GERMAN IDEALISM AND THE CONCEPT OF PUNISHMENT

Against the background of early modernism – a period that justified punishment by general deterrence – Kant is usually thought to represent a radical turn toward retributivism. For Kant, and later for Fichte and Hegel, a just punishment respects the humanity inherent in the criminal, and serves no external ends: it is instituted only because the criminal deserves it. In this original study, Jean-Christophe Merle uses close analysis of texts to show that these philosophers did not in fact hold a retributivist position, or even a mixed position; instead he traces in their work the gradual emergence of views in favor of deterrence and resocialization. He also examines Nietzsche’s view that morality rests on the rejection of retribution. His final chapter offers a challenge to the retributivist position, and a defense of resocialization, in the context of current legal theory and practice concerning the punishment of crimes against humanity.

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THE CONCEPT OF
PUNISHMENT

JEAN-CHRISTOPHE MERLE
translated from the German by
JOSEPH J. KOMINKIEWICZ
with
JEAN-CHRISTOPHE MERLE
and
FRANCES BROWN
...we all know today's executioners are humanists.

Albert Camus
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PREFACE

“Nemo prudens punit quia peccatum est sed ne peccetur,” says Seneca in De ira, and many philosophers who have come after him recommend such a justification of punishment by deterrence. Since Immanuel Kant, a completely different concept has spread among philosophers, considerably more so than among legal scholars and lawyers. According to Kant, the question of justification of punishment should not read: For what purpose punish? Rather, according to Kant’s absolutist or categorical imperative regarding punishment, punishment can only be carried out because the malefactor is deserving of the punishment. Everything else is allegedly unjust, and is detrimental to the malefactor’s human dignity as a moral subject. Such a theory of retributive justice, which draws not only from Kant but also from G. W. F. Hegel, inspires a great deal of fascination in many philosophers, but that notwithstanding it still stands on shaky ground. A precise analysis of Kant’s and Hegel’s philosophy of law and morality leads rather to a special form of deterrence theory.

I will attempt to conduct this analysis within the confines of this book. The analysis begins with Kant, continues with J. G. Fichte and Hegel, leads to Friedrich Nietzsche, and then concludes with a discussion of the justification of punishment for crimes against humanity. This closing discussion should be seen as the touchstone. Should my position be able to explain this difficult case, then it should be even more able to explain cases of lesser difficulty.

I would like to thank Manfred Frank and Anton Schindling for their comments on the manuscript as well as two anonymous referees from Cambridge University Press. Special thanks go to Sharon Byrd, Philippe Coppens, Roman Eisele, George Fletcher, Thomas Grundmann, Jan C. Joerden, Matthias Kaufmann, John Kleinig, Eugênio Pacelli de...
Oliveira, Hervé Pourtois, Alexandre Travessoni Gomes, Luiz Moreira and Jean-Claude Wolf. I have also benefited from questions and remarks from: European Network “Applied Global Justice,” Kant-Gesellschaft, Fichte-Gesellschaft, CAPPE (ANU Canberra), Chaire Hoover and Centre de Philosophie du Droit (Louvain), University of Grenoble, PUCRS Porto Alegre, UFMG Belo Horizonte, UFSC Florianopolis, Ankara Bar Association, University of Fribourg, Graduiertenkolleg Globale Herausforderung (Tübingen), Charles Sturt University at Wagga Wagga, and a conference of the European Network “Global Justice” in Otzenhausen, as well as from my seminars on these topics in Aachen, Saarbrücken, Tours and Tübingen. Last, but not least, I am very grateful to Hilary Gaskin of Cambridge University Press, as well as to Frances Brown.
ABBREVIATIONS

Kant
GMS Groundwork of the metaphysics of morals
(Grundlegung zur Metaphysik der Sitten)
(1785, Ak iv:385–464)
Immanuel Kant, Practical philosophy, ed. Mary Gregor
Idee Idea for a universal history with a cosmopolitan purpose
(Idee zu einer allgemeinen Geschichte in weltbürgerlicher Absicht)
(1784, Ak viii:15–32)
Immanuel Kant, Political writings, ed. Hans Reiss, trans.
H. B. Nisbet, second edition, (Cambridge: Cambridge
University Press), pp. 41–53
KpV Critique of practical reason
(Kritik der praktischen Vernunft)
(1788, Ak v:1–164)
Immanuel Kant, Practical philosophy, ed. Mary Gregor
KrV Critique of pure reason
(Kritik der reinen Vernunft)
(1st edn 1781, 2nd edn 1787, Ak iii:1–552)
Page numbers are from the second edition
Immanuel Kant, Critique of pure reason, ed. and trans.
Paul Guyer and Alan W. Wood (Cambridge: Cambridge
University Press, 1997)
Päd Lecture On pedagogy
(Pädagogik)
(1803, Ak ix:437–99) (no translation)
Rel Religion within the boundaries of mere reason
LIST OF ABBREVIATIONS

(Religion innerhalb der Grenzen der bloßen Vernunft)
(1793, Ak vi:1–202)
Immanuel Kant, Religion within the boundaries of mere reason, in Kant, Religion within the boundaries of mere reason and other writings, ed. Allen Wood and George di Giovanni (Cambridge: Cambridge University Press, 1998), pp. 31–192

RL The doctrine of right (Part 1 of The metaphysics of morals)
(1st edn 1797, 2nd edn 1798, Ak vi:203–372)

TL The doctrine of virtue (Part 2 of The metaphysics of morals)
(1st edn 1797, 2nd edn 1798, Ak vi:373–493)

(Eine Vorlesung Kants über Ethik) (c. 1875–80, Ak xxvii:286)

ZeF Toward perpetual peace
(Zum ewigen Frieden)
(1795, Ak vii:341–86)

Fichte Foundations of natural right, according to the principles of the Wissenschaftslehre
(Grundlage des Naturrechts nach Principien der Wissenschaftslehre)

GNR

Hegel

GPhR Elements of the philosophy of right
(Grundlinien der Philosophie des Rechts)

NRSW Lecture on Natural law and the science of state
(Vorlesung über Naturrecht und Staatswissenschaft)
(1818–19)
(No translation)
LIST OF ABBREVIATIONS

PhR Lecture on *The philosophy of right* (Vorlesung über *Philosophie des Rechts* (1824–5))
(No translation)

*Nietzsche*

GdM *On the genealogy of morality* (Zur Genealogie der Moral)

WuL *On truth and lies in a nonmoral sense* (Über Wahrheit und Lüge)

Note on translations of primary and secondary literature

Every effort has been made to find published English translations of all foreign-language texts. Where there is no published translation, German passages have been translated for the purposes of this book. The reader should assume that if a quotation is from a German work for which no English-language citation is given, then the text has been newly translated. In the interests of simplifying the footnote citations, this will not always be noted unless there is a specific need for clarification.