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REDISCOVERING HEGEL'S THEORY OF CRIME AND PUNISHMENT

Markus Dirk Dubber*

HEGEL'S POLITICAL PHILOSOPHY: INTERPRETING THE PRACTICE OF
LEGAL PUNISHMENT. By *Mark Tunick*. Princeton: Princeton Uni-
versity Press. 1992. Pp. xi, 191. \$35.

Hegel's emphasis on the dignity and right of the criminal as a moral and rational individual may serve as a reminder that the problem of crime and punishment involves more than the cure of a social disease by way of compulsory re-education or readjustment.¹ This holds especially true, it seems to us, in an age of crisis where a fully developed individualism has destroyed the community of values and norms.¹

INTRODUCTION

By presenting the most detailed English discussion to date of Hegel's theory of punishment, Mark Tunick² has done Anglo-American scholarship a great service. Since the late nineteenth century, when British philosophers like F.H. Bradley and T.H. Green developed Hegelian accounts of punishment,³ the English literature has unjustly neglected Hegel's writings on that subject. Several recent English books on the *Philosophy of Right*⁴ discuss Hegel's political and moral philosophy in general but do not fully explore his significant contributions to punishment theory.⁵ Similarly, a recent English book on punishment theory by Igor Primoratz only briefly discusses Hegel's views.⁶

Hegel's theory of punishment deserves the close attention that

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1. Ossip K. Flechtheim, *Hegel and the Problem of Punishment*, 8 J. HIST. IDEAS 293, 294 (1947).

2. Assistant Professor of Political Science, Stanford University.

3. See F.H. BRADLEY, *ETHICAL STUDIES* (New York, G.E. Stechert & Co. 1876); T.H. GREEN, *LECTURES ON THE PRINCIPLES OF POLITICAL OBLIGATION* (Ann Arbor Paperbacks 1967) (1895) (reprinting lectures from 2 T.H. GREEN, *PHILOSOPHICAL WORKS* 302-553 (London, Longmans, Green & Co. 1879)).

4. G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* (Allen W. Wood ed. & H.B. Nisbet trans., Cambridge Univ. Press 1991).

5. See STEVEN B. SMITH, *HEGEL'S CRITIQUE OF LIBERALISM: RIGHTS IN CONTEXT* (1989); PETER J. STEINBERGER, *LOGIC AND POLITICS: HEGEL'S PHILOSOPHY OF RIGHT* (1988); ALLEN W. WOOD, *HEGEL'S ETHICAL THOUGHT* (1990).

6. See IGOR PRIMORATZ, *JUSTIFYING LEGAL PUNISHMENT* (1989).

Anglo-American writers have paid to Kant's views on the subject or, for that matter, to Hegel's theory of property and contracts.⁷ Kant actually wrote very little about punishment; what little he wrote was dispersed throughout his career.⁸ His most extended and far-and-away best-known treatment of punishment theory fills roughly ten pages of *Die Metaphysik der Sitten* [*The Metaphysics of Morals*].⁹ Nonetheless, Kant's views on punishment have become popular as a subject for serious study,¹⁰ as a convenient straw man for polemical assaults on "retributivism," and as a legitimizing citation in a Scalia death penalty opinion.¹¹ In sharp contrast, Hegel's theory of punishment has received little attention in the Anglo-American literature.¹² Herbert Morris's celebrated 1968 essay, *Persons and Punishment*, provides the most spectacular evidence of Hegel's non-impact on the Anglo-American punishment debate.¹³ Morris managed to develop a theory of punishment based on the offender's right to be punished without even once citing Hegel,¹⁴ who had famously postulated the offender's right to punishment a century and a half earlier.¹⁵ Things

7. To take a recent example, not one of the 16 articles in the wide-ranging *Cardozo Law Review* symposium on Hegel's legal theory deals with Hegel's views on criminal law or punishment. See Symposium, *Hegel and Legal Theory* (pts. 1 & 2), 10 CARDOZO L. REV. 847 (1989).

8. See the collection of Kant's comments in Jeffrie G. Murphy, *Does Kant Have a Theory of Punishment?*, 87 COLUM. L. REV. 509 (1987).

9. 1 IMMANUEL KANT, *DIE METAPHYSIK DER SITTEN* 452-59 (A195-206/B225-35) (Wilhelm Weischedel ed., Frankfurt am Main, Suhrkamp, 8th ed. 1989) (A edition 1797, B edition 1798). Citations to Kant's works will refer either to the first (A) and second (B) editions or to the page number in the Kant edition of the Berlin Academy of Sciences (Ak.).

10. See, e.g., B. Sharon Byrd, *Kant's Theory of Punishment: Deterrence in Its Threat, Retribution in Its Execution*, 8 LAW & PHIL. 151 (1989).

11. See *Morgan v. Illinois*, 112 S. Ct. 2222, 2242 n.6 (1992) (Scalia, J., dissenting).

12. Before Tunick's book, Hegel's punishment theory was treated only in the occasional expository article or essay. See, e.g., David E. Cooper, *Hegel's Theory of Punishment*, in *HEGEL'S POLITICAL PHILOSOPHY: PROBLEMS AND PERSPECTIVES* 151 (Z.A. Pelczynski ed., 1971); S.W. Dyde, *Hegel's Conception of Crime and Punishment*, 7 PHIL. REV. 62 (1898); Mitchell Franklin, *The Contribution of Hegel, Beccaria, Holbach and Livingston to General Theory of Criminal Responsibility*, in *PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT* 94 (Edward H. Madden et al. eds., 1968); Lewis P. Hinchman, *Hegel's Theory of Crime and Punishment*, 44 REV. POL. 523 (1982); J. Ellis McTaggart, *Hegel's Theory of Punishment*, 6 INTL. J. ETHICS 479 (1896); Peter J. Steinberger, *Hegel on Crime and Punishment*, 77 AM. POL. SCI. REV. 858 (1983); Peter G. Stillman, *Hegel's Idea of Punishment*, 14 J. HIST. PHIL. 169 (1976).

13. See Herbert Morris, *Persons and Punishment*, 53 MONIST 475 (1968).

14. Morris did acknowledge that "[s]ometimes — though rarely — these philosophers [of punishment] have expressed themselves in terms of the criminal's right to be punished." *Id.* at 475-76.

15. See *HEGEL*, *supra* note 4, § 100; *infra* notes 35, 129-37 and accompanying text. Fichte had earlier developed a different concept of the right to punishment based on his theory of the *Bürgervertrag*, a variation of the social contract idea. JOHANN GOTTLIEB FICHTE, *GRUNDLAGE DES NATURRECHTS NACH PRINZIPIEN DER WISSENSCHAFTSLEHRE* 253-56 (Fritz Medicus ed., Hamburg, Felix Meiner, 2d ed. 1967) (1796). The right to punishment also played a central role in the theory of the early German rehabilitationists. See generally Peter Landau, *Die recht-philosophische Begründung der Besserungsstrafe: Karl Christian Friedrich Krause und Karl David August Röder*, in *STRAFGERECHTIGKEIT* 473 (Fritjof Haft et al. eds., Heidelberg, C.F. Müller Juristischen 1993) (discussing early German rehabilitationists).

have looked up only slightly for Hegel since then. Outlining her moral education theory of punishment in 1984, Jean Hampton mentioned Hegel, along with Plato, and cited J.E. McTaggart's 1896 article on Hegel's theory of punishment.¹⁶

If one looks for treatments of the subject outside the confines of Anglo-American scholarship, one comes to appreciate the full significance of the task Tunick set for himself in *Hegel's Political Philosophy: Interpreting the Practice of Legal Punishment* — the resurrection of Hegel's theory of punishment. The publication of a lengthy study of Hegel's views on crime and punishment in 1991¹⁷ marked the first time since 1936 that a German text had discussed Hegel's punishment theory in substantial detail.¹⁸

Tunick's book on Hegel deserves praise for changing all that. The trouble with *Hegel's Political Philosophy*, however, is that it aims both too high and too low. In the roughly 170 pages of his monograph, Tunick tackles a tremendously wide array of important and complex issues. The book's title already forewarns the reader that Tunick intends to use Hegel's punishment theory as a springboard into the far broader subject of Hegel's political philosophy in general, as Tunick later confirms (p. 36).

In addition to explicating Hegel's political philosophy, Tunick also seeks to extract from the *Philosophy of Right* a method of political analysis he calls "immanent criticism" (pp. 20-23). Not satisfied with demonstrating that Hegel is an immanent political critic, rather than the royalist Prussian *Staatsphilosoph* critics have made him out to be ever since the *Philosophy of Right* appeared in print, Tunick also attempts to illustrate the practical significance of Hegel's critical method for criminal justice issues in the United States today. Accordingly, Tunick devotes many pages to applying Hegel's remarks in the *Philosophy of Right* and his lectures¹⁹ to contemporary problems of criminal

16. Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208, 208 n.1 (1984) (citing McTaggart, *supra* note 12).

17. DIETHELM KLESCZEWSKI, DIE ROLLE DER STRAFE IN HEGELS THEORIE DER BÜRGERLICHEN GESELLSCHAFT (Berlin, Duncker & Humblot 1991) (Hamburger Rechtsstudien, Heft 81). For another recent, more limited reconsideration of Hegel's views on crime and punishment, see FELIX HERZOG, PRÄVENTION DES UNRECHTS ODER MANIFESTATION DES RECHTS (Frankfurt am Main, Peter Lang 1987).

18. Before 1991, the most recent German text on this subject was OSSIP K. FLECHTHEIM, HEGELS STRAFRECHTSTHEORIE (Brünn, Rudolf M. Rohrer 1936). The Nazis stripped Flechtheim of his citizenship and doctorate in 1938. OSSIP K. FLECHTHEIM, HEGELS STRAFRECHTSTHEORIE 118 (Berlin, Duncker & Humblot, 2d ed. 1975) (Schriften zur Rechtstheorie, Heft 42) [hereinafter FLECHTHEIM (2d ed.)]. A reprint of the book appeared in 1975 with an epilogue by Flechtheim. *Id.* In 1960, however, the German translation of a Russian work on Hegel's punishment theory and political philosophy appeared. See A.A. PIONTKOWSKI, HEGELS LEHRE ÜBER STAAT UND RECHT UND SEINE STRAFRECHTSTHEORIE (Anna Neuland trans., Berlin, VEB Deutscher Zentralverlag 1960).

19. Tunick relies heavily on notes of Hegel's lectures on the *Philosophy of Right* and translates a passage from one of the notes. Pp. 140-41. Cf. *infra* text accompanying notes 63-66 (discussing Tunick's use of the lecture notes).

law, such as plea bargaining (pp. 123-24) and the status of victim impact evidence under the U.S. Constitution (p. 132).

At the same time, Tunick aims too low. He leaves unexplored much of what Hegel's theory of punishment can tell us today. Tunick derives Hegel's contemporary significance, not from Hegel's substantive theory of crime and punishment, but from what he considers to be Hegel's method of critiquing societal institutions and practices from within.²⁰ There is so little specifically Hegelian about immanent criticism, however, that it is not worth fighting one's way through the *Philosophy of Right* to see what immanent criticism is all about. One might be better off to peruse the opinions of common law courts over the past few centuries.²¹

Tunick also argues that Hegel matters today because of his astute comments on particular topics in criminal law. Hegel's immanent criticism of punishment practices in 1820s Prussia, however, also does not warrant our reexamination of his work.

No matter whether or not one can fairly read the *Philosophy of Right* as a blueprint for immanent criticism of societal practices in general, Hegel's substantive views on crime and punishment deserve greater attention than Tunick has given them. Tunick does not fully appreciate how these views can help us overcome the deep alienation large segments of contemporary American society experience vis-à-vis the criminal justice system. Tunick shows concern for the gulf separating criminal theory and practice, particularly in terms of the lack of communication between academics and "those working within the criminal justice system" (p. ix). He also mentions the alienation many members of oppressed groups experience when they look at our country's criminal justice system and cannot see themselves reflected there. Hegel, however, speaks not only to prison wardens and inner-city blacks but to our society as a whole. Crime and punishment daily exacerbate the divisions that mark our society. Hegel realized that the very notion of criminal punishment rests on the recognition that victims and offenders — punishers and punished — in fact form a community with boundaries defined by the common bond of rationality.

Hegel overcomes the distinction between punishment theory and punishment practice by revealing rationality as the principled core of punishment. He reminds us that, whenever we assess another person's criminal liability, we affirm that person's membership in the community of rational persons, of which we are also members. Hegel speaks to us as rational agents capable of rational choices and calls on us not to check our rationality at the door when we think about criminal punishment. This means two things. First, we must exercise our rea-

20. For Tunick's definition of immanent criticism, see *infra* text accompanying note 90.

21. See *infra* note 38 (discussing immanent criticism in critical theory) and accompanying text (discussing the vagueness of Tunick's notion of immanent criticism).

son to check our emotional impulses that are triggered by reports of and experience with crime and criminals. Second, we must recognize the common rationality we share with all members of the community, including those accused or convicted of a criminal offense. In Hegel's dynamic account of crime and punishment, this recognition of shared rationality then lays the necessary foundation for a fuller assessment of the offender based on empathic responses and attitudes that permit the recognition of the offender's additional, substantive characteristics. In the end, we will benefit from regarding the offender as a person both equal and unique because only by seeing ourselves reflected in the offender can we overcome our alienation from the criminal justice system.

Part I of this review presents a brief summary of Hegel's views on punishment. Part II turns to Tunick's book on Hegel, paying particular attention to the connection between Tunick's reading of the *Philosophy of Right* and his failure to realize fully the contemporary significance of Hegel's views on crime and punishment. This Part will examine in particular Hegel's positions on the death penalty and the role of emotions in punishment theory. Part III returns to the question of what Hegel's views on crime and punishment can tell us today.

I. HEGEL ON CRIME AND PUNISHMENT: AN INTRODUCTORY OVERVIEW

We can see Hegel's punishment theory as one of two major responses to the deontological and consequentialist elements in Kant's theory of punishment as outlined in *The Metaphysics of Morals*.²² The other response came from P.J.A. Feuerbach, the great philosopher-judge-legislator-author of the early nineteenth century.²³ Feuerbach constructed a sophisticated system of preventative punishment on the basis of the consequentialist strand in Kant's theory that permitted consequentialist considerations at least in the distribution of punishment.²⁴ In sharp contrast to Feuerbach, Hegel developed the deontological foundation of Kant's theory into an all-encompassing theory of the logical connection between crime and punishment.

Hegel was a value retributivist.²⁵ This means, among other

22. 1 KANT, *supra* note 9, at 452-59 (Ak. 331-37).

23. On Feuerbach, see generally GUSTAV RADBRUCH, PAUL JOHANN ANSELM FEUERBACH: EIN JURISTENLEBEN (Vienna, Julius Springer 1934).

24. See, e.g., 1 PAUL JOHANN ANSELM FEUERBACH, REVISION DER GRUNDSÄTZE UND GRUNDBEGRIFFE DES POSITIVEN PEINLICHEN RECHTS (Erfurt, Die Henningschen Buchhandlung 1799); 2 *id.* (Chemnitz, Georg Friedrich Tasché 1800).

25. Opinions differ with regard to what kind of retributivist Hegel really was. Compare WOOD, *supra* note 5, at 109; Dyde, *supra* note 12, at 63; Hinchman, *supra* note 12, at 524; Stillman, *supra* note 12, at 173 (arguing that Hegel was a genuine retributivist) with OSSIP K. FLECHTHEIM, *Die Funktion der Strafe in der Rechtstheorie Hegels*, in VON HEGEL ZU KELSEN: RECHTSTHEORETISCHE AUFSÄTZE 9, 11 (Berlin, Duncker & Humblot 1963); FLECHTHEIM (2d ed.), *supra* note 18, at 113; Flechtheim, *supra* note 1, at 297; STEINBERGER, *supra* note 5, at 144-

things,²⁶ that he viewed the relationship between crime and punishment as one of equivalence, not of equality. Hegel specifically recognized that the material talion's exchange of eyes for eyes and teeth for teeth leads to absurd results, as in the case of a toothless or one-eyed offender.²⁷

Applying H.L.A. Hart's familiar distinction between the general justifying aim and the distribution principle of punishment,²⁸ one could call Hegel a full retributivist with respect to the former and a limiting retributivist with respect to the latter.²⁹ In other words, although Hegel saw retribution as the only reason for punishing anyone, he recognized that consequentialist considerations, such as deterrence and reformation, may determine the distribution of specific penalties if the justice system first shows that the offender deserves punishment.³⁰ Hegel said little about the distribution of punishment because he was content with identifying the basic principle of the relation between crime and punishment³¹ — equivalence — and believed that historical and cultural accidents, as opposed to philosophical truth, determine what precise penalty applies to a given crime.³²

48 (cautioning that Hegel was not an ordinary retributivist). At least one commentator calls Hegel a reformist in retributivist clothing. McTaggart, *supra* note 12, at 482-84; see also Hampton, *supra* note 16, at 208 n.1 (citing McTaggart with approval).

26. For a more detailed discussion of the role of the value concept in Hegel's theory of punishment, see *infra* text accompanying notes 162-63.

27. HEGEL, *supra* note 4, § 101A. Throughout this review, Hegel's own published comments (*Anmerkungen*) to the sections of the *Philosophy of Right* will be referred to as "A." Hegel's marginal notes (*Notizen*) to the sections will be cited as "N." Finally, Eduard Gans's additions (*Zusätze*) to the sections will be referred to as "Z." Comments and additions are cited according to the new Cambridge translation, unless otherwise indicated. Notes are cited according to the 1970 Suhrkamp edition because they have not yet been translated into English. See G.W.F. HEGEL, *GRUNDLINIEN DER PHILOSOPHIE DES RECHTS* (Eva Moldenhauer & Karl Markus Michel eds., Frankfurt am Main, Suhrkamp 1970) (1821). On the significance of Hegel's comments and Gans's additions, see *infra* text accompanying notes 49-57.

28. See H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, in *THEORIES OF PUNISHMENT* 354, 355-56 (Stanley Grupp ed., 1971) (distinguishing between the general justifying aim of the practice of punishment and the distribution of punishment in particular cases).

29. The general metaphysical grounding of Hegel's theory of crime and punishment prevents the theory from fitting comfortably into Hart's schema. Identifying a general justifying aim in Hegel's theory of punishment is problematic because Hegel, as a logical retributivist, attempted to explicate punishment by exposing its rational essence or logical structure, and particularly its essential or logical relationship with crime. Although Hart's category of general justifying aim makes for an uneasy fit for any deontological justification of punishment, it has a particularly difficult time accommodating Hegel's view because Hegel was concerned solely with laying bare the rational core of the concept of punishment. Hegel's philosophical work was done once he had located punishment as a necessary concept in the perpetual self-realization of Reason.

30. HEGEL, *supra* note 4, §§ 99A, 99Z. But cf. *id.* § 100A (prescribing that the measure of punishment must be based on the offender's act and that the offender may not be treated as a dangerous animal to be incapacitated, or punished for deterrent or rehabilitative purposes).

31. On Hegel's general view of the limits of his philosophical project, see *infra* text accompanying notes 93-95.

32. HEGEL, *supra* note 4, §§ 101A, 218A. For a discussion of the only apparent exception to this rule, the death penalty for murder, see *infra* notes 54-66 and accompanying text.

Hegel was also a logical — or metaphysical or dialectical — retributivist. According to Hegel, crime logically implies its punishment; that is, the dialectic naturally moves from crime to punishment as punishment follows crime in the process of Reason's self-actualization.³³ This is not to say that Hegel held the absurd position that every society always punishes all offenders, or even all convicted offenders, as any society, or even any state,³⁴ may not perfectly reflect Reason in all of its practices at all times.

Finally, and for our purposes most importantly, Hegel was a rational retributivist. He argued that the offender deserves punishment because anything else would deny her the dignity that is to be accorded all rational persons. As a rational person, the offender bears responsibility for her actions, because the fact that she is rational means that she can be considered to posit³⁵ and adopt her act formulated as a universal law.³⁶ To Hegel, a criminal act violates another's freedom. The offender therefore is understood to act according to the maxim that she should violate another's freedom. Universalizing this maxim produces the law that one should act so as to violate another's freedom. Honoring the offender's rationality requires the application of this universal law to her. According to Hegel, the dominant deterrence theories of the day, in particular that developed by P.J.A. Feuerbach, disrespected the offender's dignity as a rational person: "To justify punishment in this way is like raising one's stick at a dog; it means treating a human being like a dog instead of respecting his honor and freedom."³⁷

II. TUNICK'S HEGEL

After this rough-and-ready summary of some elements of Hegel's theory of crime and punishment, it is now time to turn to Tunick's interpretation of Hegel. In *Hegel's Political Philosophy*, Tunick attempts to reach a very diverse readership: all those "interested in

33. In particular, Hegel posited that crime is self-contradictory — a mere negation of right (*Recht*) — and therefore already carries within itself its own negation — the reaffirmation of right through punishment. He viewed punishment as the logically necessary result, "the other half," of crime. HEGEL, *supra* note 4, § 101Z. For further discussion, see *infra* text accompanying notes 129-37.

34. HEGEL, *supra* note 4, § 258Z.

35. In German, *setzen*. The offender's punishment is also *her* right in the sense that her maxim has become a law (*Gesetz*) that applies also to her, not only to her victim. HEGEL, *supra* note 27, § 101N. It is in this sense, and in this sense only, that the offender can be said to have consented to her punishment. *Id.* § 100N; HEGEL, *supra* note 4, § 100Z. For more on the right to punishment, see *infra* text accompanying notes 132-37.

36. HEGEL, *supra* note 4, § 100Z.

37. *Id.* § 99Z. It is not clear to what extent this passage embellishes Hegel's views. As we see later in greater detail, the additions to the section of the *Philosophy of Right* were compiled from lecture notes by a colleague of Hegel's, Eduard Gans, who admitted to taking certain stylistic liberties. See Eva Moldenhauer & Karl Markus Michel, *Anmerkungen der Redaktion zu Band 7*, in HEGEL, *supra* note 27, at 524, 527-29.

political theory, law, or the criminal justice system, including undergraduates and students, scholars, and practitioners of law" (p. 4 n.7). His book is meant to discuss not only "Hegel's answer to the philosophical question [of why we do — and should — punish] but also the theoretically informed prescriptions he has to offer those working within the criminal justice system and needing to know how to proceed" (p. ix). Despite its laudable intentions, the book may in the end disappoint theorists as well as practitioners because it is too short on theory for the former and too short on practice for the latter.

Tunick's reading of the *Philosophy of Right* turns on two interpretive moves. On the one hand, Tunick sets out to extract the metaphysics from Hegel's metaphysics of right. On the other, he attempts to determine what Hegel really thought, as opposed to what Hegel wanted his Prussian censors to think he thought.

Applying these interpretive strategies, Tunick arrives at three central claims about Hegel's political philosophy. First, the *Philosophy of Right* represents the mature Hegel's elaboration of the young Hegel's vision of the state as ethical substance, in which all persons are "at home." Second, the dialectic of Reason retains contemporary significance only as a somewhat ambiguous method of societal criticism Tunick calls immanent criticism.³⁸ Third, Hegel considered it the business of political philosophy to resolve particular policy matters. Based on this reading of the *Philosophy of Right*, Tunick presents Hegel's remarks on punishment theory as an illustration of the method of immanent criticism and as a collection of helpful hints for criminal law practitioners today.

This Part discusses Tunick's reading of the *Philosophy of Right* with an emphasis on those elements of Hegel's theory of punishment that Tunick leaves unexplored. Driven by his desire to discard Hegel's foundationalism, Tunick unjustly neglects the substance of Hegel's views on crime and punishment. Hegel's theory of punishment in the *Philosophy of Right* has more to offer us than an illustration of the method of immanent criticism or comments on a smorgasbord of issues of interest to today's criminal lawyer. Hegel instead presents the fundamentals of a theory of crime and punishment peculiarly applicable to modern society.

We will first address Tunick's attempt to dislodge Hegel's political philosophy from its metaphysical base. We then turn to Tunick's distinction between the true and the false Hegel, focusing on Tunick's treatment of Hegel's position on capital punishment and the role of

38. See *infra* notes 88-92 and accompanying text (discussing immanent criticism). It should be pointed out that Tunick does not borrow the term *immanent criticism* from critical theory. Unlike Tunick, Steven Smith, from whom Tunick takes his claim that Hegel is an immanent critic, p. 22, acknowledges the similarities between critical theory and Hegel's "immanent critique." See SMITH, *supra* note 5, at 178, 180, 221-22.

emotions in punishment. This Part ends with a brief consideration of Tunick's efforts to make Hegel speak directly to current issues in penal policy.

A. *Hegel Without Foundations*

Tunick wants to "leave aside [Hegel's] metaphysics" and to "appropriate . . . a nonfoundationalist, nonmetaphysical . . . Hegel" (p. 4). Demetaphysicizing Hegel without de-Hegeling him is tricky business. Merely to envision his political philosophy, or for that matter any other aspect of his philosophical system, without his metaphysics requires considerable effort, as Hegel equated philosophy with metaphysics.³⁹ Hegel, the last German philosopher,⁴⁰ bemoaned the destruction of metaphysics at the hands of Kant's Critical Philosophy and sought to resurrect it.⁴¹ For Hegel, the *Philosophy of Right*, "the last great metaphysics of right,"⁴² was but another opportunity to illustrate the correctness and fundamental significance of dialectical logic, that is, to demonstrate the power of his metaphysics. As Marx put it bluntly, "Hegel's true interest is not the philosophy of right but logic. . . . Logic is not used to prove the nature of the state, but the state is used to prove the logic."⁴³

Although anyone seeking to demetaphysicize Hegel therefore faces a daunting task, Tunick is surely correct that "Hegel's metaphysics and claims to science pose a serious obstacle to appropriating his philosophy" (p. 3). Given the fundamental importance of Hegel's metaphysics to his political philosophy and the need to reconsider some of its aspects in order to preserve Hegel's contemporary significance, any Hegel appropriation must carefully distinguish between what to keep and what to let go.

If one disregards Tunick's repeated claims that he aims to remove Hegel's metaphysics in its entirety, the piece of Hegel's metaphysics Tunick actually rejects seems small enough. Tunick apparently

39. This is not to say he thought of philosophy as divorced from common sense. See HEGEL, *supra* note 4, § 22Z.

40. See Moses Heß, *Die europäische Triarchie*, in PHILOSOPHISCHE UND SOZIALISTISCHE SCHRIFTEN, 1837-1850, at 75, 75-78 (Auguste Cornu & Wolfgang Mönke eds., Berlin, Akademie-Verlag 1961) (1841).

41. See G.W.F. HEGEL, SCIENCE OF LOGIC 25-26 (A.V. Miller trans., Humanities Press 1969) (1812).

42. MANFRED RIEDEL, *Tradition und Revolution in Hegels "Philosophie des Rechts"*, in STUDIEN ZU HEGELS RECHTSPHILOSOPHIE 100, 103 (Frankfurt am Main, Suhrkamp 1969) (translation by author); see also MANFRED RIEDEL, *The Hegelian Transformation of Modern Political Philosophy and the Significance of History*, in BETWEEN TRADITION AND REVOLUTION: THE HEGELIAN TRANSFORMATION OF POLITICAL PHILOSOPHY 159, 188 (Walter Wright trans., Cambridge Univ. Press 1984) (1969) (referring to Hegel's work as "the last metaphysical philosophical 'politics'").

43. KARL MARX, CRITIQUE OF HEGEL'S "PHILOSOPHY OF RIGHT" 18 (Joseph O'Malley ed., Annette Jolin & Joseph O'Malley trans., Cambridge Univ. Press 1970). The *Critique* was first published in 1964.

equates Hegel's metaphysics with a narrow "foundationalism," which he defines as "the position that social practices have noncontroversial explanations and justifications with which any right-thinking person is compelled to agree" (p. 3). Tunick goes on to explain that he "share[s] in the modern sensibility that rejects" Hegel's foundationalism (p. 3). More to the point, Tunick suggests that Hegel's foundationalism "forecloses debate and discussion about competing interpretations" (p. 4).

Hegel's foundationalism, however, does nothing to foreclose debate. Hegel's claim that Reason, to varying degrees, is the essential foundation of all modes of existence, including political institutions, instead focuses political debate on making these institutions as rational as they can be. His foundationalism may cut off philosophical debate, but it guides political debate.

There may be good reasons for objecting to Hegel's claim to philosophical certainty and objectivity and for abandoning his vision of Reason as the sole mover and shaker of the universe. His alleged suffocation of debate about punishment practices, however, is not among them. We need not believe that all modes of existence are but manifestations of Reason to recognize the power of Hegel's remarks on the fundamental role rationality plays in the concept of criminal punishment. We need not view every aspect of our world as but a step in the continuous waltz of dialectical movement to recognize that regarding punishment as the affirmation of the rationality of onlooker, offender, and victim may help eliminate the alienation we feel separates us from the offender and the criminal justice system.

B. *At Home with Young Hegel*

Though setting out to excise the metaphysics from Hegel's metaphysics of right — and therefore from Hegel's punishment theory — Tunick displays a definite fondness for the young Hegel's vision of the monolithic state as unitary ethical substance, as exemplified by the city-states of classical Greece. More generally, Tunick tends to disregard the mature Hegel of the *Philosophy of Right* in favor of the young Hegel of the *Phenomenology of Spirit*.⁴⁴ In Tunick's reading, the young Hegel's vision of ethical substance reappears as the central concept of the *Philosophy of Right* (p. 166).

Having relieved Hegel's system of its foundationalism, which Tunick rejects because he finds it stifles debate, Tunick rebuilds Hegel's political philosophy around the concept of being-at-home-ness (*bei sich sein*). Tunick lifts this concept directly out of the young Hegel's masterpiece, the *Phenomenology*. According to Tunick, Hegel

44. G.W.F. HEGEL, PHENOMENOLOGY OF SPIRIT (A.V. Miller trans., Oxford Univ. Press 1977). The *Phenomenology* was first published in 1807.

there proclaims that "[i]n his happy state, or ethical substance, the individual is at home" (p. 83), describing ethical substance as "a ground to which [*Geist*] returns after its journeys upon breaking away from this ground, this happy state" (p. 83).

Tunick makes little effort to elaborate on this intriguingly elusive concept of being at home. One can gather from Tunick's remarks that a person is at home when she has overcome alienation and sees herself reflected in the world around her. Tunick repeatedly distinguishes "being" at home from "feeling" at home, although he acknowledges that a sharp distinction between the two may be difficult to draw (p. 148 n.13) and that, at any rate, Hegel does not draw any such distinction (p. 144). One can perhaps best grasp Tunick's understanding of these two concepts by considering how he puts them to use. For example, Tunick employs the two concepts to distinguish Hegel from Kierkegaard and Marx. According to Tunick, Hegel wants us not only to feel, but also to be, at home. "His goal is not to invent a happy pill to ease the pain of our chains by making us feel free" (p. 144). Kierkegaard, by contrast, is only concerned about having us feel at home, even if we are not (pp. 145-47). Marx, like Hegel and unlike Kierkegaard, wants us to be — not just feel — at home but claims that Hegel's "armchair" philosophy can never "change the building."⁴⁵ Still, Tunick is quick to point out, Hegel's lack of interest in changing the building does not suggest that Hegel cannot also be an (immanent) critic of societal institutions. After all, "to feel at home does not mean that we never have to clean, repair, or even remodel our home" (p. 173).

For our purposes, it suffices to point out that Tunick locates the metaphysical concept of being-at-home-ness in the young Hegel's *Phenomenology*, not in the *Philosophy of Right*, and installs it as the rose in the cross of the mature Hegel's political philosophy.⁴⁶

45. Pp. 148-50. Tunick also explains the distinction between Hegel and Marx in another way: "Hegel achieves climax alone, by intellectual masturbation, while Marx achieves it by intercourse, by having theory 'penetrate deeply into the virgin soil of the people.'" P. 158 (citing Karl Marx, *Contribution to the Critique of Hegel's Philosophy of Right: Introduction* in THE MARX-ENGELS READER 53, 65 (Robert C. Tucker ed., 2d ed. 1978)). Although this sentence reminds one of Derrida's reading of Rousseau, see JACQUES DERRIDA, OF GRAMMATOLOGY 150-56, 165-67 (Gayatri C. Spivak trans., Johns Hopkins Univ. Press 1976) (1967), Tunick does not mention Derrida here or anywhere else. For a discussion of Derrida's views on writing as masturbation, see GUYORA BINDER & ROBERT WEISBERG, LITERARY CRITICISMS OF LAW (forthcoming 1994).

46. A detailed consideration of Tunick's reading of Hegel's concept of *bei sich sein* would exceed the bounds of this review. A few remarks are nonetheless in order. In general, Tunick's heavy use of the concept as a metaphor, particularly in distinction from the concept of feeling at home, does some violence to Hegel. The concept did not occupy the central role in Hegel's political philosophy that Tunick assigns to it, and, at any rate, Hegel did not invoke the concept to distinguish it from feeling at home. Although Tunick only refers the reader to two passages in the *Phenomenology*, p. 83, Hegel does use the concept in the *Philosophy of Right*; Hegel uses it, however, mainly as a shorthand for the more familiar concept of *an und für sich sein* (being in and for itself). See, e.g., HEGEL, *supra* note 27, §§ 22-23. Being at home is therefore not distin-

By emphasizing the similarities between the young Hegel and the Hegel of the *Philosophy of Right*,⁴⁷ Tunick fails to appreciate fully Hegel's contribution to punishment theory in that work. The Hegel of the *Philosophy of Right* does make more sense if one remembers the Hegel of the *Phenomenology*. However, this is so not only because the mature Hegel shared many of the young Hegel's general intuitions but also because the mature Hegel developed the young Hegel's insights.

Most important, the *Philosophy of Right* reflects the mature Hegel's recognition of the fractures in the Prussian society of his day — fractures the young Hegel did not find in his stylized image of the city-states of classical Greece. This recognition of the reality of division makes Hegel's punishment theory relevant for our modern polyethnic society, which has come to deny its commonality with those of its members who have been accused or convicted of a crime. Hegel suggests a way in which we can once again affirm the criminal offender's membership in our community.

We will return to Hegel's contemporary significance after discussing two important issues in Hegel's punishment theory: capital punishment and the role of emotions. Tunick's treatment of these topics illustrates his somewhat uneven invocation of the distinction between what Hegel wanted his censors to think he meant and what he really meant.

guished from feeling at home, but from being (merely) *in* itself and being (merely) *for* itself. For a helpful discussion of Hegel's use of the concept of *bei sich sein*, see WOOD, *supra* note 5, at 45-51; see also Allen W. Wood, *Editorial Notes* to HEGEL, *supra* note 4, at 381, 401-02. Furthermore, Tunick's frequent and detailed discussion and development of the being-at-home imagery finds little support in Hegel's text. "Being at home" translates *bei sich sein*, which says little about being at anyone's home. See WOOD, *supra* note 5, at 45 (discussing several meanings of *bei sich* in German). The excellent new Cambridge translation of the *Philosophy of Right* translates *bei sich sein* as "being with itself." HEGEL, *supra* note 4, § 23. The old Knox translation, which Tunick uses, translates it as "being by itself." G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* § 23 (T.M. Knox trans., Clarendon Press 1942). Although *bei sich sein* carries a connotation of being at someone's home (as in *Klein Fritzchen ist bei Tante Erna*, "Little Freddy is at Aunt Erna's"), the German equivalent of being at home would be *zu Hause sein* or, perhaps, *daheim sein*. As far as I can tell, Hegel never used either *zu Hause sein* or *daheim sein* in his writings. *Zu Hause sein* does appear once in one of the lecture notes. G.W.F. HEGEL, *Philosophie des Rechts*, in 4 *VORLESUNGEN ÜBER RECHTSPHILOSOPHIE*, 1818-1831, at 67, 105 (Karl-Heinz Ilting ed., Stuttgart, Frommann-Holzboog 1973) [hereinafter HEGEL, *RECHTSPHILOSOPHIE*]. Tunick, however, never refers to this passage. In fact, his discussion of *bei sich sein* never cites to the *Philosophy of Right* or to Hegel's lectures on the *Philosophy of Right*.

47. "I am wary of claiming that there is any difference between the political philosophies of the early and late Hegel, apart from a new language: the ethical substance, in the [*Philosophy of Right*], has become the modern state . . ." P. 93. According to Tunick, Hegel sees no difference between the ethical substance of Athens and the modern state because the members of both societies are at home. See p. 91. In the *Philosophy of Right*, "[t]he early Hegel's vision remains but is translated consistently into the language of right and freedom." P. 91. Considering that Tunick thinks this translation makes Hegel's vision more concrete and plausible, p. 91, it is unclear why Tunick's appropriation of Hegel's political philosophy relies not on the language of right and freedom but on precisely the language he claims Hegel abandoned in the *Philosophy of Right*, namely the language of being-at-home-ness Tunick pulls out of the *Phenomenology*.

C. Hegel True or False?: The Death Penalty

Faced with a position of Hegel's that does not accord with his "modern sensibility" (p. 3), Tunick either declares his disapproval with little further elaboration — as in the case of Hegel's foundationalism — or suggests that Hegel might have taken the position to please his Prussian censors. Tunick displays a heightened sensitivity for Hegel's interest in not upsetting the censors when it comes to statements in the *Philosophy of Right* that highlight the futility of Tunick's attempt to make Hegel's political philosophy resolve particular issues of criminal justice policy (pp. 153-54). Tunick's interest in the distinction between the esoteric and the exoteric Hegel, however, wanes when Hegel makes claims that do not disturb Tunick's sensibility.

Tunick's discussion of Hegel's position on capital punishment illustrates the point.⁴⁸ Tunick claims that Hegel "advocate[d]" (p. 136) or, at the very least, "accept[ed]" (p. 137) the use of the death penalty despite numerous indications that Hegel's position on capital punishment remains at least unclear. He discusses Hegel's position on capital punishment without considering that Hegel could hardly have expected to receive the Prussian government's approval for an attack on the death penalty. Tunick also does not mention that Hegel in fact neither endorses nor criticizes the death penalty in the pages of the *Philosophy of Right*. Although Tunick remarks in passing that the only evidence that Hegel advocated capital punishment appears in an addition (p. 136), he does not explain what this means. The additions stem not from Hegel's pen but from that of Eduard Gans, the editor of the second — posthumous — edition of the *Philosophy of Right* and a leading Hegelian in his own right, who taught the *Philosophy of Right* in Hegel's place after 1826.⁴⁹ In composing the additions, Gans relied on two students' lecture notes and Hegel's marginal notes.⁵⁰ Hegel's marginal notes nowhere argue for capital punishment.⁵¹ Tunick, who

48. An endorsement of capital punishment apparently would not merit Tunick's disapproval. See p. 137; see also MARK TUNICK, PUNISHMENT: THEORY AND PRACTICE 148 (1992) (suggesting that "[w]e might want to lock [an insane serial killer] in an impenetrable cell on some far-off island, or perhaps execute him").

49. Hegel lectured three times on the basis of the *Philosophy of Right*, in 1821-1822, 1822-1823, and 1823-1824. Dietrich Henrich, *Introduction* to G.W.F. HEGEL, PHILOSOPHIE DES RECHTS: DIE VORLESUNG VON 1819/20 IN EINER NACHSCHRIFT 9, 10 (Dieter Henrich ed., Frankfurt am Main, Suhrkamp 1983). Gans began teaching the course in 1826. Hegel resumed lecturing on the *Philosophy of Right* in 1831 but died of cholera within a few weeks. Manfred Riedel, *Introduction* to 1 MATERIALIEN ZU HEGELS RECHTSPHILOSOPHIE 11, 21-22 (Manfred Riedel ed., Frankfurt am Main, Suhrkamp 1975).

50. Moldenhauer & Michel, *supra* note 37, at 527-29; Wood, *supra* note 46, at 381-82.

51. At one point, Hegel's marginalia in fact suggest that he would oppose the death penalty for murderers who killed in order to be killed. HEGEL, *supra* note 27, § 99N. Hegel reports, with apparent approval, that in these cases the death penalty has been converted into a prison sentence. This comment appears in the context of Hegel's claim that punishment must be perceptible (*empfindlich*). In the same context, Hegel mentions the case of the Roman who walked around town slapping people and carried with him a bag of money to pay the fine for slapping.

pays so much attention to student lecture notes, rarely consults Hegel's marginal comments and does not consult them in this case.

The addition in question is based on one of the two sets of lecture notes Gans consulted.⁵² According to this set of notes, Hegel in his lectures also did not argue that murder necessarily calls for capital punishment. Instead, Hegel merely remarked that "[m]urder is punishable by death."⁵³

Hegel's purported endorsement of capital punishment appears less than certain not only because it appeared in an addition written by Gans that finds no support in Hegel's or his students' notes;⁵⁴ it also does not fit into Hegel's discussion of crime and punishment.⁵⁵ The endorsement appears in the addition to section 101 of the *Philosophy of Right*. After acknowledging the impossibility of talionic equality of crime and punishment, the addition continues: "[A]lthough retribution cannot aim to achieve specific equality, this is not the case with murder, which necessarily incurs the death penalty."⁵⁶ Only the death penalty can be the proper punishment for murder, "[f]or since life is the entire compass of existence, the punishment cannot consist in a *value* — since none is equivalent to life — but only in the taking of another life."⁵⁷

This straightforward endorsement of the death penalty comes as a surprise because it is the only time Hegel would have addressed the question of what penalty should attach to a given crime. Hegel not only had expressed no opinion on the subject but had taken great pains to point out that this subject lay outside the domain of political philosophy. The quality and quantity of crime and punishment were questions not amenable to absolute resolution — matters whose resolution depended on the historical and cultural circumstances of a particular society.⁵⁸

Hegel's emphasis on the relativity of the connection between par-

Id. Hegel recalls Kant here, who pointed out that monetary fines for slander have no effect on the wealthy. Kant instead proposed forcing the slanderer to kiss the hand of the object of his insult, even if the victim was of a lower social rank. 1 KANT, *supra* note 9, at A198/B228.

52. See HEGEL, *supra* note 4, § 101Z; see also *id.* § 101Z, at 129 (indicating the source of Gans's addition); cf. H.B. Nisbet, *Translator's Preface* to HEGEL, *supra* note 4, at xxxv, xxxvi (explaining the system of identifying the source).

53. G.W.F. Hegel, *Philosophie des Rechts: Nach der Vorlesungsnachschrift von H.G. Hotho 1822/23*, in 3 RECHTSPHILOSOPHIE, *supra* note 46, at 5, 322 ("Auf Mord ist Todesstrafe gesetzt."); see also Peter Landau, *Das Unrecht als Stufe des abstrakten Rechts in Hegels Rechtsphilosophie*, in JENSEITS DES FUNKTIONALISMUS 143, 161 n.69 (Lothar Philipps & Heinrich Scholler eds., Heidelberg, Decker & Müller 1989).

54. Note also that in another addition, we find high praise for Beccaria's campaign against the death penalty. HEGEL, *supra* note 4, § 100A.

55. Moreover, it also does not fit into Hegel's account of the relationship of mutual respect between onlooker and offender. See *infra* notes 109-10, 148-80 and accompanying text.

56. HEGEL, *supra* note 4, § 101Z.

57. *Id.*

58. HEGEL, *supra* note 27, § 96N; HEGEL, *supra* note 4, §§ 96Z, 101A.

ticular crimes and particular penalties plays an important role in his punishment theory because it permits him to escape the charge that retributivism leads to results he calls absurd, such as the application of the talion to a toothless or one-eyed defendant. Hegel responds to the absurdity argument by postulating only the equivalence, not the equality, of punishment and crime. Philosophy, he argues, can do no more than point out the equivalence between crime and punishment. It is up to particular societies to work out that equivalence in accordance with their historical and cultural circumstances.⁵⁹

In Tunick's view, then, only when it came to the death penalty would Hegel have called for the equality — not the equivalence — of crime and punishment. Only in this case would he have diverged from his declaration that it was not the business of philosophy to postulate the absolute correctness of a particular penalty for a particular crime.⁶⁰

Furthermore, the explanation for the special treatment Hegel was to have accorded capital punishment is less than compelling. The addition's argument in favor of the death penalty proceeds from the claim that one cannot place a value on life, because life encompasses being in its infinity, with its infinite potentialities and manifestations. The taking of a life therefore amounts to violating the victim's freedom in all its infinite objective and subjective manifestations. If the value of the punishment is to equal the value of the crime, murder calls for a punishment of similarly infinite value: taking the offender's life. In the end, it turns out that in the case of murder, and only in that case, does the equivalence of crime and punishment also amount to an equality.⁶¹

Although this argument may sound convincing to ears familiar with arguments favoring the death penalty that appeal to the qualitative difference between murder and other crimes and between the death penalty and other punishments, it relies on the faulty premise that life has infinite value. As the addition points out, one cannot apply the concept of value to life. This cannot mean, however, that life has infinite value, because saying that life has infinite value means ap-

59. See HEGEL, *supra* note 4, § 101A.

60. Tunick also considers the addition to § 101 in light of Hegel's emphatic claim that philosophy did not define particular penalties for particular crimes. Tunick, however, sees no inconsistency between the addition's elaborate deduction and unequivocal endorsement of capital punishment and Hegel's remarks on the limits of philosophy in the realm of punishment distribution. On the contrary, Tunick suggests that it is precisely Hegel's acknowledgment of these limits that "forces him to make a 'relativist' concession and accept the use of the death penalty." P. 137. This may or may not have been Hegel's attitude, but it certainly cannot account for the addition's language that goes far beyond a grudging acceptance of capital punishment. That language explicitly marks the death penalty for murder as an exception to the rule that philosophy does not determine particular penalties and argues that the death penalty for murder is necessary, not merely permissible. See HEGEL, *supra* note 4, § 101Z.

61. See HEGEL, *supra* note 4, § 101Z.

plying the concept of value to life.⁶² The impossibility of applying the concept of value to life therefore does not imply that murder requires capital punishment — a punishment that takes something to which we cannot apply the concept of value, namely the offender's life. It would be just as consistent to claim that murder does not logically require any punishment at all, because the taking of a life prevents the application of the concept of value, which is necessary to determine logically — or absolutely — the appropriate punishment for murder.

In short, according to the available evidence, Hegel did not argue for capital punishment in the *Philosophy of Right* or in his lectures. Tunick does not consider the possibility that Hegel disapproved of the death penalty but hesitated to criticize it publicly in deference to the Prussian authorities.⁶³ Hegel must have been aware that his lectures, like the lectures of his colleagues, were under the vigilant scrutiny of the Prussian authorities. Dieter Henrich, the editor of one of the lecture notes, even considers — and ultimately rejects — the possibility that the notes had been commissioned by a Prussian state agency.⁶⁴ According to Manfred Riedel, it is likely that a few weeks before Hegel's death in 1831, either the Prussian government or the Prussian king brought the republican tenor of Gans's lectures to Hegel's attention and indirectly urged Hegel to resume his lectures on the *Philosophy of Right* to emphasize the correct — and presumably royalist — interpretation of his philosophy.⁶⁵

Had Tunick applied his sensitivity to the distinction between what Hegel "really meant" and what Hegel said he meant, not only to the *Philosophy of Right*, but also to the lectures, he might have been more wary of reading the lecture notes as records of Hegel's true beliefs. Tunick wants to use the lecture notes only to "make clear and concrete a very difficult and at times obscure text — the *Philosophy of Right*" (p. 11). Nonetheless, even if the lecture notes are but a key to the *Philosophy of Right*, one should be careful not to assume uncriti-

62. If anything, it may mean that life's value — and therefore the value of its taking — cannot be assessed, that is, that life's value is immeasurable.

63. Hegel would not have been the first to carve out an exception from his philosophical system to accommodate positions particularly dear to the authorities. Roughly 20 years earlier, Kant had found it appropriate to designate homicide by duel as one of only two exceptions to his otherwise characteristically ironclad rule that the categorical imperative governed the criminal law. 1 KANT, *supra* note 9, at A204-05/B233-35. Kant was immediately accused of cozying up to the military command in Königsberg. HEINRICH STEPHANI, ANMERKUNGEN ZU KANTS METAPHYSISCHEN ANFANGSGRÜNDE DER RECHTSLEHRE 124 (Brussels, Culture et civilisation 1968) (1797); see also 1 FERDINAND CARL THEODOR HEPP, DARSTELLUNG UND BEURTHEILUNG DER DEUTSCHEN STRAFRECHTS-SYSTEME 108 (Heidelberg, J.C.B. Mohr, 2d ed. 1843-1844).

64. HEGEL, *supra* note 49, at 302-03.

65. Riedel, *supra* note 49, at 21-22; see also Manfred Riedel, *Hegel und Gans*, in *NATUR UND GESCHICHTE* 257 (Hermann Braun & Manfred Riedel eds., Stuttgart, W. Kohlhammer 1967). Hegel complied, but died of cholera shortly after the beginning of the semester. Karl-Heinz Ilting, *Vorwort* to 1 HEGEL, *RECHTSPHILOSOPHIE*, *supra* note 46, at 7, 9.

cally that they came straight from Hegel's heart.⁶⁶

D. *Hegel True or False?: Emotions*

As another example of Tunick's uneven invocation of the distinction between the real and the fake Hegel, take Tunick's reading of Hegel's outburst against the sentimentalists in the preface to the *Philosophy of Right*. Though Tunick discounts Hegel's numerous explicit limitations on the scope of political philosophy in the preface, he cites without similar hesitation Hegel's preface condemnation of the *Burschenschaften's* sentimental political criticism as evidence of Hegel's wholesale condemnation of emotions (pp. 69-70 & n.136). This example is particularly relevant for our purposes because its accommodation of considered emotional responses and attitudes partly accounts for the contemporary significance of Hegel's punishment theory.

Tunick himself points out that Hegel "rework[ed] his preface to the *Philosophy of Right* in order to attack viciously his former colleague at Heidelberg, the philosopher Jacob Fries, who in many respects supported the politics of [Wilhelm] de Wette" (pp. 9-10). Tunick goes on to explain that de Wette, a colleague of Hegel's, had been "dismissed after discovery of a letter of his to [Carl Ludwig] Sand's mother that expressed support for her son" (p. 9). On March 23, 1819, Sand, a *Burschenschaftler* and theology student from Jena, murdered Friedrich Kotzebue, a reactionary writer on salary from the Russian czar. Kotzebue's assassination triggered the Karlsbad decrees, aimed particularly at university students and professors, and with them the Prussian restoration.⁶⁷ More rigid censorship regulations appeared in October 1819 and forced Hegel to revise his manuscript of the *Philosophy of Right*, which did not appear in print until the fall of 1820.⁶⁸ More important, the Prussian authorities' crack-down led to the arrests of several students, including some of Hegel's own.⁶⁹

Considering the political climate at the time, no one could have interpreted Hegel's vicious attack on Fries and the *Burschenschaften* as anything but taking sides with the Prussian authorities in the bitter

66. One may wonder why it should matter what Hegel "really meant." As Tunick acknowledges, p. 6 n.11, the question of the Hegel behind the *Philosophy of Right*, or even behind the lectures, arouses considerably less curiosity in someone interested in learning what Hegel can teach us about political theory, and punishment theory in particular. Efforts to save Hegel's image would seem to have been more appropriate during the years immediately following the publication of the *Philosophy of Right*, when his followers came to the master's rescue and defended him against attacks from the left — Hegel is too Prussian — and the right — Hegel is not Prussian enough. For a collection of some of these attacks and defenses, see 1 MATERIALIEN ZU HEGELS RECHTSPHILOSOPHIE, *supra* note 49.

67. Riedel, *supra* note 49, at 15-16.

68. *Id.* at 16-17. The preface is dated June 25, 1820, although the title page bears the year 1821. *Id.*

69. *Id.* at 16.

dispute between them and the *Burschenschaften* supporters among Hegel's colleagues on the Berlin faculty. If Hegel revised the preface to cozy up to the Prussian censors, he could not have picked a more effective way than to blast Fries and the *Burschenschaften*.

Tunick recognizes the political significance of Hegel's attack but fails to appreciate fully its theoretical significance. He correctly concludes that Hegel's criticism of Fries pitted "rationalism against confused sentimentalism" and reflected "the way Hegel thinks politics should be played — as rational politics."⁷⁰ Furthermore, Tunick correctly claims that Hegel denies political relevance to "subjective feelings" and "insists we provide genuine, disciplined, rational social criticism" (p. 69); Hegel distinguishes his proper societal analysis from one based on "the subjective form of feeling."⁷¹ After Tunick recognizes Hegel's exclusion of subjective emotions from political discourse, however, he goes on to assume that emotions are by their very nature subjective. Tunick equates "subjective justification" with "justification that appeals to subjective standards, such as feelings, likings, pleasure, [and] happiness" and argues that Hegel "apparently insist[ed] that feelings and sentiments be banned from the political arena" (p. 71).

Tunick's reference to the inherent subjectivity of feeling would not be objectionable if he is implicitly relying on a distinction between *feelings* and *emotions*, such that feelings are inherently subjective, while emotions may have a conceptual component and therefore be open to intersubjective rules. If he does use *feelings* in this restrictive sense, Tunick does not say so. His discussion suggests that he does not.⁷²

In the passages in question, Hegel uses the term *Gefühl*,⁷³ which is commonly translated as "feeling" but does not quite have the strong subjective connotations of that term. In his most extended treatment of emotions, in the *Encyclopedia*, Hegel distinguishes between *Gefühl* and *Empfindung* (sensation) by contrasting the subjectivity of *Empfindung* with the potential objectivity of *Gefühl*.⁷⁴ There, Hegel recognizes the incorporation of *Gefühl* into the commonly used term *Rechtsgefühl*, loosely translated as "sense of justice" or "sense of right," and notes the absence of the term *Rechtsempfindung*.⁷⁵ In the

70. P. 68; see also p. 10 n.25.

71. P. 70 (quoting HEGEL, *supra* note 4, at 16).

72. In a different book and in a different context, Tunick makes an offhand comment about "a distinction Hegel suggests, between revenge, which is subjective and appeals to an individual's feelings of hurt; and righteous anger, which reflects a social judgment." TUNICK, *supra* note 48, at 89.

73. HEGEL, *supra* note 27, at 20-22.

74. 3 G.W.F. HEGEL, ENZYKLOPÄDIE DER PHILOSOPHISCHEN WISSENSCHAFTEN §§ 399-412 (Frankfurt am Main, Suhrkamp 1970) (1830); see also HEGEL, *supra* note 4, § 4A (referring to the *Encyclopedia* discussion and acknowledging the significance of *Gefühl* in the will's self-realization).

75. 3 HEGEL, *supra* note 74, § 402.

German literature, *Rechtsgefühl* is generally acknowledged to contain a conceptual component.⁷⁶

Tunick does not carefully consider the theoretical significance of Hegel's objection to the consideration of subjective feelings. He does not pay much attention to the precise nature of Hegel's objection because he sees his prime goal as demonstrating — all of the preface's cautionary comments about the role of philosophy in the assessment of societal institutions to the contrary — that Hegel was in fact a critic — not a radical critic, perhaps, but an immanent one. Tunick therefore restricts his interest in determining what Hegel really meant, as opposed to what he said, to the passages that make Hegel look like anything but a societal critic.

Accordingly, Tunick invokes the central political significance of Hegel's attack on the "sentimentalist" Fries only to demonstrate that Hegel did not criticize Fries for being a critic. As long as this goal has been accomplished, Tunick no longer sees a need for interpreting the preface in light of the political realities of the time. In particular, Tunick is not concerned if, in the course of salvaging Hegel's critical image, he portrays Hegel as a formalist who, like Kant in his more polemical moments, denies the philosophical relevance of emotions.

The parallel to Kant, in fact, helps put Hegel's outburst against Fries into perspective. Jacques d'Hondt has pointed out that Fries's philosophy combined two philosophical traditions Hegel considered particularly disagreeable: Kantianism and sentimentalism.⁷⁷ Interestingly, Hegel's radical denunciation of Fries's sentimentalism recalls none other than Kant, and particularly Kant's emphatic rejection of the Scottish moral sense school.⁷⁸ Despite these repeated attacks on the moral sense philosophers, however, Kant recognized that his account of human morality had to establish an emotional connection between human agents and their moral law, the categorical imperative. He called this connection the moral *Gefühl* and defined it as the sense of respect for the moral law and the satisfaction of leading one's life according to that law.⁷⁹

76. See, e.g., ERWIN RIEZLER, *DAS RECHTSGEFÜHL: RECHTSPSYCHOLOGISCHE BETRACHTUNGEN* 6-25 (Munich, C.H. Beck'sche, Verlagsbuchhandlung, 3d ed. 1969).

77. See JACQUES D'HONDT, *HEGEL EN SON TEMPS* 126 (Paris, Editions sociales 1968).

78. See, e.g., IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 46 & n.30, 59 (Ak. 442 & n.30, 460) (James W. Ellington trans., Hackett 1981) (1785) [hereinafter KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS*]; IMMANUEL KANT, *KRITIK DER PRAKTISCHEN VERNUNFT* 45-46 (Ak. 38) (Karl Vorländer ed., Hamburg, Felix Meiner, 9th ed. 1985) [hereinafter KANT, *KRITIK DER PRAKTISCHEN VERNUNFT*]; 2 KANT, *supra* note 9, at A36-37.

79. KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS*, *supra* note 78, at 59 (Ak. 460); KANT, *KRITIK DER PRAKTISCHEN VERNUNFT*, *supra* note 78, at 46, 86-95 (Ak. 38, 73-81); 2 KANT, *supra* note 9, at 530-31 (A35-37). Every moral being possesses this moral *Gefühl*, which should be cultivated and strengthened. 2 KANT, *supra* note 9, at 530-31 (A36); KANT, *KRITIK DER PRAKTISCHEN VERNUNFT*, *supra* note 78, at 46 (Ak. 38).

Similarly, Hegel's criticism of Fries's sentimentalism should not be read as advocating the exclusion of emotions from moral and political philosophy. Insofar as Hegel's vitriolics against Fries, whom he had begun to despise for personal reasons long before the publication of the *Philosophy of Right*,⁸⁰ contain phrases that permit the reading that Hegel considered all emotions subjective and therefore irrelevant for philosophical purposes, these phrases may well have resulted from the carelessness that often accompanies bitter polemics.

As d'Hondt points out, Hegel's attack on Fries focuses on what Hegel views as Fries's celebration of subjectivity.⁸¹ According to Hegel, this subjectivity can take any number of different forms and is not restricted to emotions.⁸² Hegel does not object to the consideration of emotion in societal analysis because he thinks emotions irrelevant in general. He instead objects to the consideration of subjective emotions.⁸³

Emotions clearly are crucial to Hegel's full notion of freedom and recognition.⁸⁴ A person will not fully recognize herself in another person or in her society's institutions unless and until she establishes an emotional bond with that person or those institutions.⁸⁵ Hegel merely calls for reasonable checks on emotion.

Hegel also connects the check — Reason — to the underlying identity among onlooker, offender, and victim.⁸⁶ The onlooker recognizes her identity with the offender because she has Reason. Her identity with the offender, in turn, consists in the fact that both have Reason. Once one acknowledges the important role emotions play in our overcoming our alienation from others and from our society's institutions, the task of the law shifts from the exclusion of emotions to the distinction between rational and nonrational emotions.⁸⁷ Before

80. See D'HONDT, *supra* note 77, at 124-33.

81. *Id.* at 133-36.

82. See, e.g., HEGEL, *supra* note 4, at 20 (referring to "reflection, feeling [*Gefühl*], or whatever form the subjective consciousness may assume").

83. *Id.* at 18 ("[Fries's superficial philosophical principles] identify what is right [*Recht*] with subjective ends and opinions, with subjective feeling [*Gefühl*] and particular conviction.").

84. This important insight, among others, distinguishes Hegel's view of punishment from Kant's. Although Kant attempted to make room for the "peculiar" nonsensuous "moral feeling," he sought to ban from the new purified moral science all "sensuous incentives" because they kept us from acting as perfectly rational beings. KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS*, *supra* note 78, at 16, 34 n.19, 46 (Ak. 404, 426 n.19, 442-43); KANT, *KRITIK DER PRAKTISCHEN VERNUNFT*, *supra* note 78, at 84-85 (Ak. 71-73).

85. See *infra* text accompanying notes 157-70 (describing the necessity of empathic judgments).

86. By contrast, Durkheim, who placed emotions at the heart of his account of punishment, did not suggest that members of society must check their emotions against their rationality in order to maintain the minimum commonality necessary for the continued existence of that society. Cf. ÉMILE DURKHEIM, *DE LA DIVISION DU TRAVAIL SOCIAL* 52-64 (Paris, Presses universitaires de France, 10th ed. 1978) (describing the central role of emotion in punishment). For more on Durkheim's relation to Hegel, see *infra* note 104 and accompanying text.

87. For an attempt to draw this distinction in the context of capital sentencing, see Markus

we can return to the question of what contemporary punishment theory can learn from Hegel, however, we must briefly consider Tunick's attempt to make the *Philosophy of Right* matter to criminal law practitioners.

E. Hegel for Practitioners

Instead of drawing from Hegel's general account of crime and punishment, Tunick rests Hegel's contemporary relevance on Hegel's scattered remarks in the *Philosophy of Right* on particular punishment practices in 1820s Prussia. This effort stands little chance of success on its face, and Tunick seems to admit as much. We have seen earlier that Tunick reads the *Philosophy of Right* as working out the young Hegel's vision of society as common ethical substance. If one assumes the correctness of Tunick's reading, one would expect that the contemporary relevance of the *Philosophy of Right* would fall with Tunick's observation that contemporary society is not, in fact, held together by one common ethical substance.⁸⁸ Moreover, if Tunick is correct that Hegel presented a critique immanent to the punishment practices of 1820s Prussia, it is unclear how that critique could at the same time be an immanent critique of our current practices.⁸⁹

As Tunick explains, the immanent critic first identifies principles immanent in a given practice. If she finds an aspect of the practice that does not accord with these principles, she has two options: either reject that aspect or recognize that it really is not an aspect of the practice at all but rather a separate practice with separate principles. The immanent critic then goes to work identifying the principles of that newly discovered practice, and so on, and so on.⁹⁰

Again assuming that Tunick is correct in portraying Hegel as an immanent critic — and he may well be — there would be little reason

Dirk Dubber, *Regulating the Tender Heart When the Axe Is Ready to Strike*, 41 BUFF. L. REV. 85 (1993).

88. Tunick seems to agree: "For a society deeply divided about what is right and wrong, as ours is regarding many acts — abortion, flag burning, consensual homosexual sodomy, distribution of pornography — Hegel's principle that the law reflects the people's ethical substance is not helpful." P. 112. Tunick also points out that the *Philosophy of Right*, understood as a theory of society as shared ethical substance, can tell us little about the proper scope of the criminal law: "[W]hen we want to know whether to make criminal actions that are not violations of abstract rights, threats to the institutions of the state, or affronts to what is indisputably society's shared sense of right, Hegel offers us little guidance." P. 113. Despite these acknowledgments, Tunick invokes that very concept when he tries to illustrate the contemporary relevance of Hegel's views on the jury. Pp. 122-23.

89. Tunick does assert, without elaboration, that "the practice of legal punishment" of 1820s Prussia "is in many respects similar to our own practice." P. vii n.1.

90. See p. 21 ("[The immanent critic] steps outside a practice in order to think about it, to adduce its purpose or concept, and then steps back inside the practice, using his account of the principle(s) immanent in the practice to criticize the actual practice should it diverge from the principled or idealized practice."); see also pp. 21 n.90, 151, 158-59; TUNICK, *supra* note 48, at 12-13, 17.

for the contemporary reader to dust off the *Philosophy of Right*. Tunick, perhaps wisely, does not claim that Hegel was the first to engage in this sort of immanent criticism.⁹¹ Tunick's definition of immanent criticism, after all, seems to define the general practice of interpretation and, more specifically, the deliberate search for precedent as practiced by common law judges long before and after Hegel.⁹² Though judges may not view themselves as "step[ping] outside a practice . . . to adduce its purpose or concept" (p. 21), they certainly look at a prior decision in the context of its facts to identify its holding and, more broadly, at a series of decisions to determine "the law." If "the law" can account for three out of four prior decisions, the judge may decide (i) to disregard the fourth because it really dealt with a different question or different facts (and therefore did not belong with the other three in the first place) or (ii) if that distinction cannot be drawn with a straight face and the court has the necessary authority, to discard the aberrant decision altogether because it was "wrongly decided."

At any rate, even if one does not hold Tunick to his reading of the *Philosophy of Right*, Hegel himself considered philosophy to be of limited relevance for particular policy issues, contemporary or otherwise. Hegel held that political philosophy — and therefore he as political philosopher — served a limited purpose. Philosophy identifies the basic concepts that drive the evolution and workings of political institutions and the interrelation between these institutions and members of society. Philosophy exposes what it means for a political institution to be rational and points out that not every existing political institution is rational by virtue of its existence alone. Philosophy explains that only Reason, or the rational, truly *is*. Therefore, political institutions, like all modes of existence, only truly *are* if and *to the extent* they are rational, manifesting Reason.⁹³

Distinguishing between Reason on the one hand and its manifestations on the other, Hegel limits philosophy to the exposition of the former.⁹⁴ Put another way, philosophy, according to Hegel, concerns itself solely with Reason, which provides general and essential principles. It is the understanding, not Reason, that works out the implications of these principles in a given historical context.⁹⁵

Once viewed in the context of Hegel's general view of philosophy's mission, his remarks in the preface to the *Philosophy of Right* on the limits of political philosophy are not easily dismissed as opportunistic

91. Neither does Steven Smith, whom Tunick cites as "also not[ing] the critical power of Hegel's philosophy." P. 22 (quoting SMITH, *supra* note 5, at 10 (calling Hegel "the great champion of a form of philosophical practice that I want to call immanent critique")).

92. See generally 2 CHARLES TAYLOR, *PHILOSOPHY AND THE HUMAN SCIENCES* (1985) (tracing the tradition of immanent criticism in Western philosophy).

93. See HEGEL, *supra* note 4, §§ 1-2; HEGEL, *supra* note 27, at 24.

94. HEGEL, *supra* note 4, § 31A.

95. *Id.* §§ 3A, 101A.

rhapsodies composed exclusively for the benefit of Hegel's Prussian censors:

[W]hat matters is to recognize in the semblance of the temporal and transient the substance which is immanent and the eternal which is present. For since the rational, which is synonymous with the Idea [*Geist*], becomes actual by entering into external existence . . . it emerges in an infinite wealth of forms, appearances, and shapes and surrounds its core with a brightly coloured covering in which consciousness at first resides, but which only the concept can penetrate in order to find the inner pulse, and detect its continued beat even within the external shapes. But the infinitely varied circumstances which take shape within this externality as the essence manifests itself within it, this infinite material and its organization, are not the subject-matter of philosophy. To deal with them would be to interfere in things . . . with which philosophy has no concern, and it can save itself the trouble of giving good advice on the subject.⁹⁶

Hegel also cites two specific examples of philosophers overstepping the bounds of their discipline:

Plato could well have refrained from recommending nurses never to stand still with children but to keep rocking them in their arms; and Fichte likewise need not have perfected his *passport regulations* to the point of "constructing," as the expression ran, the requirement that the passports of suspect persons should carry not only their personal description but also their painted likeness. In deliberations of this kind, no trace of philosophy remains, and it can the more readily abstain from such ultra-wisdom because it is precisely in relation to this infinite multitude of subjects that it should appear at its most liberal.⁹⁷

Having constructed the conceptual framework for an analysis of particular policy issues, Hegel considered his philosophical mission accomplished. This is not to say that policy — as opposed to philosophical — issues did not interest him. It is well documented, and Tunick duly notes, that Hegel kept up with current events and discussed particular policy issues in class (pp. 121, 123). Although he certainly had opinions on a wide range of penal policy issues, Hegel's *philosophical* concern was to show what mattered about societal institutions and practices — namely, their rationality, or, the extent to which they manifested Reason.⁹⁸ To return to an already familiar example, Hegel thought that philosophy had no business setting particular penalties for particular crimes.⁹⁹ He merely wanted to expose the rational and logical essence of crime and punishment in society. As we saw earlier,

96. *Id.* at 20-21.

97. *Id.* at 21.

98. *Id.* §§ 31-32.

99. Kant similarly had no interest in developing the political application of his retributive punishment theory, an application he believed may well take into account consequentialist considerations such as reformation. See RICHARD SCHMIDT, *DIE AUFGABEN DER STRAFRECHTS-PFLEGE* 24-25 (Leipzig, Duncker & Humblot 1895); Byrd, *supra* note 10.

Hegel believed philosophy could do no more and no less than expose the logical relation between crime and punishment, that is, equivalence.¹⁰⁰ Similarly, he claimed that the concept of personhood implies ownership of private property, whereas the exact distribution of property depends on the particular historical context.¹⁰¹

Tunick acknowledges Hegel's limited philosophical ambition with respect to the assessment of particular penalties. He does not recognize, however, that Hegel's unwillingness to define philosophically mandated punishments represented his philosophical agnosticism with respect to the practical issues that occupy Tunick's "criminal law practitioners" generally. As his unrelenting attack on Fries's subjectivism shows, Hegel was very dogmatic when it came to philosophy; he was very undogmatic when it came to everything else.

Undeterred by Hegel's position on the limits of philosophy, Tunick sets out to construct Hegel's position on a long list of issues in contemporary U.S. criminal and constitutional law: the quality and quantity of particular criminal penalties for particular crimes (pp. viii-ix, 131-37), judicial discretion in sentencing (p. 131), the scope of the criminal law (pp. viii, 110-13), abortion (p. 112), flag burning (p. 112), consensual homosexual sodomy (p. 112), distribution of pornography (p. 112), adultery (p. 112), nonintent crimes (pp. viii, 124-31), diminished capacity (pp. viii, 124-31), insanity (pp. viii, 124-31), plea bargaining (pp. viii, 122-24), recidivist statutes (pp. viii, 131-32), capital punishment (pp. viii, 136-37), political crime (pp. 113-20), "legal formalities" (pp. 120-22), due process (pp. 120-24), the right to jury trial (pp. 122-23), the right to present mitigating evidence (p. 130), and victim impact evidence (pp. 132-33). Suffice it to say that Tunick himself is forced to conclude that Hegel said little to nothing about most of these issues.¹⁰²

In sum, Tunick has it backwards: The view of community underlying the *Philosophy of Right* does not disqualify Hegel's punishment theory from contemporary relevance. On the contrary, it is precisely the mature Hegel's view of community that makes his punishment the-

100. See *supra* text accompanying note 59.

101. HEGEL, *supra* note 4, § 49. For another example from the theory of property, see *id.* § 55Z ("When I possess something, the understanding at once concludes that it is not just what I possess immediately that is mine, but also what is connected with it. Here, positive right must pronounce judgment, for nothing further can be deduced from the concept."). For an example from the section entitled Morality, see *id.* § 132A ("[I]t is impossible to impose a definite limit . . . on these conditions [mental defects and diseases] and the level of responsibility associated with them.").

102. See, e.g., p. 113 ("Hegel offers us little guidance [on the scope of the criminal law]."); p. 124 ("Hegel says nothing about plea bargaining."); p. 125 ("It is difficult to get clear Hegel's view on accountability . . ."); p. 131 ("On this issue of judicial discretion [in sentencing] Hegel offers us only a few morsels."); p. 131 ("Hegel says very little on the topic [of individualized sentencing] . . ."); p. 133 ("Hegel of course has nothing to say about [the constitutionality of victim impact evidence]. . ."); p. 134 ("[Hegel] says little about how much punishment is needed.").

ory relevant today. The key to the theory's contemporary significance lies in its foundation in modern society, not in Hegel's comments on the pros and cons of plea bargaining.

III. HEGEL FOR ALL OF US: REDISCOVERING HEGEL'S THEORY OF CRIME AND PUNISHMENT

The earlier sections of this review have argued that the contemporary significance of Hegel's punishment theory does not lie in its illustration of a general method of societal criticism or in Hegel's application of that method to particular issues of criminal justice. Even if we assume, however, that immanent criticism and Hegel's comments on, say, the jury warrant a reexamination of the *Philosophy of Right*, it is worth considering what else we might learn from Hegel's rich remarks on crime and punishment. This Part explores some of the ways in which the substance of Hegel's punishment theory may benefit our thinking about crime and punishment.¹⁰³

The *Philosophy of Right* and its theory of crime and punishment reflect Hegel's recognition of the reality of fracture in modern society. The Hegel of the *Philosophy of Right* realizes that what he admires as the harmonious days of the Greek city-states are long gone. At the same time, he recognizes that crime represents the most extreme form of differentiation and alienation that is possible between members of society. Because modern society suffers from a lack of identification among its members, and crime both signifies and continuously threatens to exacerbate this differentiation, Hegel suggests that the relevant community for purposes of criminal punishment is the community that both lies at the heart of the law governing society and reflects the community members' lowest common denominator: the community of rational persons.¹⁰⁴

Hegel would agree that recognizing the common rationality of the offender and other members of society only marks the starting point of a process of identification among members of society and between members of society and their society's institutions. Nonetheless, the recognition of common rationality in this context of greatest possible

103. The emphasis of this Part lies on contemporary significance, not exegesis. The discussion will focus, not on what Hegel really meant, but on what Hegel can mean to us today.

104. Durkheim saw humanity as having emerged as the lowest common denominator in modern society. See EMILE DURKHEIM, *SUICIDE: A STUDY IN SOCIOLOGY* 336 (John A. Spaulding & George Simpson trans., Free Press 1951) (1897). It appears, however, that our society has begun to discard even humanity as a recognizable commonality, at least when it comes to criminal punishment. Prosecutors will deny a defendant's humanity; they will not (and cannot) deny her rationality. See *infra* text accompanying notes 180-81. The offender's rationality, however, is obviously related to her humanity. Her rationality is but the most formal aspect of her humanity, her most abstract human characteristic. Recognition of the offender's rationality therefore merely makes the necessary precondition for the eventual recognition of her full humanity.

differentiation is fundamental to the ability of members of society to overcome their alienation from each other and their institutions.

An account of punishment based on the formal community of rationality bears particular relevance to a society as fractured as the United States in the late twentieth century. Communitarians invoke the spirit of Hegel in their attempt to ground law in a substantive concept of community that jars with the experience of those living in the United States today. The mature Hegel's view of punishment, however, is significant today precisely because it left behind the young Hegel's Romantic affection for an idealized society bound together by a unitary ethical substance. Although Hegel's political philosophy revolves around the concept of right (*Recht*), the manifestation of that concept begins with the right of every person considered only as rational, that is, without reference to any cultural, ethnic, ethical, or other contextual bonds whatsoever.¹⁰⁵ If Hegel is to be a communitarian when it comes to law, and criminal law in particular, he is at bottom an abstract communitarian who speaks to those who see few similarities between contemporary American society and classical Athens.

Again, this is not to say that Hegel's political philosophy does not make room for a more substantive community. Hegel's political philosophy is relevant today not only because it acknowledges the need to respect others as abstract rational persons so that we can respect them as complete and unique. We need to recognize our abstract identity with other persons before we can appreciate their particular characteristics, which may or may not match our own particular characteristics. The appreciation of difference presupposes the recognition of identity.

Hegel's theory of crime and punishment in the *Philosophy of Right* does not overburden us with appeals to identities more substantial and substantive than we care to admit. Rationality is a widely accepted common denominator, formal enough not to be overly presumptuous by overstressing our commonality with a person from whom we initially wish to distinguish ourselves — as in "I, or people like me, could never have done such a thing" — yet substantive enough to be meaningful. On the one hand, Hegel's rationality bond is more formal — and thus less threatening and demanding — than the sort of rich commonality presumed by those who invoke our shared ethical substance¹⁰⁶ or view moral community as the mutual willingness to put oneself in another's shoes.¹⁰⁷ On the other hand, Hegel's concept of a

105. See Peter Landau, *Hegels Begründung des Vertragsrechts*, in 2 MATERIALIEN ZU HEGELS RECHTSPHILOSOPHIE, *supra* note 49, at 176, 178.

106. As we saw earlier, Tunick seems enamored with what he considers Hegel's vision of the state as ethical substance. See *supra* text accompanying notes 45-47.

107. See Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83 (1993).

community of rational agents is more substantive than Kant's mere "ideal" of a community of perfectly rational and perfectly free beings — the kingdom of ends¹⁰⁸ — or Bentham's community of utility maximizers.¹⁰⁹

This Part locates Hegel's account of crime and punishment in the *Philosophy of Right*. The ensuing discussion of Hegel's contemporary significance illustrates four aspects of his account of crime and punishment in the context of several topics in contemporary criminal law, including the insanity defense, strict liability, capital sentencing, victims' rights, and rehabilitation. First, Hegel suggests that punishment presumes a fundamental similarity between onlooker and offender — between judge and judged — that marks them as members of one community. Second, this similarity of judge and judged in the criminal law emerges if one abstracts from the onlooker's and the offender's accidental qualities and views them first as rational persons. Once the judge becomes aware of her fundamental common rationality with the judged, however, she can begin to acknowledge the offender as a complete person with more specific characteristics; this, in the end, will allow her to see herself reflected in the offender and to respect the offender — and through the offender, herself — as a complete person, not as a mere abstraction. Insofar as the onlooker's full self-recognition depends on regarding another — in this case the offender — as an equal, yet unique, person, treating the offender with respect lies in the onlooker's self-interest.

Third, Hegel's punishment theory forces us to reassess the role of abstraction in punishment. According to Hegel, abstracting from the offender's particular characteristics is a prerequisite to respecting the offender's dignity as a rational person. Finally, Hegel presents a dynamic account of punishment that relies on the dialectical relationship among the onlooker's different conceptions of the offender's person. On the one hand, Hegel stresses that, in judging the offender, the onlooker always also views the offender in the abstract as a rational per-

108. KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS*, *supra* note 78, at 39-41, 61 (Ak. 433-35, 462-63).

109. This is not to say that Bentham did not also stress that the welfare of each member of that community, including criminal offenders, must be considered because it affects the societal utility calculus:

It ought not to be forgotten, although it has been too frequently forgotten, that the delinquent is a member of the community, as well as any other individual — as well as the party injured himself; and that there is just as much reason for consulting his interest as that of any other. His welfare is proportionably the welfare of the community — his suffering the suffering of the community.

JEREMY BENTHAM, *THE RATIONALE OF PUNISHMENT* (1830), *reprinted in THE WORKS OF JEREMY BENTHAM* 398 (John Bowring ed., Edinburgh, William Tait 1843).

Hegel therefore resembles Bentham more than is generally recognized. See 1 HEPP, *supra* note 63, at 181-82 (discussing similarities between Bentham's and Hegel's accounts of punishment). Nonetheless, Hegel goes beyond Bentham because he views the community of rational agents as only the starting point and foundation of a development toward a community held together by more substantive, and less abstract, commonalities.

son. On the other hand, he points out that viewing the offender in the abstract, though necessary to respect her dignity, can only be the foundation for a more complete recognition of the offender, and therefore of oneself in the offender.

A. *Hegel on Crime and Punishment as Abstract Right*

One cannot get a sense of Hegel's account of crime and punishment without placing it in the context of the *Philosophy of Right*. The philosophy of right, to Hegel, tracks the progressive manifestation of the concept of right.¹¹⁰ Right in turn manifests freedom to varying degrees and in varying forms. Hegel defines right broadly as encompassing all modes of existence in which freedom comes to be.¹¹¹ In the *Philosophy of Right*, he also uses right in a narrower sense, referring to "law" (*Gesetz*) or to a personal right, inalienable or not, as in "a right to property." As he so often does, Hegel distinguishes his concept of right from what he considered to be Kant's (limited) version of the concept. Whereas Kant defines right as the conditions under which individuals can coexist under a universal law,¹¹² Hegel's philosophy of right considers the individual's rights and interests only insofar as they manifest the concept of right.¹¹³

To Hegel, there is more to right than the recognition and protection of a person's objective freedom, that is, her freedom to interact with others and the world around her. Hegel explores this aspect of right in the first section of the *Philosophy of Right*, Abstract Right. Once we leave behind Kant's limited and instrumental conception of right, Hegel suggests, we recognize that the concept of right also shapes our lives insofar as we view ourselves as seeking identity in isolation from any external context, be it familial, ethnic, or societal. Right is considered from this subjective viewpoint in the second section, Morality. In the final section of the *Philosophy of Right* — and the final stage in the manifestation of right — Ethical Life (*Sittlichkeit*), right governs and captures our self-recognition and recognition of others once we realize that, in order to live in a society of equal and self-aware persons, we must see ourselves reflected in the things¹¹⁴ and persons, including criminal offenders, around us.

Hegel not only exposes different aspects of the concept of right but also illustrates their dynamic interconnection. The *Philosophy of Right* considers right from the general vantage points of Abstract Right, Morality, and Ethical Life, as well as from more particular positions within these broad categories. Hegel insists, however, that the

110. HEGEL, *supra* note 4, § 1.

111. *Id.* §§ 29-30; see also *id.* § 33Z.

112. 1 KANT, *supra* note 9, at 337 (AB33).

113. HEGEL, *supra* note 4, § 29A.

114. On Hegel's concept of "thing," see *infra* text accompanying notes 116-21.

existence of several viewpoints should not obscure the fact that they are but viewpoints of one and the same concept of right. He suggests that, as all appearances of right are but manifestations of the same concept, when we consider right in one sense, we always also — and always already — consider it in the other senses.

The same holds for all other concepts, as not only the concepts of right and freedom undergo a dialectical transformation in the *Philosophy of Right*. So does the concept of person in general and the concept of the offender in particular, insofar as these concepts manifest the dialectical movement of freedom. In Abstract Right, persons are considered as agents with only formal, objective freedom, in abstraction from their particular characteristics.¹¹⁵ Only Ethical Life, the final section in the *Philosophy of Right*, turns on a notion of freedom that takes into account the full complexity of a person with unique characteristics.

Hegel's theory of crime and punishment appears at the end of the first section, Abstract Right.¹¹⁶ The section on abstract right addresses the different ways in which my will can be free in external things (*Sachen*), where "things" refers to all external objects of consciousness. It begins by considering the concept of right in the context of property,¹¹⁷ then moves on to right as contract,¹¹⁸ and culminates in a discussion of the negation of right in civil and criminal wrongs.¹¹⁹ The right of property governs my freedom to manipulate external objects. As a person I am a locus of right (a legal subject) and therefore have an inalienable right to determine myself and exercise my freedom by making external objects my own, by subjecting them to my will.¹²⁰

Hegel's discussion of the right of property far exceeds the bounds of what we now regard as the law of property and foreshadows his account of crime and punishment later in Abstract Right. The external things in which my freedom manifests itself also include myself considered as an object of the senses and as an object that I can choose to shape and educate (*bilden*).¹²¹ This notion of self-determination underlies Hegel's accounts of property and of crime and punishment. Right as property introduces the right to self-determination whose violation through crime triggers punishment.

115. See HEGEL, *supra* note 4, § 35.

116. Tunick does not pay much attention to this fact. He mentions (and rejects) only the argument that one can infer from Hegel's introduction of the concepts of crime and punishment in Abstract Right that Hegel disapproved of criminalizing so-called victimless crimes. Pp. 111-12.

117. HEGEL, *supra* note 4, §§ 41-71.

118. *Id.* §§ 72-81.

119. *Id.* §§ 82-104.

120. *Id.* § 49. While I have an inalienable right to property, the distribution of property is a matter of positive law only. *Id.* §§ 49, 49A.

121. *Id.* § 42Z.

The discussion of the value or comparability of property leads Hegel from right as property, that is, right as the freedom to manipulate external things directly through my subjective will, to right as contract, that is, right as the freedom to manipulate external things indirectly through the will of another, and ultimately through a common will. Whereas the right of property deals with an isolated person who seeks to exert her freedom by making things of nature her own, the right of contract turns on the mutual recognition of two persons as equal insofar as both are entitled to property, possess property, and want to retain property.¹²²

According to Hegel, the essence of contract is the exchange of objects of equal value. Value is an object's general characteristic, its quantity, which remains after one has abstracted from all qualitative and incidental characteristics.¹²³ Because a "real contract" involves the exchange of equivalent objects, each party "retains *the same* property with which he enters the contract and which he simultaneously relinquishes."¹²⁴

The value concept connects not only property to contracts but also contracts to crime and punishment. It permits the comparison of various external things in property and defines their exchange in contract. As contract law exchanges only equivalent objects, so criminal law matches equivalent punishments and crimes. The violation of another's external freedom is the value — the essence — of both crime and punishment.¹²⁵

After exploring right in the subjective possession and objective exchange of external objects,¹²⁶ Hegel moves to the ultimate affirmation of right: the negation of wrong, or non-right (*Unrecht*). Hegel distinguishes three kinds of wrong: unintentional wrong, deception, and crime. An unintentional wrong results from a violation of civil law. For example, the losing party in a legal dispute over the interpretation of a contract committed a wrong — acted contrary to right. This dispute, however, concerns merely the application of contract law to a given case, so that both parties affirm right insofar as they disagree

122. *Id.* §§ 71, 75Z.

123. *Id.* § 63.

124. *Id.* § 77; see also *id.* § 74 ("[E]ach party . . . ceases to be an owner of property, *remains* one, and *becomes* one."). Hegel accordingly objected to contracts stipulating an exchange of nonequivalent objects. *Id.* §§ 77, 77A (citing the *laesio enormis* of Roman law as a fundamental principle of contract law requiring the equivalence of objects in a contractual exchange); see also Landau, *supra* note 105, at 176, 183-88 (placing Hegel's position on equivalence in historical context).

125. Cf. FLECHTHEIM (2d ed.), *supra* note 18, at 99 (criticizing Hegel for merely "translating the old *ius talionis* into the language of the modern world governed by the equivalence of goods [das alte *ius talionis* in die sprache der modernen Warenäquivalenzwelt zu übersetzen]" (translation by author)).

126. See HEGEL, *supra* note 4, §§ 41-71.

merely about how — not whether — the law governs.¹²⁷

When I commit an unintentional wrong I try to follow the law and therefore respect it, but I find out later that I violated it. In contrast, when I commit a deception I know I am violating the law, but I trick another into believing that the law is what it is not. Therefore, even in deception I indirectly affirm the law by pretending to follow it as I knowingly misrepresent it to my victim.¹²⁸

Finally, when I commit a crime, I do not even pretend to respect the law. Unlike in deception, I disrespect my victim's will because I make no effort to deceive her into believing that my act accords with the law.¹²⁹

Crime therefore directly and blatantly attacks right and seeks to negate it. Punishment affirms abstract right in the most complete way by reaffirming right against the offender's attempt to negate it. Crime has its roots in abstract right because the criminal offender treats her victim as a nonperson¹³⁰ by violating her external freedom, that is, her freedom to exercise her inalienable right to transform herself and the world around her, a right attached to her as a person in abstraction from all incidental qualities. Punishment responds not to crime's subjective aspect — the infliction of a loss on a particular victim — but to its objective aspect — the affront to right as such manifested in the criminal act. Otherwise, restitution to the victim would be sufficient.¹³¹

According to Hegel, punishment does nothing more than expose the ultimate futility of the offender's attempt to negate right. Crime is an unstable concept because it attempts to posit a law by negating right itself. The law posited by a criminal act is the offender's maxim universalized. Punishment attaches to the only place where the law posited by the criminal act has — albeit purely subjective — existence: the offender's will.¹³² By being punished, the offender is treated as a rational person capable of acting according to maxims that could be universalized to all rational persons. Because crime violates another's external freedom, the offender, as rational, is treated as having acted according to the maxim that one should violate another's external freedom. Punishment merely applies this law to the offender.¹³³ Punishment therefore is also the offender's right in that it results from the

127. *Id.* §§ 84-86. Hegel distinguishes this case from an intentional breach of contract, which constitutes a coercive interference with the freedom of another. Breach of contract disrespects not only the other party's person but also right itself. *Id.* § 93A.

128. *Id.* §§ 83Z, 87-89.

129. *Id.* §§ 83Z, 95.

130. HEGEL, *supra* note 27, § 95N.

131. HEGEL, *supra* note 4, §§ 98-99.

132. HEGEL, *supra* note 27, §§ 98N, 99N.

133. Punishment does not apply the offender's universalized maxim to all persons — which would lead to the violation of everyone's external freedom — because the offender's law is only of

application of her universalized maxim to her.¹³⁴ The offender, by committing the criminal act, herself posits the law that compels her punishment.¹³⁵ In this sense, she has consented to her punishment through her act.¹³⁶ As Hegel puts it, the offender herself awakens the Eumenides with her criminal act.¹³⁷

After its introduction in Abstract Right, the concept of punishment reappears only in Ethical Life. In Morality, Hegel does not concern himself with the coercion of another by violating her external freedom, because the standpoint of Morality considers only the ways in which freedom realizes itself subjectively and through self-reflection.¹³⁸ By contrast, the standpoint of Ethical Life regards freedom in both its subjective and its objective manifestations and therefore can conceptualize crime and punishment while considering the person, not only in her abstract rationality, but also as someone who belongs to — and subjectively views herself as belonging to — a family, an ethnic community, a corporation, and, ultimately, the state.

B. *Community, Rationality, and Strict Liability*

The criminal law reflects the rationality requirement in several ways, most obviously in the “voluntary act” and “mental state” requirements and the defenses of mistake and insanity. The following discussion focuses on the insanity defense because it traditionally represents the criminal law’s most considered effort to make the rationality requirement explicit. This defense excludes an offender from criminal liability if, because of some mental defect, she (i) cannot comprehend an intersubjective rule defined in the penal code — when it is left open whether the rule be a legal or a normative one — and understand how it would be applied to a given course of conduct — the *cognitive prong* — or (ii) cannot conform her conduct to the requirements of that rule — the *volitional prong*.¹³⁹

The various struggles to define the insanity defense illustrate both the general sense that some sort of rationality requirement is needed

hypothetical universality insofar as it has positive existence only in the offender’s subjective will. HEGEL, *supra* note 4, § 99.

134. *Id.* § 100.

135. HEGEL, *supra* note 27, § 101N.

136. *Id.* § 100N; HEGEL, *supra* note 4, § 100Z.

137. HEGEL, *supra* note 4, § 101Z.

138. This is not to say that Hegel does not develop his views on criminal responsibility in Morality. See, e.g., *id.* §§ 115-120 (states of mind, causation), 127 (necessity), 132 (mistakes, insanity).

139. For an example of the traditional insanity test, see MODEL PENAL CODE § 4.01(1) (Proposed Official Draft 1962) (“A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.”); see also STRAFGESETZBUCH [StGB] § 20 (Ger.), translated in THE PENAL CODE OF THE FEDERAL REPUBLIC OF GERMANY § 20 (Joseph J. Darby trans., 1987).

and the difficulty of defining that requirement. Most of the legislatures that have expressed dissatisfaction with the insanity defense object not to the insanity defense in general but to the volitional prong in the traditional insanity test and would like to see the test reduced to its cognitive component. These legislatures therefore have barred a defendant who is incapable of conforming her conduct to a general norm from invoking the insanity defense, but still would require that she be able to comprehend that norm and to apply it properly to a considered course of action.¹⁴⁰ Even the few jurisdictions that have abolished the insanity defense altogether acknowledge that evidence of insanity must remain relevant to the offender's mental state.¹⁴¹ Moreover, even in these jurisdictions, evidence of insanity — at least evidence relevant to the cognitive prong of the traditional insanity test — would remain relevant under the rubric of a mistake defense because the cognitive prong merely represents a particular instance of the general mistake defense. Any person judged insane under the cognitive prong will be incapable of avoiding a mistake about the content and application of any criminal statute, and therefore of the particular criminal statute in question.¹⁴²

The debates about the insanity defense, therefore, are about how, not whether, the criminal law should recognize evidence of insanity. The formal question even in cases of homicidal maniacs like Jeffrey Dahmer remains whether they are insane, not whether they should be punished despite their insanity.

The insanity standard briefly popularized by Judge Bazelon's opinion in *Durham*¹⁴³ raises a deeper question about the insanity defense. It suggests that ultimately the rationality requirement may simply amount to an affirmation of the retributive limits of the criminal law. According to *Durham*, "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."¹⁴⁴ This standard suffered from considerable vagueness. First, not every mental disease or defect, however insignificant, precludes criminal liability. Second, it is unclear what it means for an act to be the product of a mental disease or defect. Through its very vagueness, the *Durham* standard challenged the distinction between the insanity issue and the general question of imputation by instructing the jury that an offender

140. See, e.g., 18 U.S.C. § 17 (1988) (retaining the cognitive prong); ALASKA STAT. § 12.47.010 (1990) (same).

141. See, e.g., IDAHO CODE § 18-207 (1987); MONT. CODE ANN. § 46-14-102 (1985); UTAH CODE ANN. § 76-2-305 (1990).

142. See THEODOR LENCKNER ET AL., ADOLF SCHÖNKE & HORST SCHRÖDER'S STRAFGESETZBUCH: KOMMENTAR § 20, at 317 (Theodor Lenckner et al. eds., Munich, C.H. Beck'sche Verlagsbuchhandlung, 24th ed. 1991).

143. *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

144. 214 F.2d at 874-75.

is not criminally liable if she is so mentally incompetent that she cannot be blamed for her acts.

The difficulty of defining rationality for purposes of the criminal law, however, does not alone render the rationality requirement a tautology. It may be troubling to think that a doctor testifying about a defendant's rationality may employ a test that does not differ from the one the jury might use — asking whether the defendant deserves criminal punishment. It may be even more disconcerting to think that there is no such thing as a "medical" rationality test, so that basing the rationality determination on the question of mental incompetence would prove an exercise in futility. Nonetheless, all questions about the proper judge of rationality — doctors? jurors? judges? — and the difficulty of defining and determining rationality aside, there is widespread agreement that rationality — however defined — remains the bottom line for criminal liability.

The *Philosophy of Right* will be of little help in resolving the insanity debate in this country because Hegel explicitly denies that philosophy can generate a bright-line test to determine rationality in particular cases.¹⁴⁵ If one goes beyond Hegel's rather sketchy comments on the insanity defense,¹⁴⁶ however, and considers his account of crime and punishment as a whole, the traditional rationality requirement appears in a new light. Whereas the criminal law tends to focus exclusively on the offender's rationality or irrationality, Hegel points out that not only must the offender be rational to deserve punishment, but the onlooker must also be rational to determine the offender's criminal desert. In this sense the criminal law presupposes not only the offender's rationality but also a fundamental commonality between judges and judged. The fact that rationality is a prerequisite for criminal liability means that judge and judged must share that characteristic, because, in passing judgment on the presumptively rational offender, the onlooker also assumes herself to be rational.

This initial and fundamental commonality between judge and judged is entirely formal and therefore remains in place even if one disagrees over the particular content of the rationality requirement or, more radically, decides that rationality is an empty concept adding nothing to the idea of retributive limits on criminal liability — as the *Durham* standard suggests — or that retributive limits should be discarded in favor of a strict liability regime.¹⁴⁷ As long as the onlooker does not view herself as making irrational judgments about criminal

145. HEGEL, *supra* note 4, § 132A.

146. Hegel briefly touches on the insanity issue in two remarks. *Id.* §§ 120A, 132A. Only one set of lecture notes contains a noteworthy discussion of insanity. G.W.F. HEGEL, *VORLESUNGEN ÜBER NATURRECHT UND STAATSWISSENSCHAFT* 65-66 (Claudia Becker et al. eds., Hamburg, Felix Meiner 1983).

147. See, e.g., BARBARA WOOTTON, *CRIME AND THE CRIMINAL LAW* 51-53 (1963).

offenders and agrees that the offender must have at least the capacity for rational thought, the onlooker must recognize that she and the offender share the characteristic of rationality.

The example of a strict liability system underscores this point. Even a system of strict criminal liability assumes the offender's rationality, though at a different level than a guilt-based system does. Although a strict criminal liability system is not concerned with the offender's ability to make a rational choice to violate a norm of the criminal law, her general ability to make rational choices to act or not to act remains a prerequisite for strict criminal liability.¹⁴⁸ The state may hold a person strictly liable only if she could have chosen to engage — or not to engage — in the prescribed — or proscribed — conduct had she been confronted with the choice. Even if one abstracts — as in a strict liability regime — from the offender's ability to choose between following and violating a particular criminal statute, the offender must be capable of conforming her conduct to an external rule in general and, more specifically, to the rules laid out in the penal code.

Under this analysis, the problem with strict criminal liability would lie, not in its failure to rely on a formal community of onlooker and offender, but in its failure to consider the offender's substantive characteristics in any way. Strict liability may begin with some watered-down version of a formal community of onlooker and offender as rational persons but can never go beyond that tenuous connection between the two. Strict liability considers only a single fact about the offender: that she has caused the violation of some penal provision. The offender therefore always remains indistinguishable from her violation of the criminal law. To think of an offender merely as someone who has violated a penal statute or its underlying moral norm means to differentiate oneself from the offender from the outset.¹⁴⁹ A strict liability system therefore respects the offender's dignity only in her abstract rationality and cannot make room for a full, empathic judgment of the offender as a complete person.

148. The criminal law reflects this judgment by retaining the voluntary act requirement — *act* is here understood to encompass omissions — and the insanity defense in strict liability cases. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 4.1(b), at 306 (2d ed. 1986). Because mistakes of law are irrelevant for strict liability purposes, the insanity defense would not apply to strict liability offenses in jurisdictions that have abandoned the volitional prong of the insanity defense.

149. One may argue that merely identifying an offender as a lawbreaker does not separate the offender from the onlooker. With very few, if any, exceptions, onlookers will themselves have broken the law at one time or another. One could therefore affirm the community of onlooker and offender in a classic way by first pointing out that onlookers are also lawbreakers and then asking who would throw the first stone. The problem is that onlookers will either deny they have broken the law or distinguish between the "crimes" they committed — say, speeding or tax evasion — and the crime of the offender — say, robbery. In fact, onlookers may deny to themselves and to others their commonality with an offender even if they had engaged in the very same criminal conduct.

A strict liability regime may appear attractive, however, precisely because it shows more, not less, respect for an offender's dignity than a guilt-based system of punishment does. One may even argue that a strict liability system better acknowledges the offender's community membership because it does not brand the offender as a moral outcast who violated the societal norm embedded in a given criminal statute. Under strict liability, the criminal law could be freed of the confusion and impulsiveness that comes with moral condemnation.

These presumed benefits of strict criminal liability would come at a high price, however. The elimination of an inquiry into the offender's mental state not only would rob criminal punishment of its moral significance — which may or may not be desirable — but also would prevent the sort of empathic substantive judgment that asserts the offender's membership in the onlooker's community and permits the onlooker to overcome her alienation from the offender and the criminal justice system as a whole. By treating the offender only formally as a violator, a strict liability system would therefore cement, not challenge, our current failure to consider offenders as equal persons.¹⁵⁰

Thus, strict criminal liability illustrates the significance of Hegel's account of punishment because it centers on and thereby highlights the simplistic categorization of offender as law violator that plagues our current thinking about criminal offenders. Hegel shows us that this unreflective categorization is not only facile but incomplete and divisive. He urges those who judge a criminal offender to think not only of what distinguishes the offender from them but also of what unites them with the offender. He asks us to consider how we can accept a rationality requirement and yet fail to realize that we thereby acknowledge the offender as a fellow rational person worthy of respect and a patient closer look at her characteristics. Hegel reminds us that once anyone decides, whether in the comfort of her own home watching a news report or in the jury box, that a given offender deserves criminal punishment, she thereby recognizes this offender's rationality — however defined — and affirms a fundamental similarity between her and the offender that identifies them as members of at least one common community, that of rational persons.

C. *Abstraction, Dignity, and Capital Sentencing*

Having considered Hegel's introduction of the concepts of crime and punishment in *Abstract Right*, Ossip Flechtheim faulted Hegel for regarding the offender only in the abstract as a rational being.¹⁵¹

150. One may argue that a strict liability system is undesirable for many reasons other than its effect on our perception of the offender as a full and equal member of our community. For a critical discussion of the traditional arguments against strict criminal liability, see Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731 (1960).

151. FLECHTHEIM (2d ed.), *supra* note 18, at 85, 95; Flechtheim, *supra* note 25, at 15, 20.

Flechteim's criticism of Hegel, however, points to one of Hegel's most significant contributions to punishment theory. Although Flechteim correctly remarked that Hegel describes the offender as a rational person, he overlooked the fact that Hegel thereby affirms the offender's membership in a community with all other members of society because the offender shares with them her rationality. By regarding the offender first as a member in the purely formal community of rational persons, a community that emerges if one abstracts from all historical particulars, Hegel provides the offender's dignity with a solid foundation independent of historical accidents, such as the offender's particular characteristics, including her familial or ethnic identity. By introducing the concepts of crime and punishment, Hegel makes clear that the offender is worthy of respect simply because she is a member of the community of rational persons.

Hegel's insight that respecting the offender's dignity requires one to view the offender also in the abstract distinguishes his punishment theory from current attempts to preserve the offender's dignity in punishment. The U.S. Supreme Court seeks to prevent irrational and arbitrary death sentences by giving the defense the opportunity to present every detail about the defendant's background and character at the capital sentencing hearing.¹⁵² Commentators similarly decry the federal sentencing guidelines for curtailing judges' ability to mete out individualized sentences.¹⁵³ More generally, Martha Nussbaum argues that proper moral judgments, whether in everyday life or in capital sentencing, turn on "a highly particularized perception of the [defendant's] situation" and require a "keen interest in all the particulars."¹⁵⁴

Hegel, by contrast, suggests that abstracting from, not merely focusing on, the offender's particular characteristics also safeguards her dignity because doing so disqualifies her as a target for vengeful impulses. As Schopenhauer pointed out in his critique of Kant's retributivism,¹⁵⁵ the problem with punishment as vengeance is precisely that it does not view the offender in the abstract, say, as a member of the community of utility maximizers or of rational persons, but rushes to inflict pain on the individual offender, isolated from all societal context. Furthermore, an offender viewed in abstraction from her other characteristics, including her ability to experience pain as a sentient being, leaves vengeful impulses to inflict pain with no blood to draw. Finally, the focus on the offender's particular characteristics itself

152. See *infra* text accompanying note 162.

153. See, e.g., Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992).

154. Nussbaum, *supra* note 107, at 110.

155. Arthur Schopenhauer, 1 DIE WELT ALS WILLE UND VORSTELLUNG § 62, at 432-36 (Arthur Hübscher ed., Zurich, Diogenes 1977) (3d ed. 1859).

amounts to an abstraction from the offender's general characteristic of being possessed of rationality.

By placing the offender's rationality at the core of his account of punishment, Hegel reminds us not to put the cart before the horse. Adam Smith and more recently Martha Nussbaum have stressed that to assess another's moral desert also means to imagine oneself in the other's situation.¹⁵⁶ One should not expect the onlooker to see herself in the offender's particular characteristics, however, unless she first recognizes that the offender and she already share one basic characteristic: rationality. Without acknowledging their common rationality, the onlooker cannot assess the offender's conduct. If the offender is unlike the onlooker because the offender lacks rationality, she cannot be judged because she cannot be held accountable. In judging the offender, the onlooker therefore acknowledges the offender's rationality. In acknowledging her rationality, the onlooker acknowledges her fundamental identity with the offender. It is the acknowledgment of this identity, however formal, that permits the onlooker to engage in the sort of empathic thought experiment that is required for a full assessment of desert.¹⁵⁷

Emphasizing the offender's abstract rationality therefore does not imply rejecting individualized assessments of desert. Hegel's position leaves room for the recognition that a full assessment of the offender would require consideration of the particularities of the crime and the offender's person. Because one arrives at the abstract concept of the offender as a rational person by abstracting from the offender's particular qualities, the very process of abstracting assumes the presence of these particular qualities. Furthermore, if I view the offender — and myself — in the abstract, I nonetheless focus on the particular offender — or on myself as a particular object — and thereby acknowledge the necessity of particularization.¹⁵⁸ The mere fact that there is an object of the abstraction — the offender or myself — illustrates that abstraction also implies particularization.¹⁵⁹ Having thus acknowledged the presence of the offender's particular qualities, we can no longer ignore them. We now seek to overcome the incompleteness of our initial conceptualization of the offender as merely rational by taking into account her particular characteristics.¹⁶⁰

156. See Nussbaum, *supra* note 107, at 85; ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 16-21 (London, Millar, Kincaid & Bell, 3d ed. 1767).

157. The criminal law explicitly recognizes the need for this thought experiment in cases discussing the "subjective" reasonableness standard. See, e.g., *State v. Leidholm*, 334 N.W.2d 811, 818 (N.D. 1983) (in a self-defense case, stating that the jury should "assume the physical and psychological properties peculiar to the accused, viz., . . . place itself as best it can in the shoes of the accused").

158. HEGEL, *supra* note 4, § 6A.

159. *Id.* § 6Z.

160. *Id.* § 6A. Hegel viewed his recognition of the incompleteness of abstraction as his contribution over Kant and, in particular, over Fichte. *Id.*

In order to respect another as a complete person, I must recognize her in her uniqueness, which is defined by her particular characteristics — more specifically, by her particular characteristics that differ from mine. I must learn how to see her difference not as something to be overcome — as I do when I abstract from her particularities to recognize our formal identity — but as something worthy of respect.¹⁶¹ I can only see another's substantive difference as not divisive against the background of my recognition of our formal identity, which requires the abstraction from all particular characteristics.

Hegel's limited concept of the offender in Abstract Right bears within itself another, fuller, concept of the offender. The concept of the offender changes as the concept of rationality changes. In Abstract Right, the offender's rationality means merely that her maxims can be universalized, that is, that they have potential objective validity and one could apply them to all rational agents even if one abstracts from the offender's particular characteristics. In Ethical Life, however, rationality encompasses not only objective validity but also subjective validity. This means that the identification between the offender and other members of society goes beyond the common universalizability of their acts. The offender and all other members of society now recognize their substantive, not merely their formal, similarity as equal *and* unique persons.

Hegel therefore not only identifies the core of the notion of punishment, the identity of members of society as rational agents, but also outlines the path from abstract recognition of the offender as formally similar to a more substantive identification with the offender. Hegel shows us how we can overcome our alienation and how far we still have left to go.

When considered in the context of contemporary capital punishment, Hegel's emphasis on the need to abstract from the particular characteristics of the offender suggests that the Supreme Court's focus on individualization in its death penalty jurisprudence is myopic at best and misguided at worst. The goals of the Court's death penalty jurisprudence fall into two strands: accuracy and uniformity. On the one hand, the Court calls for individualization to ensure accuracy in capital sentencing, with accuracy defined as a correct assessment of moral desert based on the consideration of all relevant facts about the defendant and the crime. On the other hand, the Court focuses on abstraction from the particular characteristics of the defendant as a means to ensure uniformity. While the sentencer must have the opportunity to consider the defendant as a unique human being, the sentencer must also receive guidance through explicit and uniform standards, so that cases alike at some higher level of abstraction — despite the obvious difference between equally unique defendants —

161. See KLESCZEWSKI, *supra* note 17, at 30.

are treated alike.¹⁶²

In this model, abstraction is considered only as a means of achieving uniformity, not accuracy. By contrast, Hegel points out that abstraction is also essential for accuracy, because it is only through abstracting from the defendant's substantive characteristics that the sentencer comes to recognize the fundamental commonality that in turn permits her to explore other empathic connections with the defendant. The sort of abstraction the Court's capital sentencing model requires — though only in the name of uniformity — differs from the sort of abstraction Hegel has in mind. When the Court thinks of abstracting from the facts of the case and the defendant's characteristics, it envisions placing the case into some class of "death-eligible" cases, say, felony murder. This abstraction often occurs at the legislative stage and therefore does not influence the sentencer's consideration of the particular defendant. Moreover, even if this abstraction occurs at trial, it does nothing to encourage the sentencer to recognize her shared rationality with the defendant. The Supreme Court's effort to ensure accuracy through individualization alone therefore appears futile.

Hegel believes that substantive empathy based on identification requires that the judge first recognize her formal commonality with the judged; this insight also has implications for defense strategies in capital sentencing hearings. A committed defense lawyer may be doing her client more harm than good by presenting the sentencer with a barrage of details about the defendant's life experiences. Individualizing the defendant by stressing his uniqueness may remind the sentencer of the weight of her decision, but it may also be so successful that the sentencer comes to believe that she has nothing in common with the defendant. Without commonality, there can be no empathy.

In order to arrive at a considered moral assessment, the sentencer surely must have the opportunity to consider not only the defendant's particularities but also the very fact that the defendant is unique. Without a reminder, however, that the sentencer shares with the defendant the most basic value of rationality — *value* in the Hegelian sense, meaning that which remains after one has abstracted from all particular qualities¹⁶³ — details may at best fall on deaf ears and at worst lead the sentencer to deny any similarities with the defendant.

162. See *Callins v. Collins*, 114 S. Ct. 1127, 1127-28 (1994) (Scalia, J., concurring in the denial of certiorari) (discussing the uniformity and accuracy strands and noting their incompatibility); *Callins*, 114 S. Ct. at 1129 (Blackmun, J., dissenting from the denial of certiorari) (same); see also Dubber, *supra* note 87; Steven G. Gey, *Justice Scalia's Death Penalty*, 20 FLA. ST. U. L. REV. 67 (1992).

163. HEGEL, *supra* note 4, § 63.

D. Onlookers, Offenders, and Victims

Hegel's commandment in Abstract Right calls on everyone to "be a person and respect others as persons."¹⁶⁴ From the viewpoint of abstract right, all persons are considered as equal insofar — and only insofar — as they bear within themselves the potential to gain self-recognition.¹⁶⁵ In right as property, the commandment calls on me to be as a person, that is, to respect myself — considered as an external thing — as a person. In property, I manifest my identity as a person by shaping external things, more specifically by converting nature into my property and by educating (*bilden*) my body and mind.¹⁶⁶

In contract law and punishment, abstract right is the mutual recognition of equal persons. In contract, I see the other party as an equal person and achieve mutual recognition and self-manifestation through an exchange of external things. In crime, the offender disrespects her victim. In punishment, however, by respecting the offender as a rational person, I affirm abstract right by following its commandment.

Hegel's account of punishment, therefore, removes the offender and her rationality from the spotlight and refocuses our attention on the relationship between onlooker and offender. Both the offender and the onlooker are rational persons who owe each other and themselves respect. Moreover, the onlooker derives a significant benefit from recognizing the offender as an equal rational person. As the master-slave relationship of the *Phenomenology* tells us, full self-recognition can only be achieved through the reflection of oneself in another person who is considered as equal. Although the slave can begin to achieve self-recognition through manifesting her identity in her labor — right as property¹⁶⁷ — the master has no hope of self-recognition because he neither works nor views the slave as equal.¹⁶⁸ Thus, in regarding the offender as an equal rational person, the onlooker recognizes herself in the offender and achieves mediated self-awareness.

Respecting the offender as also rational is therefore in the onlooker's self-interest. Applying this insight to the criminal offender illustrates the contradictoriness of the offender's criminal act. Insofar as the offender disrespects her victim, she acts contrary to her interest in self-recognition. Similarly, the onlooker's interest in gaining self-awareness through the offender makes for a strong argument against

164. *Id.* § 36 (emphasis omitted); see also G.W.F. Hegel, *Jenaer Realphilosophie*, in FRÜHE POLITISCHE SYSTEME 203, 226-27 (Gerhard Göhler ed., Frankfurt am Main, Verlag Ullstein GmbH 1974).

165. HEGEL, *supra* note 4, § 49Z.

166. HEGEL, *supra* note 74, § 486A; G.W.F. HEGEL, PHÄNOMENOLOGIE DES GEISTES 153-54 (Frankfurt am Main, Suhrkamp 1970) (1807) (describing labor as *Bildung*).

167. HEGEL, *supra* note 166, at 153.

168. *Id.* at 150-52.

capital punishment as the dead offender cannot function as the medium for the onlooker's self-reflection.¹⁶⁹

Combining the relationship of mutual respect between offender and victim, on the one hand, and that between onlooker and offender, on the other, sheds new light on the victims' rights movement. Rehabilitationism, special deterrence, and standard retributivism all focus exclusively on the offender. Victims' rights advocates compensate for this limited approach to punishment by focusing exclusively on the victim and, by dubitable extension through the concept of potential victim, on onlookers in general. Hegel's account of punishment based on mutual respect reminds us to consider not only the similarities between onlooker and victim — all onlookers are potential victims — but also those between onlooker and offender. We have already seen that the onlooker's unquestioning self-association with the victim fails to acknowledge the offender's status as an equally rational person. It also ignores the obvious fact that all offenders also are potential victims — a fact that victims' rights advocates and incapacitationists disregard.¹⁷⁰

Finally, Hegel's account of punishment as based on abstract right — that is, on the mutual recognition of equally rational persons — also elucidates the connection between the offender's relation to her victim and the onlooker's relation to the offender. The offender's disrespect of her victim only warrants punishment if her victim deserved respect as a person. In judging the offender deserving of punishment, the onlooker refuses to do to the offender what the offender had done to her victim. The onlooker's call for punishment manifests her respect for the offender, a respect the offender had denied her victim. Punishment therefore presumes that both the victim and the offender are persons worthy of respect.

E. *Hegel and Morris on Dignity*

Some years ago, Herbert Morris revived the offender's dignity as a central concept in Anglo-American punishment theory.¹⁷¹ Without referring to Hegel or to the connection between rationality and dignity, Morris attacked rehabilitation as a purpose of punishment on the ground that rehabilitative treatment, as opposed to punishment, fails to acknowledge the offender's dignity as a person.¹⁷² As Flechtheim points out, Hegel also rejected involuntary rehabilitation as incompatible with the offender's dignity.¹⁷³ Hegel not only makes us think

169. *Id.* at 148-49.

170. Cf. Markus Dirk Dubber, Note, *The Unprincipled Punishment of Repeat Offenders*, 43 STAN. L. REV. 193, 215 (1990).

171. Morris, *supra* note 13.

172. *Id.*

173. Flechtheim, *supra* note 1, at 304.

about the rationality of our practices — be it through immanent criticism or in some other way — as Tunick points out, but he also calls on us to recognize the offender's dignity as a rational person and as a member of our community of rational persons.

Recognizing the community of judge and judged as the basis of the criminal law helps reorient the debate between rehabilitationists and retributivists like Morris. This dispute may be reduced to a disagreement over which approach best protects the offender's dignity. Retributivists follow Kant in emphasizing the need to respect the offender's dignity as a rational individual. Focusing exclusively on the offender's dignity as an individual, however, may isolate him and thereby emphasize the distinction between, not the community of, judge and judged.¹⁷⁴

Retributivists charge that rehabilitationists are willing to sacrifice the offender's dignity for uncertain gains in crime control; rehabilitationists counter by asserting that only a rehabilitative approach encourages the state to treat criminal offenders humanely.¹⁷⁵ This argument overlooks that rehabilitation permits the disrespectful treatment of criminal offenders because it treats them as deviants, therefore denying the community of judge and judged. In other words, rehabilitationists would do well to take a step back from the correctional context and consider what effect the conviction of an offender and her concomitant diagnosis of deviance will have on her treatment. By neglecting the importance of affirming the offender's membership in the onlooker's community from the very start, rehabilitationists ask the tail to wag the dog. Societal attitudes about criminal offenders control the treatment of prisoners, not vice versa. Attempts to protect the offender's dignity by changing the correctional system are therefore likely to fail.

Recognizing the central role in criminal law of the community of judge and judged suggests that neither rehabilitationists nor retributivists have a lock on the best approach for protecting the offender's dignity. The success of either view turns on its recognition of the offender's membership in the community of the onlooker, the police officer, the legislator, the judge, the jury, the probation officer, the prison warden, and the prison guard. Only an approach to criminal punishment that acknowledges and proceeds from this sense of community will protect the offender's dignity.

CONCLUSION

Hegel stresses that by affirming the offender's membership in the

174. See *supra* text accompanying notes 162-63.

175. See generally FRANCIS T. CULLEN & KAREN E. GILBERT, *REAFFIRMING REHABILITATION* (1982).

community of rational persons, we affirm the offender's dignity as a rational person. Even Marx, otherwise a severe critic of Hegel's punishment theory, recognized that Hegel, "instead of looking upon the criminal as the mere object, the slave of justice, elevates him to the position of a free and self-determined being."¹⁷⁶ Ossip Flechtheim similarly praised Hegel's "solicitude for the integrity of the criminal's self."¹⁷⁷

Hegel's emphasis on the offender's continued membership in our community of rational persons and on the offender's dignity as a fellow rational person carries great significance for our times. Crime divides our society in many ways. Television viewers, jurors, judges, and legislators do not see those accused or convicted of crime as members of their community. Chief Justice Warren's expression of concern, in a 1959 opinion for a *unanimous* Supreme Court, for "protecting [the] fundamental rights of our citizenry, including that portion of our citizenry suspected of crime,"¹⁷⁸ would seem peculiarly out-of-date today. Prosecutors, judges, and politicians alike now depict those accused or convicted of crime as animals or subhuman creatures and stress the ethnic otherness of minority defendants.¹⁷⁹ Washington's state legislature recently passed a "Sexually Violent Predators" statute.¹⁸⁰ By permitting the use of victim impact evidence at capital sentencing hearings, the Supreme Court has opened the door for prosecutors to distinguish between the worth of capital defendants, who are disproportionately members of racial minorities,¹⁸¹ and their victims.¹⁸²

Incapacitation, or the warehousing of offenders for the protection of society — and "society" obviously does not include the offenders or their prison guards — reigns as the dominant goal of punishment in the legislatures, in correctional facilities,¹⁸³ and among the popu-

176. Karl Marx, *Capital Punishment*, in MARX AND ENGELS ON LAW 193, 195 (Maureen Cain & Alan Hunt eds., 1979).

177. Flechtheim, *supra* note 1, at 308.

178. *Spano v. New York*, 360 U.S. 315, 321 (1959) (emphasis added).

179. Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1752-58 (1993). As the Rodney King state trial showed, defense attorneys in white-on-black crime cases will also not hesitate to demonize and dehumanize the victim to differentiate him from a non-black jury. *Id.* at 1752-53.

180. WASH. REV. CODE ANN. §§ 71.09.010-.902 (1992).

181. CORAMAE RICHEY MANN, *UNEQUAL JUSTICE: A QUESTION OF COLOR* 202-03 (1993). See generally DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* (1990).

182. See Vivian Berger, *Payne and Suffering — A Personal Reflection and a Victim-Centered Critique*, 20 FLA. ST. U. L. REV. 21 (1992) (discussing *Payne v. Tennessee*, 501 U.S. 808 (1991)).

183. So-called death fences that carry lethal loads of 4000 volts and 500 amperes are the *dernier cri* in U.S. prison construction. See Tony Perry, *State Prison Prepares to Turn on Death Fence*, L.A. TIMES, Sept. 27, 1993, at A1. Consider also the Security Housing Unit (SHU) of Pelican Bay State Prison in California. The SHU represents the cutting edge of U.S. correctional theory and design. The 1500 or so SHU inmates are locked up in 80-square-foot windowless cells in solitary confinement 22 hours a day, seven days a week, 365 days a year. SHU offers no recreational, vocational, or educational programs. Inmates can exercise alone and without as

lace,¹⁸⁴ even maintaining some forceful and much-respected adherents in scholarship.¹⁸⁵ The death penalty is more popular than ever. The police often seem satisfied with isolating crime in so-called inner-city neighborhoods. The white majority of American society, after decades of media reports on crimes committed by blacks, after episode upon episode of "real life" police shows documenting drug raids on black neighborhoods, has come to see crime as something that is committed by others — by those who lead a mysterious life outside the relevant community. Crime is no longer a problem within our society; crime now hovers outside the walls waiting for its chance to prey on a frightened citizenry. Criminal punishment no longer affirms our community with the offender by welcoming her back after she has done the time. Criminal punishment now combats a foreign threat that affirms the community in its stance against — not with — the offender, making a concerted effort to keep the offender out as long as possible, preferably forever.

In the face of the marginalization and disrespect that mark our society's attitude toward those accused or convicted of criminal offenses, Hegel calls on us to bring our society's political and legal institutions in line with our capacity for rational thought. Because we think of *ourselves* as rational, and must think of ourselves as rational if we are to assign blame to an offender, we should base criminal punishment on considered responses to crime. Because we consider the *offender* rational, and must consider her rational if we are to assign blame to her, we recognize her as a member in our community of rational persons. It is only on the basis of this recognition of the offender as a being equal to us by reason of her rationality that we can hope to see ourselves reflected in the offender and thereby to overcome our current alienation from the institutions of criminal justice.

much as a ball for one and one-half hours each day in a high-walled dog run under the close scrutiny of heavily armed guards. See Claire Cooper, *Study: Pelican Bay State Prison Isolation Inmates Traumatized*, SACRAMENTO BEE, Sept. 30, 1993, at A4; Jim Doyle, *Criticism of Pelican Bay in Court*, S.F. CHRON., Sept. 30, 1993, at C8; Maitland Zane, *Psychiatrist Criticizes Pelican Bay Prison*, S.F. CHRON., Oct. 13, 1993, at A17; Justin Zimmerman, *Prison Official Defends Pelican Bay*, UPI, Sept. 21, 1993, available in LEXIS, Nexis Library, Wires File. Although a significant number of SHU inmates suffer from severe psychological defects, perhaps including some that resulted from their SHU experience, they are released directly onto the streets of California. *60 Minutes: Pelican Bay*, transcript at 10-11 (CBS television broadcast, Sept. 12, 1993) (transcript on file with author).

184. But see Stephen D. Gottfredson et al., *Conflict and Consensus About Criminal Justice in Maryland*, in PUBLIC ATTITUDES TO SENTENCING: SURVEYS FROM FIVE COUNTRIES 16, 39 (Nigel Walker & Mike Hough eds., 1988) (reporting a study suggesting that incapacitation is not as popular among Maryland citizens as criminal justice policymakers expected).

185. See, e.g., JAMES Q. WILSON, THINKING ABOUT CRIME 145-61 (2d ed. 1983).