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Hegel's Theory of Punishment in Light of Contemporary Philosophy of Criminal Law

Introduction

Hegel's theory of punishment is usually labelled as a retributivist one – it is understood that Hegel justified the imposition of punishment by the individual desert of the criminal, who, by the act of crime, negates the rights of the victim and, consequently, the right as such. However, what is often forgotten, crime also negates the right of the criminal himself.¹ In effect, punishment is needed as negation of those negations, i.e., an annulment that cancels the performance of crime whose primary function is retribution imposed on the deserving criminal.²

I would like to argue that Hegel is a very particular kind of retributivist – a 'communitarian' one. In his approach, the offender violates another person as subject of law and the notion of right itself, but also infringes the fundamental relationship which binds the political community. Punishment not only balances and restores that relation between a wrongdoer who unlawfully uses coercion on a victim to negate her rights and simultaneously the right itself, but it also serves another purpose: it recognizes and affirms offender's membership in a political community of rational persons. By the means of criminal prohibitions the legal system communicates values that are deemed important for the particular society. Punishment in this sense re-establishes the offender as a fellow citizen and communicates what is not right (and what is right). Sublation (*Aufheben*) of crime by the punishment recognizes wrongdoer not

¹ The importance of this aspect, which additionally underlines the central role of Hegel's "theory of recognition" in his approach to punishment is often omitted. I will note the following exceptions to this trend, however: Markus Dubber, "Rediscovering Hegel's Theory of Crime and Punishment", in: *Michigan Law Review* 92 (1994), 1577–1621; Thom Brooks, *Hegel's Political Philosophy. A Systematic Reading of the Philosophy of Right*, Edinburgh 2007, 39–51; Jane Johnson, "Hegel on punishment: a more sophisticated retributivism", in: *Retributivism. Essays on theory and policy*, edited by Mark D. White, Oxford 2001, 146–168.

² See for example David E. Cooper, "Hegel's Theory of Punishment", in: *Hegel's Political Philosophy: Problems and Perspectives*, edited by Zbigniew Pelczynski, Cambridge 1971, 151–167.