuses. Persons should not be required to sacrifice their lives in order to respect the property of others, but may be required to sacrifice their comfort for this purpose. The state, however, is responsible for making it the case that persons need not make this latter sacrifice.

#### IV. Punishment and Communal Self-Consciousness

Before discussing how the state should address acts of civil disobedience, I will briefly discuss the relationship between punishment and communal self-consciousness. In Chapter 2, I articulate a conception of communal self-consciousness on which the community becomes a self by committing itself to a set of norms and becomes *self-conscious* in acting on those norms. On this conception, the members of the community determine whether the community acts in accord with the content of its norms. The community, then, achieves *self-knowledge* by reflecting on its own assessments of its actions.

We can understand punishment as a process by which a community acts on a set of norms by binding its members by those norms. In enforcing the criminal law, the state acts on the norms implicit in its criminal code. A community that turns a blind eye to assault cannot coherently understand itself as valuing the bodily autonomy of its members. Likewise, a community that routinely fails to prosecute or punish thieves cannot understand itself as committed to operating a system of external property ownership. Punishment, then, is one means by which the community achieves self-consciousness.

In Chapter 2, I also stated that Hegel believes that the content of the criminal law becomes more determinate in being applied. Recall, Hegel writes:

Right gains determinate existence [*Dasein*] in the first place when it has the form of being posited [as law]; it also becomes determinate in content by being *applied*...to the material of civil society...<sup>191</sup>

What counts as an assault, or a theft, in Hegel's view, is partially determined by how the community's officials adjudicate and punish actions as such. The community, then, learns what it is committed to, the actual content of the criminal law, in adjudicating and punishing crimes.

Punishment, then, is an essential means through which the community achieves self-consciousness.

#### V. Civil Disobedience and Punishment

In this section, I consider how the community, the state, should respond to acts of civil disobedience. Recall that the civilly disobedient criminal is committed to several norms. His act of civil disobedience is conscientious, yet political, public, and non-violent. The civilly disobedient criminal is willing to accept punishment for his law violation and views civil disobedience as a tactic of last resort.

His act is conscientious, yet political. The civilly disobedient criminal's act is motivated by his sense of justice, but is also guided by his understanding of the content of the political principles adhered to by persons in his community.

His act is necessarily public because it aims to express disapproval of a law or policy adopted by the state in a way that does not undermine the state's authority. To achieve this goal, the civilly disobedient criminal must announce what he is doing and his willingness to accept punishment for his crime.

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<sup>191</sup> *Ibid.*, p. 137.



The act of civil disobedience is non-violent because violence tends to obscure the civilly disobedient criminal's message and hinder this criminal's ability to express fidelity to the law while also protesting a particular law or policy.

The civilly disobedient criminal is willing to accept punishment for his crime. In doing so, the criminal expresses his disagreement with some of his community's norms, while also accepting the community's authority to posit norms that are genuinely binding on him.

Finally, the civilly disobedient criminal views civil disobedience as a tactic of last resort. Only after his attempts to bring about change through the political process are routinely disregarded does he turn to civil disobedience.

Before specifying how the state should address civil disobedience, I will discuss the forms that civil disobedience typically takes in order to further distinguish civil disobedience from ordinary criminal acts. Typically, the civilly disobedient criminal does not target a particular person or group of persons. The civilly disobedient criminal may participate in an illegal protest march, stage a sit-in on private or public property, commit tax evasion, stage an illegal strike, or block access to public roads or government buildings. In most cases, then, the civilly disobedient act does not create a "victim," understood in the traditional sense.<sup>192</sup>

While the civilly disobedient criminal acknowledges that he is not entitled to violate the criminal law, he nevertheless commits a crime. His actions betray his declarations, and, as such, his action, his crime, constitutes an infringement of right as right. To be sure, his infringement is

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<sup>192</sup> Of course, we could say that protesters who stage a sit-in victimize the owner of the store at which they protest, but this would be to distort the situation. The storeowner will likely be inconvenienced by the protest. And the storeowner will likely lose revenue because of the protest, but in most cases the owner has engaged in some morally questionable actions that gave rise to the protest. As such, it is more accurate to say that the owner is the target of a contentious protest, and not the victim of a crime.

less severe than that of the traditional criminal because the civilly disobedient criminal openly acknowledges the authority of the law and the appropriateness of his punishment.

Additionally, the civilly disobedient act is absurd. The civilly disobedient criminal attempts to make a commitment as the subject of some status (usually, that of being entitled to own property), by violating the norms that constitute that status. This criminal, however, recognizes the absurdity of his action. Thus, unlike the traditional criminal, the civil disobedient criminal is not blind to himself and the meaning of his actions. The state, therefore, need not punish with the aim getting the civilly disobedient criminal to acknowledge the absurdity of his crime.

The civilly disobedient criminal acts while acknowledging that his action is absurd and that his action threatens to undermine his self-conception. He acts knowing that in doing so he subjects himself to justified punishment. Recall that the self-conscious person identifies with the norms by which he is bound. In identifying with these norms, he is willing to sacrifice his subjective desires in order to adhere to the norms. The civilly disobedient criminal sacrifices his self-conception, his intelligibility, and his bodily autonomy for the community's norms, as he understands them. Perhaps paradoxically, civil disobedience is a substantially self-conscious act because it is a noble act of sacrifice for the sake of the community's norms.

As stated, the civilly disobedient act does infringe right as right and, as such, must be addressed by the criminal justice system. Because the civilly disobedient criminal is aware of the absurdity of his crime, and because his crime does not create a victim, the state, in this case, need not pursue a restorative penalty. At most, it seems, the state should require the civilly disobedient criminal to perform acts of community service. In doing so, the state expresses the view that the

civilly disobedient criminal is not entitled to violate the law and provides him with an opportunity to benefit the community whose norms he identifies with.<sup>193</sup>

In addition to punishing, the state should consider the views expressed in the civilly disobedient criminal's act. He acts out of a strong conviction that the state has acted in opposition to one or more of its norms and, as a recognized member of the community, his claims should be taken seriously. While the civilly disobedient criminal is typically a politically marginalized member of the community, his sayings and doing are reason-providing and he should be afforded the opportunity to shape the community's norms.

Finally, to the extent that the state agrees with the civilly disobedient criminal and reforms its policies in light of his reasons, the state has a reason to pardon his crime, forgoing punishment. In this case, the civilly disobedient criminal allows the community to achieve a greater degree of self-consciousness by forcing the community to act in accord with the norms with which it identifies. In this case, the civilly disobedient criminal does more good than harm to the community and, as a consequence, punishment is not appropriate.

## VI. Conclusion

Hegel believes that though the criminal harms the community, he is not forever forsaken. In pursuing a restorative penalty, the community is able to repair the harm done by the criminal's act in a way that leads the criminal to self-consciousness and allows the community to forgive him, welcoming him back into the fold as a recognized person. Punishment, then, is a magnanimous and restorative act.

In the next and final chapter, I consider several rival theories of punishment and argue neither is adequate in comparison to the Hegelian theory presented in this chapter.

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<sup>193</sup> For an alternative view, grounded in social contract theory and the deterrence theory of punishment, see Brownlee (2008), pp. 711-716.

## Chapter 4: Alternative Theories of Punishment

### I. Introduction

In the previous chapter, we saw that for Hegel punishment is a means by which a community repairs the various types of damage done by crime. Crucially, for Hegel, punishment not only repairs the harm that the criminal does to others and his community, but also aims at repairing the harm he does to himself by putting him in a position to achieve self-consciousness and receive forgiveness from the community. Punishment, on this conception, is a restorative practice.

Also, in repairing the damage done by crime, the community both achieves self-consciousness and comes to know itself. In punishing, the community both acts on the norms by which it is bound and further determines the content of those norms. Punishment practices not only allow the community to repair the damage done by crime, but also allow the community to further define itself. As we saw in Chapter 3, the poor criminal and the civilly disobedient criminal provide the community with reasons to reform its practices to better comply with the norms that it has adopted. These criminals, instead of simply undermining the community's norms, put the community in a position to achieve a greater degree of self-consciousness.

In this chapter, I argue that the Hegelian conception of punishment is superior to those offered by retributivism, deterrence theory, and social contract theory.<sup>194</sup> Instead of surveying and arguing against the dizzying number of contemporary versions of these theories of punishment, I will discuss only a few promising versions of each. In section II, I address two

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<sup>194</sup> In this chapter, I use the terms "justification," "conception," and "theory" interchangeably. I understand the retributivist, the deterrence theorist, the social contract theorist, and the Hegelian as responding to the same question: "What are the proper goals of a criminal justice system?"

representative retributive theories of punishment. In parallel fashion, I discuss two representative deterrence theories in section III. In section IV, I address Claire Finkelstein's contractualist justification of punishment.<sup>195</sup>

## II. Retributivism

We can understand retributivism as the view that criminals ought to be punished if and only if they *deserve* to be punished. For the retributivist, desert is a necessary and sufficient condition for justified punishment. The retributivist also takes it that punishment is necessarily a form of harsh treatment and that the suffering of the deserving criminal is intrinsically good. While the retributivist would be pleased to learn that a criminal's punishment has deterred the criminal or others from committing crime, the likelihood of this fact obtaining plays no part in the justification of his punishment. The retributivist takes it that punishment of the deserving is justified regardless of consequences.

Some retributivists seek to justify retributivism by appealing to our intuitions about particular examples of criminal activity. For instance, in "Justifying Retributivism" Michael Moore asks us to consider the case of the Russian nobleman depicted in Dostoyevsky's *The Brother's Karamazov*. In Dostoyevsky's story, a young boy injures one of the nobleman's hunting dogs. In response, the nobleman orders his dogs to hunt down and tear apart the young boy in front of the boy's mother.<sup>196</sup> Moore asks us to consider whether the nobleman should be punished given that no non-retributive purpose would be served by punishing him. Moore

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<sup>195</sup> Here I do not address every alternative theory of punishment. I instead choose to focus on the three most dominant theories. Though, I recognize that there are several viable theories of punishment that I must address in another work. Specifically, I must address the moral education theory of punishment articulated in Shafer-Landau (1991) and Hampton (1984), and the expressive theory of punishment, articulated in Gahringer (1960), Feinberg (1965), Primoratz (1989), and Hampton (1992).

<sup>196</sup> Moore (1993), p. 25.

contends that if we think about the case from a third-person perspective or from a first-person perspective, imagining that we are the noblemen, our answer to the question of punishment is the same: the nobleman should definitely be punished.<sup>197</sup>

When we consider the case from the third-person perspective, Moore contends, we feel anger and resentment toward the nobleman—we feel that he deserves to suffer. Additionally, Moore holds that when considering the case from the first-person perspective we feel guilty, we feel that we are deserving of punishment. In either case, Moore contends, our intuitions lead us to the same conclusion: that the nobleman is deserving of punishment and should be punished regardless of the consequences of his punishment.

Moore generalizes from this case to draw the conclusion that retributivism is the correct theory of punishment because it best explains our intuitions about cases like the Russian nobleman. In this way, Moore takes himself to justify retributivism in much the same way that J.S. Mill justifies the principle of utility. Moore understands Mill as justifying the principle of utility by generalizing from our common judgments about which states of affairs are desirable.<sup>198</sup> For Moore, then, retributivism is not derived from more general moral principles, but is a generalization from our moral judgments about particular cases.

It seems that Moore problematically moves from the fact that persons have retributive intuitions to the conclusion that retributivism is the correct theory of punishment. Moore, it seems, attempts to unjustifiably derive an “ought,” from an “is.” In response to this worry, Moore claims that we should believe that our moral sentiments track the moral truth, and that we have no reason to believe otherwise. For Moore, we tend to believe that the Russian nobleman ought to suffer because it is actually the case that he ought to suffer. Moore takes it that our

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<sup>197</sup> *Ibid.*

<sup>198</sup> *Ibid.*, p. 24. Jeffrie Murphy also uses this method to justify retributivism. See Murphy (1998).

retributive moral intuitions are best explained not by our psychological make up or our social circumstances, but by the fact that we appreciate the fact that wrongdoers ought to suffer.<sup>199</sup>

In response to naturalistic explanations of our retributivist intuitions, Moore offers the following, realist explanation of our intuitions about the case of the Russian nobleman:

There exists in the world a moral property of relevance to punishment, namely, desert. Desert is a property of an actor, consisting of the two moral properties of the wrongness of the act done and the culpability with which it was done... The properties of wrongdoing and culpability cause most of us to believe that, when we have culpably done wrong, such acts are evil and that we are guilty. Given the duty to suffer brought into existence by our culpable wrongdoing, our belief that we are guilty includes a belief that we must suffer (i.e., be punished).<sup>200</sup>

Moore contends that he does not attempt to derive an “ought” from an “is,” but that the truth of retributivism serves as the best explanation of our moral sentiments and, as such, we should endorse a retributivist justification of punishment. For Moore, then, retributivism should be seen as the conclusion of a good abductive inference.

Moore, of course, relies on the assumption that most people will react to the Russian nobleman case in a broadly retributivist fashion. Yet, problematically, he does not provide evidence for his assumption. I, however, will not take issue with this aspect of Moore’s argument. Moore is probably correct that most people would initially feel that the Russian nobleman is deserving of punishment.

The real problem with Moore’s argument is that it only considers a limited range of cases and intuitions. It is true that many have retributive intuitions about extreme cases like that of the Russian nobleman, but it is not clear that those intuitions remain unchanged when persons consider the corporate criminal who is guilty of tax evasion, the poor criminal, the weak-willed criminal, the criminal who is disadvantaged by institutional racism, or the criminal who had a

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<sup>199</sup> Moore (1993), pp 36-42.

<sup>200</sup> *Ibid.*, p. 42.

rough, abusive upbringing. Moore's argument is flawed, then, because it only considers our intuitions about a limited range of cases.

In fact, it is doubtful that any theory of punishment could explain *all* of our intuitions about the proper response to criminal acts. What we should seek is a theory of punishment that explains what unifies the particular acts that are criminalized and offers a conception of punishment that is sensitive to the various types of criminals and criminal acts. On the Hegelian theory of punishment, all criminalized acts represent failures of recognition and penalties for violations of the criminal law are to be adjusted to achieve the goal of repairing the various types of damage caused by crime. On the Hegelian theory, the Russian nobleman should face a greater penalty than most not because he deserves more suffering, but because his crime causes a greater degree of harm to himself, his victim, and the norms embraced by his community.

In *The Metaphysics of Morals* ("MM") Kant offers a more sophisticated defense of retributivism. Both Sharon Byrd<sup>201</sup> and Arthur Ripstein<sup>202</sup> read Kant as advocating a mixed theory of punishment, one on which the system of punishment is justified by its deterrent effects and individual acts of punishment occurring *within* the system are justified as acts of retribution.<sup>203</sup>

As both Byrd and Ripstein read Kant, one of the state's functions is to secure the rights of individual citizens by threatening punishment for rights violations. In designing these threats, the state legitimately considers their likely deterrent effect. As Byrd explains,

To encourage compliance, legislation includes some form of motivation which can be imagined as counteracting the temptation [to commit crime]. Kant points out that judicial legislation, which does not include the internal motivation of acting out of duty, attaches a motivation of aversion to the violation of these

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<sup>201</sup> See Byrd (1989).

<sup>202</sup> See Ripstein (2009).

<sup>203</sup> For a more contemporary mixed theory of punishment, see Rawls (1955).



duties since it must be coercive and not inviting.<sup>204</sup>

Kant understands that persons will not always be motivated to respect the rights of others by their recognition of duty, and thus must be coerced into doing so by the state. Kant's theory of punishment is similar to that of Erin Kelly, outlined below, in that both take it that the state may legitimately threaten punishment in order to deter persons who may be unable to act on moral reasons.

In punishing individual criminals, however, Kant takes it that the state should be guided by retributive principles. In the MM, Kant writes:

Punishment by a court...can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society. It must always be inflicted upon him *because he has committed a crime*. For a man can never be treated merely as a means to the purposes of another....<sup>205</sup>

For Kant, the CI entails that individual acts of punishment cannot be used for the purpose of deterrence. To do so, Kant thinks, is to treat the criminal as a means to an end. Kant is able to maintain a normative distinction between permissible threats of punishment aimed at deterrence and impermissible individual acts of punishment aimed at deterrence because the former threats are aimed at an entire population and, thus, do not require the state to use any individual to promote the good of deterrence.

As Byrd explains, for Kant the principle of retribution insures that no criminal is used as a mere means, but is punished in proportion to the severity of his act and consistent with the state's initial threat.<sup>206</sup> As Ripstein understands Kant, individual acts of punishment are to be proportional to the criminal's act and are taken as instances of the supremacy of the law. For Ripstein's Kant, the state has a duty to make it the case that criminals do not benefit from their

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<sup>204</sup> Byrd (1989), p.185.

<sup>205</sup> Kant (1991), p. 140.

<sup>206</sup> Byrd (1989), p. 193.

violations of the law and, as such, the state has a duty to punish criminals consistent with the principles of retributivism. These principles, we assume, are codified in the state's criminal code.<sup>207</sup>

Byrd and Ripstein, then, provide us with two complementary conceptions of Kant's retributivism. Byrd tells us that Kant's retributivism requires that the state carry out threats that are aimed at general deterrence, and Ripstein tells us that Kant's retributivism requires that the state make it the case that criminals not benefit from their crimes. The picture of Kant's retributivism that we get from Byrd and Ripstein can be summed up in the following way: retributivism requires that the state act on its legitimate threats of punishment, thereby depriving criminals of any benefits that they do not deserve.

At the core of Kant's retributivism is the idea that certain punishments "fit" particular crimes. For Kant, the state is only justified in threatening punishments that fit the crimes punished, and the notion of fit is cashed out in relation to the advantage the criminal receives from violating the criminal law. The fitting punishment, then, is the punishment that cancels the criminal's advantage.

We can understand Kant as holding the position that retributivism serves as a side constraint on the state's pursuit of general crime deterrence. And, Kant clearly believes that the state is not merely permitted to punish those who violate the criminal law, but must do so out of duty. In the MM, Kant writes:

Even if a civil society were to be dissolved by the consent of all its members (e.g. if a people inhabiting an island decided to separate and disperse throughout the world), the last murderer remaining in prison would first have to be executed, so that each has done to him what his deed deserves and blood guilt does not cling to the people for not having insisted upon his punishment; for otherwise the people

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<sup>207</sup> Ripstein (2009), pp.299-324.

can be regarded as collaborators in this public violation of justice.<sup>208</sup>

With this striking example, Kant reinforces his belief that individual acts of punishment are not to be understood as justified in relation to some future good and his belief that the state has a duty to punish the guilty. For Kant, the state has a duty to act on its legitimate threats and cannot avoid this duty by appealing to some societal good.

Kant is similar to Hegel in that he believes that it is important that the state both embraces a deontic notion of justice and treats the criminal as an individual and not as a means to an end. But, it seems that Kant does not go far enough in articulating a theory of punishment that reflects these values. Kant appears to believe that the state must either treat individual criminals as means to an end—the end of deterrence, that is—or punish criminals as a form of retribution. He concludes that the former justification of punishment is unacceptable, and thus endorses the latter. Kant, it seems, does not consider the restorative penalty as a viable alternative to penalties that either aim to deter or to punish for the sake of retribution. In this way, the first premise of Kant's argument for retributivism is simply false. We are not forced to choose between retributivism and the deterrence theory of punishment.

Admittedly, it is not entirely clear how Kant intends to argue for retributivism. It is possible that he believes that *any* punishment that is not inflicted for the sake of retribution is problematic in that it treats the criminal as a means to an end. In this way, we could understand Kant as holding the position that the Hegelian, restorative penalty is problematic in that it requires that the state use the criminal in order to repair the damage done by his crime.

Yet, in light of both Kant's understanding of what it is to treat another as a means to an end, and his argument for the conclusion that one should not treat another as a means to an end,

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<sup>208</sup> Kant (1991), p.142.

this Kantian argument against the Hegelian, restorative justification of punishment will not work. For Kant, to treat another as a means to an end is, in general terms, to not treat that other as a being who is capable of setting ends and acting on reasons, but as an *instrument* to be used to achieve some further end. In lying to another, Kant tells us, we do not engage that other *as* a reasoner, but seek to *use* his ability to reason (and *act* on reasons) as an instrument to be used to achieve some further end—that of securing a loan, for instance.

As Korsgaard points out, Kant believes that it is impermissible to treat another as a means to an end because persons, as rational, are *sources* of normativity.<sup>209</sup> For Kant, rational persons confer value on particular ends by committing themselves to realizing those ends. From this, Kant concludes that it is impermissible to use a person to bring about a certain end because doing so undermines that person's status as a source of normativity. For Kant, one person is a source of normativity if and only if all persons are sources of normativity. No rational individual, on Kant's view, is the sole determiner of which ends are of value. Thus, for Kant, if one person's status as a source of normativity is undermined—if one person is used as a means to an end—then all persons are harmed as sources of normativity.<sup>210</sup>

Clearly, then, Kant's concept of treating another as an end and Hegel's concept of recognition are similar. In the context of German Idealism, we can simply understand Hegel's concept of recognition as the successor of Kant's concept. For Hegel, to fail to recognize another is to ultimately undermine one's own status as self-conscious, and for Kant to treat another as a means to an end is to undermine one's own status as value-conferring.

The Hegelian, restorative penalty, however, should not be understood as requiring the state to treat the criminal as a means to an end. Restorative justice does aim to repair the damage

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<sup>209</sup> Korsgaard (1996a), pp. 119-124.

<sup>210</sup> *Ibid.*

done by crime, and requires that the state coerce the criminal into participating in the restorative process, but this does not amount to the state's *using* the criminal to achieve the end of restoration. As we have seen, in coercing the criminal into participating in the restorative process, the state treats the criminal as rational in that it treats the criminal's actions as reason-providing. The restorative penalty aims to both restore the recognitive relations damaged by the criminal's act and put the criminal in a position to achieve self-consciousness. The restorative penalty, then, does not require the state to treat the criminal as a means to an end, but requires the state to treat the criminal's freedom, his self-consciousness, as an end to be pursued.

Kant is simply mistaken in thinking that retributivism is the only punishment practice that respects the rationality of the criminal. Of course, it is still open to Kant to argue that *of* the punishment practices that respect the rationality of the criminal, his version of retributivism is the most justified because it incorporates the aim of general deterrence. For Kant, the threat of retributive punishment serves to deter would-be criminals without thereby using them as a means to an end. But, on Kant's theory, that a threat serves to deter must be seen as a mere positive upshot of the threat and not a manifestation of the threat's essential aim. This is so because for Kant the state is only permitted to threaten deserved punishments. Kant takes it that the state is not permitted to threaten more punishment than would be deserved because doing so would violate the principles of retributivism.

With respect to deterrence, it seems that the Hegelian and the Kantian are in the same position. The Kantian will not threaten more punishment than is deserved, and the Hegelian will not threaten more punishment than is necessary to repair the harm done by a particular type of crime. From the Hegelian perspective, that these threats tend to deter can be viewed as a positive upshot, but deterrence is not the primary aim of the Kantian theory or the Hegelian theory.

Neither theory authorizes the state to adjust punishments to achieve greater deterrence.

To be sure, the Hegelian need not be unconcerned with crime prevention. Hegel explicitly states that the state has a duty to solve the problem of poverty and the Hegelian seeks strengthen the recognitive relations that exist in a particular community, an end that will necessarily result in the reduction of the crime rate.

Given this, it is hard to see how the Kantian could make the case that Kantian retributivism is superior to Hegelian restoration. This is so because the former requires the state to harm the criminal—an action that we take to be *prima facie* unjustified—and does not aim to put the criminal in a position to achieve self-consciousness. I submit that the Hegelian, restorative conception of punishment is superior to that offered by Kant.

To be sure, Kant understands the state as having a limited role—that of protecting the rights of citizens. As such, Kant does not think that the state should be in the business of helping citizens to achieve self-consciousness. Additionally, Kant does not share the assumption that guides much of the contemporary philosophical thought about punishment: that punishment is *prima facie* unjustified. The critique I offer here is at most an *external* critique of Kant's position.

In sum, Moore's retributivism is problematic because it is justified by referencing a very limited range of intuitions, and Kant's retributivism is problematic because it requires the state to harm the criminal for the sake of retribution and does not require the state to take measures aimed at bringing the criminal to a state of self-consciousness. And, generally, retributivism is problematic from the Hegelian perspective because it does not understand the criminal as potentially self-conscious, as a potential member of a community structured by relations of reciprocal recognition.

### III. Deterrence

The deterrence theory of punishment differs drastically from the Hegelian theory defended in this work. Briefly, deterrence theory holds that punishment is only justified to the extent that it serves to deter persons from committing crimes. The state that punishes in order to deter crime understands punishment, and the threat of punishment, as providing incentives for potential criminals to obey the law. A system of punishment, for the deterrence theorist, should provide potential criminals with self-interested reasons to obey the law. For this reason, the deterrence theorist understands punishment as a form of harsh treatment. Punishments, for the deterrence theorist, must be unpleasant if they are to serve their purpose. Deterrence theories are said to be forward-looking in that they justify punishment by reference to some future good—namely, the reduction of the crime rate.

In this section, I discuss two powerful versions of deterrence theory, one articulated by economist Steven Shavell, the other by Erin Kelly, a philosopher. I conclude that deterrence theories are generally problematic because they fail to recognize the criminal as capable of acting on the right reasons, the reasons by which he is bound as a member of a recognitive community.

In *Foundations of Economic Analysis of Law*, Steven Shavell articulates powerful deterrence-based justification of criminal punishment. Relying on a particular conception of the economic approach to the analysis of law, Shavell argues that a system of punishment is only justified to the extent that it tends to increase social welfare. For Shavell, social welfare is a function of person's well-being, understood in terms of their utilities. Shavell tells us that a person's utility is to be understood in terms of what that person cares about, and that utility includes "not only material wants, but also...aesthetic tastes, altruistic feelings, or a desire for

notions of fairness to be satisfied."<sup>211</sup> Shavell, then, endorses a broadly utilitarian justification of punishment.

Shavell takes it that notions of fairness can either be given independent weight in setting punishments for specific crimes, or these notions can be seen as factors that are only important to the extent that they affect social welfare. Shavell holds that actual punishments should only differ from those that would bring about optimal deterrence<sup>212</sup> in situations in which setting punishments at the optimal level would reduce social welfare by causing persons to react negatively to punishments that they perceive as unfair. In setting punishments, Shavell argues, the state should not afford notions of fairness independent weight because doing so could reduce the overall level of social welfare.

In support of this conclusion, Shavell advances a more general thesis concerning relationship between morality and public policy formation, the Pareto conflict theorem:

If independent weight is given to a notion of morality under a measure of social welfare, then in some situations the utility of every individual will be lowered as a result of advancing that measure of social welfare.<sup>213</sup>

Shavell's argument for this claim is relatively simple. "Under the Pareto principle," Shavell (writing with Louis Kaplow) explains, "if every person is better off under one policy than another, the former policy is deemed to be socially preferable."<sup>214</sup> Concern for morality

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<sup>211</sup> Shavell (2004), p.2.

<sup>212</sup> For Shavell, the optimal deterrence level is one that will bring about a state of affairs in which would-be criminals only commit crimes in situations in which doing so will increase social welfare. For example, assuming that it is certain that all criminal activity will be detected and punished, optimal deterrence is reached under a rule which sets the punishment equal to the harm that the criminal act will likely cause. Thus, if the harm caused by car theft, say, is \$100, and the car thief is required to pay \$100 as punishment, potential thieves will only steal when the benefit they receive from stealing exceeds \$100, that is, when the theft is socially desirable. See Shavell (2004), pp. 474-478.

<sup>213</sup> Shavell (2004), p. 610.

<sup>214</sup> Kaplow and Shavell (1999), p.65.



(fairness), Shavell notes, will sometimes require lawmakers to select policies that would not be chosen if those lawmakers were concerned with social welfare exclusively. But to select policies exclusively on the basis of their impact on social welfare is to select policies that will make everyone better off. Thus, Shavell concludes, concern with morality will sometimes require lawmakers to select policies that make everyone worse off.<sup>215</sup>

Lawmakers who give independent weight to notions of fairness, Shavell assumes, will embrace a retributive conception of punishment, one on which criminals are to be punished in proportion to the severity of their crime. Shavell argues that there are situations in which threatening criminals with punishments that are not fair, from the retributivist's perspective, would benefit everyone by minimizing enforcement costs, thereby lowering taxes, while keeping deterrence levels constant.<sup>216</sup> Thus, Shavell concludes, the state's embracing a retributive notion of punishment can serve to make everyone worse off.

While retributivism is Shavell's target, his argument against retributivism can easily be seen as an argument against all conceptions of punishment that do not take deterrence to be the primary aim of a criminal justice system. Shavell would likely see the Hegelian, restorative conception of criminal justice as problematic in that the pursuit of restoration can conflict with the aim of deterrence. While the criminal who is made to repair the harm caused by his crime will likely be deterred from committing crimes in the future, neither his deterrence nor the deterrence of would-be criminals serves as the justifying aim of the restorative process. Thus, Shavell would argue, adopting a restorative conception of criminal justice could serve to make everyone worse off.

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<sup>215</sup> Shavell (2004), p. 610-611.

<sup>216</sup> Kaplow and Shavell (1999), p. 71.

Shavell, however, does not consider the possibility of a conception of well-being and social welfare that is not tied to individual's utility. For Hegel, as we have seen, there is a distinctive notion of individual well-being and social welfare that is not directly related to the happiness of a particular person, or the level of happiness (or desire satisfaction) within a community. For Hegel, the individual who is free, who is and treats himself as the subject of a normative status—who, in other words, is self-conscious—enjoys a type of well-being that is not reducible to his level of happiness. The self-conscious person is what he takes himself to be, he is not mistaken about who he in fact is. This good—that of being for oneself what one is in oneself—can be had regardless of one's level of happiness. Of course, Hegel need not deny that personal happiness is a good that the self-conscious individual can legitimately seek. Hegel's only claim is that self-consciousness and happiness are distinct goods.

Likewise, the community's level of self-consciousness does not turn on the aggregate level of happiness of its individual members. The self-conscious community acts on the values it has committed itself to—it is for itself what it is in itself. Additionally, a community's well-being, for Hegel, is tied to the recognitive relations that exist between its members. In the ideal community, each member recognizes and is recognized by every other member. This is why crime is a deviation from the ideal. Crime represents a failure of recognition and, thus, represents a reduction in social welfare. The ideal community, then, is the community which is self-conscious and in which each member recognizes and is recognized by every other member. Again, the good that is ethical life (*Sittlichkeit*) is not to be understood relative to the happiness of individual members of a given community. The Hegelian conception of individual well-being and social welfare is not compatible with Shavell's normative framework.

Moreover, a state that embraces Shavell's deterrence-based conception of punishment fails to recognize criminals as rational, and as potentially self-conscious. In the PR, Hegel asserts, but does not explicitly argue for, the claim that the criminal who is punished for the sake of deterrence is not honored as a rational being.<sup>217</sup> Recall that Hegel believes that if we punish the criminal, at least in part, because we recognize him as bound by and capable of acting on reasons, and thus providing reason for the members of his community to act on his reasons, we recognize him as rational *in* punishing. From this, Hegel concludes that punishments that are not justified by reference to the criminal's reasons for action are not forms of recognition, but serve to undermine the criminal's status as rational. Taking this to be the case, Hegel contends that the criminal "does not receive his due of honor unless the concept and measurement of his punishment are derived from his own act."<sup>218</sup>

The aim of punishment, thought of as a deterrent, is not that of repudiating the criminal's reasons for action, but to give the criminal (and would-be criminals) reasons to not act similarly in the future. In this way, the criminal is not recognized as rational. To be sure, the state that punishes to deter takes it that person threatened with punishment *can* act on self-interested, instrumental reasons, but it does not repudiate the actions of persons who fail *as* instrumental reasoners. The state that seeks to deter does not take it that persons are bound by the norms of instrumental reason and thus criticizable for their failure to comply with those norms. The state that punishes to deter does not *bind* persons by the norms of instrumental reason, it does not recognize persons *as* instrumental reasoners, but simply takes it that persons who are subject to punishment can and do reason instrumentally.

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<sup>217</sup> Hegel (1998), p. 103.

<sup>218</sup> *Ibid.*

There is a difference, then, between understanding a person as capable of instrumental reasoning and recognizing that person as an instrumental reasoner. To do the latter is to understand that person as undertaking commitments (a commitment to save for a vacation, for example) for which he can be held responsible. In punishing to deter, the state does the former, adjusting punishments in order to manipulate the criminal's behavior. In this way, the state acts as a pet owner who sanctions her pet in order to guide its future behavior. The acts of the pet owner are not acts of recognition.

In punishing to deter the state treats the criminal's action not as reason-providing, but as a mere source of harm. Only in punishing to repudiate the criminal's reasons does the state recognize him as rational. Admittedly, a punishment that is inflicted in order to deter may *serve to* repudiate the criminal's reasons for action in that others may view the punishment as a form of repudiation, but it does not follow from the fact that a punishment serves this purpose that the state punishes *in order to* repudiate the criminal's reasons. The state that punishes to deter does not engage with the criminal as a reasoner, as one who is capable of taking a stance toward the community's norms, and thus fails to honor him as rational.

This same point can be made in a different way. The deterrent punishment is not justified by the fact that the criminal failed to act *on* a particular norm, but by the fact that the criminal failed to act *in conformity with* the norm. Kant's distinction between one's acting from duty and one's acting in accordance with duty, can be employed to make this point more clear. For Kant, a person acts from duty when the CI serves as his reason for action. On the other hand, for Kant, a person merely acts in accordance with duty when he acts as the CI demands, yet does not take the CI as his reason for action.<sup>219</sup> The state that punishes in order to deter justifies individual acts

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<sup>219</sup> Kant (1997), pp. 10-11.

of punishment by referencing the criminal's failure to in accordance with duty (which, in this instance, is the criminal law). However, the state that punishes to deter does not punish the criminal because he fails to act *from* duty.

In this way, the state that punishes to deter fails to treat the criminal as capable of recognizing and acting on the right reasons in failing to bind him by the community's norms. To bind the criminal *by* a norm is to inflict sanctions on the criminal because he failed to act *on* the norm. In binding the criminal, the state treats him as the subject of some normative status by holding him responsible for acting on the norms that constitute that status. In failing to reference the criminal's reasons for action in justifying punishment, the state fails to bind the criminal by a norm and, thus, does not recognize him as rational. Hegel is thus justified in holding that a state that punishes in order to deter does not recognize the criminal as rational and potentially self-conscious.

Of course Shavell, as a deterrence theorist, is not concerned with the Hegelian conception of social welfare and individual well-being. He does not believe that the state should make efforts to recognize the criminal. The state's only legitimate aim, Shavell would argue, is that of increasing social welfare. But Shavell understands social welfare as a function of individual well-being, which itself is a function of desire, or preference satisfaction. And, Shavell holds that person's desire for justice should be taken into account in setting public policy. It is reasonable to ask, then, if person's desire for recognition can be accommodated by Shavell's theory. I contend that it cannot.

The desire for recognition, on one understanding, is the desire to be treated as an occupant of the space of reasons. It is the desire to be treated as rational, to have one's reasons taken seriously as potentially good reasons. What one desires when one desires recognition is

*actual* acknowledgement and respect, not feigned acknowledgement. Feigned recognition is no recognition at all. Likewise, one cannot recognize another simply in order to bring about some emotional state in the recognized person (happiness or feeling of respect, for instance). To recognize for this reason is to not actually treat the other's reasons as authoritative. Recognition that only aims to make the recognized person happy is not actual recognition.

Given Shavell's normative framework, the state can only recognize persons in order to bring about positive emotional states, which is to say that the state that adopts Shavell's normative framework cannot recognize persons at all. And if this is the case, the state that adopts Shavell's theory cannot satisfy person's desire for recognition under the guise of increasing social welfare. Person's desire for recognition can be accommodated by Shavell's theory.

Shavell's understanding of social welfare, then, is in tension with itself because while it understands social welfare in terms of desire satisfaction, there exist desires which cannot be satisfied by a state that embraces Shavell's theory. Of course, I (and Hegel) believe that there are reasons to reject Shavell's theory of social welfare and punishment that are independent of this internal tension, but this internal tension exists as a reason that Shavell, as a deterrence theorist, must acknowledge.

In "Criminal Justice Without Retribution," Erin Kelly develops a deterrence-based justification of punishment on which punishments are justified only to the extent that they serve to deter persons from violating the rights of others. Kelly raises doubts about the conception of freedom that underlies retributivism and our ordinary practice of blame. Kelly claims that retributivism and our ordinary practice presuppose that persons are free in that they are capable of acting on certain moral reasons. Put another way, Kelly believes that the retributivist

presupposes that the criminal, at the time he commits his crime, could have appreciated the correct moral reasons and thus could have abided by the law instead of committing a crime.<sup>220</sup>

Kelly holds that we have reason to be skeptical about the notion of freedom she takes to underlie retributivism. As Kelly points out, the criminal's level of education, genetic make-up, social circumstances, and past experiences influence which reasons are available to him at the time he commits his crime. Kelly believes that this skepticism extends even to our understanding of the capacities of those with which we have formed close personal relationships. She writes:

The possibility of explaining a friend's morally unjustifiable actions by reference to her impulses, circumstances, prior experiences, or dispositions threatens the investment we have made in viewing her as capable of doing what she ought to despite her past experiences, psychological traits, or other features of the causal order.<sup>221</sup>

For Kelly, then, our understanding of the multiple causal factors that influence person's behavior threatens to undermine our understanding of others as fully capable of acting as they ought.

Kelly contends that despite our legitimate doubts about the moral capacities of our close friends and family, we must treat these persons as capable of acting on moral reasons. That is, Kelly believes that we must treat our friends and family as free in the morally relevant sense. Kelly believes that this is the case because these close relationships would lose their meaning and value if we did not believe that others were capable of acting on moral reasons.<sup>222</sup>

However, Kelly also contends that we need not regard persons, qua their status as citizens, as free in the same sense. Kelly claims that the value of our relationships with persons as citizens does not turn on our understanding them as capable of responding to moral reasons. Kelly views the state as a "cooperative endeavor for mutual advantage" which legitimately

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<sup>220</sup> Kelly (2009), p.440.

<sup>221</sup> *Ibid.*, p.442.

<sup>222</sup> *Ibid.*, pp.445-446.

utilizes sanctions to incentivize certain behaviors. Understood in this way, Kelly contends, the state need not presuppose that persons are capable of responding to moral reasons, but only that they are instrumentally rational.<sup>223</sup> In short, Kelly believes that law-governed social relationships need not presuppose that persons can recognize and respond to moral reasons.

In light of doubts about the presuppositions of retributivism, Kelly develops a deterrence-based justification of punishment. For Kelly, the aim of criminal justice is the protection of a reasonable system of rights and liberties.<sup>224</sup> Punishment, for Kelly, should be understood as a form of harsh treatment designed so as to give persons reasons to abide by the criminal law, and thus respect the rights of others. On Kelly's view, punishments are only justly inflicted on those who have been made aware that violations of the criminal law will be met with punishment and are capable of viewing the threat of punishment as a reason to comply with the law. Kelly takes it that persons who are not instrumentally rational are not to be subjected to punishment. "The point of punishment," Kelly writes, "is to motivate the person to avoid doing something they ought not do and have fair opportunity to avoid doing."<sup>225</sup>

Kelly, of course, is aware of the worry that her view seems to presuppose a conception of freedom that is not unlike the conception presupposed by the retributivist. The retributivist, for Kelly, understands the criminal as capable of acting on moral reasons, and Kelly, it seems, presupposes that the criminal can act on instrumental reasons. But it is not clear, so goes the objection, why the retributivist's presupposition is more problematic than Kelly's.

Kelly responds to this worry by specifying that she does not, in fact, presuppose that each criminal is capable of acting on self-interested reasons, but only that each culpable criminal is

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<sup>223</sup> *Ibid.*

<sup>224</sup> Kelly does not specify what a reasonable regime of rights should look like, but we can assume that she would support a regime like the one implicit in the MPC.

<sup>225</sup> Kelly (2009), p.451.



fairly considered to be a member of a group of persons who are capable of acting on self-interested reasons. This group includes those who are not insane, coerced, or otherwise reasonably excused from criminal liability. For Kelly, a variety of conditions will exclude one from membership in this group.

In the legal context, Kelly argues, fairness requires that like cases be treated alike. Thus, for Kelly, the thief who is incapable of acting on self-interested reasons but who also does not satisfy one of the excusing conditions, is to be punished in the same manner as the thief who *is* capable of acting on self-interested reasons because both thieves were made aware of the legal consequences of theft and their actions are similar enough to warrant the same penalty. Both criminals, considered as members of a group of persons who are capable of acting on self-interested reasons, had a fair opportunity to avoid violating the law.

While powerful, Kelly's justification of punishment is problematic for several reasons. First, the core Hegelian objection leveled against Shavell's justification is applicable to Kelly's justification as well. Like Shavell, Kelly adopts a view on which the state does not punish because persons fail to act *on* particular norms, but because they fail to act in accord with those norms. The state that adopts Kelly's justification fails to recognize the criminal in punishing.

Of course, Kelly, as a deterrence theorist, need not give this objection much weight. Kelly's justification of punishment is motivated by concerns about criminal's ability to act on moral reasons, and Hegel presupposes that persons are generally capable of acting on the norms that they embrace. Kelly takes skepticism about the criminal's ability to act on moral reasons as a reason to treat him, in his capacity as a citizen, as only capable of acting on self-interested reasons. But, Kelly only offers reasons to be skeptical about the criminal's ability to act on the moral reasons embraced by his community and codified in the community's laws. Kelly does not,

however, provide us with reasons to be skeptical about the criminal's ability to act on the moral reasons *he* embraces.

It is true that a the criminal's level of education, genetic make-up, social circumstances, and past experiences influence which reasons are available to him at the time he commits his crime. But we need not conclude from this that the criminal is incapable of acting on reasons we could understand as moral. Surely, some thieves take it that they are *entitled* to steal because the world "owes" them something. Additionally, it is clear that some assailants take themselves to be *justified* in assaulting in response to insults. The fact that the criminal's background influences his behavior and beliefs does not give us reason to believe he is incapable of acting on moral reasons we take to be mistaken, those he takes to be correct.

Hegel takes it that the typical criminal simply acts on the wrong reasons, and for this reason should be subjected to a punishment which is aimed, in part, at putting him in a position to understand that his reasons for action are not good reasons. For Hegel, the wrong reasons that criminals act on include, but are not limited to, self-interested reasons. (And Hegel takes it that the state should not be in the business of giving the criminal *more* self-interested reasons, more reasons that are distinct from the right reasons.)

Thus, while Kelly's skepticism may undermine the presuppositions of some versions of retributivism, it does not undermine the core presuppositions of the Hegelian theory of punishment and it does not, in itself, give us reason to treat the criminal, qua his status as citizen, as only capable of acting on self-interested reasons.

Thus far, I have only concluded that Kelly's attack on retributivism cannot be understood as an attack on the Hegelian theory of punishment. I have not, however, provided an internal

criticism of Kelly's theory, one that would give one reason to prefer the Hegelian theory to the deterrence theory offered by Kelly. I now turn to that task.

Kelly claims that our personal relationships would lose their worth if we did not presume that our close personal relations were capable of acting on moral reasons. Skepticism about the moral agency of our friends, Kelly claims, threatens to undermine the value of our friendships. Kelly, however, does not fully explain why this is so. I propose that skepticism about moral agency threatens the value of our friendships because this skepticism undermines our conviction that our friends do in fact act on reasons, and are not simply part of the causal order. In other words, the threat of social or psychological determinism is a threat to the value of our friendships because we presuppose that our friends are capable of *recognizing* us, of taking the fact that we are committed in a certain way as a reason to be so committed themselves. Our friendships are valuable, I propose, because we take our friends to be part of the normative, spiritual world and not simply cogs in the causal order.

Kelly does not think the threat of social or psychological determinism is a threat to the value we place on persons in their capacity as citizens, but it is not clear that this is the case. For Kelly, the state is a cooperative enterprise that aims at securing certain goods for all participants, or citizens. Importantly, Kelly claims, the state seeks to secure the safety and security of its citizens by taking measures to ensure that their rights are respected. As I explained above, it is for this reason that Kelly believes the state acts legitimately in punishing to deter. Kelly, however, does not give us a reason to believe that the value of our relationships with persons, qua their status as citizens, is not threatened by social or psychological determinism.

In fact, just the opposite seems to be the case. In conceiving of oneself as a rights holder, one takes it that one is entitled to a certain type of treatment from persons who recognize one as

so entitled. Though A may not know his neighbor, B, he derives value from fact that B does not invade his house *because* she, B, recognizes him as a homeowner, as one who has a right to occupy his house uninterrupted. This value is diminished if A comes to believe that B is socially are psychologically determined to *not* invade his home. I submit, then, that there are links of recognition and respect between persons, in their capacity as citizens, which would be undermined if persons came to believe in social or psychological determinism.

If I am correct, we have reason to presuppose that both our friends and fellow citizens possess certain moral capacities. Though, this presupposition need not entail the conclusion that each criminal was, at the time he committed his crime, capable of acting on the *correct* moral reasons. The Hegelian only needs to presuppose that persons are generally capable of acting on moral reasons, reasons that are distinct from their immediate, self-interested reasons. This capacity, for Hegel, is a necessary, but not sufficient condition for person's freedom. True freedom, as we have seen, consists in a person's acting on the right reasons, the reasons by which he is bound. The criminal is not free, in Hegel's sense, but this lack of freedom is not a barrier *to*, but a necessary condition *for*, his eligibility for restorative punishment.

In sum, Kelly argues that while skepticism about free agency threatens to undermine the value we place on our friendships, it does not threaten to undermine the value we place on our relationships with persons in their capacity as citizens. I contend that this thought is mistaken. Part of the value we place in our relationships with persons as citizens is derived from the belief that our fellow citizens are capable of respecting us *as* citizens, as entitled to a certain level of respect. The Hegelian conception of freedom allows us to accommodate the worry that criminals are often not in a position to act on the *right* moral reasons, without thereby concluding that they should be treated as if they lacked the capacity to respond to any moral reasons. On the Hegelian

conception of criminal justice that I advocate, restorative penalties aim to put the criminal in a position to act freely, self-consciously, within his community. In acting self-consciously, as a citizen, the (former) criminal thereby performs free actions that are of value to his fellow citizens.

The deterrence theories of both Shavell and Kelly are problematic from the Hegelian perspective and suffer from internal tensions. I conclude, then, that the Hegelian theory of punishment should be preferred to both theories. Clearly, there are many other deterrence theories, but those put forward by Shavell and Kelly are representative of the core commitments of deterrence theorists and, as such, my criticisms of Shavell and Kelly gives us reason to be suspicious of all deterrence-based justifications of punishment.

#### IV. Social Contract

The social contract justification of punishment differs in subtle, yet profound ways from the Hegelian theory of punishment. In fact, some theorists have mistakenly interpreted Hegel as offering a contractualist justification of punishment because he claims that punishment both benefits and is owed to criminals.<sup>226</sup>

In “Punishment as Contract,” Claire Finkelstein offers a sophisticated, contemporary contractualist justification of punishment. Finkelstein motivates her contractualist justification of punishment by pointing out shortcomings in the two dominant theories of justification: retributivism and deterrence theory. She argues that her account, unlike pure retributivism, does not rely on the ill-defined notion of “desert” and is able to provide guidance on issues of criminal justice policy. Finkelstein also argues also that her theory, unlike pure deterrence theories, does not require that persons be *used* to deter others from committing crimes.

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<sup>226</sup> See Knowles (2002).

Finkelstein thinks that a justification of punishment must 1) recognize punishment as a means of social control and 2) be acceptable to those punished.<sup>227</sup> Retributivism fails to satisfy this first criterion because the retributivist does not take deterrence to be a legitimate goal of punishment. As such, Finkelstein contends, the retributivist is unable to provide any guidance on issues of criminal justice reform. For Finkelstein, deterrence theory fails to satisfy the second criterion because the deterrence theorist does not justify punishment by referencing the criminal's act, but instead the likely results of his being punished. In the face of the deterrence theorist's justification, the criminal will feel that he is simply being used to promote some social good, rather than being treated as an individual who is responsible for his act and his act alone.

Finkelstein thinks that punishment can be more easily justified on a contractualist approach because, generally, it is easier to justify upholding the conditions of a contract (which we take to be a voluntary agreement) than it is to justify imposing harsh treatment on another against his will.

Finkelstein seeks to spell out a punishment scheme that would be agreed to by rational, self-interested persons. She makes the following assumptions about these persons and their preferences:

1. [They] are rational in the sense that they are primarily interested in maximizing their welfare and their preferences are generally not other-regarding [...].
2. [E]ach has knowledge of each other's rationality and, further, that each has knowledge of each other's knowledge of his rationality [...].
3. [They] are highly risk-averse when it comes to fundamental aspects of their welfare. [...].
4. [...] They seek...an assurance of benefit for the *worst case scenario* under any rule proposed for an agreement that pertains to the basic structure.

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<sup>227</sup> Finkelstein (2010), p. 325.

5. They assume that any agreement pertaining to the basic structure [of society] must be unanimous and universal, meaning that consent must be unanimous and that benefit must be universal in order for our institution of punishment to be both voluntary and welfare enhancing.<sup>228</sup>

Finkelstein argues that under these conditions, persons would contract for a system of punishments aimed at deterring crime. The level of punishment, however, would differ from that which would be set by a pure deterrence theorist. While the deterrence theorist only considers the likelihood of a particular form of punishment to deter crime, the contractualist asks whether persons who end up worse off under a given punishment regime could see themselves as benefitting from that regime. If the answer to this latter question is “no,” it follows that a rational, self-interested person would not contract for such a regime and, thus, the regime is not justified.

To illustrate, Finkelstein asks us to imagine that contractors are deciding whether to adopt of system of punishment for property theft. Finkelstein imagines that the contractors must decide between zero, ten and twenty years imprisonment as punishment for theft. The rational contractor would not choose zero years, because this punishment regime would leave all property unprotected. Essentially, there would be no property rights in this regime, since persons without property could steal without consequence.

In deciding between the ten and twenty year penalties, the rational contractor would ask herself how she would fare in the worst case scenario under the two regimes. Finkelstein assumes that the worst-case scenario for any individual with regard to the proposed regimes of property and punishment is the scenario in which she owns no property and finds herself subject to punishment. In this scenario, according to Finkelstein, the rational contractor could see herself as benefitting because throughout her life she is afforded the opportunity to own property, a

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<sup>228</sup> *Ibid.*, p. 332.

benefit that outweighs the harm of being imprisoned for ten years. Finkelstein argues that the rational contractor would reject the twenty-year sentence because while this regime would make property more secure, the increase in security would not outweigh the harm of being imprisoned for twenty years.

Given the choice between zero, ten and twenty years in prison as punishment for theft, the rational contractor would likely choose ten. And, according to Finkelstein, imposing this penalty is justified because it is simply the enforcement of a contract that the rational thief would have agreed to *ex ante*.

Hegel advances a general objection to the contractualist understanding of the state which can also serve as an objection to the contractualist justification of punishment. In §258 of the PR, Hegel attempts to explicate and undermine the contractualist presuppositions that he believes entail a base understanding of the state. Hegel writes:

If the state is confused with civil society, and if its specific end is laid down as the security and protection of property and personal freedom, then *the interest of individuals as such* becomes the ultimate end of their association, and it follows that membership of the state is something optional. But the state's relation to the individual is quite different from this. Since the state is objective spirit, it is only as one of its members that the individual himself has objectivity, truth, and ethical life.<sup>229</sup>

This passage is better understood in light of an addition to §75 inserted by Eduard Gans. Gans writes:

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<sup>229</sup> Hegel (1998), p. 228-229. In §75 of the PR, Hegel states his disagreement with the contractualist understanding of the state. There he writes:

The intrusion of this contractual relation, and relationships concerning private property generally, into the relation between the individual and the state has been productive of the greatest confusion in both constitutional law and actuality.... they [social contract theorists] have transferred the characteristics of private property into a sphere of a quite different and higher nature. Hegel (1998), p. 85.



In contract...there are two identical wills who are both persons and wish to remain property-owners. Thus contract springs from a person's arbitrary will.... But the case is quite different with the state; it does not lie with an individual's arbitrary will to separate himself from the state.... The rational end of humanity is life in the state... therefore the state does not rest on contract, for contract presupposes arbitrariness.<sup>230</sup>

Hegel's main objection to social contract theory is that it assumes that the purpose of the state, or a given community, is to secure certain goods for its members. But, according to Hegel, membership in a community, one's status as the citizen of some state, makes selfhood and freedom possible. To think otherwise, Hegel contends, is to embrace a view on which persons can exist *as persons* outside of a particular community.

For Hegel, the contractualist is implicitly committed to a view on which persons can be understood as selves, as recognized individuals, *prior* to the formation of a state. This is so because on Hegel's view entering a contract with another *is* a form of recognition. Whether we understand the contract as one for the sale of goods, or as establishing a state, in entering a contract with another, one recognizes that other as *entitled* to execute the terms of the contract. In other words, contracting parties bear a normative, and not merely natural relation to one another. Contracting parties are entitled to enter contractual relationships and are held responsible for failing to adhere to the terms of a contract. Genuine contractual relations, then, require a certain level of normativity.

If it is the case that contractual relations require a certain level of normativity, and, as Hegel believes, genuine normativity is only possible among persons who recognize one another—a genuine recognitive community—then such a community cannot be established *by* contract. Or, to put the conclusion another way, the normativity that exists within a political community cannot be understood as arising from a contract, whether real or imagined.

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<sup>230</sup> Hegel (1998), pp. 85-86.

Hegel, in §258, and Gans, in §75, also express the idea that the contractualist mistakenly assumes that the individual can intelligibly separate himself from all recognitive relations. Persons entitled to contract can choose to *not* enter a given contract. But, Hegel contends, it does not make sense to suppose that an individual can choose to eschew all recognitive relations and remain a self. As we have seen, selves only exist in relation to other selves. The contractualist, Hegel contends, fails to recognize this point.

To be clear, Hegel is not of the opinion that persons cannot contract to for specific institutions or policies. In fact, Hegel takes it that a community's norms are determined through a process of negotiation and agreement that resembles the process that the contractualist takes to give rise to the state. Hegel believes that contractual relations are possible and practically necessary within a community, but cannot exist prior to and outside of a given community.

Hegel's objections to the contractualist understanding of the state can easily be extended to the contractualist justification of punishment. For Hegel, to be eligible for sanctions for the violation of a rule is not, in the first instance, something that one contracts for. To be entitled to make contracts, to be recognized as a contracting party, is to be eligible for sanctions of a certain type. To be entitled to make contracts, to commit oneself to a certain course of action, one must be recognized as the owner of one's body and as bound by the norms of bodily ownership. And, to be recognized as bound by the norms of bodily ownership is, in part, to be subject to criticism and sanctions for one's violations of those norms. Thus, those who are recognized as entitled to make contracts are subject to sanctions and because of this we cannot understand sanctions, in the first instance, as arising from a contract.

Hegel takes it that those who understand the state or a given punishment regime as arising from contract have mistakenly "transferred the characteristics of private property into a

sphere of a quite different and higher nature.”<sup>231</sup> For Hegel, contracts only exist *within* ethical life and thus cannot exist as the normative foundation of a recognitive community or any regime of sanctions.

Of course, Finkelstein, as a contractualist, may accept this Hegelian argument against the contractualist understanding of the state and its punishment regime, but assert nonetheless that *after* a state has been established recognized persons would contract for a system of punishments similar to the one outlined by the contractualist. In other words, the contractualist could, it seems, accept the Hegelian argument against the contractualist understanding of the state, yet hold that the social contract is the best model on which to understand the justice of a particular punishment regime.

This suggestion is problematic because it would require us to distribute punishments based on the benefits and burdens that persons could rationally contract for. The social contract model places side constraints on the state’s use of punishment as a deterrent, but it also requires the state to treat the criminal as if he were unable to appreciate and act on the norms by which he is bound. The contractualist model of punishment, then, is plagued by some of the same problems that plague the deterrence-based justifications of punishment discussed above.

Only the Hegelian theory of punishment recognizes the criminal not as a mere threat to the safety of individual persons, but as a person himself who is capable of acting freely as a self-conscious member of recognitive community. The Hegelian theory should be preferred to retributivism, deterrence theory, and the contractualist theory. Understanding the significance of Hegel’s thoughts on criminal justice allow us to move from a conception of criminal justice that

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<sup>231</sup> Hegel (1998), p. 85.

is merely concerned with punishment (understood as a form of harsh treatment) to one that takes seriously the concept of recognition.

## Conclusion

I have argued that a well-functioning criminal justice system should seek to repair the various types of physical, psychological, and normative harms caused by acts of crime, thereby restoring a particular community to its pre-crime state. For far too long, we have either implicitly or explicitly thought of punishment as a mechanism for either getting back at or controlling the criminal. Neither way of thinking about punishment recognizes the criminal as (potentially) one of us.

In reaching this conclusion, I developed a Hegelian theory of punishment and argued that it is superior to the most viable alternative theories. In Chapter 1, I provided an interpretation of Hegel's thoughts on the relationship between recognition, freedom, and ethical life. I claimed that for Hegel freedom is only possible within ethical life, within circumstances in which self-conscious persons recognize one another as the subjects of normative statuses. In the chapter, I offered a Hegelian conception of bodily ownership and property ownership on which these statuses serve to give content to the Hegelian notion of freedom.

In Chapter 2, I articulated a Hegelian conception of crime, one on which crime is understood as a disruption of ethical life which threatens to undermine the freedom of all. In the chapter, I argued that crime causes physical, emotional, and normative harm. In Chapter 2, I also explained that Hegel believes that the content of the norms that constitute ethical life are to be determined within ethical life, through a process of conversation and negotiation. I argued further that our contemporary conception of crime, as consisting of *actus reus* and *mens rea*, can be understood in recognitive terms. The criminal, as we understand him, exhibits the attitude of Hegel's master.

Further, in Chapter 2, I articulated a Hegelian conception of action and responsibility that allows us to understand how the individual and community can both achieve self-consciousness and gain self-knowledge. I concluded Chapter 2 by articulating a Hegelian conception of civil disobedience.

In Chapter 3, I presented the Hegelian, restorative theory of criminal justice. There I argued that Hegel's discussion of wrongdoing and punishment in the PR and the PS support a restorative conception of criminal justice, one on which the state punishes in order to repair the various types of harm caused by crime. The restorative penalty seeks to bring the criminal into conversation with his victim in order both ask for and receive forgiveness from the victim and to work to make his victim whole. Hegelian restorative justice aims, in part, to put the criminal in a position to achieve self-consciousness and receive forgiveness from his victim and his community.

Accepting the Hegelian theory of criminal justice, I argued, would require that the state not inflict punishments that would cause permanent physical or psychological damage to the criminal, as either type of damage would hinder the criminal's ability to achieve self-consciousness. In Chapter 3, I also argued that the state that adopts the Hegelian theory of criminal justice seeks to forgive the criminal, to treat the criminal as if he had never committed his offense. Doing so would require that the state accept the punished criminal as a full citizen, with all the rights and privileges that attach to citizenship.

In Chapter 4, I argued that the Hegelian theory of criminal justice is superior to retributivism, deterrence theory, and the social contract justification of punishment. There I argued that each theory fails to regard the criminal as at least potentially self-conscious, instead viewing him merely as a threat of some type.

The criminal is not a mere threat. He was raised in our community and his continued personhood requires that we treat him as capable of living within the community as a free, self-conscious person. Of course, thinking differently about the criminal is difficult. Criminals cause us much pain. They violate our bodily autonomy, make us feel unsafe and, in extreme cases, rob us of our loved ones. But despite this, we should embrace a restorative conception of criminal justice. We should do this for our sakes and for the sake of the criminal.

“The wounds of the Spirit heal, and leave no scars behind...”<sup>232</sup>

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<sup>232</sup> Hegel (1977), p.407.

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