Hegel and the Normative Foundations of Criminal Justice

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Is criminal justice a necessary evil or does it have intrinsic value? Hegel's Philosophy of Right insists that criminal justice measures by the state have intrinsic value on the basis of their discharging the state's responsibility to preserve freedom and right. Separating the foundational, functional and formal dimensions of his argument, this paper argues that Hegel’s position is defensible only to the extent that an ideal of the state has been made real. Hegel fails, on related grounds, to vouchsafe normative foundations for criminal justice.

Introduction

Do criminal justice systems stand in need of justification? To the extent that criminal justice practices involve coercion, force, and deprivation which mirror the kinds of actions that they intend to prevent or remedy, criminal justice has an ambiguous claim to justice. This presents us with a choice. Either, on the one hand, concede that the similarities between crime and responses to crime are real, and then prove that they are justified similarities. Or, on the other, prove that the similarities are superficial and that coercion, force, or deprivation visited on an individual by the state are of a wholly different order to those arising from the actions of private individuals.

The first strategy, preserving the similarities, can be treated as a ‘necessary evil’ position (Duff 1986). The evils of state coercion are real, but justified by the ends that they serve. Or, put another way, the state possesses a monopoly on the legitimate use of violence because, while violence is an evil, its use by the state secures other goods.

The second strategy is the harder route. It demands demonstration that coercion, force, or depravations enacted by a private individual (crimes) are qualitatively different to ostensibly similar actions when visited on an individual by the state (criminal justice). There are three possibilities here which will structure subsequent remarks. First, insist that they have different foundations: coercion arising from individual actions and state actions are always categorically different from their inception. Second, treat them as serving wholly different functions. Or, third, insist that their material form is always different.

Hegel’s analysis of criminal justice in the Philosophy of Right (1820, hereafter PR) posits difference on all three grounds. Rejecting an account of criminal justice as regrettable but socially useful, Hegel insists that criminal justice has intrinsic value. Violence arising from the state and state actors is categorically distinctive from its inception because it originates in agents required to police and punish. It is distinctive in its function: to negate, and not simply react to, an injustice. And it is distinctive in its form:

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legal retribution is always distinguishable from vengeance because it communicates to criminals, treating them as rational, rights-holding, individuals.

Hegel's account of criminal justice is a powerful defence of punishment as an intrinsically, rather than instrumentally, valuable practice. It is an account containing a good, if sparse, psychology of punishment. And it is an account providing a coherent phenomenology of criminal justice, i.e. an explanation of how criminal justice appears to us as both morally problematic and necessary. There are nonetheless further questions that need to be asked of Hegel concerning both the internal coherence of his arguments and the more general assumptions underpinning them. It is the intention of this paper to map the main arguments, and internal tensions, of Hegel's position; it concludes that Walter Benjamin's analysis of instrumental violence provides the most perspicacious, external, critique of Hegel's underlying assumptions. More specifically, and with respect to internal coherence, Hegel's arguments identifying foundational, functional, and formal differences between state and individual violence are mutually dependent: functional difference depends upon proving foundational difference, and formal difference depends upon the assumption of functional difference. More broadly, conventional, non-Hegelian, histories of the state – wherein the classification of crime is dynamic or the state's authority is contingent – challenge Hegel's conclusion that violence and right are in logical opposition. Criminal justice is better characterised as having a 'fateful', rather than dialectical or negating, character. For these reasons we should doubt Hegel's appeal to the modern state as the sufficient condition for justified criminal justice practices.

Hegel's System

Hegel’s PR benefits from contextualisation within Hegel's general philosophy. Hegel is a system-building philosopher with a synoptic objective: encompassing the entirety of the physical, the mental, and the historical within a single explanatory framework. This system seeks to explain change and progress and does this by charting the evolution of consciousness (Hegel, 1977 [1807]). This evolution of consciousness is the progressive movement towards consciousness of life ('spirit' / 'Geist') as a whole. That is, an evolution away from humans understanding only the particular and the local, an evolution towards understanding the whole of life (or the universal), and a process that will have an end point where there is harmonious understanding of both the particular and the universal. While we might be suspicious of both the evolutionary dimension of this system and the terms in which it is couched (Foucault, 1979), its value lies in being an account of change through ideas and consciousness. As our ideas have become richer – more able to apprehend the universal, progressively less perspectival – we have wrought changes in our view of the world and of ourselves.

The focus of the PR is not consciousness generally, but specifically consciousness of freedom. It is an analysis of freedom – “the worthiest and holiest thing in humanity” (Hegel, 2008 [1820]: 204) – as a driver and goal of change in human affairs. Such freedom is not freedom of the will understood as individual volition. It is the experience of our own freedom, recognition of the freedom of others, and
apprehension that such freedom generates social rights and obligations. It is also an analysis of freedom as lived in the public and private spheres, and the clash of ostensibly incompatible rights in those spheres:

Morality, ethical life, the interests of the state, each of these is a distinctive right because each of them is a specific determination and existence of freedom. They can come into collision with each other only insofar as they are all equally rights (Hegel, 2008 [1820]: 47).

Above all, this is an evolutionary, not static, analysis of freedom and the state. The evolution that Hegel charts and celebrates in the PR is the movement away from the priority of the good to the priority of the right. The antonyms 'right and wrong', as opposed to 'good and bad', mark a distinctly modern, and decisive, shift in our consciousness. Hegel seeks to isolate the emergence of 'right', show the forms that it can take, and ultimately demonstrate that this term has an intimate relationship with freedom. As Steinberger puts it:

In the Hegelian system, the word "Right" refers to the entire normative structure of social life; as such, it includes what we generally think of as the morality of interpersonal relations, civil rights and liberties, the law, and the legitimate bases of political authority (1983: 859).

The emergence of right was a crucial step in human consciousness. The idea of the morally good – what is useful to increase or achieve human happiness or flourishing – dominated pre-modern thinking about the individual and the state. Such a prioritisation of the good is, however, potentially repressive in the hands of the state. It establishes a normative view of the human good regardless of individual will and human particularity, and authorises the limitation of freedom in the name of a prescribed conception of human nature or human happiness. Right, conversely, has the benefit of respecting and encompassing both the particular and the universal. The individual's particular will, needs, and personality can be realised through the granting of rights which give immunity against the intrusions of others. However, the state not only grants rights but administers human affairs on the basis of laws that are fair and impartial, i.e. laws that are right necessarily. Our most basic rights – to life, to property, to personality – are found neither in contingent laws nor in contingent moral norms, but in the state concretising what is necessary:

[T]he fact that the human being in and for himself is not destined to be a slave should not itself be understood as a mere 'ought'. These demands are fulfilled, however, only when we recognise that the Idea of freedom is actual only as the state (Hegel, 2008 [1820]: 70-71).

The PR is, therefore, the product of two related themes: the emergence of right as a concept, and the material development of the modern state allowing right to become concretised in the rule of law. Together these ideal and material phenomena have driven human consciousness towards a full realisation of freedom.
Some signposts can be raised at this point. Most crucially, the idea of freedom is fundamental to Hegel’s analysis, although it is easy to lose sight of within Hegel’s sustained – phenomenological and dialectical – analysis of the modern, bureaucratic, state (Fine, 2001). And this narrative anticipates some contemporary criticisms, both conservative and radical, of liberalism. As with communitarian positions, public and private freedoms have to be understood within a framework of social interdependence (Mulhall and Smith, 1992: 134-139). Hegel also anticipates criticism, shared by critical legal studies and critical race theory (Douzinas and Gearey, 2005), of the value of rights language and rights claims alone. The expansion of freedom cannot depend exclusively on granting rights to degraded minorities: without concrete changes in the state alongside changes in consciousness about what is right, the granting of rights becomes an empty formalism. Finally, we should not expect from Hegel a programme for criminal law or for punishment. Hegel does not prescribe standards of conduct from which individuals are prohibited from deviating; he is isolating the logically necessary components of the modern state (Tunik, 1992). A programmatic scheme of social engineering would be inimical to the priority of the right and the expansion of freedom. Rather, an evolved state has one overarching responsibility: to maintain and allow the expansion of freedom. Criminal justice practices which are inimical to freedom are illegitimate from their inception.

**Hegel and crime**

For Hegel, ideas of crime, criminal justice, and criminal law have evolved with the evolution of human consciousness. Crime is not a natural category, nor is it something that has evolved in human understanding unrelated to other ideas. Those ideas are freedom and right. Right, as indicated, contains both the particular (my rights) and the universal (what is right) and is not reducible to individual will. Crime, as an aspect of what is right, is never something purely subjective:

[Criminal justice is distinctive in that it] is the demand for a justice freed from subjective interest and a subjective form and no longer contingent on power, i.e. it is the demand for justice not as revenge but as punishment (Hegel, 2008 [1820]: 107).

Hegel is at pains to distinguish vengeance, the subjective will to inflict pain in response to being wronged, from state punishment, which always possesses a relationship with right and rights:

[R]evenge remains defective inasmuch as it is the act of a subjective will […]. Members of a court of law are, indeed, also persons, but their will is the universal will of the law and they aim to import into the punishment nothing except what is implied in the nature of the thing (Hegel, 2008 [1820]: 106-107).

It is right that the state respond to crime, not in order to avenge the wrong done to any particular individual, but to respond to wrongness itself. ‘Wrongness’ is found in deliberate assaults on the rights
and freedom of an individual. As a violation of one’s own obligations, wrongs are subjective; but as an assault on freedom they are objective:

Wrong in the full sense of the word is crime, where there is no respect either for right in itself or for what seems right to me, where, then, both sides, the objective and the subjective are infringed (Hegel, 2008 [1820]: 97).

A crime has an irreducibly social dimension. Crime is never only a wrong against an individual. A crime is a violation of rights and freedom even where the victim alone has suffered harm: "[A]n injury to one member of society is an injury to all others" (Hegel, 2008 [1820]: 207).

We thereby have the outlines of one of three possible routes to an intrinsic justification of criminal justice: that it has an origin or foundation different to that of the violence of the private individual. Individual violence is founded in self-interest and blindness to the rights and freedoms of others; criminal justice is founded in the responsibility to create rights and freedoms. The responsibility of the state arises from its status as the agent and precondition of freedom and right. And the state is the only agent capable of acting on the basis of what is universal (and necessary) rather than particular (and contingent). Note, this is a responsibility not, in contradistinction to utilitarianism, something that may (or may not) be useful or good:

If crime and its annulment […] are treated as if they were unqualified evils, it must, of course, seem quite unreasonable to will an evil merely because another evil is there already. To give punishment this superficial character of an evil is, amongst the various theories of punishment, the fundamental presupposition of those which regard it as a preventive measure, a deterrent, a threat, as reformative etc., and what on these theories is supposed to result from punishment is characterised equally superficially as a good. But it is not merely a question of [what is good]; the precise point at issue is wrong and righting of it, that is, justice (Hegel, 2008 [1820]: 101).

This foundation of criminal justice can be glossed as follows. The state has a responsibility to be the condition of, and defend, freedom. Consequently, the state must classify and distinguish certain acts as crimes because, if it fails to, it will treat all social ‘deviations’ (from poor life decisions to murder) as a diminution of the good. To fail to censure the wrong, or only seek to augment the good, is to fail to protect the normative foundations of the state: the freedom created and marked by the right.

Hegel portrays criminal justice as confronting an a priori category of wrongs, wrongs which are an affront to the basis of the state rather than the concerns of private individuals. They are a priori in the sense of possessing a necessity arising from their correspondence with universal truths about humanity and freedom. This category of a priori wrongs exists by virtue of the emergence of right: rightness has gained logical necessity through a teleological, dialectical, expansion of human consciousness; criminal
wrongs are those acts which challenge this necessity and universality. And Hegel has to presume that such a division can be drawn, because only wrongs can be punished.

However, the division as we encounter it contemporary law exhibits no such a priori necessity. The divisions between crime and tort (and, by extension, between moral obligation and public policy) appear as contingent, not necessary, classifications. Hegel’s response is that, despite the vicissitudes of existing law, criminal wrongs are always associated with criminal responsibility. We do not treat all events that diminish our happiness as crimes. Only responsible acts, the products of rational agency, are capable of being considered wrongs. And, those cases of wrong through, for example, negligence lack the intent to negate another’s rights and are, accordingly, dealt with through non-criminal legal measures.

Nonetheless, focussing on intentional wrongs fails to draw a wholly persuasive dividing line between crimes as an assault on right, and other (deliberate but less fundamentally transgressive) wrongs.

This foundation, a moral responsibility to engage in coercion, is uniquely possessed by the state. And this responsibility generates the distinctive function of criminal law and justice. The function of criminal justice is to discharge a responsibility on the part of the state: to negate the original violence. In fact because the act of private violence has been characterised as a negation of what is necessary, criminal justice meets negation with negation:

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 a negation (Hegel, 2008 [1820]: 100).

This might be thought to function like a double-negative in speech or logic: two ‘nots’ or negations cancel one another out. In parallel, when the state uses a form of violence or coercion to respond to crime, we are not left with two instances of violence or coercion, rather, nothing at all. If correct, this is an attractive explanation of why criminal justice appears both problematic and necessary. However, this depends upon proving that crime is fundamentally or categorically a negation. At first glance this is questionable. Crime is a relational concept describing a relationship between criminal and victim; only secondarily, when legally conceptualised, is it perceived as a negation of one’s rights. And this abstraction has led to the charge that Hegel’s functional negation is little better than an ‘analogy’ (Brown, 2001: 493). Hegel’s response is that we have to adopt the point of view of the state. The state’s concern is with the will of the criminal, not the harm visited on the victim. It is an attitude towards others, manifest in a wilful act of criminality that is negative, not a concrete state of affairs:

The positive existence of the injury consists solely in the particular will of the criminal. Hence to injure this particular will as a determinately existent will is to annul the crime, which otherwise would be held valid, and to restore the right (Hegel, 2008 [1820]: 101).

This reflects contemporary criminal law. Agency and culpability – regardless of outcome – are the sufficient conditions of criminal responsibility. And on this basis, Hegel’s functional position is consistent
with the responsibility of the state alone to engage in criminal justice and do this solely on the basis of the criminal’s responsibility for a wrong.

If we concede to Hegel that the proper function of criminal justice is this negating of criminal intent, we should nonetheless ask two further questions. First, has Hegel proven that criminal justice, understood as the negation of a negation, is the cancellation of an injustice with a just act, rather than cancellation of an injustice with another injustice? Here Hegel has to link function and foundation, i.e. insist that criminal justice is already just because of its origin in a state. The exercise of criminal justice functions as a negation only on the assumption that state is already in a position to do justice.

A second question: does this negation of a negation result in the status quo ante despite the fact two things (coercion and a coercive response) have taken place? Hegel’s answer is that while in actual terms two things have happened, from an ideal and normative perspective we are left with nothing. An attitude or orientation towards others – a negation of their status as rights-holder – has been negated, not an aspect of the past. With this negation alone the state re-establishes the situation of universal right and freedom in the state. This distinguishes Hegel’s account of criminal justice from a Durkheimian one (1986: 167-173) with which is shares some similarities. Durkheim sees criminal justice measures as serving the function of generating or preserving solidarity; the function that criminal justice serves for Hegel is deontological not consequential. There is a duty to negate the existence of crime; any consequences flowing from this negation of crime are normatively irrelevant.

These points about function also generate conclusions about the form of criminal justice. If Hegel’s negation of a negation account of criminal justice is to hold, then the forms of individual violence and state violence have to be the same. Even if we admit that this is a cancelling out rather than a duplication of violence, the two violences must be qualitatively identical. Certainly, for Hegel, state and individual coercion share common forms. But both instances of coercive violence also share a negativity or self-destructiveness. Properly administered justice is always an exact counterpart to the original violence and as such its cancellation. Hegel’s concession that state violence is violence is uncharacteristically pragmatic:

But apart from being applied to the particular, right by being posited [as law] becomes applicable to the individual case. Hence it enters the sphere where quantity, not the concept, is the principle of determination. This is the sphere of the quantitative […]. In this sphere, the concept merely lays down a general limit, within which vacillation is still possible. This vacillation must be terminated, however, in the interest of getting something done, and for this reason there is a place within that limit for contingent and arbitrary decisions (Hegel, 2008 [1820]: 202).

Finally, part of Hegel’s account of form lies in the relationship between properly administered punishment and recognition of the personhood of the person being punished:
To base a justification of punishment on threat is to liken it to the act of someone who lifts a stick to a dog. It is to treat a human being like a dog instead of with the freedom and respect due to him as a human being. But a threat, which may ultimately rouse a person to demonstrate his freedom in spite of it, discards justice altogether (Hegel, 2008 [1820]: 102).

There are two points concerning personhood at work here. One is recognition of the criminal as human. Not as an animal to be conditioned but as a free human able to understand why punishment is appropriate. Second, a point presupposing the first, is that criminals should be communicated with. Punishment in a pure form, separated from reform and deterrence, communicates the importance of freedom and rights even though a free individual may decline, or be unable to, hear that message. As such, punishment must take a form where freedom is removed from an individual criminal only insofar as it serves to communicate the importance of freedom: communication, not incapacitation, is central. With so much weight attached to punishment in this account of criminal justice, we should consider Hegel's specific analyses of punishment.

**Hegel and punishment**

Hegel's view of punishment is not simply an outcrop or by-product of his ideas of the state and justice, rather a state's very claim to being an agent of justice is captured in the negation that takes place in punishment. To fail to punish is to undermine the very notion of right. Conversely this need not exactly mirror the crime and Hegel opposes crude *lex talionis*: "requital cannot simply be made specifically equal to the crime" (Hegel, 2008 [1820]: 106). Jointly, these points identify Hegel as a retributivist, albeit a deontological, purely duty-based retributivist, rather than an avenging, desert-based, retributivist (Robinson, 2008). Retribution is a duty demanded by the functioning of rights in general. The state does not remedy or restore the interests or status of the victim alone, and nor is the state a form of, or substitute, victim. Rather the state has the authority and responsibility to respond to violence because of the universality – the rights, the necessity, and the law – that the state is the embodiment of and which the criminal has denied through her actions.

Accordingly, at the foundation of punishment, Hegel draws a clear dividing line between retribution and vengeance. Retribution demands attribution of, and seeks acceptance of, responsibility for criminality. And responsibility is located in agency, capacity and rationality. As Steinberger expresses it (1983: 861): "The criminal is thus, by definition, a free individual. Punishment confirms this by identifying the transgressor as a criminal." Punishment only accrues to those possessing rationality, and the criminal is a rational citizen who, through punishment, should be reconciled with the law, the state, and himself:

[Punishment] is the reconciliation of the criminal with himself, i.e. with the law known by him as his own and as valid for him and his protection; when this law is executed upon him, he himself finds in this process the satisfaction of justice and nothing save his own act (Hegel, 2008 [1820]: 209).
Crucially, punishment is not expulsion from a community or exiling from the state. The prisoner remains a citizen and does not forfeit any rights other than those flowing from the manner of punishment, principally loss of freedom. Hegel’s philosophy of punishment has its greatest appeal here in its unequivocal prohibition on punishment as dehumanisation.

These foundations dictate some of the formal characteristics of punishment. Hegel, consistent with his system, historicises punishment and the forms of punishment. For instance:

The magnitude of a person’s punishment, for example, cannot be made to correspond to any determination of the concept [of punishment], and the decision made, whatever it be, is from this point of view always arbitrary. But this contingency is itself necessary, and if you argue against having a code at all on the ground that any code is incomplete, you are overlooking just that element of law in which completion is not to be achieved and which therefore must just be accepted as it stands (Hegel, 2008 [1820]: 203).

There is no necessary correlation between the ethical and moral demand that the state punishes and the exact quantity and quality of that punishment:

Reason cannot determine, nor can the concept provide any principle whose application could decide, whether justice requires for an offence i/ a corporal punishment of forty lashes or thirty-nine, or ii/ a fine of five dollars or four dollars […], or iii/ imprisonment of a year or three hundred and sixty-four […] days […]. And yet injustice is done at once if there is one lash too many, or one dollar […], one week in prison or one day, too many or too few (Hegel, 2008 [1820]: 203).

Punishment has to be a negation of the original crime it responds to. Nonetheless quantity and form can and will change through time: “A penal code […] is primarily the child of its age and the state of civil society at the time” (Hegel, 2008 [1820]: 207). This goes some way towards Hegel’s own (not uncommon) inconsistency in denying that strict proportionality holds in punishment, except for the case of murder where death is the only just punishment (Hegel, 2008 [1820]: 106).

To summarise, Hegel only proves that, given its normative foundations, the form of criminal punishment must be a constrained and proportionate form of violence, not that it takes a categorically different form to individual violence. This echoes the idea found in contemporary literature that there is no substitute – morally, and not just efficaciously – for ‘hard treatment’ (Ryberg, 2004: 22-36). This gloss on the idea of violence and coercion by the state suggests that deprivation and coercion may be used by the state in a way that is constrained but nonetheless coercive. Hard treatment is a means of communication, through deprivation and public censure, which have an irreplaceable debt-discharging role. Hegel’s justification of this form lies in the rights of the state and the criminal: the state’s responsibility to defend
the foundations of right and the criminal's right to be held responsible for her acts as a free individual. Thus Hegel has an answer to a question articulated by Cooper (1971: 166):

[Let us admit that the existence of rights is only established if some action is taken against those who infringe putative rights. But why should this action take the form of punishment? Why should it not take the form of public denunciation, for example?]

Hegel must respond that the weight of the penalty has to reflect the violation of fundamental rights, indeed the precondition of those rights. Hegel treats certain intrusions on property and person as fundamental to the state, while other rights can be defended through civil means. Some wrongs (in a general sense) can be dealt with through purely communicative means, but some wrongs (as negation of rights), have to be treated as crimes demanding punishment.

That punishment must necessarily take the form of violence is less certain and other disciplining technologies may well be strong, if not better, communicative means (Foucault, 1979). But these means would fail to fulfil the functional constraints placed on punishment. Again, the function of punishment is not to bring about certain ends but to discharge a responsibility on the part of the state; its intrinsic value lies in being a normative remedy, a negation. So, while the final outcome of any punishment is not significant, it must nonetheless serve two ends: communication to a rational individual and recognition.

Recognition has two facets within punishment. The first is that crime can be construed as a denial or failure of recognition, the second that the function of punishment is to elicit recognition. Crime is a violation of personhood, a failure not only to see that criminality has violated (universal and necessary) laws promulgated by the state, but that the victim of crime deserves recognition as a rights-holding individual who is both particular (has particular interests) and is representative of universal values. This failure of recognition is not confined to a pathological, or irredeemably criminal, class or type. It is part of the very nature of human understanding. Human consciousness is always characterised by struggle, imbalance and incompleteness (Hegel 1977 [1807]: 111-119). Crime is a deviation from this normal struggle for recognition amongst free individuals. Punishment functions to remedy a failure, not to alter the structure of, or cure an illness within, an individual's personality.

These ideas are informed by a psychology of alterity: that we come to know ourselves through interaction with other people. Interaction sets in train the formation of the psyche and continues throughout our lives. Interaction is always characterised by struggle, because we never control the impression we make on others, and because we are never wholly self-sufficient individuals. Nevertheless, human interaction, like consciousness itself, is characterised by progress. Over time, as human consciousness has evolved, and as our own individual understanding expands, we can see people 'in their own right' not purely as others that we need recognition from. We recognise people as particular rights-holders and, more completely, free individuals deserving respect. In short, recognition of others is not simply a categorisation of individuals as possessing a particular status or set of rights, but seeing ourselves and others as free and mutually dependent (Honneth, 1996).
This underpins punishment’s function as the eliciting of recognition. Punishment is not curative, and it cannot be purely afflictive. The function of punishment is to cultivate recognition of the crime as a failure of recognition. Therefore, punishment is (negatively) not about the reformation of character but (positively) about recognition of rights and freedom. We might ask whether the functioning of punishment, as we generally encounter it, could achieve this without a more fundamental remedial rehabilitative approach. There is here, nonetheless, a foreshadowing of the Foucauldian criticism of punishment as normalisation (Foucault, 1979: 182-183).

‘Eliciting recognition of a failure of recognition’ is the specific function that just punishment must serve when aiming at the general function of ‘negating the negation’ of crime. Recalling that general function, Hegel says of coercion:

[That] coercion is in its concept self-destructive is exhibited in reality by the fact that coercion is annulled by coercion; coercion is thus shown to be not only right under certain circumstances but necessary, i.e. as a second act of coercion which is the annulment of one that has preceded (Hegel, 2008 [1820]: 97).

This presumes the logical annulment already discussed, but posed in factual terms this is problematic. The putative fact that coercion is annulled by coercion assumes psychological and not just logical efficacy: justice must have been seen – by the public or the perpetrator – to have been done. In fact, Hegel only specifies that a rational criminal may not recognise this justice, while assuming that citizens of a modern state will apprehend this as justice and the restoration of right (Tunick, 1992: 97-98). While psychologically under-theorised, this nonetheless has prima facie attractiveness over a drive to demand repentance on the part of the criminal or a utilitarian psychology of instilling or avoiding pain. And Hegel does thereby provide some foundations for restorative approaches to criminal justice although not, it should be stressed, as an alternative to punishment. Even if recognition could be achieved through non-punitive means, a punitive response is still necessary to achieve the wider functional goal of negation. Any other kind of extra-punitive measure is irrelevant to Hegel; these may well produce good ends but they are not responsibilities on the part of the state. This can be brought to light if we consider the other function of punishment, communication.

Communication is functionally important because of the foundational issue that the state has a responsibility to demonstrate that some things are inimical to the very idea of freedom and are not simply social or personal inconveniences. Steinberger: “Failure to punish [a criminal] would be to suggest that his action is qualitatively similar to other, noncriminal acts. And failure to punish anyone would thus make the category of “crime” very dubious indeed” (1983: 862, my emphasis). This failure to ‘suggest’ is not a failure of general deterrence but rather a failure to discharge a communicative responsibility with respect to the individual criminal. The communicative function of punishment is directed at the individual as an autonomous person whose hard treatment or coercion at the hands of the state is the means by which their crime is negated and is seen to be negated. Hegel does not specify how that communication takes place, only that it will result in recognition by the criminal of the binding nature of right.
It is possible to criticise communicative theories of punishment by suggesting that they do not explain why punishment as hard treatment is needed at all if this communicative function could be achieved through some other non-penal means. However this fails to hit home when directed at Hegel because he has already asserted that some kind of parity must be achieved between the wrong done and the punishment and indeed such parity in treatment is justice where it mirrors the wrong. Communication-through-punishment is necessary, not one option amongst other communicative options. To this extent, the more important criticism to be levelled at Hegel concerns the possibility that hard treatment may ‘drown out’ (Duff, 1996: 52) its moral meaning. The negating of a wrong may, while proportionate, have a disproportionate impact on certain individuals such that they are blinded to the function of the punishment altogether. And a free and rational individual may simply refuse to recognise the justice of the punishment. Clearly Hegel sets no store by rehabilitative goals, but his position looks perverse if punishment were to be viewed by the majority of its intended recipients as a mechanistic imposition of vengeance. Hegel no doubt presumes his position has some deterrent effect, but he would rather have a large quantity of crime and punishment than fewer crimes achieved through unprincipled means.

What we can say of Hegel’s position on punishment as a whole is that it provides arguments for penal parsimony. Excessive punishment is never justifiable, and given that the quantity of punishment is always relative to social context, there is no reason why what is seen as proportionate cannot be reduced to the lowest level that provides parity, proportionality and consistency. But Hegel could never offer support for abolitionism. This presumes we have an evil to diminish rather than a duty to discharge. The functions of communication and recognition have to be administered through hard treatment because they treat the criminal as rational and treat the criminal as capable of recognising their own rights as well as the rights of others.

Conclusion

Drawing together criminal justice and punishment we can summarise Hegel’s position as follows. The state has a responsibility to maintain freedom and sustain the possibility of rights, a possibility threatened by crime. This responsibility generates the functional shape of criminal justice – the negation of a negation – which takes on the specific functions of communication and recognition in the context of punishment. From this the form of criminal justice is dictated to be proportionate punishment, characterised by coercion or violence but no more than is proportionate to the crime, with proportionality taking different forms in different circumstances. All this by way of arguing for an intrinsic value for punishment and criminal justice – a duty-based retributivism – with its moral justification flowing from the state as the embodiment of freedom and foundation of right. This will serve to preface fuller evaluation of these normative foundations.

Hegel remains on the value side of the fact-value distinction. Ignoring the material development of criminal justice – not least the emergence of boundaries between crime and other forms of law – Hegel can inhabit an unequivocally normative position. Hegel is able to prescribe the form that criminal justice should take on the basis of his foundational and functional arguments.
The necessary evil position is prescriptive; so too is the abolitionist position with its insistence that normative foundations for criminal justice are both needed and lacking (Duff, 1996: 67-87; Greenwalt 1983). However, Hegel is alone in arguing that the existence of the modern state is the sufficient condition for justified criminal justice. Other positions might well treat the actions of the state (criminalisation and punishment) as necessary conditions for understanding crime, but they would also treat the origins of criminal law, the sources of criminality, and the consequences of punishment as normatively significant. In comparison, Hegel’s reliance on an analysis of the state to ground all normative analysis of crime clearly neglects the history, and social significance, of criminal justice institutions. This in itself does not serve as a refutation of Hegel’s argument; Hegel is mapping criminal justice’s conceptual evolution not its genealogy. However, it does point to questions prior to any substantive arguments between opposing normative positions. That is, meta-theoretical questions concerning the basis of value. After all, if what is morally or socially necessary can be deduced differently from different theories of value, competing positions on criminal justice may be incommensurable and, as such, each correct in their own terms. The relevant meta-theoretical question to be directed at Hegel is whether value should be derived from the ideal, the real, or a combination of both.

If values are objects of knowledge, they can come to be known either through deduction from axioms or evaluation of factual claims. Hegel’s philosophy relies on a synthesis of the two. Ideas of obligation and normativity have emerged from concrete social and historical processes, but that evolution is driven by the ideal: the ideal in an epistemological sense (ideas and cognition) and in an evaluative sense (the perception that existing social practices fall short of completeness or fullness). Put into the terms of Hegel’s system, value is contained in the idea of the right as something both a priori and concrete. This allows Hegel to eschew genetic assessment of social institutions. While social practices may have arisen from brutal or repressive sources (the real), their present forms, functions and foundations are not thereby tainted by their origins. Rather their present form is valorised as the product of struggles in, and the evolution of, consciousness (the ideal). In other words, to call into question the justification of existing institutions on the basis of their origins is not only to disregard the division of value and fact, but to commit a genetic fallacy of identifying something’s value with its origins.

This places considerable argumentative weight on the authority of the state in its ‘evolved’, freedom-defending form, to be the sufficient condition of just criminal justice in both real and ideal senses. It must be the case that the state makes freedom and right real: any retrogressive shrinking in the commitment of the state to freedom and right entails that the state is no longer the concrete manifestation of progress, thereby erasing its authority. At the same time there must be a match between the reality of the state and our idea of freedom and right. It must be impossible to feel free or perceive what is right without demanding their concrete manifestation the state. If the state is to be the sufficient condition of just criminal justice, a state must have unequivocal moral authority at the levels of both reality and idea.

Neither necessary evil nor abolitionist positions demand that the ideal and the real be identified with the state. Necessary evil positions identify the ideal with using as little violence as necessary to secure social goods; they identify real criminal justice with deterring instances of, and offsetting the consequences of, crime. The abolitionist position identifies the ideal with the absence of violence; it treats
real criminal justice as the securing of social goods through unnecessarily coercive means. These are distinctive axiological positions and have to be accepted or rejected on their own terms. Hegel’s normative account must be judged, ultimately, by its locating of the relevant source of value in the state alone: i.e. the assumption that there is uninterrupted harmony between our conceptions of right and freedom on the one hand, and the characteristics and trajectory of the state on the other. Such harmony can be called into question on a number of grounds, not least Marxist grounds (1977 [1844]).

In fact, Marx and Hegel are not radically divergent in their understanding of the historical characteristics of the modern state. They agree on the forces that have shaped the state (namely struggle and dialectical opposition) and the importance of the emergence of right (an enhanced conception of obligation). But Marx’s conception of history as class struggle gives rise to a richer, material, analysis of the structural and ideological forces at work in criminal justice and punishment (see Rusche and Kirchheimer, 1968). And Walter Benjamin’s work on the use of violence by the state points clearly to the tensions between Hegel’s valorisation of the state and Marx’s historical materialism. Benjamin argues that right and violence cannot be put in dialectical opposition to one another; they are neither conceptual, nor material, opposites. His Critique of Violence (1921) is an attack on those philosophies which set law and violence in opposition:

[E]ven conduct involving the exercise of a right can nevertheless, under certain circumstances, be described as violent. More specifically, such conduct, when active, may be called violent if it exercises a right in order to overthrow the legal system that has conferred it; when passive, it is nevertheless to be so described if it constitutes extortion […] (1979: 137).

Hegel’s ideal criminal justice, the negation of a negation, treats right as a transcendent, regulative, force that the criminal is compelled to recognise. This compulsory recognition – recognition by the criminal of what is necessary in the social world – makes the criminal point at which wrongs are negated by the state. Violence by the state is an instance of making the logically necessary real in the state’s discharging its moral responsibilities. Conversely, for Benjamin the idea of criminal justice has to encompass the contingent and fateful:

For law preserving violence is a threatening violence. And its threat is not intended as the deterrent that uninformed liberal theorists interpret it to be. A deterrent in the exact sense would require a certainty that contradicts the nature of a threat and is not attained by any law, since there is always hope of eluding its arm. This makes it all the more threatening, like fate, on which depends whether the criminal is apprehended (1979: 140).

Criminal justice never attains perfection because not every criminal will be apprehended. Real criminal justice has a quality closer to fate than to logical necessity. In fact, far from being a transcendent force, violence and law are linked together by the imperfect contingencies of governance and crime control. Law and violence are not in logical antithesis, and are therefore not capable of mutual negation. And
recognition, too, is demanding recognition of something already established by violence: the state’s relationship with freedom and rights, a relationship established by violence not pure obligation. Benjamin’s realignment of right, freedom, and instrumental violence undermines the argument at the very heart of Hegel’s position. Violence is not a rupture in the fabric of law demanding remedy by the state: it is the foundation, function and form of criminal justice.

References

Marx, Karl, (1977) [1844], ‘Critique of Hegel’s ‘Philosophy of Right” in Karl Marx: Selected Writings, Cornwall: Oxford University Press.