

# ANNULMENT RETRIBUTIVISM:

## *A Hegelian Theory of Punishment*

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### I. INTRODUCTION

Despite the bad press that retributivism often receives, the basic assumptions on which this theory of punishment rests are generally regarded as being attractive and compelling. First of these is the assumption that persons are morally responsible agents and that social practices, such as criminal punishment, must acknowledge that fact. Additionally, retributivism is committed to the claim that punishment must be proportionate to the crime, and not determined by such utilitarian concerns as the welfare of society, or the hope of deterring other criminals.<sup>1</sup> Because the most commonly discussed version of retributivism is developed from Kant's moral and legal theory, I will refer to it as *Kantian Retributivism*.<sup>2</sup> Despite its appeal, Kantian Retributivism cannot provide a satisfactory response to a kind of case that is receiving increasingly serious consideration in philosophical literature. The case is this: Many crimes are committed by individuals profoundly disadvantaged by unjust social institutions, such as racism, clas-

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1. Jeffrie Murphy writes, "Even many people who do not like the *name* 'retributivist' are persuaded by considerations that are clearly retributive in nature. Suppose it was suggested that we punish negligent vehicular homicide with life imprisonment and first degree murder with a couple of years in jail, and suppose this suggestion was justified with the following utilitarian reason: Conduct of the first sort is much more common and dangerous than conduct of the latter sort (we are much more likely to be killed by a negligent driver than by someone who kills us with the primary object of killing us), and thus we should use the most severe deterrents against those who are genuinely dangerous. If we object to this suggestion, as most of us would want to, that this would be unjust or unfair because it would not be apportioning punishment to fault or desert, we should be making a retributive argument. Thus even if the label 'retributivist' repels most people, many of the actual doctrines of the theory do not." Jeffrie Murphy, *RETRIBUTION, JUSTICE, AND THERAPY* 230 (1979).

2. This interpretation of Kant's theory of punishment has been developed by Herbert Morris, *Persons and Punishment*, 52 *MONIST* 475 (1968), and Murphy, *supra* note 1.

sism, and/or sexism. If such individuals commit crimes, the retributivist is placed in a very difficult position: *Either* she must claim that the individual has willfully committed a crime and for that reason deserves punishment, seeming to ignore entirely the social background of the individual, *or* she can claim that the individual—in virtue of being disadvantaged by social injustices(s)—does not deserve punishment because such punishment would be unfair.<sup>3</sup> I have argued elsewhere that neither strategy is tenable.<sup>4</sup> The first simply refuses to take seriously the important political intuition that designing punitive practices regardless of social injustices is irresponsible and unjustifiable. The second, although initially compelling, is not an option because, put briefly, Kantian retributivistic punishment is a function of the wrongdoer's will entirely, not a function (wholly or partly) of the social context in which the wrongdoer finds himself. Thus, it is not an option for a Kantian retributivist to “build into” the criminal's will his social background as a means to determine the punishment he deserves. Because of the uncomfortable situation these cases create for Kantian Retributivism, many conclude that retributivism is compelling “in theory” only, and endorse (perhaps unhappily) utilitarian theories of punishment “in practice.”<sup>5</sup> However, I believe that abandoning retributivism in the face of these cases is premature. I will argue that what we need is a different *version* of retributivism, one that allows us to remain committed to the moral claims that persons should be held responsible for their freely willed actions and that punishment should be proportionate to their willfully committed wrongs, and at the same time allows us to take seriously our political intuition that a responsible institution of punishment acknowledges the social injustices that seriously disadvantage many individuals in our society.

The theory of retributivism that I will be developing in this article does not come from Kant's (or Kantian) moral theory, but instead from Hegel's political theory. There is little literature on Hegel's theory of punishment, and much of what has been written about it is either dismissive or flawed (and often both).<sup>6</sup>

3. Murphy comes to the conclusion that the punishment of such individuals is unfair and, therefore, unwarranted. See Jeffrie Murphy, *Marxism and Retribution*, in Murphy, *supra* note 1, at 93–114.

4. See Jami L. Anderson, *Reciprocity as a Justification for Retributivism*, 16 CRIM. JUST. ETHICS 13–25 (1997).

5. Social injustices such as classism or racism create no analogous problems for utilitarian theories of punishment: If punishing individuals burdened by unjust social institutions produces more harm than good, or if punishing them as severely as we would punish individuals who are not likewise burdened by social injustices produces more harm than good, then the utilitarian would claim that punishment is unwarranted—clearly the answer many are hoping to hear from the retributivist.

6. J.E. McTaggart lamented how little support Hegel's theory of punishment receives from the philosophical community. He writes, “It is not impossible that we may find out that the world has been acting on the Hegelian view for many ages, but as an explicit theory it has found little support.” J.E. McTaggart, *Hegel's Theory of Punishment*, 6 INT'L J. ETHICS 482–99 (1896). Peter Steinberger made a similar observation nearly 100 years later. See Peter Steinberger, LOGIC AND POLITICS ch. 3 n.1 (1988).

Hegel claims that punishment is justified because it annuls crimes, thereby revealing the criminal act for what it is—a will “null and void.” Many philosophers regard the idea of annulling crime as extremely dubious, if not ridiculous. However, I believe that many criticisms of Hegel’s notion of “annulment” rest on serious misconceptions. After presenting an analysis of the notion of annulment, I will argue that Hegel has provided not only a compelling account of retribution, but also the theoretical machinery to address satisfactorily the “hard cases” that trouble Kantian Retributivism. Because Hegel’s theory of punishment differs from Kantian Retributivism, I will refer to it as *Annulment Retributivism*.

## II. KANTIAN RETRIBUTIVISM AND “ROTTEN SOCIAL BACKGROUND”

In this section I outline the essential assumptions of the Kantian retributive theory of punishment in order to set up my conclusion that, despite the initial appeal of Kantian Retributivism, cases in which the criminal has been disadvantaged by social injustices raise irresolvable problems for this version of retributivism.

Kantian Retributivism is often described as being “backward looking” because, rather than justify punishment by appealing to the future effects of punishment (as “forward looking” utilitarian theories of punishment do), it justifies punishment by appealing to the wrongful act freely committed in the past. Such a justification reveals two primary assumptions of Kantian Retributivism:

R1: Persons are autonomous agents capable of free action.

R2: A crime is a freely committed wrong that unfairly advantages the criminal.

These two assumptions create the foundation for three secondary claims of retributivism:

R3: The punishment must be proportionate to—it must “fit”—the crime.

R4: Punishment is morally permissible.

R5: Punishment is obligatory.<sup>7</sup>

7. Some separate theories of retributivism into two categories: those that follow in the Kantian (and Hegelian) tradition of insisting that retributive punishment is not only permissible, it is also obligatory, and those that break from Kantian tradition and claim that retributive punishment is permissible, but not obligatory. H.L.A. Hart is one notable example of someone who makes this distinction. See PUNISHMENT AND RESPONSIBILITY 231–37 (1963). I believe that abandoning the claim that punishment is obligatory is motivated by the desire to make the theory more appealing to those who are ambivalent about retribution. However, I do not think that such a move is successful; in fact, given that the theory of retribution rests on the claims that we are morally obligated to treat persons as autonomous agents and that retribution is how we treat a criminal with respect, I do not see how it could *not* be obligatory to punish (retributively) criminals. But the

After explaining why the retributivist sees R3–R5 as developments of R1 and R2, I will address the problem social injustices create for Kantian Retributivism.

To begin, let us look at a famous passage in which Kant discusses retributive punishment:

Punishment by a court—this is distinct from natural punishment, in which vice punishes itself and which the legislator does not take into account—can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society. It must always be inflicted upon him only because he has committed a crime. For a man can never be treated merely as a means to the purposes of another or be put among the objects of rights to things: His innate personality protects him from this, even though he can be condemned to lose his civil personality. He must previously have been found punishable before any thought can be given to drawing from his punishment something of use for himself or his fellow citizens. The principle of punishment is a categorical imperative, and woe to him who crawls through the windings of eudaemonism in order to discover something that releases the criminal from punishment or even reduces its amount by the advantages it promises. . . . For if justice goes, there is no longer any value in men's living on the earth. . . . But what kind and what amount of punishment is it that public justice makes its principle and measure? None other than the principle of equality (in the position of the needle on the scale of justice), to incline no more to one side than to the other. Accordingly, whatever undeserved evil you inflict upon another within the people, that you inflict upon yourself. If you insult him, you insult yourself; if you steal from him you steal from yourself; if you strike him, you strike yourself; if you kill him, you kill yourself.<sup>8</sup>

There is much packed into this passage, and it is worth unpacking because it will give us a good sense of what Kantian Retributivism is. First, we see a complete rejection of a utilitarian justification of punishment. Such a justification is misguided because it relies on a false conception of persons. It assumes that persons are unfree—are, in fact, not persons—and ought to be treated like animals and controlled with threats of harm for the purposes of another. To a retributivist, threats of punishment are as morally objectionable as the crimes they are intended to prevent. Punishment cannot be justified as an attempt to cure the criminal, to improve her morally, or to inflict injury on her with an eye to preventing future crimes. Nor are we free to inflict injury on the criminal for the purpose of bringing satisfaction to the victim or society. To undertake any of these goals is to cease to act in a manner consistent with R1, which requires that we treat persons as moral agents deserving respect. If persons are autonomous moral agents, then

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development of that argument would take us too far afield of the purposes of this paper. For present purposes, because this paper focuses on Kantian Retributivism and Hegel's Annulment Retributivism—both of which are committed to the claim that punishment is obligatory—I will regard that claim as an important feature of retributivism.

8. Immanuel Kant, *THE METAPHYSICS OF MORALS* 140–41 (Mary Gregor trans., 1991), emphasis deleted.

crimes are a reflection of a willful deliberation, not merely illicit harms resulting from undeliberated drives or emotions. Nor are crimes signs of a need for therapy, a “bad attitude,” or of recalcitrance. For the Kantian retributivist, even the fact that an individual willfully commits a particular kind of crime *repeatedly* is not, by itself, an indication that the crimes were acts of compulsion or that the criminal is incorrigible.

In rejecting a utilitarian justification for punishment, Kant is making a distinction between being punished and having harm inflicted on one for the sake of one’s own good or for the good of others. To a utilitarian, there is no distinction—to be punished simply is to be inflicted with injury for the sake of a future good.<sup>9</sup> But clearly Kant means something entirely different by ‘punishment’: For him, to be punished is to receive state-inflicted injury in a manner that is compatible with being treated as a person deserving dignity and respect. How can that be possible? If we reject all utilitarian criteria for apportioning punishment, then punishment must be determined in a manner that acknowledges the moral worth of the criminal and the moral significance of the crime. We do that by punishing in a manner that “equals” the crime. This entails R3, the claim that a punishment must be proportionate to what the criminal has done to another.<sup>10</sup> If a crime unfairly advantages the criminal (R2), then that imbalance is rectified only when that advantage is removed and the criminal made an equal again. In this way we can ensure that punishment is not primarily an injury that serves another’s purposes, but is, instead, a direct reflection of what the criminal has freely done to another. In freely committing a crime, the criminal has chosen to pursue his interests at the cost of other persons. Punishment rights this wrong. R4, the claim that retributive punishment is morally permissible, also follows from R1 and R2. Because the criminal’s punishment is a recognition of his freely willed action, he cannot object that punishing him is morally wrong. Punishment is, for the retributivist, a means to honor a person as a *person*. Herbert Morris argues that because retributive punishment is reserved for persons, we ought to view it as a reaffirmation of our capacity to will as free agents, as beings with intrinsic value. An effort to eliminate retribution is an effort to eliminate our means to respond to the wrongs committed by persons *as wrongs*, and not as mere harms.<sup>11</sup> Finally, from R1 and R2, the retributivist draws R5, the claim that

9. Bentham’s theory of punishment serves well as an example of a paradigmatically utilitarian theory of punishment. He writes, “[A]ll punishment is mischief: all punishment in itself is evil.” For Bentham, no punishment is ever justified in itself; the only morally acceptable reason for punishing a person is to promote happiness or to prevent greater harms. Jeremy Bentham, *PRINCIPLES OF MORALS AND LEGISLATION* ch. 13 sec. 2 (1781/1988).

10. A common criticism of the claim that the punishment must fit the crime is that it requires that we rape the rapist, torture the torturer, and so on. Murphy quite rightly points out that Kant is not committed to a literal reading of this passage; rather, all that he is committed to is the not implausible idea that a crime is a “debt” the criminal owes society and that she pays off that debt when she has made a payment (via punishment) that is proportionate to what she owes. See Jeffrie Murphy, *KANT: THE PHILOSOPHY OF RIGHT* 143 (1970).

11. See Herbert Morris, *Persons and Punishment*, in *ON GUILT AND INNOCENCE* 31–59 (1976).

because punishment gives a criminal what he deserves (and because we are obligated to give others what they deserve), punishment is obligatory. We are not obligated to control all potentially harmful animals, children, or other non-autonomous individuals since there may be occasions in which it is simply too costly to control or deter their actions. However, to refuse to punish a criminal (because it would be costly, say) would be to treat that criminal as if he were a dangerous child or harmful animal rather than, as R1 claims, as a moral agent deserving our respect. Since we are obligated to realize justice insofar as we are able, we are obligated to exact payment from each criminal (in the form of her punishment) for her crimes.

As I said earlier, R1–R5 are attractive and compelling. However, cases in which the criminal comes from an environment of poverty, lacks an education, and/or has experienced profound racism throughout his life give us reason to wonder about the applicability of Kantian Retributivism to such crimes. If it seems plausible to suppose that such social factors play a significant role in their committing crimes, one must, if one is to be a retributivist, have a response for such cases. There are two possible responses. The first response is to claim that the social factors caused the person to commit the crime and that, since the crime is not, properly speaking, a reflection of the criminal's will, punishment is unwarranted. The second response is to claim that (1) such social factors ensure that the criminal is insufficiently connected with his society; (2) since punishment is the repaying of a debt one owes to one's society, the criminal owes nothing to his society; and, therefore, (3) the criminal should not be punished. Richard Delgado, in advancing both arguments, refers to various social injustices more generally as a "Rotten Social Background" (henceforth, RSB). I hope to show that in spite of Delgado's arguments, the Kantian Retributivist need not accept either argument.<sup>12</sup>

Let us now (briefly) look at the first argument, that RSB caused the crime, and, therefore, the crime was not the result of a willful action for which one should be held responsible. Delgado gives four kinds of conditions that an RSB defendant might have experienced that would sufficiently show that she should be excused from punishment:

[1] [W]riters observe that daily existence in a ghetto environment creates a reservoir of rage, which, if tapped, can take control on the individual's actions. . . . In this sense, the defendant's conduct resembles a seizure or automatic reflex. The actor's conduct is not voluntarily determined, but rather directed by the dominating emotional force of rage. [2] Even where the defendant's conduct appears outwardly voluntary, the power of the RSB

12. I want to make it clear that Delgado is not primarily addressing retributivism; rather, he is attempting to show that a case can be made for defendants who have experienced RSB that is consistent with legal defenses currently used. I am using Delgado's arguments because he lays out the arguments relevant for this discussion. See Richard Delgado, 'Rotten Social Background': *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, in PUNISHMENT AND REHABILITATION 249–73 (Jeffrie Murphy ed., 1995).

defendant's mental and emotional trauma might cause a different excusing condition, the loss of ability to control conduct. . . . [3] Dyscontrol could also result from physical and psychological changes associated with early poverty and deprivation. These changes could also alter perception and interpretation, causing the person to perceive incorrectly the nature or consequences of his or her actions. . . . And, [4] the circumstances of an RSB defendant's existence might lead him or her to a conclusion that his or her conduct is not wrongful, or less wrongful than any other available alternatives.<sup>13</sup>

Delgado claims that if any one of these four excusing conditions held, the individual who committed a crime should be excused. (In short, since R1 does not hold for these criminals, retributive punishment is unwarranted.) Can the Kantian retributivist accommodate RSB as an excuse? Certainly Kantian Retributivism can accommodate excuses. If R1 does not hold, then punishment is unjust. So the real question is this: Is RSB an excuse that Kantian retributivists *want* to accommodate? I have mixed feelings about this strategy. Consider the first excuse—the excuse that rage, once tapped, causes the person to act uncontrollably. Certainly Kant would accept that some actions, those caused by seizures, for example, are outside of one's control and deserve excuse. But is an uncontrolled rage like a seizure? This is an empirical question, of course, and not easily settled by speculation, but I think we ought to be hesitant to embrace this excuse. First of all, it is not obvious that the analogy between a rage and a seizure is an acceptable one. Seizures are verifiable, and we can reliably differentiate seizure-driven wrongs from non-seizure-driven wrongs. Can we likewise differentiate between a poor person's RSB rage-driven wrongs from a poor person's non-RSB rage-driven wrongs? (Or, are all rages experienced by poor people RSB rages by definition?) Second, and more problematic, for Kant rage (or any other strong emotion) does not render a person immune from moral judgment. In virtue of being an autonomous agent, one is morally required to will in accordance with the moral law, that is, in accordance with respect to oneself and all other persons as moral agents. And, for Kant, one is morally required to will in accordance with the moral law even when one has strong (rage-driven) desires not to.<sup>14</sup>

Suppose, instead, we look at RSB not as an excuse for a particular act, but as a way of showing that the defendant is not a moral agent. That is, suppose RSB prevents or destroys one's moral agency and renders one like a child or an insane person, incapable of seeing that one's actions are wrong or incapable of accurately perceiving the nature or consequences of one's

13. *Id.* at 258–59.

14. After all, one of the central ideas of this moral theory is the rejection of Hume's sentiment-based moral theory. For Kant, facts about our emotions and attitudes—for example, that we have no interest in being moral, are indifferent to being moral, or, as with the RSB defendant, have violent emotions that give us the urge to act immorally—are, in a significant sense, utterly beside the point. Our particular and idiosyncratic dispositions do not change the fact that we are autonomous agents capable of freely willing our actions.



actions. If so, then one is outside the moral community and is, therefore, not deserving of retributive punishment.<sup>15</sup> This seems a plausible way to understand Delgado's suggestion that RSB renders one incapable of knowing right from wrong, or incapable of seeing that one's actions are wrong. As with the "rage excuse," I think we should be wary of embracing this suggestion too quickly. Surely there are people who are so damaged by their experiences or social situation that they can no longer be considered as moral agents. However, do we really want to exclude those who have been disadvantaged by social injustice from the moral community? For those of us who are attracted to retributivism because of its assumption that all persons should be treated with dignity and respect (R1 and its rejection of the assumption that crime is a sign of illness, need for treatment, or state control), this strategy is unappealing.<sup>16</sup>

So much for excusing crimes committed by people who suffer from RSB. Let us now look at the "outsider argument" that suffering from RSB means that (1) the criminal has insufficient ties with society; (2) since punishment is the repaying of a debt one owes to one's society, the criminal owes nothing; and, therefore, (3) he should not be punished. Which Kantian retributivist claim is this argument rejecting? It seems to be R4 (and, indirectly, R5). But, in fact, the real target of the objection is R2, the claim that a crime is a reflection of an autonomous agent's will *only*. The "outsider argument" instead reinterprets the crime as a *social* act. The claim is that because of the nature of the relationship between the wrongdoer and society, the wrongness of the crime fails to warrant punishment. Delgado writes:

From society's perspective, the wrongdoer has taken unfair advantage of the agreed-upon sharing of benefits and burdens, and therefore the wrongdoer owes something to society as a result of renouncing the burden of self-restraint which others have assumed. . . . How does this theory of punishment apply to an RSB defendant? The view that the criminal needs punishment "to heal the laceration of the bonds that joined him to society" assumes the actual existence of a community to which each individual is bonded in a meaningful way. . . . Thus, even if an RSB defendant is responsible for his or her acts, retribution theory provides little moral basis to punish him or her for those acts.<sup>17</sup>

15. Delgado explicitly rejects this interpretation. He writes, "The rotten social background is relevant only in that it can cause an excusing condition. While a person's background encompasses his or her entire past, the excusing condition arises at a specific moment when the crime was committed. An individual always "carries" his or her background with him or her, but the jury must determine whether it caused an excusing condition at the time of the crime." Delgado, *supra* note 12, at 260–61.

16. I realize that this argument does not prove that RSB does not cause criminal behavior. I hope to show only that the cost of embracing any of the four excusing conditions as a strategy for addressing RSB is a high one, and one that, in the face of such cases, the retributivist would adopt *last*, not *first*.

17. Delgado, *supra* note 12, at 263–64.



This argument is compelling because it rests on the plausible claim that society has failed to apportion to RSB individuals their fair share of social goods, and, therefore, a crime committed by such an individual does not create a debt that needs to be paid off through punishment. Thus, according to Kantian Retributivism, not every crime warrants punishment, only those that unfairly advantage criminals.

The problem with this argument is that it rests on a misunderstanding of Kantian Retributivism; therefore, Delgado is mistaken in concluding that Kantian Retributivism provides “little moral basis” for the punishment of RSB individuals. Remember that what is so attractive about Kantian Retributivism is the claim that persons are moral agents deserving respect and dignity in virtue of having the capacity to will in accordance with the moral law, *not* in virtue of being male, white, wealthy, economically significant (or having any other trait that is valued in one’s society) (R1). Because our moral worth is founded entirely on our capacity for autonomous actions, a crime is simply (and *solely*) evidence of one’s capacity to will autonomously (albeit immorally) (R2). That is why when Kantian Retributivism apportions punishment to “fit” the wrongness of the crime, it does not “build into” the criminal will the criminal’s social context as a way to adjust the punishment—one’s social status cannot be used as a reason to increase *or decrease* one’s punishment. Suppose two individuals both commit armed robbery. Both robbers steal \$1,000, and in neither situation is anyone injured. Mr. Jones is a poor black who has lived his entire life in a ghetto where violence is a way of life, whereas Mr. Smith is a middle class white who has had no real firsthand experience of violence or crime, but who simply craved excitement. Is Mr. Jones’s crime, in virtue of his RSB, less wrong than Mr. Smith’s? Obviously Mr. Jones and Mr. Smith experience a different relationship with their communities, but are the *criminal wills* of Mr. Jones and Mr. Smith sufficiently different so that the two deserve different punishments? If the answer is yes, that difference must lie *either* in the person’s ability to act autonomously (and this brings us back to viewing RSB as an excuse),<sup>18</sup> *or* it must be that one’s autonomously willed actions are not merely a reflection of one’s respect for the moral law, but are also a reflection of one’s class, race, sex, or social value. The first option is not, as I argued earlier, a promising one. And it is precisely this second claim that Kantian retributivists want to deny. Instead, Kantian retributivists want to insist that as long as an act is freely willed, the punishment that it deserves is decided by examining only the value of the wrongness of that act.<sup>19</sup>

18. If you are tempted to build into this example features such as an inability on Mr. Jones’s part to restrain himself from robbing (because of his life in the ghetto), then you are regarding RSB as an *excuse*, not as a factor that reduces or eliminates the imbalances created by committing wrongs.

19. Kantian Retributivists would, I think, also have a difficult time accommodating the intuitions that, other things being equal, recidivists deserve more severe punishments and “first timers” deserve lighter sentences.

So what should we do—wistfully regard retributivism as a theory of punishment appropriate to worlds without social injustices? While that is the conclusion that many have come to, such a conclusion is premature. If we are to accommodate RSB, then the claim that must be reworked is R2—the claim that a crime is a reflection of the individual will itself, entirely divorced from a social context. But what this means is that Kantian Retributivism cannot accommodate RSB without ceasing, in a significant way, to be *Kantian* Retributivism. However, Hegel's theory of punishment—although like Kant's in being retributivist—can better address RSB because Hegel's theory is developed out of a political theory that regards a moral agent's social context as relevant to his punishment. Let us now look at Hegel's Annulment Retributivism.

### III. ANNULMENT RETRIBUTIVISM

Providing a brief, instructive, yet accurate analysis of Hegel's theory of punishment is a particularly challenging task because to do so requires elucidating assumptions underlying his political theory. And, although Hegel's political theory is in some respects Kantian, many of Hegel's ideas are importantly different from Kant's and often misunderstood. Therefore, as we look at Hegel's Annulment Retributivism I will have to spend some time demonstrating how Hegel's political theory influences this theory of punishment. Let us begin as we did in the previous section and examine the retributivist claims.

Like Kantian Retributivism, Annulment Retributivism endorses R1—the claim that persons are free—and echoes the claim that any utilitarian theory of punishment is unjustifiable. Hegel writes:

To what extent is the threat [of punishment] compatible with right? The threat presupposes that human beings are not free, and seeks to coerce them through the representation of an evil. But right and justice must have their seat in freedom and the will, and not in that lack of freedom at which the threat is directed. 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 . . . [A]nd any legal codes which may have originated in this doctrine [of deterrence] consequently have no proper foundation.<sup>20</sup>

Annulment Retributivism rules out the criminal punishment of children or the mentally incompetent since children and the insane cannot commit willful wrongs.<sup>21</sup> Likewise, unintentional or accidental wrongs and socially undesirable noncriminal acts cannot be punished since such acts are not willful wrongs. Obviously, taking measures to deter or prevent harms done

20. Hegel, *ELEMENTS OF THE PHILOSOPHY OF RIGHT*, sec. 99A (H.B. Nisbet trans., 1991).

21. *Id.* at secs. 100, 120.

by children or the insane (or to prevent undesirable but noncriminal acts) may be desirable, but such measures are not annulling wrongs and therefore any responses to such acts cannot be *conceived of as punishment*.

This distinction between moral agents capable of willful wrongdoing and individuals incapable of willful wrongdoing brings us to the first assumption of Hegel's political theory that will heavily influence Annulment Retributivism. I will call this the Willful Actions Assumption. It is:

WAA: The willful actions of persons—both criminal and noncriminal—create rights claims

When a person acts willfully, her will is, among other things, a claim “I am free to do that” (“I am free to take possession of that thing,” “I am free to destroy this thing”).<sup>22</sup> Because the will has altered the material world—it has transformed matter, thereby creating or altering a thing—the person's will is “embodied.” When I transform a fallow field into an apple orchard, the effects of my actions are overt evidence that I am person, a being with a will. My will created a rights claim over that apple orchard. Although animals and (young) children move, transform and destroy matter, such actions do not establish rights claims because such actions are not willful.

This brings us to R2, the claim that crimes are freely committed wrongs that unfairly advantage the criminal. Like Kantian Retributivism, Annulment Retributivism stands by the first part of R2, the claim that crimes are freely willed wrongs. But Annulment Retributivism does not claim that crimes unfairly advantage the criminal. So for Annulment Retributivism, the R2 assumption is:

R2\*: Crimes are freely willed wrongs that are “nullities.”

What can Hegel mean? Hegel refers to a crime as a “show” or “semblance,” and says that a “crime alters something in some way, and the thing has its existence in this alteration. Yet this existence is a self-contradiction

22. When Hegel speaks of a will he does not mean the faculty to which Kant refers as a free will. For Kant, our failure to realize our will does not affect the value of the will itself. In a well-known passage, Kant makes this point: “Even if, by some especially unfortunate fate or by the niggardly provision of stepmotherly nature, this will should be wholly lacking in the power to accomplish its purpose; if with the greatest effort it should yet achieve nothing, and only the good will should remain (not, to be sure, as a mere wish but as the summoning of all the means in our power), yet would it, like a jewel, still shine by its own light as something which has its full value in itself.” Immanuel Kant, *GROUNDING FOR THE METAPHYSICS OF MORALS* 7–8 (James W. Ellington trans., 1981). For Hegel, a person who does not (or cannot) realize her will is a less free person than one who does; nonetheless, Hegel agrees with Kant, her worth as a moral agent is undiminished. When Hegel discusses Kant's sense of free will, he refers to this as the *predisposition* to will. But he insists that such a will, merely the deliberative faculty, is not a *will* at all. He writes, “I do not merely will—I *will something*. A will which . . . wills only the abstract universal, wills nothing and is therefore not a will at all.” Hegel, *supra* note 20, at sec. 6A. A will must, for Hegel, be something that actually affects the material world and, thereby, establishes a rights claim.

and to that extent is inherently a nullity.”<sup>23</sup> Although wrongs are “semblances” or “nullities,” this does not mean that they are unreal or imaginary and that we are free to ignore them. Since crimes are willful actions, they exist as rights claims (WAA). Just as willfully transforming a fallow field creates a property rights claim, willfully assaulting a person creates a rights claim, albeit a wrongful one. But a crime exists only insofar as it is a negation, or denial, of what is right. The criminal, in assaulting his victim, denies that his victim is a free being and asserts that she is instead a *thing* (comparable to the fallow field), an object to use and manipulate for *his* purposes. But a person is not, properly speaking, a thing. Therefore, the criminal will is contrary to what is right, and it is, consequently, a “nullity.”

This brings us to the second assumption of Hegel’s political theory that plays an important role in Annulment Retributivism. I will call this the Rights Claims/Actual Rights Distinction. It is:

RCAR: Rights claims become actual rights when they are acknowledged by other rights-bearing persons in one’s society.

We saw with WAA that the willful actions of persons establish rights claims. But such claims become *actual rights* only when they are recognized by other rights-bearers in one’s community. The acknowledgment by others of my right to an object is not simply an acknowledgment of my *de facto* possession of that object but also an acknowledgment that I have willfully—and therefore rightfully—taken ownership of that object. The notion of one’s will being recognizably embodied in a thing is developed by Hegel in a discussion distinguishing rightful possession from the rights claims made by children.<sup>24</sup> Children, especially young ones, often regard most objects within their reach as their own. Yet these beliefs do not establish actual rights. Thus, what separates a child’s (false) belief that a thing is rightfully his from an adult’s (correct) belief that she has an actual right to a thing is that, since a child cannot act willfully, he cannot make willful rights claims that can be acknowledged by persons. WAA cannot be fulfilled; therefore, RCAR cannot be fulfilled. However, there is more to it than that. For it would seem that older children (children in their middle or late teens, say) are persons capable of making rights claims to own things. Yet very often teens do not have *actual property rights*. What this shows is that even if a person fulfills WAA and makes rights claims, other persons in her community can refuse to acknowledge those rights claims and thereby prevent her from having actual rights.<sup>25</sup>

23. Hegel, *supra* note 20, at sec. 97A. Throughout this paper I will be concerned only with crimes, actions that violate natural rights. I cannot here address civil disobedience or revenge. Although Hegel’s analysis of these issues is interesting, it takes us too far afield for present purposes.

24. *Id.* at sec. 51.

25. An interesting turn Hegel scholarship has taken recently is in exploring the applicability of Hegel’s political theory to feminism. It is this idea of Hegel’s, the idea that a community can refuse to acknowledge the rights claims of certain persons and thereby ensure that those

Can criminal rights claims become actual rights? Strictly speaking, no, they cannot. However, criminal acts can become “validated” in an unjust society and will, therefore, *seem* to be rights. Obviously, this is a complicated issue, one that gets at the heart of Annulment Retributivism. For simplicity, I will use Hegel’s discussion of slavery to illustrate this point. Though enslavement is hardly a typical crime we experience, the ideas are applicable to any crime.

If we hold firmly to the view that the human being in and for himself is free, we thereby condemn slavery. But if someone is a slave, his own will is responsible, just as the responsibility lies with the will of a people if that people is subjugated. Thus the wrong of slavery is the fault not only of those who enslave or subjugate people, but of the slaves and the subjugated themselves. Slavery occurs in the transitional phase between natural human existence and the truly ethical condition; it occurs in a world where a wrong is still right. Here, the wrong *is valid*, so that the position it occupies is a necessary one.<sup>26</sup>

Again we see Hegel’s commitment to R1, the claim that persons are free and that enslavement is a violation of their natural rights as autonomous moral agents. However, there is a significant and interesting difference between a slave society and one like ours. In a slave society, because everyone (Spartacus excepted) believes that slavery is the proper, perhaps even “natural,” order of things, everyone—slaves and slave owners alike—is wrong insofar as he regards persons as things to be used for the purposes of others. (Of course, the slave owners are guilty of committing the additional (criminal) wrong of enslaving others!) In such a society, the criminal rights claims of the slave owners have “validity”; that is, those rights claims are regarded as legitimate, and the slave owners thereby experience those rights claims as if they were actual rights. (They cannot in fact *be* actual rights because the rights claims contradict the moral status of free persons.) What does this tell us about criminal rights claims? It tells us that unless society explicitly invalidates criminal rights claims, those rights claims will exist as valid rights, even though they are, in fact, wrongs.<sup>27</sup>

Annulment Retributivism sounds very much like Kantian Retributivism in its endorsement of R3, the claim that punishment must “fit” the crime. In freely willing the crime, the criminal has willed to have an injury inflicted on herself of equivalent value. As with Kantian Retributivism, Annulment

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persons do not have actual rights, that has generated such interest. For example, in order to sustain racist or sexist beliefs, it is vital that a society refuse to acknowledge the worth of the willful accomplishments of those regarded as inferior. The loss of such rightful recognition not only prevents one from having actual rights, it also prevents one from living a life as an acknowledged moral agent.

26. Hegel, *supra* note 20, at sec. 57A.

27. *Id.* at sec. 99.

Retributivism claims that the criminal will *itself* establishes what degree of punishment is appropriate. Hegel writes:

In becoming existent in something, however, the will enters the sphere of quantitative extension and qualitative characteristics, and hence varies accordingly. For this reason, it makes a difference to the objective aspect of crime whether the will so objectified and its specific quality is injured throughout its entire concept (as in murder, slavery, enforced religious observance, &c.), or whether it is injured only in a single part or in one of its qualitative characteristics, and if so, in which of these. . . . The distinction between robbery and theft is qualitative; when I am robbed, personal violence is done to me and I am injured in my character as consciousness existing here and now and so as this infinite subject.<sup>28</sup>

To use Hegel's example, because theft and robbery are qualitatively different crimes, punishment must acknowledge that qualitative difference. To fail to punish the more serious crime more severely would be to fail to recognize it as being a more serious crime. The problem is not simply that the criminal is receiving a punishment more lenient than he deserves, but that the punishment treats that crime as a less serious wrong than it is.

According to Hegel, the requirement that punishment acknowledge the qualitative and quantitative differences is a formal requirement. In what *manner* we respond to particular crimes cannot be determined in the abstract, and for that reason Hegel refuses to present an explicit typology of crimes. The particularities of institutions of punishment will (and should) vary from society to society, reflecting particular sociohistorical circumstances, because different societies may coherently regard the "same" criminal act quite differently. No society is mistaken, according to Hegel; each simply values certain rights claims differently. Likewise, Hegel does not claim that any particular punishment is necessarily the appropriate response to a particular crime. What one society regards as an act of punishment, another may not. Thus, whether or not the act of punishment is appropriate to the crime depends on what each society deems appropriate. As long as each society distinguishes types of crimes from one another by scaling the punishment to "fit the crime," whatever form the punishment takes, it is appropriate to that crime. Thus the value of a crime is objectively determined, yet the value of a punishment is socially determined.<sup>29</sup>

28. Hegel, *PHILOSOPHY OF RIGHT* (T.M. Knox trans., 1952) at sec. 96.

29. Hegel's treatment of R3 is actually more complicated still. On the one hand, Hegel explicitly claims that social practices determine the appropriateness of a particular punishment for a particular crime. Hegel writes: "How any given crime is to be punished cannot be settled by mere thinking; positive laws are necessary. But with the advance of education, opinions about crime become less harsh, and today a criminal is not so severely punished as he was a hundred years ago. It is not exactly crimes or punishments which change but the relation between the two." *Id.* at sec. 96A. This fits in well with what we have said about R3. On the other hand, Hegel (like Kant) explicitly writes that capital punishment is the appropriate response to murder. Hegel writes: "[M]urder . . . necessarily incurs the death penalty . . . . [S]ince

Let us look at Hegel's reasons for endorsing R4, the claim that retributive punishment is morally permissible. Punishment may look to the criminal to be an unpleasant event foisted upon her by others, but it is not. Hegel writes:

The injury which falls on the criminal is not merely implicitly just—as just, it is *eo ipso* his implicit will, an embodiment of his freedom, his right; on the contrary, it is also a right established within the criminal himself; i.e. in his objectively embodied will, in his action. The reason for this is that his action is the action of a rational being and this implies that it is something universal and that by doing it the criminal has laid down a law which he has explicitly recognized in his action and under which in consequence he should be brought *as under his right*. . . [P]unishment is regarded as containing the criminal's right and hence by being punished he is honored as a rational being.<sup>30</sup>

And Hegel writes:

Retribution is inflicted on the criminal and so it has the look of an alien destiny, not intrinsically his own. Nevertheless punishment, as we have seen, is only crime made manifest, i.e. *is the second half which is necessarily presupposed by the first*.<sup>31</sup>

Hegel gives two arguments for R4. The first is the claim that punishment—insofar as it is retributive and thereby explicitly acknowledges the personhood of the criminal—honors the criminal and is, therefore, permissible. (This was Morris's point in support of Kantian Retributivism mentioned in Section I above.) When Hegel says that a criminal has a right to be punished, he is saying that in punishing the criminal we are acting in "the right," acting in accord with *her right* that she established when giving volition to her criminal will. That is why in being punished, the criminal is being "honored as a rational being," and not being treated as a means to social order or as a dangerous animal. Punishment is an explicit acknowledgment of her capacity to will freely. This point is intuitive enough to anyone with even moderately retributivistic leanings.

However, the second argument strikes even "hard core" retributivists as peculiar. The second argument is that punishment is permissible because it is nothing more than the "second half" of the criminal will, the proper and

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life is the entire compass of existence, the punishment [for murder] cannot consist in a value—since none is equivalent to life—but only in the taking of another life." Hegel, *supra* note 20, at sec. 101A. The claim that murder is the most serious wrong a person can do to another, and, therefore, warrants the most serious punishment, is plausible and in keeping with Annulment Retributivism as I have developed it. However, the claim that capital punishment is the only appropriate punishment for murder seems at odds with Hegel's claim that, with the advancement of education, less and less severe punishments are needed. Hegel's insistence that murder—and murder alone—necessitates capital punishment can be viewed *either* as an uncritical endorsement of the Kantian argument that only death "equals" the loss of a person's life *or* as a rather liberal-minded rejection of Germany's practice of executing criminals for far less serious crimes. Either way, it is not a view that fits well with the spirit of Annulment Retributivism.

30. *Id.* at sec. 100 (Hegel's emphasis deleted; mine added).

31. *Id.* at sec. 101A (emphasis added).



complete manifestation of that will that makes vivid the incoherence and wrongness of the first half. Hegel's point is not obvious, so I will try to elucidate it with an example. Suppose I require my students to write a philosophy paper on Hegel. One paper, by John Q. Student, is an 'A' paper; it is clear, largely correct, and provides a creative and insightful analysis of Hegel's ideas. Another paper, by Jane C. Pupil, is a 'D' paper; it is cursory, largely incorrect, and the criticisms are not clear or even obviously relevant. The grade that the 'A' paper receives is nothing more than a validation of what that paper is; in other words, that paper has been an 'A' paper since the student finished working on it—the student, in a sense, gave that grade to himself. All I do, as the person with the authority to grade papers for the course, is to validate the worth of the paper. It is likewise with the 'D' paper. In giving that paper a 'D' grade, I do not *make* that paper a 'D' paper; the student made it a 'D' when she wrote it. My grade merely “makes manifest” (to use Hegel's terminology) the worth of the paper.<sup>32</sup>

The usual criticism given of R4 is this: The criminal, in committing a crime, did not act with the thought of his punishment in mind—indeed, he probably thought he would escape punishment—therefore, it is false to say that the criminal “willed his own punishment.” While the premise of this argument is probably true, the argument fails to show that R4 is wrong. To explain why, I will use the student paper example again. It is very unlikely that students write papers with the thought of a bad grade in mind; indeed, most students seem to be under the impression that however little time they spend on a paper they will escape receiving a bad grade. So Jane C. Pupil can truthfully claim that she did not will a grade of a 'D'. However, she cannot truthfully claim that she did not write a 'D' paper. And this is Hegel's point exactly: The criminal may (truthfully) claim that he did not commit a crime with the thought of his punishment in mind, but he cannot deny that he committed a criminal act. And, therefore, Hegel claims that the criminal cannot truthfully claim that he did not will an act that is punishable. There are two reasons why Hegel's grounds for R4 still may be unper-  
suasive: Either one rejects R1 by believing that all this talk of willfully committing crimes simply lends further evidence to the claim that most crimes are the result of passions or overwhelming drives, or one rejects the analogy between punishing a crime and grading a paper. The first reason simply reveals a lack of commitment to the retributivist project. The second, however, shows that one is still uncomfortable with the notion that punish-

32. Notice that this example assumes that there is an objective standard for grading papers, a standard that I can learn and apply. This is exactly analogous to Hegel's claim that crimes have objective value, and that we can know the value of crimes; of course, we may make mistakes, just as a teacher may be mistaken about what constitutes an 'A' or a 'B'. What about Hegel's claims that with education, punishments will get less severe or can differ in different societies (R3)? Well, we see those same factors with grading; teachers lament “grade inflation,” and we are certainly aware that some universities claim to have a far higher standard for grading student work than others. Despite these variations in grading practices, it would be false to claim that the worth of a given paper is entirely relative or arbitrary.

ment is not about controlling, deterring, or educating dangerous persons, but simply about annulling crimes (thereby revealing them for what they are, namely, violations of a person's rights). This point will be developed in more detail in the next section.

Now let us finally look at Hegel's reasons for endorsing R5, the claim that retributive punishment is an *obligatory* response to crime. We saw that when a person commits a crime, her will establishes a rights claim to the use or, more accurately, *abuse*, of the victim (WAA). And although the criminal will is wrong—the criminal cannot rightfully abuse another person—as long as a criminal will remains in effect, the denial of the victim's rights remains valid (RCAR). Thus, the failure to invalidate the criminal will is an *ipso facto* validation of the violation of the victim's rights. The correct thing to do is to annul the criminal will and thereby reveal what is *really* right, namely, that a criminal cannot rightfully abuse another person and that the victim is not, properly speaking, a thing to be abused. Hegel claims that it is retributive punishment that reveals the validity of right and the nullity (invalidity) of wrong. He writes:

Wrong is a show of this kind, and, when it disappears, right acquires the character of something fixed and valid. . . . What is here called the essence is just the principle of rightness, and in contrast with it the particular will annuls itself as a falsity. Hitherto the being of the right has been immediate only, *but now it is actual because it returns out of its negation.*<sup>33</sup>

And he writes:

A nullity, however, must reveal itself to be such, i.e. manifest itself as vulnerable. A crime, as an act, is not something positive, not a first thing, on which punishment would supervene as a negation. It is something negative, so that its punishment is only a negation of the negation. *Right in its actuality, then, annuls what infringes it and therein displays its validity and proves itself to be a necessary, mediated, reality.*<sup>34</sup>

The victim's right to not be assaulted, say, becomes 'actual' when the criminal rights claim is annulled. Punishment is our means of doing that. Thus, if we are to validate the rights of persons (RCAR), then we must punish crimes.

Of all the retributivist claims, R5 is the most controversial. Kantian Retributivism claimed that retributive punishment is fair; since justice obligates us to be fair, it follows fairly straightforwardly that retributive punishment is obligatory. But Annulment Retributivism does not claim that retributive punishment is *fair*; instead, it claims that retributive punishment reveals the *truth*—that criminals cannot rightfully abuse other persons. So

33. Hegel, *supra* note 28, at sec. 82A (emphasis added).

34. *Id.* at sec. 97A (emphasis added).

the typical criticism of R5 is this: While the truth is important, it is not always our most important concern. To continue with the student paper analogy, giving Jane's poor paper a 'D' will reveal the worth of that paper. But there are many reasons to give 'D' papers 'C's: Receiving a 'D' is upsetting; it rarely motivates students to improve, but instead usually causes them to give up on the course; and it could harm their chances for graduate school or a scholarship. Therefore, moral decency requires that we *not* rank our interest in revealing the worth of papers ahead of our interest in helping others. Likewise, our concern for the welfare of the criminal can outweigh our obligation to annul the crimes of that criminal. The problem with such an argument, though initially attractive, is that it is offering utilitarian reasons for rejecting R5. But such reasons conflict with R1, and abandoning R1 would mean abandoning Annulment Retributivism entirely. Moreover, I hope to show in the next section that there are good reasons to annul crimes—reasons that clearly outweigh utilitarian considerations.

In this brief introduction to Annulment Retributivism, I hope to have shown that while it is like Kantian Retributivism in being retributivistic, it is importantly different from Kant's more familiar theory of punishment. However, at this point several questions remain:

1. Isn't it absurd to claim that inflicting injury on a criminal "annuls" their crime—how can anything, let alone punishment, erase what has been done in the past?
2. Isn't Hegel's theory of punishment actually consequentialist, since it justifies punishment by appealing to a future state of affairs, namely, the invalidation of a wrong and the validation of right?
3. Even if we accept the claim that crimes must be annulled in order to validate right, why is *punishment* the only (the best?) means to do that? In particular, isn't it needlessly barbaric to insist that punishment be painful?
4. Does Annulment Retributivism obligate us to punish each and every crime, or can we make room for other important concerns (such as those which arise when the criminal suffers from RSB)?

In the next section I will address these questions, thereby further clarifying the notion of "annulment."

#### IV. ANNULING CRIMES

Hegel writes:

If we do not grasp either the connection, as it is in itself, between crime and its nullification, or the thought of value and the comparability of crime and punishment in terms of value, we may reach the point of regarding a proper punishment as a purely arbitrary association of an evil with an illicit action.<sup>35</sup>

35. Hegel, *supra* note 20, at sec. 101.

Grasping the connection that exists between crime and punishment is difficult, and criticisms of Hegel's Annulment Retributivism abound.

#### A. Annulment as Erasure

The most common criticism of Annulment Retributivism, and the weakest, runs as follows. The claim that punishment annuls crime is extremely dubious, if not ridiculous: If to annul something is to "erase it," then punishment cannot *annul* crime because punishment cannot make it the case that the crime did not occur.<sup>36</sup> Hegel does not claim that punishment erases crime, nor that it makes things "what they were before." I think one reason for this common misunderstanding of Hegel's Annulment Retributivism is the term 'annulment' itself. It is an unfortunate choice of words to translate 'aufheben' which, more literally translated, means 'to lift up,' 'to bring out,' or, when used in a legal context, 'to repeal.' Punishing a criminal does not *erase* the crime, rather it makes vivid the facts that the victim has rights, that the criminal committed a wrong, and that society takes the victim's rights seriously enough to invalidate the criminal's wrong.<sup>37</sup>

#### B. Annulment Retributivism is a Consequentialist Theory of Punishment

Allen Wood develops this criticism. Wood writes:

The righting of wrong and the doing of justice, of course, do look like paradigmatically retributivist reasons for punishing. But the state's intention to *reassert* the validity of right in the face of wrong looks like an intention not to do justice as such, but to promote a good end, namely the *public recognition* of the validity of right. . . . Why is it important for the state to *assert* the validity of right, to *express* its disapproval of crime? Is there any reason for it to do this apart from its devotion to such consequentialist ends as preventing future crimes and reassuring people that their rights are being protected?<sup>38</sup>

36. Ted Honderich makes such an argument. He writes: "There is another retribution theory of very secondary interest. . . . A punishment is an annulment, a cancellation or a return to a previous state of affairs. Marriages, considered as contracts, can be annulled. Crimes cannot be, in any ordinary sense. My death or imprisonment, after I have killed a man, does not make things what they were before." Ted Honderich, *PUNISHMENT: THE SUPPOSED JUSTIFICATIONS* 35 (1969).

37. Steinberger stresses the point that Hegel does not claim that punishment "makes things what they were." He writes: "[N]egating the negation does not simply restore the status quo. For punishment in fact improves and elevates the concept of right; it explicitly introduces *into* that notion the idea that any violation will be punished and that the active and vigorous protection of rights is therefore a fundamental task of society." Steinberger, *supra* note 6, at 124 n.4.

38. See Allen Wood, *HEGEL'S ETHICAL THOUGHT* 110–112 (1990).

This criticism, too, rests on a misunderstanding. It is true that annulling a crime brings about consequences—the validation of the victim’s rights and the invalidation of the criminal will. However, that fact by itself does not make Annulment Retributivism a consequentialist theory of punishment. The invalidation of wrongs is not a state of affairs that Annulment Retributivism intends to bring about (in the way that utilitarian theories use punishment to create maximal happiness or minimal pain).<sup>39</sup> Instead, Hegel is offering a *conceptual* justification for punishment: X’s assault on Y establishes the right to assault Y (WAA), and as long as X’s crime remains unpunished, it is valid (RCAR); therefore, as long as X’s crime goes unpunished, the claim that X does not have the right to assault Y is hardly coherent. If we are to preserve conceptual coherence of moral terms (such as ‘crime,’ ‘noncrime,’ ‘right,’ and ‘wrong’), we must demonstratively distinguish crimes from noncrimes. Just as a criminal will is a demonstrative assertion (albeit a wrongful one), an act of punishment is a demonstrative assertion. It asserts: *That act* is a crime and a willful wrong that is not tolerated in this society. Our intolerance is demonstrated by the infliction of injury on any person who commits a crime. In singling out and injuring criminals, punishment differentiates right action from wrong action, thereby establishing what right and wrong *are*.

Hegel is not explicit in explaining *how* punishment annuls crime. But from what has been established, I think there are at least two requirements that a system of punishment must meet before it can annul crimes. The first is that punishment be *public* and the second that it be *applied consistently*.

Let us look at the first condition, the publicity requirement. In order for punishment to annul crimes, punitive practices must be public. In order for us to know what our rights are (to know what we can legitimately do and what we cannot legitimately do), and, perhaps more importantly, what others can legitimately do to us, we must know which acts are punished.<sup>40</sup> This point is intuitive enough. Suppose that a criminal is tried, but the usual judicial process—the trial, court decision, sentencing and punishment—are kept secret. It seems that in such a situation there would be uncertainty about the rights of the victim and the wrongness of the criminal will in the minds of those who know of the crime and expect punishment. Suppose, now, that *all* crimes are punished secretly. In such a situation, it hardly seems that we could conceive of ourselves as having rights or that we

39. Hegel is not claiming that by identifying criminal acts as wrongs society “teaches the criminal a lesson” or “morally improves the criminal.” The conclusions particular members of a society *in fact* draw from an act of punishment differ, depending on contingent features about members and their relationship to society. For example, the defining feature of the “rabble” is their inability to regard their own punishment *as punishment*—they instead regard it as an arbitrary infliction of injury—because they are alienated from their society. See Hegel *supra* note 20, at secs. 244–45.

40. *Id.* at sec. 228. To those ignorant of law and criminal justice, legal practices will appear as contingent, alien forces, and they will conceive of punishment in much the same way utilitarians conceive of punishment—as forces designed to control and deter illicit behavior.

could regard as *crimes* violations of what we believe to be our rights. In short, we know what our rights are when we know which acts are punished.

Now let us look at the consistency requirement. Earlier we saw that Annulment Retributivism requires that punishment “fit” the crime (R3). This requirement follows from the argument that because all crimes have a certain value, or degree of wrongness, if we want to invalidate a particular crime, we must respond with a punishment of the same value. More generally speaking, if we are to acknowledge the fact that all robberies, for example, have the same value, then we must punish all robbers with a punishment of the same value. To go back to the example used earlier, Annulment Retributivism would insist that Mr. Jones and Mr. Smith, because they committed the same crime, be punished similarly. If they are not—if, suppose, Mr. Jones receives a twenty year sentence and Mr. Smith a five year sentence with the possibility of early parole—then their crimes are mismarked as two *qualitatively* different crimes.

### C. Annul Crimes, but Do Not Inflict Pain

Annulment Retributivism requires that punishment be painful—even in the face of the deterrence theorist’s objection that the infliction of painful punishment is (often) pointless because the criminal is incorrigible or because she is already guilt-ridden. But this insistence on inflicting pain, especially when the purpose of punishment is not (as it is with Kantian Retributivism) to have the criminal “pay back a debt,” but to “validate right,” seems difficult to justify. After all, if all we are doing when we punish is *identifying* crimes as wrongs it seems unnecessarily barbaric to insist that we do so by inflicting pain. To avoid all the unpleasantness that punishment typically incurs, we could instead make public denuncements of criminal activities. Our denuncements would state that a crime had been committed and that the victim’s rights were violated. Thus, we would have the publicity and consistency that Annulment Retributivism requires, without inflicting injury on the criminals.

The problem with such an argument, however, is that it conflates invalidating crimes with expressing an opinion about crimes. To invalidate a crime is more than to express disapproval; it is to confirm a commitment to taking rights seriously, and denuncements cannot do that. This is because denuncements do not, in fact, differentiate crimes from noncrimes. Denuncements fail to annul, because to respond to a crime with such a denouncement is, in fact, to give *two* responses. The first is the verbal statement that “killing is wrong,” for example. This statement draws a distinction between the rightful treatment of a person and wrongful treatment. The second response, however, is *implicit*. This response is our treatment of the criminal, and this response treats the criminal as any noncriminal, that is, as a person who is not punished. This second response *denies* the distinction

between the rightful treatment of a person and wrongful treatment. According to the second response, crimes and noncrimes are alike in that they are treated alike: They are actions tolerated without punishment.

To make matters worse, we are not simply contradicting ourselves with two conflicting responses when we denounce crime. We are, in fact, *validating* crime despite our explicit verbal statement denouncing its validity. How can this be? Because the decisive response is in our action—how we treat the criminal—and our action is the withholding of a punitive response. To continue with the student paper example, I could denounce the ‘D’ paper and praise the ‘A’ paper, but would their differing values be sufficiently confirmed if I then gave the two papers the same grade? It seems not.

We now see how important a role RCAR plays in Annulment Retributivism. Hegel is claiming that so long as the victim’s rights are not validated via the punishment of the criminal, that victim’s rights are not validated and the crime is not invalidated. And I think this is an intuitive claim. It is difficult to take seriously the assertion that an action is wrong if society does not actively differentiate that act from actions that are not wrong by responding with punishment. Mere declarations are insufficient; only the punishment of the criminal will satisfactorily reassert the rights of the victim.

But let us alter the criticism of Annulment Retributivism to this: Suppose it is correct that we must respond in some way to crimes and cannot treat criminals *just like* non-criminals (for that surely would make our insistence that there is an important difference between the two incoherent), it does not follow from that that we must inflict *pain* on the criminals. Instead of imprisoning or fining we could reserve a special set of painless responses to go with our denouncements. Thus we would be both explicitly *and implicitly* treating crimes as acts different from non-criminal acts.

Hegel does not explain why punishment must be painful, but an argument can be constructed on his behalf. It is true that reserving a special set of treatments to use only in response to criminal wills would both implicitly and explicitly differentiate crimes from noncrimes. The problem with such a practice, I suspect, is that it would fail to identify the crime as a *wrong*. Under such a system we would know that murder, for example, is different from charity, because acts of charity would be rewarded and acts of murder would receive a “special treatment.” But we would not know that murder is regarded as a *wrong*, that is, as an act that deserves moral judgment and righteous indignation. Nor would we regard the “special treatment” as a declaration of disapproval. In other words, we would regard the special treatment as a *descriptive response*, but not a *normative response*. And my suspicion is that a descriptive response would not have the normative force necessary to validate rights.<sup>41</sup> The

41. I find the suggestion of reserving “special treatments” for the purposes of marking crimes very dubious because, in spite of my best efforts, I cannot think of *anything* that we could do to a person that would (a) satisfactorily differentiate her crime from noncrimes, (b) establish the *wrongness* of the crime, and (c) inflict no injury of any sort on her. My suspicion is that a category of such actions does not exist.



idea that the judgment of a wrong action requires normative judgment (and not merely a correct description), is, I think, at the very heart of Annulment Retributivism. To the Annulment Retributivist, the point of inflicting pain is not to bring about any particular consequence(s); to inflict pain is simply what it is to respond intelligibly and appropriately to a criminal will.<sup>42</sup>

#### D. Punishing in the Face of RSB

At the end of Section I, I concluded that a problem with Kantian Retributivism is that it is unable to satisfactorily address cases in which the criminal suffers from RSB. Can Annulment Retributivism do any better?

Suppose we try to accommodate RSB with the following argument: Annulment Retributivism justifies punishment *as a practice*, but only indirectly justifies the punishment of any particular criminal. It is certainly true that moral concepts such as the concepts of right and wrong would be meaningless if a system of punishment was inflicted arbitrarily. But as long as we punish *most* crimes consistently, we can choose not to punish RSB crimes without threatening the coherence of our moral concepts. Thus Annulment Retributivism can accommodate our interest in treating RSB crimes differently.

There is some value in this argument. It is true that a few unpunished crimes would have little effect on our conception of right and wrong; in fact, if our conceptual hold on right and wrong were that tenuous, it would be impossible for us to identify miscarriages of justice. And it is true that a single act of punishment does not by itself annul a crime. It is only an act of punishment that is a part of a consistent, well-run punitive practice that can annul a crime. Therefore Annulment Retributivism justifies punishment as a practice, but not the punishment of each particular criminal. However, we need to insist that those who wish to withhold punishment provide the justification for so doing. What reason (what good *moral* reason) can we have for treating this crime differently from all similar crimes? If we choose to withhold the punishment of a particular murderer, then we need a good reason for treating this case differently; that is, there needs to be something about this act that differentiates it from other crimes. Reasons such as “The punishment of this criminal would upset the community” or “This is a time for healing, not a time for inflicting further pain” will not suffice, as these are utilitarian concerns that Annulment Retributivism explicitly regards as irrelevant to legitimate punishment. Annulment Re-

42. Notice that since criminals are free persons, the Annulment Retributivist cannot (and does not) claim that the point of punishment is to ensure that criminals experience certain feelings. If the criminal does not feel pain (remorse or shame, for example) when receiving the punishment that fits his crime, that does not mean that we are free to extend the punishment until he does! That fact that one particular instance of punishment is not painful to the criminal does not mean that it is an inappropriate punishment or that he is not being punished.

tributivism forces us to recognize the facts that no matter how much we wish to withhold punishment from some individuals, we have an obligation to take rights seriously, and the punishment of the criminal is the only means whereby we can demonstrate our commitment to the victim's rights.

Does Annulment Retributivism then have nothing to say about RSB cases? On the contrary, it has much to contribute to the conversation.<sup>43</sup> The assumption to examine is RCAR—the assumption that criminal rights claims become valid rights claims if left unpunished. If one believes that RSB criminals do not (or cannot) commit crimes that create valid rights claims (as non-RSB criminals do commit), then one will question the claim that the crimes of RSB criminals necessitate annulment. And we may have good reason to not regard the crimes committed by RSB criminals as having validity. RSB is an injustice not because some individuals have fewer material goods than others, but because being poverty-stricken (or the victim of racism or sexism) means that one is not recognized as an equal by the members of one's society. If others refuse to recognize a person as an equal, then, as we saw with RCAR, they will not recognize (and thereby not validate) the rights claims of that person. The result, as we saw with our earlier discussion of slavery, is that even though such persons *have* rights, they are not actual rights. Instead, what becomes validated is the legitimacy of the oppression and disenfranchisement of persons suffering from RSB.

What happens when such individuals commit crimes? Well, we face a dilemma: We could treat RSB crimes as we would non-RSB crimes and punish them, or we could continue to refuse to acknowledge the rights claims of RSB persons—both criminal and non-criminal claims. But to fail to recognize and validate the *legitimate* rights claims of the RSB person, yet recognize and invalidate the *criminal* rights claims of such a person, seems more self-serving than just. On the other hand, to continue to refuse to recognize the rights claims of an RSB person is equally offensive (and unjustifiable).<sup>44</sup>

It may seem that we are at an impasse, but there are two more important contributions Annulment Retributivism can make to this discussion. The first is a reminder of the earlier argument for R5: As long as the criminal rights claim remains unpunished, it is valid; and, because we are obligated to take rights seriously, we are obligated to annul the crime. This argument applies whether the criminal suffers from RSB or not. Furthermore, we

43. Although Hegel certainly does not use the term "RSB," he does address the problem of punishing the "rabble," those individuals who are alienated and disenfranchised from society because of poverty. See Hegel, *supra* note 20, at secs. 237–46.

44. This is exactly the dilemma that Hegel finds himself in when he wonders about the legitimacy of punishing the "rabble," those alienated, poverty-stricken individuals who commit crimes. Hegel concludes that because such individuals know that they have been wronged by their society, they cannot regard their own punishment as being anything other than a contingent harm—precisely the kind of (utilitarian) punitive experience Hegel warned us to regard as illegitimate. Hegel writes, "Of course crime [committed by the rabble] can be punished, but this punishment is only contingent." Hegel's lectures of 1819–1820, *supra* note 20, at 454.

ought to take especially seriously the rights of the victim, because RSB criminals typically victimize individuals who also suffer from RSB. If we are committed to ending social injustice, rather than perpetuating it, then we must validate the rights of those individuals victimized by RSB crimes.

The second point is a reminder of a conclusion of the earlier discussion of RCAR: Crimes left unpunished have validity. As complex as our discussion of this matter has already been, there is one more facet to discuss. Hegel writes:

[W]hereas it would be impossible for society to leave a crime unpunished—since the crime would then be posited as right—the fact that society is sure of itself means that crime, in comparison, is always of a purely individual character, an unstable and isolated phenomenon. The very stability of society gives crime the status of something merely subjective.<sup>45</sup>

The more “sure of itself” a society is—that is, the more a society is clear about which political values it is committed to, the more stable the political institutions are, and the more the citizens of that society understand and affirm those political commitments—the less damaging crimes are. That is because, as long as one is a member of a society that is “sure of itself,” crimes cannot damage one’s sense of moral worth and political standing. And, given that the purpose of punishment is to reveal what is right, if we are certain (even without punishment) what is right and, most importantly, what our rights are, then the need for punishment becomes less urgent.

What of a society that is not sure of itself? Hegel writes:

If a society is inwardly unstable, punishments must be made to set an example, for punishment is itself a counter-example to the example of crime.<sup>46</sup>

A society that is burdened with social injustices such as racism, sexism, or classism is “inwardly unstable.” It may give lip service to “liberty and equality for all,” but the reality is that the privileged consistently refuse to recognize the rights of the nonprivileged. The result is that those who suffer from social injustice will regard their rights as contingent, and wholly dependent on the good will of the privileged, rather than as rights they are due because of their own willful actions. In such a society, the need for the annulment of crimes is urgent: For it is only by means of a consistent and public punitive system properly proportioning punishment that all individuals can have a clear idea of their rights.

Is our society “sure of itself,” or “inwardly unstable”? Settling that question is beyond the scope of this article, but I suspect that since a concern for RSB crimes motivated my analysis of Annulment Retributivism, we have

45. *Id.* at sec. 218A.

46. *Id.*

reason to believe our society is unstable. And if it is unstable, then it seems we have reason to remain committed to punishing RSB crimes.<sup>47</sup>

## V. CONCLUSION

So what should we conclude about Annulment Retributivism? Is it, as I claimed earlier, a more compelling version of retributivism than Kantian Retributivism? I think it is. But its appeal comes not from giving a simple answer to RSB cases; in fact, it is because of my suspicion of simple solutions to such complex social issues that I looked to Annulment Retributivism for insight into such cases. The appeal of Annulment Retributivism is that it underscores important ideas typically ignored by other versions of retributivism: Social injustices such as racism, sexism, and classism importantly affect our punitive practices, and an adequate theory of punishment must address these factors in its analysis.

47. I suspect that the real problem in our society is not the fact that we punish RSB crimes, but that we *over*-punish RSB crimes. Stephen Nathanson gives an insightful analysis of the racist and classist motives behind capital punishment sentencing. See Stephen Nathanson, *Does It Matter if the Death Penalty is Arbitrarily Administered?*, 14 PHIL. & PUB. AFF. 149–164 (1985).