FORUM:
ON ENLIGHTENED PUNISHMENT

The Right to Be Punished:
Autonomy and Its Demise
in Modern Penal Thought

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The Enlightenment was the age of empathy and abstract identity. The common
man no longer was to be pitied for his unfortunate plight. Instead, enlightened
gentlemen and reformers strove to empathize with the ordinary person—iden-
tify with him—precisely because he was identical to them in some fundamental
sense. That sense differed from Enlightenment theory to theory, but the identi-
ty remained central. So Bentham insisted that every member of the utility
community was like any other because every member’s pain and joy equally
affected the utilitarian calculus and thus the common good. Contractarians like
Beccaria or Fichte portrayed all citizens as identical insofar as they were all
signatories to the social contract, a contract grounded in the shared rationality

1. See Jeremy Bentham, Principles of Penal Law (Rationale of Punishment), in The Works
theory of punishment had already stressed the identity of humans in contrast to omniscient
and omnipotent God. Hugo Grotius, De Jure Belli ac Pacis, bk. 2, chap. 20, sect. 4 (Am-
sterdam, 1625). See also Samuel Pufendorf, De Jure Naturae et Gentium, bk. 8, chap. 3,
sect. 8 (London, 1672); Christian Thomasius, Institutiones Jurisprudentiae Divinæ, 7th ed.
(Halle, 1730; 1687), bk. 3, chap. 7, sect. 36; Michael Ignatieff, A Just Measure of Pain: The
John Howard). At least since Hobbes, intracommunal punishment was distinguished from
extracommunal war. Thomas Hobbes, Leviathan, chap. 28 (London, 1651); John Locke, Of

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York at Buffalo. An early version of this paper was presented at the Twenty-Fifth
Annual Meeting of the American Society for Legal History, Houston, October 19,
1995. He thanks Guyora Binder, Michael Hoffheimer, Elizabeth Mensch, John
Henry Schlegel, Robert Steinfeld, and Leonardo Zaibert for comments and Jay
Osviovitich for research assistance. Work on this paper was supported by a sum-
mer research grant from the State University of New York at Buffalo School of Law.

Law and History Review Spring 1998, Vol. 16, No. 1
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of its signatories who surrendered some of their external freedom to pursue their life plans protected from the chaos of the law of nature. And Kant and Hegel stressed the common capacity for rational deliberation shared by all humans as rational beings.

Given this postulate of baseline identity, the distribution of power was no longer to be predetermined by birth or wealth. Government was to be autonomous, by the people, for the people. The self was to realize itself in private and in public. Each person’s moral life was to be shaped by moral norms she originated and applied to herself. Her ethical (“sittliches”) life similarly was to be governed by self-originated and self-applied ethical norms, or, in less ambitious variants, by self-originated and self-applied legal norms. In Rousseau’s words, “[t]he people that is subject to the laws ought to be their author.”

The moral and political theory of the Enlightenment, in short, rested on the autonomy of abstractly identical rational persons.

The practice of criminal punishment put Enlightenment political thought to its most difficult test. It was one thing to have some of the state’s constituents promulgate rules designed to help all of the state’s constituents lead more fulfilling, more self-realized, lives, perhaps of hunting, fishing, cattle rearing, and criticizing, as the young Marx imagined. It was quite another to permit these persons to enforce the rules they promulgated. Since the social contract was said to originate from the recognition by rational persons that they would stand a better chance of developing their capacities in a cooperative system than in a war of all against all, there was something odd about the need to enforce rational rules against rational persons.


Particularly disturbing was the image of state officials enforcing community rules by subjecting their presumably rational and autonomous violators to painful punishment. Any state coercion of autonomous individuals was troubling, but whipping, hanging, burning, mutilating these persons in the marketplace surely was at odds with their autonomy. At the very least, the condemned man about to be broken on the wheel and quartered would not view the state as an instrument of his self-realization.

In earlier times, this poor man’s suffering and doubts about the benefits of joining the social contract would not have troubled the writers of moral treatises and those spectators at public executions who were educated enough to keep diaries of their experiences or to publish them on broadsheets. The newly discovered empathy for the ordinary, however, presented Enlightenment thinkers with an uncomfortable dilemma. On the one hand, the violent violation of the condemned’s autonomy through criminal punishment could not be denied. On the other, a state without the power to punish seemed entirely out of the question, perhaps in part because the reformers’ trust in the common man’s equal rationality was not quite as solid as they claimed.

This dilemma was resolved by simultaneously assaulting existing punishment practices and calling for their radical reconception and reform on the grounds of autonomy. The offender, it was said, had in fact consented to his punishment. This consent was found either in his signature to the social contract (which, as it turned out, contained a punishment clause) or in his very act (which, after all, was universalizable as the act of a rational being).6

The more daring among punishment apologists of the time went so far as to argue that the offender not only had consented to his punishment, but that he had a right to be punished. Contrary to the suggestion of some modern retribution revivalists, who claim the right to be punished as a uniquely retributive concept, this right spanned the spectrum of punishment theories from the contractarians to the retributivists and even to the rehabilitationists. Hegel is most commonly associated with the right to be punished,7 but he merely put a sharp dialectical point on a Kantian idea. One year before Kant’s Metaphysics of Morals appeared,8 Fichte spoke of punishment as the offender’s right in his Foundations of Natural Law.9 The early nineteenth-century fathers of German rehabilitationism—who thought more systematically, though not always more clearly, about the theory of punishment than did their American coun-

6. Kant, Grundlegung zur Metaphysic der Sitten, AB 70–71.
terparts—Karl Christian Friedrich Krause (1781–1832)\textsuperscript{10} and Karl David August Röder (1806–1879),\textsuperscript{11} soon appropriated the concept.

This article investigates the right to be punished during the golden age of modern criminal law, the century from 1750 to 1850, during which the foundation for our modern system of punishment was laid in theory and practice. It promises more than a fresh look at the contemporary debate between retributivists and rehabilitationists. The development of the concept of the right to be punished from Kant, Hegel, and Fichte to the early rehabilitationists and on to the new criminologists of the late nineteenth and early twentieth centuries also elucidates the origins of the legitimacy crisis of modern criminal law.

The story of the right to be punished begins with an affirmation of the offender’s autonomy and ends in its denial. Along the way identity turns into difference as empathy gives way to indifference. In the end, the transformation of the right to be punished into a need for treatment poignantly illustrates that the Enlightenment project to legitimize state punishment has failed and that hypocrisy has taken the place of legitimation. We take for granted the general legitimacy of punishment. Even particular exercises of the state’s punishment power go unchallenged. Today, the state can punish what it wants, whom it wants, and how it wants, few questions asked.\textsuperscript{12}

The story of the rise of rehabilitation and the concomitant emergence of imprisonment as the dominant method of punishment has been told many times over, most influentially by Michel Foucault.\textsuperscript{13} In retelling this story here, I focus on two features of rehabilitationism that have proved particularly damaging to the Enlightenment project of legitimizing punishment as autonomous: the denial of the pain of punishment and the denial of the identity of the subject and the object of punishment.

As it explores the origins and trajectory of the normalization and differentiation of punishment central to rehabilitationism, this article draws on sources largely ignored by Foucault and other historians of punishment. Although Foucault’s work remains a powerfully suggestive account of certain aspects of the evolution of modern punishment practices,\textsuperscript{14} no treatment of the Enlightenment reforms of punishment can ignore the important contributions of Kant, Hegel, and Fichte. From these central representatives of the retributive and contractarian strands of Enlightenment thought on punishment, the article

\begin{itemize}
\item \textsuperscript{10} Karl Christian Friedrich Krause, \textit{Grundlage des Naturrechts}, 2d ed. (Leipzig, 1890; 1803) and \textit{Das System der Rechtsphilosophie (Vorlesungen über Rechtsphilosophie)}, ed. K. D. A. Röder (Leipzig, 1874), 317.
\item \textsuperscript{11} Karl David August Röder, \textit{Zur Rechtsbegründung der Besserungsstrafe} (Heidelberg, 1846) and \textit{Besserungsstrafe und Besserungsanstalten als Rechtsforderung: Eine Berufung auf den gesunden Sinn des deutschen Volks} (Leipzig and Heidelberg, 1864), 10–11.
\item \textsuperscript{13} Michel Foucault, \textit{Discipline and Punish}, trans. Alan Sheridan (New York, 1978).
\item \textsuperscript{14} See below, 137–38.
\end{itemize}
moves to the unjustly neglected work of Krause and Röder. These men assembled a rehabilitative theory of unmatched comprehensiveness that explicitly revolved around the denials of pain and identity long before treatment and classification became the hallmarks of modern "correctional" science. The article ends with a critical assessment of the continued legitimacy of our punishment practices now that incapacitative isolation has replaced rehabilitative treatment as the dominant mode of punishment and the pretense of autonomous punishment can no longer be maintained.

I. Punishment as Autonomy: Kant and Hegel

Although both Fichte and Kant had previously postulated a right to be punished, it was Hegel who built his theory of punishment on that right. His account, however, added little to the principle of self-government captured in the Kantian categorical imperative.\textsuperscript{15} It appears in the first section of the Philosophy of Right, Abstract Right, where Hegel worked out the theory of law that Kant had outlined in the \textit{Rechtslehre}.\textsuperscript{16}

For Kant, to be free meant to be autonomous, that is, both to be governed by no one else’s rules (no mere means to another’s end) and to be governed by one’s own rules (not willkürlich).\textsuperscript{17} It was the great hope (and the assumption) of Kant, and the Enlightenment more generally, that the distinction between these two sets of rules would become meaningless. The relevant community would expand beyond parochial boundaries to include all rational beings who were governed by rational rules that were both their own and those of every other member of the community.

The community of criminal punishment in particular was to be an aspirational community of rational persons. The great humanitarian core of Kant’s and Hegel’s philosophy of punishment lay in the demand to treat offenders as identical to their judges because they shared the same baseline formal rationality. That rationality Kant had defined as the universalizability of one’s acts.\textsuperscript{18} Similarly, to the Hegel of Abstract Right, rationality meant "self-conscious

15. Hegel pursued the idea of autonomy more consistently than had Kant. At one point, Kant suggested that the commission of a felony renders the offender incapable of being a citizen of the state (\textit{Rechtslehre}, A 195, B 225). At another, he argued that the offender, strictly speaking, cannot punish himself because, given the separation of powers, he could not both originate the laws and be punished under them. It was the homo noumenon who legislated and the homo phænomenon who was punished (ibid., A 202–3, B 232).


17. See, e.g., Kant, \textit{Grundlegung zur Metaphysik der Sitten}, AB 17–88, and \textit{Kritik der praktischen Vernunft} (1788), 51–59. For an early application of Kant’s categorical imperative to state punishment, see Christoph Carl Stübel, \textit{System des allgemeinen peinlichen Rechts (Einleitung in die peinliche Rechtswissenschaft)} (Leipzig, 1795), vol. 1, sect. 6.

universality.”19 Thus, to treat an offender (or for that matter any other person) as rational meant to assume that his acts followed norms that could be applied to every other rational being.20

According to Hegel, the offender’s right to punishment arose from the application of the norm governing his criminal act to every rational being, including himself.21 Punishing him thus treated the offender as rational in two senses: first, by assuming the universalizability of his act, and, second, by applying the universalized norm to him as a rational person. But, as Hegel saw it, the norm governing the offender’s criminal act was merely the violation of a universal norm manifesting the “neminem laede” of Kantian legal theory, that is, a norm safeguarding the autonomy of the immediate victim of the crime and all other rational persons. To apply this violation of a universal norm to the offender as though it were itself a universal norm meant to beat the norm at its own game, to call its bluff, so to speak.

When all was said and done, the authority of the law had been reaffirmed (by confidently ignoring the pernicious substance of the norm governing the criminal act and treating it abstractly as but one instance of a universalizable norm), and so had the offender’s rationality. Punishment, the violation of the universal norm also protecting the autonomy of the offender as a rational person, had affirmed the offender’s autonomy as a rational person. The paradox of punishment lay in the affirmation of the offender’s autonomy by his autonomous deprivation of that autonomy. In Hegelian terms, the negation of right that is punishment had exposed the negation of right that is crime as fleeting and had thereby reaffirmed right.22 Two wrongs had made a right, which, in Hegel’s words, was also the offender’s right because it governed all rational beings and therefore also the offender.23

Thus, according to Hegel, the offender’s right to punishment emerges as another manifestation of the principle of autonomy. In the condensed phrase of the English Hegelian J. D. Mabott, “[r]etribution is the agent’s own act.”24 As the objective applicability of penal norms to the offender reflected his autonomy as a rational person, so did their subjective application to a particular offender. If the offender did not confess and thereby recognize the application of a given penal norm to himself as an actual reflection of his rationality, the

22. Ibid., sect. 97 Addition.
23. Ibid., sect. 100.
jury as a reflection of the “criminal’s soul” could ensure at least an indirect self-application of the norm. Finally, even the penal norm itself was to be grounded in the offender’s autonomy by assigning its definition to representatives of the state community, to which the offender also belonged.

II. Punishment as Reintegration: Fichte

Even before Kant, Fichte suggested that the offender had a right to punishment, though not qua rational being, but in a contractual sense. The offender was entitled to punishment as the only means of expiating his crime. Expiation, however, was a necessary precondition for his reentry into the community of rational parties to the social contract.

Fichte’s justification of the state’s right to punishment drew on, but also differed from, the standard contractarian theory of his day. As Beccaria had reminded all of Europe in 1764, a party to the social contract consented to being punished for certain breaches of the agreement. This consent amounted to one of the sacrifices the party made to enjoy the benefit of the state’s protection from others who might break the contract by interfering with her liberty. This consent theory of punishment led Beccaria to disapprove of capital punishment, since no one could have consented to his own extinction, be it through

27. Fichte, Naturrecht, sect. 20, 253–56.
state punishment or suicide, no matter how great a consideration he might receive in return (though Beccaria saw no similar problem with consenting to lifelong incarceration, which he viewed as a state of perpetual slavery, a fate worse than death).\textsuperscript{29}

Based on this common justification of the state’s right to punishment, Fichte uncommonly concluded that, strictly speaking, the offender had to be excluded from the community of rational persons because, through his criminal act, he had proved himself unfit for the company of rational men.\textsuperscript{30} It was rational for humans to form the social contract; it was irrational to abandon its protections and render oneself quite literally an outlaw,\textsuperscript{31} who lives at the mercy of passersby.

Fichte’s account of punishment, by crystallizing the crucial connection between community membership and exclusion, developed Rousseau’s cursory remarks on the analogy between the law of war and the law of crimes\textsuperscript{32} and presaged later work on the sociology of punishment by Durkheim and George Herbert Mead.\textsuperscript{33} Having captured the exclusionary nature of punishment then and now, Fichte struggled to make room for the offender’s return to the community. He argued that signatories to a particular social contract may decide not to permanently exclude all members who have violated its most basic provisions, provided that the state’s protective function was not compromised by the reintroduction of certain offenders into the community.\textsuperscript{34} The provisions governing the punishment and reintroduction of offenders appeared in the so-called expiation contract. The offender’s right to be punished derived from this


\textsuperscript{30} Fichte, \textit{Naturrecht}, sect. 20, 254.

\textsuperscript{31} Fichte uses the terms vogelfrei, exlex, hors de la loi (ibid.). See also F. C. Th. Hepp, \textit{Darstellung und Beurtheilung der deutschen Strafrechts-Systeme, ein Beitrag zur Geschichte der Philosophie und der Strafgesetzbuch-Wissenschaft}, pt. 1, no. 1 (Die Vertrags- und die Abschreckungstheorien) (2d ed., Heidelberg, 1844), 39; Grotius, \textit{De Jure Belli ac Pacis}, bk. 2, chap. 20, sect. 3 (offenders, through their criminal act, have excluded themselves from the community of humans and entered the community of beasts). For a classification of offenders according to their degree of “wildness” and an explicit analogy between offenders and wild animals, both inspired by Fichte, see Karl von Grolman, \textit{Ueber die Begrundung des Strafrechts und der Strafgesetzgebung nebst einer Entwicklung der Lehre von dem Maaßtabe der Strafen und der juridischen Imputation} (Gießen, 1799), 128, 129.

\textsuperscript{32} Rousseau, \textit{Du contrat social}, bk. 2, chap. 5, at 72.


\textsuperscript{34} Fichte, \textit{Naturrecht}, sect. 20, 255.
agreement subsidiary to the social contract. It was up to the individual offender to choose between reintegration through expiation or permanent exclusion.\footnote{Ibid., sect. 20, 266. Fichte even proposed permitting the inmate to set the projected date of his expiation and thus of his release (269–70).}

Several features of Fichte's punishment theory are significant for our purposes. First, unlike other contractarian punishment theories, the legitimacy of punishing the offender is not based on his consent but on his irrationality (and therefore, strictly speaking, on his inability to consent). The offender is not punished because he violated the norms of the social contract but because his criminal act indicated a personal characteristic that requires punishment. Punishment, for Fichte, therefore merely reflected the discovery of a fundamental difference between the offender and members of the rational community of social contract members, a difference that presumably could have been discovered in another way. In fact, it would seem to be the state's obligation to make every effort to identify those too irrational to belong to the social contract prior to their inflicting harm on those who do belong and who had joined the social contract precisely to be protected from infringements upon their liberty.

Therefore, although still generally grounded in standard Enlightenment contractarian theory, Fichte's account of punishment already implicitly challenges the central principle within the Enlightenment's attempt to legitimate state punishment: the autonomous, intracommunal nature of punishment. Insofar as the offender is punished by the rational state for his irrationality, he is no longer punishing himself by applying to himself norms to which he has consented (if only because he could not have consented to them given his irrationality). Autonomous punishment under the social contract freely joined has become heteronomous punishment of the irrational by the rational.

Both the assumption of difference and, more specifically, the role of the criminal act as an indicator of difference reappears in rehabilitationist writings.\footnote{Published two years after the opening of Philadelphia's Penitentiary House in 1794, Fichte's prescribed methods of expiatory imprisonment resembled those recommended by the early American prison reformers in several respects, including reformation through work—already familiar from the English and Dutch "houses of correction" of the mid-sixteenth century—and the all-important segregation of prisoners from the outside population. Ibid., 268–69; Hinrich Rüping, Grundriss der Strafrechtsgeschichte, 2d ed. (Munich, 1991), 74.} The seed of heteronomy was to blossom into the flower of criminology, which became the science of detecting indicators of difference and soon broadened the scope of its diagnostic inquiry from the crime of conviction to other indicia of criminality.\footnote{See below, 139–41.}

Moreover, Fichte described punishment as a benefit the state may or may not be obligated to extend to the offender, depending on the presence or absence of
an expiation contract. Without punishment, the offender is forced to stray the countrysid as an outlaw. Punishment reflects not only the offender’s difference, but also his inferiority, his pitiful neediness in the face of the state.

Rehabilitationists later would vociferously criticize Fichte for building his account of punishment around the outlawry of offenders. They did not hesitate, however, to praise Fichte for his emphasis on the reintegrative function of punishment, although the need for reintegration assumed the previous exclusion of the offender. Rehabilitationists might agree with Fichte that offenders had proved themselves to be different. But they claimed that the offender did not need to be reintegrated as much as he needed to be cured.

III. Punishment as Healing: Krause, Röder, and Beyond

With the emergence of imprisonment as the dominant mode of punishment during the late eighteenth and early nineteenth centuries, the problem of punishment became the problem of imprisonment. Rehabilitationists were the first to address themselves to this novel form of punishment in any detail. Retributivists like Kant and Hegel, in contrast, were content to justify that punishment was inflicted and showed little interest in justifying how it was inflicted.

Its privacy and duration dramatically distinguished imprisonment from all previous methods of punishment infliction and therefore posed new and difficult questions of legitimacy. Most immediate, the seclusion of imprisonment meant that it carried an enormous potential for abuse. The Enlightenment had moved the imposition of punishment into the public spotlight by establishing a system of public oral jury trials. At the same time, however, it had moved the infliction of punishment from the marketplace into secluded prisons, which were often built in remote areas or otherwise made impenetrable to the general public. Public controls over the state’s treatment of offenders during the infliction of punishment had disappeared. The public ceremonial display of the state’s dignified treatment of the offender had been moved from the infliction to the imposition of punishment.

The unprecedented duration of punishment as imprisonment meant, among other things, that the state’s officials had more opportunities to engage in the illegitimate infliction of punishment. The infliction of corporal punishment

38. Hepp, Darstellung und Beurtheilung der deutschen Strafrechts-Systeme (punishment as “Rechtswohlthath”), 43.
39. See below, 138.
might last a day; the infliction of imprisonment could last a lifetime.\textsuperscript{42} Prolonged imprisonment could be seen as the continuous daily rein infliction of punishment, each reaffirmation requiring rejustification.

The complexity, flexibility, and intrusiveness of rehabilitative punishment only compounded the problems of justifying an extended period of punishment. Rehabilitative punishment consisted of an ever expanding panoply of treatment options, which were to be adjusted to match the inmate's unique diagnosis and the progress of his recovery. The infliction of each and every one of these punishment practices required legitimization, particularly since rehabilitative theory stressed that they, without exception, were to the inmate's benefit.

No matter how much attention rehabilitationists lavished on the infliction of punishment, they did nothing to legitimize it. The arrival of rehabilitationism brought with it the abandonment of the Enlightenment project of legitimizing state punishment on the basis of the offender's autonomy. According to full-fledged rehabilitationism, state punishment required no justification. The Enlightenment project was misguided because punishment was not pain, nor was the offender an autonomous equal. Since the state coerced no autonomous persons to suffer pain, there was no legitimacy crisis of state punishment.

Thus, the theory of rehabilitative punishment turned on two denials, both of which developed aspects of earlier theories and presaged the development of punishment theory to this day: (1) the denial of the painful impact of punishment in general and of incarceration in particular, and (2) the denial of the identity between offender and observer, between the object and the subject of punishment. These denials help account for the disappearance of any serious effort to continuously assess the legitimacy of our system of state punishment after the middle of the nineteenth century and the resulting degeneration of that system into the heteronomous imposition of punishment onto others.

\textit{A. The Denial of Pain}

When consequentialists first turned their attention to the method of inflicting punishment in the late eighteenth century, they made no attempt to deny the its painful nature. Bentham, for one, stressed both the painful effect of all aspects of state punishment from its threat to its infliction.\textsuperscript{43} His utility calculus would have been incomplete (and therefore decidedly un-Benthamite) had it failed to take into account painful consequences of considered acts, regardless of who immediately experienced the pain.\textsuperscript{44} Although Bentham made room for reformation as a factor that should influence the assignation of a particular

\begin{enumerate}
\item Beccaria, \textit{Dei delitti e delle pene}, sect. 16, 146.
\item See also Fichte, \textit{Naturrecht}, 270.
\item Jeremy Bentham, \textit{An Introduction to the Principles of Morals and Legislation}, 2d ed. (Oxford, 1823), 175–76.
\end{enumerate}
penalty to a particular offense, he nowhere suggested that punishment was anything other than an evil.

The early prison reformers in the United States also acknowledged the necessarily painful nature of punishment. They may have moved the focus of punitive pain from the body to the soul, as Foucault has remarked, but the infliction of pain continued to play a central role in their schedule of reformative treatment. The Philadelphia prison reformers often stressed the cruelty of the correctional methods in the new penitentiaries, including solitary confinement and the rule of silence, in response to charges that rehabilitative imprisonment meant a cozy life of leisure. As William Bradford put it in 1793: "When he looks into the narrow cells prepared for the more atrocious offenders—When he realizes what it is to subsist on coarse fare—to languish in the solitude of a prison—to wear out his tedious days and long nights in feverish anxiety—to be cut off from his family—from his friends—from society—from all that makes life dear to the heart—When he realizes this he will no longer think the punishment inadequate to the offence."

Solitary confinement was said to accelerate the rehabilitative process. It forced the inmate to ponder his misdeeds in the presence of only his conscience (and God, who, as the cell walls in the French reformatory at Mettray reminded him, was watching at all hours of the day and night). Furthermore, the experience of complete and utter isolation proved excruciatingly painful to inmates

45. Ibid., 195.
46. Ibid., 170.
47. The early prison reformers’ use of pain for reformative purposes was not limited to the psychological realm. Whippings were seen as conducive to rehabilitative efforts and continued in American penitentiaries long after they had been transformed into institutions of rehabilitation. Allen, The Decline of the Rehabilitative Ideal, 3, 52. As Simone Weil put it over a century later, it was through the infliction of pain that the offender’s conscience was awakened in the first place, thus enabling him to regard the punishment as an honor and a “supplementary form of education.” According to Weil, punishment was but “a method for getting justice into the soul of the criminal by bodily suffering.” Simone Weil, The Need for Roots: Prelude to a Declaration of Duties Towards Mankind (London, 1952), 21. In 1793, William Bradford reported with approval the Danish practice of sentencing infanticides to lifelong incarceration in a workhouse, interrupted only by annual whippings “on the day when, and the spot where, the crime was committed.” William Bradford, An Enquiry How Far the Punishment of Death Is Necessary in Pennsylvania (Philadelphia, 1793), 40. This Danish practice could have been taken straight out of Bentham’s infamous schedule of analogous punishments based on considerations of specific deterrence. Bentham, Principles of Penal Law (Rationale of Punishment), 365, 407–9. According to Bentham’s illustrative schedule, the arsonist was to be burnt, the poisoner poisoned, and the forger to have his hand “transfixed by an iron instrument fashioned like a pen; and in this condition he may be exhibited to the public, previously to undergoing the punishment of imprisonment.” Ibid., 408.
49. Foucault, Discipline and Punish, 294.
and its mere prospect struck terror into the hearts of offenders and reformers alike.\textsuperscript{50} Loneliness appears to have been considered a particularly abominable condition by the men and women of the late eighteenth and early nineteenth centuries, a time when the dominant moral philosophy described society as a web of mutual empathic identification and when the capacity for and the experience of fellow feeling were valued more highly than ever before or since.\textsuperscript{51}

As rehabilitationism came into its own, however, meticulously purging itself of vestiges of specific deterrence, punishment was converted from pain to benefit, and from terror to treatment. Initially, the painful effects of punishment were declared to be merely incidental. In the end, when the rehabilitationists recognized that it was impossible to drain punishment of its painful connotations, no matter how incidental, they discarded the concept of punishment altogether and insisted that incarceration was treatment, not punishment.\textsuperscript{52} The denial of pain became the distinguishing feature of rehabilitationism. Rehabilitationism was superior to all punishment theories precisely because they were punishment theories and because they did not disavow the connection between pain and punishment. Rehabilitative treatment was the only justifiable response to crime precisely because it was the only response that did not inflict pain on the offender.

50. The new penitentiaries, particularly those based on the Philadelphia model, so well reflected the role of pain in early “correctional” science that reports about inmates who had been driven mad by extended periods of solitary confinement were quite common (Gehorsamer Bericht der Gefängnis-Commission, den Bau eines allgemeinen Gefängnisgebäudes betrührend [Frankfurt, 1840], 31) and remain common today. See, e.g., Maitland Zane, “Psychiatrist Criticizes Pelican Bay Prison,” \textit{San Francisco Chronicle}, 13 October 1993, at A17; Jim Doyle, “Criticism of Pelican Bay in Court,” \textit{San Francisco Chronicle}, 30 September 1993, C8; Claire Cooper, “Pelican Bay State Prison Isolation Inmates Traumatized,” \textit{Sacramento Bee}, 30 September 1993, A4; Justin Zimmerman, “Prison Official Defends Pelican Bay,” \textit{UPI}, 21 September 1993; “Pelican Bay,” \textit{60 Minutes}, CBS, 12 September 1993 (transcript on file with author). As early as 1789, John Howard had warned that a system of continuous solitary confinement “is more than human nature can bear, without the hazard of distraction or despair.” Bradford, \textit{Enquiry}, 71, n. 13 (quoting John Howard, \textit{An Account of the Principal Lazarettos in Europe} [London, 1789], 169). Occasional warnings of the devastating psychological effect of solitary confinement were duly noted, but generally ignored. Gehorsamer Bericht der Gefängnis-Commission, 31. The Auburn system, in which inmates were housed in single cells but worked and ate together, later came to be preferred over the Philadelphia system of complete solitary confinement not because it proved less painful to inmates but because it was cheaper to maintain and could even turn a profit by forcing inmates to work in large prison factories instead of having them cobble shoes in their lonely cells. Jonathan Simon, \textit{Poor Discipline: Parole and the Social Control of the Underclass, 1890–1990} (Chicago, 1993), 26; Allen, \textit{The Decline of the Rehabilitative Ideal}, 55. At any rate, the communal treadwheels of Auburn prisons proved no less hazardous to the inmates’ physical health than solitary confinement did to their psychological well-being. Ignatief, \textit{A Just Measure of Pain}, 177.

51. See below, 133–35.

The early nineteenth-century German philosopher Karl Christian Friedrich Krause and his student Karl David August Röder developed what comes closest to a principled defense of rehabilitative treatment. Their work illustrates with particular clarity the development, and eventual abandonment, of the Enlightenment attempt to legitimize state punishment in general, and the evolution of the offender's right to punishment into an entitlement to treatment. Their work is also of interest because it builds on certain assumptions and precepts that continue to shape not only criminological thought but also punitive attitudes more generally. Although Krause was the teacher and Röder the student, I focus on Röder because he developed Krause's ideas on state punishment into a comprehensive system.

Röder was deeply influenced by the penitentiary movement in the United States and fought hard, though with mixed success, for the introduction of the Philadelphia prison model in Germany. He took the Pennsylvania reform movement and converted it into a theory of rehabilitation that drew on his and Krause's Christian natural law ideas. According to Röder, the state had the obligation to provide its constituents with the means for achieving their rational life goals. As an institution of education and "Bildung," the state was obligated to set up public schools, vocational programs, Sunday schools, libraries, and museums, and to provide for the publication of good "Volk" newspapers.

The law was an important means by which the state could discharge its pedagogic duty. Given this rather expansive view of the state's authority and of the role of law in the exercise of that authority, it is not surprising that Röder disliked Kantian positivism and formalism. Still, he also took great care to distance himself from what he saw as the all-powerful state of the Hegelians. The state, he argued, should make every effort to delegate some of its functions to private, particularly religious, organizations.

As law in general served the state's pedagogic purpose, so did criminal law in particular. Röder's account of adult punishment follows directly from his account of juvenile punishment. Certain youths required "supplementary education" in reform houses, to which they could be committed not only upon the commission of a crime, but also upon parental request or judicial determination. Adult criminal offenders, however, were very much like disobedient

54. Röder, Besserungsstrafe und Besserungsanstalten, 10–11.
55. Ibid., 9–10.
56. Ibid., 13.
children. Criminal punishment was "rational supplementary education" of those persons who "by illegal word or deed" had proved themselves so morally diseased as to be incapable of rational self-determination.\textsuperscript{57} It now fell upon the state literally to serve as their guardian and to provide them with pedagogic treatment to nurse them back to moral health. Punitive treatment as supplementary education must focus on the "inner man," so that it may generate and foster those good thoughts, feelings, and resolutions that determine behavior.\textsuperscript{58} Punishment, as Röder put it, was "effective but bitter medicine."\textsuperscript{59}

Therefore, in the end, punishment was not an evil, but a benefit to the offender.\textsuperscript{60} According to Röder, retributivists and preventionists alike had confused the form of punishment, pain, for its moral core. Whereas retributive punishment, for example, inflicted punishment for the purpose of causing the offender pain, any pain resulting from reformative punishment was purely incidental to its educative function.\textsuperscript{61} The punisher's intent therefore could distinguish two punishment practices that had the same painful impact on the offender and were generally indistinguishable to the offender and any nonexpert outside observer.

In the context of this article, it is important that Röder stressed that punishment merely accorded the offender his right.\textsuperscript{62} This was so because the offender was entitled to have the state facilitate the pursuit of his rational life plans, so that punishment turned out to be in the offender's ultimate interest, even if he might not realize this immediately. Despite this talk of punishment as the offender's right and as the manifestation of right, Röder sharply distanced himself from Hegel and Kant "who have uttered the assertion, or rather the delusion, . . . that

\textsuperscript{57} Ibid., 13–14.

\textsuperscript{58} Ibid., 14.

\textsuperscript{59} Ibid., 34.

\textsuperscript{60} The rehabilitationists were not the first to characterize punishment as treatment beneficial to the offender. Already Plato had argued that punishment treated the offender's moral disease revealed through his crime. See, generally, Mary Margaret Mackenzie, \textit{Plato on Punishment} (Berkeley, 1981), chap. 11. In Plato, one also already finds the distinction between curables and incurables and their respective treatments, rehabilitation and incapacitation. Ibid., 186–89, 198–99. Plato's account even foreshadows the rehabilitationists' classification of criminal punishment as a matter of public hygiene (\textit{Laws} 735). Unlike the rehabilitationists, however, Plato nowhere denied the painful nature of punishment. For later analogies between crime and disease, and punishment and medical treatment, see, e.g., Grotius, \textit{De Jure Belli ac Pacis}, bk. 2, chap. 20, sect. 6 (citing Plutarch's definition of punishment as medicine for the soul); Benedict Carpszov, \textit{Practica nova rerum criminalium imperialis Saxonica} (1635), pt. 3, qu. 101, nn. 1, 13, 14; Pufendorf, \textit{De Jure Naturae et Gentium}, bk. 8, chap. 3, sect. 9 (quoting Plato, \textit{Gorgias}); Thomasius, \textit{Institutiones Jurisprudentiae Diviniae}, bk. 3, chap. 7, sects. 100–30; Globig and Huster, \textit{Abhandlung von der Criminal-Gesetzgebung}, 10.

\textsuperscript{61} Röder, \textit{Besserungsstrafe und Besserungsanstalten}, 34–35.

\textsuperscript{62} Ibid., 31–33.
one honors the offender by treating him entirely according to the principle that
he himself had postulated and that he had followed in his offense.\textsuperscript{63}

Röder had turned Enlightenment punishment theory on its head, and with
it the concept that lay at its core: the offender’s right to punishment.\textsuperscript{64} That right
now stemmed from the offender’s incapacity for autonomy whereas it had once
reflected his autonomy even in the face of criminal behavior. Röder did not
need to justify punishment as autonomous rule application because the offender
was declared to be by definition incapable of such application. In addition, even
if he were capable of autonomy, punishment was in no need of justification
because it was at its core not painful. According to Röder, the problem of state
punishment was not justifying the infliction of punishment, but justifying the
failure to inflict punishment in disregard of the state’s duty to educate its con-
stituents by whatever means necessary. The autonomous and equal offender’s
right to punishment had become the heteronomous and deviant offender’s right
to supplementary education.

Röder found that the problem of the legitimacy of punishment deserved lit-
tle attention simply because there was no legitimacy problem to start with. After
all, punishment was a good, not a wrong. It would be absurd to challenge the
physician’s right to treat his patients, he argued, and so it would be to chal-
lenge the state’s right to punish.\textsuperscript{65}

Still, Röder devoted much effort to establishing just why punishment needed
no justification. His theory of punishment flowed from a general moral and le-
gal theory that first had to be established as “the true” one.\textsuperscript{66} Röder attempted
to lay the foundation for rehabilitative punishment first, and then to build a specific
penological treatment program on that foundation. As he quoted another writer of
the time: “one cannot even understand the controversy about the penitentiary
system, not to mention resolve it, unless one goes back to the ultimate founda-
tion of the right to punish.”\textsuperscript{67} Later generations of rehabilitationists lost this con-

\textsuperscript{63} Ibid., 39.

\textsuperscript{64} Karl Marx, more famous than Röder for standing Hegel rights side up, praised Hegel’s
punishment theory for placing the offender’s right at its core. Karl Marx, “Capital Punish-
ment,” in Articles on Britain, 150–53 (quoted in Marx and Engels on Law, ed. Maureen Cain
as lex talionis in fancy metaphysical garb. John Lekschas, “Der Mensch in der Hegelschen

\textsuperscript{65} See, e.g., Franz von Liszt, “Der Zweckgedanke im Strafrecht,” Zeitschrift für die
gesamte Strafrechtswissenschaft 3 (1883): 1, 45 (so-called “Marburger Programm”). This
argument has lost much of its force in a world of medical malpractice suits and explicit
consent requirements that protect surgeons against criminal liability for assault and battery.
See, e.g., N.Y. Penal Law sect. 35.10(5).

\textsuperscript{66} Röder, Besserungsstrafe und Besserungsanstalten, 13–19.

\textsuperscript{67} Ibid., 2 (quoting F. v. Wick, Über Strafe und Besserung [1853], 1 ff.).
cern for questions of legitimacy. Röder might have thought that there was no legitimacy problem. This did not mean, however, that he thought the legitimacy question did not require an answer, no matter how obvious.

Röder’s ability to discount the painful nature of punishment was significant not only because it permitted him to deny the legitimacy problem that Enlightenment writers on punishment had identified and attempted to solve. It also reflected an odd mixture of professed concern for the plight of inmates, on the one hand, and utter disregard for the painful reality of incarceration, on the other, that was to become a hallmark of rehabilitationism. Rehabilitationists from the very beginning blasted proponents of other views on punishment for their failure to eradicate pain from the practice of punishment. Yet, once they had purified their theory by excising the painful vestiges of specific deterrence, rehabilitationists could follow their own advice only by obscuring the actual suffering of inmates behind hypocritical labels and semantic distinctions.

It was this hypocrisy at the heart of full-blown rehabilitationism that permitted its adherents to support dubious practices such as preventive detention. These were based on entirely vacuous distinctions between punishment practices that appeared indistinguishable to the purported object of rehabilitative concern, the offender. In the mid-nineteenth century, it was the distinction between retrospective legal punishment and prospective police detention that fulfilled this semantic role. With the disappearance of police courts, the distinction between retrospective punishment and prospective measures assumed a similar function. As early as 1864, Röder spoke approvingly of the estab-

68. On the euphemism of modern rehabilitative treatment programs in the United States, see Allen, The Decline of the Rehabilitative Ideal, 51.


70. For a similar distinction between “police regulations to prevent crime” and “ordinary criminal laws prohibiting and punishing an act or acts as a crime or crimes” in a New York case of the time, see In re Forbes, 11 Abb. Pr. 55, 19 How. Pr. 457 (N.Y. Sup. Ct. 1860) (second emphasis added).
lished Prussian practice of incarcerating dangerous offenders beyond their judicially imposed sentence by transferring them to police detention institutions. This practice constituted a blatant circumvention of Enlightenment limitations on the central state’s punishment power by renaming a portion of the offender’s punishment and relegating its infliction to local police authorities; nonetheless, Röder did not hesitate to cite it in support of his proposal to introduce indeterminate sentencing for all offenders. Of course, the individual inmate would have been hard-pressed to distinguish incarceration in the name of retrospective legal punishment from incarceration in the name of prospective police detention.

Röder’s support for indeterminate incarceration in police prisons could only be maintained if one ignored the actual effect of incarceration on the offender regardless of its label and official justification. More generally, Röder’s attempt to distinguish rehabilitative punishment from all other forms of punishment on the ground that it inflicted pain incidentally, whereas other forms of punishment inflicted pain intentionally, displayed an astonishing indifference toward the inmate’s experience of punishment that remains pain and coercion by any name. According to the rehabilitationist Röder, it was the state of mind of the punishment theorist, the legislator, the judge, or the warden that determined the relevance of pain and defined the experience of punishment, not the state of mind of the inmate who actually experienced the punishment.

This disregard for the offender’s experience is troubling in its own right, but is particularly disturbing given that rehabilitationists otherwise placed great emphasis on the actual effect of punishment on the offender’s mind and often chided their opponents for failing to do so. As Foucault has pointed out, after the specific deterrence reformers had drawn attention to punishment’s effect on the particular offender, the rehabilitationists had redirected the ultimate focus of punishment from the offender’s body onto his soul. Röder himself stressed that the work of the criminal justice system in practice and theory was not done once the judgment of the court had been announced. He advocated indeterminate sentences precisely because their duration would depend entirely on the continuous expert evaluation of the impact that the infliction of the imposed punishment had on the offender’s progress in recovering from the “moral sickness of his inner self.”

Röder approved of the Prussian distinction between legal punishment and police detention. His rehabilitative successors at the turn of the century laid

72. Foucault, Discipline and Punish, 16 (quoting Gabriel Bonnot de Mably, De la légis-
lation, in Œuvres complètes, vol. 9, 326 [1789]).
73. Röder, Besserungsstrafe und Besserungsanstalten, 20, 22–24; cf. Glueck, “Principles of a Rational Penal Code,” 453, 477 (calling for indeterminate sentences, “so that, if necessary, such treatment may be modified, much as the physician modifies treatment, in the light of progress”).
the foundation for a similarly semantic distinction between retrospective punishment and prospective measures. This distinction underlies the famous two-track system of German criminal law to this day. In contrast to punishments (Strafen), measures (Maßregeln) are not imposed as proportionate responses to criminal acts, but—as their title suggests—for prospective incapacitative and rehabilitative purposes.  

Originally “measures” included commitment to an insane asylum, an addiction treatment center, or a workhouse, professional debarment, deportation, preventive imprisonment, and emasculation. Today, they include commitment to an insane asylum, an addiction treatment center, supervision, suspension of driving privileges, professional debarment, and preventive incarceration. Although the conditions of incarceration are virtually indistinguishable, only punitive incarceration is considered punishment and therefore subject to the full panoply of traditional constraints upon the state’s punishment power, the most important of which is the proportionality of the punishment to the offender’s moral desert. Anyone inquiring into the legitimacy of preventive punishment is likely to be accused of a category mistake, since preventive detention is, by definition, anything but punishment.

American criminal and constitutional law officially frowns upon preventive detention. But the distinctions in American law between (civil) commitment and (criminal) punishment and between punitive and remedial commitment insulate the state from challenges to the legitimacy of its punishment practices in much the same way as does the distinction between punishment and measures in German criminal law. Since American constitutional protections with any bite apply only to those state practices that are labeled “punishment,” the state manages to escape scrutiny of its punitive power by classifying its coercive practices as anything but punishment.

74. The “measures of security and rehabilitation” were not recognized in the German Penal Code until November of 1933. See Hans-Heinrich Jescheck, Lehrbuch des Strafrechts: Allgemeiner Teil, 4th ed. (Berlin, 1988), 74–75. But their origin can be traced directly to the efforts of the “modern” or “sociological” school of criminal law around Franz v. Liszt (1851–1919), which promoted the virtues of rehabilitative and incapacitative treatment against the “classical” retributive school represented most prominently by Karl Binding (1841–1920). Liszt and his followers, much like other early criminologists at the time, called for the indefinite incapacitation of incurable offenders regardless of their desert. The two-track system represented a compromise between the modern and classical schools by maintaining the proportionality limitation for most offenders while abandoning it in cases of exceptional dangerousness. On Liszt and his school, see below, 140.

75. German Penal Code, sect. 42a (a.F.).

76. Ibid., sect. 61.

To cite a recent example, the Washington state law providing for the indeterminate incarceration of so-called sexually violent predators was found to lie beyond the reach of traditional constraints on legislative authority for precisely this reason. The Washington legislature, after all, had decided to characterize that incarceration as civil commitment, not criminal punishment, and had placed the relevant statute in the chapter of the Washington Code entitled "Mental Illness," rather than in the chapter on "Crimes and Punishments." It mattered little that the legislature conceded that the statute's victims were not in fact mentally ill.78 In effect, sexually violent "predators" are deemed sufficiently human to be subject to criminal punishment for their acts, yet insufficiently human to be subject to the limitations on that punishment. This inconsistency is resolved by the distinction between civil commitment and criminal punishment, with the period of excessive punishment being declared not to be punishment after all.79

B. The Denial of Identity

The denial of the identity of offender and observer, much like the denial of the pain of punishment, was foreign to the early writers on the infliction of punishment in general and on imprisonment in particular. The early prison reform-

ers not only emphasized the importance of empathic identification among prison insiders and outsiders. Their prison was (and was meant to be) an "abode of discipline and misery" \( ^{80} \) precisely because its isolation made that identification impossible. \( ^{81} \)

The prison reform movement originated at a time when empathic identification was considered the foundation of moral attitudes and behavior. \( ^{82} \) The capacity for empathic identification was thought to distinguish man from beast and a particular sensitivity to empathic experience was considered the mark of an educated gentleman. Reformers recoiled at the horror of the prisoner's "seclusion from his friends and connections," \( ^{83} \) which precluded empathic identification with others or of others with oneself. \( ^{84} \) When Caleb Lownes wanted

80. Rush, Enquiry, 10–11.


84. No feature of prison life, however, was considered to be more disagreeable than the "coarse fare." Bradford, Enquiry, 32. See Bentham, Principles of Penal Law (Rationale of
to criticize attitudes toward crime and criminals in late eighteenth-century Philadelphia, he spoke of the public’s “insensibility.” The establishment of the Philadelphia Society for Alleviating the Miseries of Public Prisons he attributed to the “minds of the citizens” having been “variously affected” by the sorry sight of the “wheelbarrow men.”

This affective response, however, presupposed an identity between the onlooker and the object of his moral curiosity. As the moral theorists of the Scottish Enlightenment taught, feeling empathy for another person meant placing oneself in that person’s shoes and experiencing his pain as though it were one’s own. Interest in the other’s suffering and willingness to take that person’s role requires that I recognize the other person as identical to myself in some way. That identification may occur naturally, or at least without our conscious effort, first in the immediate family group (starting with the mother) and then in wider social groups, such as classes or ethnic communities and even in secondary social institutions such as clubs or corporations. It is the moral point of view that permits us (or at least calls on us) to transcend these unconsidered.

Punishment), 365, 421 (ranking “Confinement to disagreeable diet” as first and “Total exclusion from society” as fourth on a list of seven “Accessory Evils, commonly attendant on the Condition of a Prisoner”).


ered boundaries of our empathy and extend it to all persons, all of whom we recognize as sharing with us the fundamental identity of rationality. 89

The identity of rationality played an important role not only in the writings of the Enlightenment punishment theorists discussed above, but also in the pamphlets and broadsheets of the early prison reformers. 90 But the early period of prison reform already carried the seeds of distinction that blossomed into that denial of identity of offender and observer characteristic of full-blown rehabilitationism. Although the early prison reformers might have been affected by the suffering of all inmates, the debtors tended to attract the lion's share of their empathy. 91 This may well have reflected the fact that the visitors were better able, and perhaps more willing, to place themselves in the shoes of imprisoned debtors than in those of other, more serious, offenders. Prison reformers simply might have found it easier (or more pleasant) to imagine themselves as "worthy characters ... reduced by misfortune" to the debtor's prison than as "wretches who are a disgrace to human nature," 92 especially if the distinction between the two groups of prisoners also roughly coincided with distinctions of social class, with the debtors' (former) social class more closely resembling that of the reformers. 93


90. So Caleb Lownes in 1793 appealed to this shared characteristic in support of his reform proposals: "Some seem to forget that the prisoner is a rational being, of like feelings and passions with ourselves." Lownes, "Account," 82–83. For a less secular variation on the identification theme, consider the admonition by the influential British prison reformer John Howard in 1777 that "A felon is a man and by men should be treated as a man." John Howard, The State of Prisons in England and Wales (London, 1777), 12 (quoted in Ignatieff, A Just Measure of Pain, 56). Howard saw the relevant identity of persons not in their common rationality, but in their common temptation by sin and their common failure to resist that temptation. Ignatieff, A Just Measure of Pain, 55–56. Punishment in seventeenth-century England and New England similarly had proceeded from the assumption that judge and offender were both identical as potential sinners. The spectators at a seventeenth-century New England public execution were all sinners, potential and actual. Garland, Punishment and Modern Society, 207; Lincoln Faller, Turned to Account: The Forms and Functions of Criminal Biography in Late Seventeenth- and Early Eighteenth-Century England (Cambridge, 1987), 54; Rothman, The Discovery of the Asylum, 15–16; Louis F. Masur, Rites of Execution: Capital Punishment and the Transformation of American Culture, 1776–1865 (New York, 1989), 43. See also Adam Jay Hirsch, The Rise of the Penitentiary: Prisons and Punishment in Early America (New Haven, 1992), 32–35.

91. See Innes, "The King's Bench," 257.


The violent offenders were perceived as radically different and thus precluded from empathic identification. As a disgrace to human nature, they quite literally lacked the fundamental characteristics of humanity that make identification and therefore empathy possible. The prison reformers thus owed these offenders not a mutual moral duty of empathy, but at most a unilateral benevolent obligation of pity, much as they might for a sentient animal or an insane person.

In general, a similar class bias of empathic attitudes may help account for criminal law reform at the turn of the nineteenth century. Günter Haber, for example, has pointed out that much of the zeal with which the rising German bourgeoisie pursued the introduction of public jury trials during the first half of the nineteenth century can be attributed to the identification with the bourgeois victims of the political prosecutions of the period. In late eighteenth-century England, the plight of political prisoners likewise did much to mobilize political resistance against the expansion of solitary cell penitentiaries. There would be nothing particularly troubling (or unusual) about a program of social action triggered by unconsidered empathic identifications based on membership in communities of class or kin. Presumably, all truly moral attitudes develop through gradual, and increasingly conscious, expansion of the circle of empathy. Rehabilitationism, however, went wrong when it abandoned the Enlightenment project of expanding the empathic circle altogether and grounded itself in the concept of difference, not of identity. Instead of recognizing the observer’s identity not only with the “worthy characters” but also with the “wretches,” the rehabilitationists first housed the “worthy characters” in separate debtors’ apartments and then removed them from the realm of criminal punishment altogether, be it through decriminalization (in the case of debtors, for example) or through parole. In the end, no immediate objects of unconsidered empathy remained in prison. Today, class and race differences further block the unconsidered empathic identification between wardens, prison guards, and the general public, on the one hand, and inmates, on the other.

95. Ignatieff, A Just Measure of Pain, 120–33.
97. Simon, Poor Discipline.
98. Dubber, “Recidivist Statutes as A Rational Punishment,” 720–22. The empathic identification between antiwar protesters and prison inmates optimistically invoked by Francis Allen in his brilliant little book on rehabilitationism (The Decline of the Rehabilitative Ideal, 31, 63) unfortunately has proved as ephemeral and inconsequential as earlier instances of bourgeois identification with the bourgeois objects of criminal punishment, such as debtors and political prisoners. It ended as soon as the last antiwar protester was released from prison and the threat of punishment for his sympathizers had dissipated.
The denial of identity and the affirmation of difference in rehabilitative theory turned on a reconception of punishment in medical and pedagogic terms that remained influential long after criminological science had completed the secularization of carceral healing and penitence. In addition to defining punishment as a form of medical treatment, the rehabilitationists were fond of treating adult offenders as juveniles and obliterating the distinction between adult and juvenile punishment along the way. Characteristic of this medico-pedagogic turn was the derivation of the principles of adult punishment from those of juvenile punishment and the concomitant reconception of the criminal offender as inadequate and deviant.

The offender no longer deserved punishment because he was a fellow member of the community of rational agents to which the observer also belonged. He now needed correctional treatment to overcome whatever deficiency had proved him unworthy of membership in that community. Punishment no longer affirmed the offender’s dignity as a fellow person; instead it corrected the offender’s abnormality.

Rehabilitationism’s exclusionary turn in punishment theory had several important implications for the legitimacy of state punishment and the status of offenders. The reconception of crime as the symptom of some psychological defect and the accompanying reconception of punishment as the treatment of that defect normalized imprisonment and thus rendered the question of its legitimacy moot. Once the rehabilitationists placed punishment into a continuum of pedagogic state practices, the intense interest in the strict and vigilant control over the state’s punishment practices that had triggered their Enlightenment reform slowly began to dissipate.

Foucault has highlighted the expansion of the state’s coercive potential that resulted from the inward turn of punishment as psychological treatment. He in effect turned the rehabilitationist account of punishment back against itself. Whereas the rehabilitationists had argued that punishment really was treatment,

99. Röder, Besserungsstrafe und Besserungsanstalten, 34; see also Liszt, “Der Zweckgedanke,” 45; Glueck, “Principles of a Rational Penal Code,” 453, 461, 462, 469 (punishment to be used only “by trained scientists, and only where ‘indicated,’ as the physicians would say”; punishment “but one of numerous ‘ medicines’ or devices that are more and more being put at the disposal of trained experts”; arguing against capital punishment on the ground that “it is short-sighted to destroy our ‘laboratory material’ without study”); Harno, “Rationale of a Criminal Code,” 549, 550, 555, 562 (comparing the criminal to “a man with a contagious disease” and criminality to “matters of sanitation and health”).

100. Röder, Besserungsstrafe und Besserungsanstalten, 12–14. Solitary confinement, for example, was recommended as the proper treatment for offenders because “‘isolation is the best means of acting on the moral nature of children . . .’” (Foucault, Discipline and Punish, 294 [quoting Edouard Ducpétaux]). The reaction to rehabilitationism since the mid-1970s has reversed the inspirational flow, while retaining the analogy between juvenile and adult punishment. See Allen, The Decline of the Rehabilitative Ideal, 8.

Foucault pointed out that all treatment was punishment. As criminality took its place in the limitless spectrum of normal abnormalities, so punishment took its place in the correspondingly limitless spectrum of normal abnormality treatments administered by the state.\textsuperscript{102} For the rehabilitationists' state, punishment had become simply a matter of "eliminat[ing] its weeds."\textsuperscript{103} By denying the problem of the state's coercive interference with the life plans of its presumably autonomous constituents in the narrow confines of punishment, the rehabilitationists paradoxically succeeded in demonstrating that the problem of state power could not be denied in any area of modern societal life. To Foucault, the comprehensive system of pedagogic state services, into which Röder integrated punishment, appeared as a "carceral archipelago" that emanated in concentric circles of institutional control from the prison at its core.\textsuperscript{104} Instead of enlarging the circle of empathy, as the Enlightenment had sought to do, rehabilitationism expanded the circle of state power.

Rehabilitationism, however, not only affected perceptions of and interest in the legitimacy of punishment. It also reconceived the once autonomous equal offender as deviant and defective.\textsuperscript{105} Punishment was a benefit, not a wrong, because the offender suffered from a debilitating condition, revealed by his crime, which marked him not only as different from, but also as inferior to, his judge.

As we saw earlier, Fichte's expiatory theory of punishment rested on the proposition that the offender, by his crime, had identified himself as deviant in the sense that his incapacity for continuously rational behavior distinguished him from the presumably rational parties to the social contract. The rehabilitationists bristled at Fichte's claim that the offender through his offense had become an outlaw at the mercy of the state\textsuperscript{106} but heartily endorsed his assertion that the offender was entitled to punishment as the only means for his reintegration into the community.

Reintegration, however, presumed exclusion. Fundamentally, therefore, the rehabilitationists only disagreed with Fichte's account of the particular nature of the offender's deviance, not with the assumption of the offender's deviance itself. According to Röder's rehabilitative theory, the offender was no longer at the mercy of the rational parties to the social contract, who through their representatives could do with him as they pleased (within the confines of the Fichtean expiation contract, if one existed). In Röder's account, the offender was just as helpless as in Fichte's account of punishment. Now, however, the state had the moral obligation to cure the offender's social pathology (as opposed to the contractual obligation to permit reentry through atonement).

\textsuperscript{102} Ibid., 299.
\textsuperscript{103} Harno, "Rationale of a Criminal Code," 549, 550.
\textsuperscript{104} Foucault, Discipline and Punish, 296–97.
\textsuperscript{105} Ibid., 299.
\textsuperscript{106} Landau, "Die rechtsphilosophische Begründung der Besserungsstrafe," 473, 481 (citing Krause, Das System der Rechtsphilosophie, 317).
By treating the offender as just another deviant desperate for treatment, the rehabilitative state demonstrated its superior power over the offender, who did not even deserve to be considered a threat to the state’s authority. So secure was the state’s position that it had no particular interest in seeing criminal violations punished. It was the offender, not the state, who was in need of punishment, a service the state provided to him for his personal growth, his Bildung, along with a museum of natural history and public libraries. The empathic gentleman who took it upon himself to tour the local penitentiary for his edification and the inmate he observed in that very penitentiary underwent similar pedagogic experiences, courtesy of the state.

Although the rehabilitationists agreed with Fichte that the offender was both different and defective, they developed an alternative account of the difference and the defect. Whereas Fichte spoke generally of the incapacity to act rationally, the rehabilitationists drew on the new behavioral sciences that had sprung up since the early nineteenth century to assemble an ever lengthier list of criminal pathologies and of corresponding criminal types. This project continues to this day.

The rehabilitationists in effect turned the problem of punishment into a problem of classification, or as Sheldon Glueck put it in 1928, the problem of “separating the sheep from the goats.” This concern with the classification and separation of offenders for purposes of “peno-correctional treatment” can be traced back to the squalid and chaotic conditions of prisons in the late eighteenth and early nineteenth centuries. As was noted earlier, prison reformers of the day frequently lamented that the prisons had become warehouses for a motley mixture of characters who had little in common beyond their confinement under the same roof. In 1786, the influential report by the Grand Jury of the Court of Oyer and Terminer on the Walnut Street Prison in Philadelphia objected to the indiscriminate mixture of “criminals and debtors.” An 1840 report by the Frankfurt prison commission similarly documented the deterioration of the city’s work or corrections house, opened in 1810 to hold forty minor offenders convicted of such crimes as beggary and vagrancy, into an overcrowded prison for all offenders, including those convicted of the most serious crimes. In its present condition, the commission remarked, the workhouse “could in no respect satisfy the demands that are placed on a prison designed to effect the reformation of offenders.”

109. See Meranze, *Laboratories of Virtue*, 200–202 (1797 proposal to assign offenders to four categories, “who shall neither lodge, eat, or associate together”).
110. See above, 135.
To classify an offender, however, one had to identify and interpret indicators of deviance. The most obvious—and for Fichte, the only—indicator of criminal deviance was the criminal act itself. But as punishment turned out to be just one more benevolent state activity along the medico-pedagogic continuum from the cradle to the grave,¹¹³ so crime became only one among many indicators of the need for and the right to punishment. Psychological markers were joined by physical markers as Lombroso discovered Criminal Man.¹¹⁴ Since then, posture, left-handedness, chromosomes, and hormones, not to mention skull shape, have joined the usual psychological suspects as criminal indicators.¹¹⁵

Not only did the identification methods multiply, so did the identification tasks. It was no longer sufficient to distinguish offenders from nonoffenders; soon one began differentiating among different classes of offenders, each with its exclusive identifying characteristic. This in turn called for a distinction among different classes of penological treatment. Franz v. Liszt, the scholar who in the late nineteenth century established and cemented the dominance of rehabilitation over the infliction of punishment in Germany, famously distinguished between three classes of offenders and of corresponding treatments: the occasional minor criminal would receive a warning (which could come in the shape of a brief prison sentence), the offender who suffered from a more serious, yet still treatable, criminal pathology would be sent to prison for his rehabilitation, and the serious hardened offender, upon whom rehabilitative efforts would be wasted, was to be incapacitated indefinitely, until his condition had, contrary to expectations, improved so dramatically as to “indicate” his release.¹¹⁶ By the 1930s, the correctional sciences had developed to the point where rehabilitationists could call for scientific experts to diagnose each offender’s criminological deficiency. As the American author of a much-cited 1936 article on criminal law reform explained, once a person “had been determined to be a criminal” in court, these experts were to prescribe the proper “incapacitative and reformatory”¹¹⁷ or “disabling and curative” “treatment,” depending on “whether the conduct showed the accused to have such a disposition or trait as to require treatment.”¹¹⁸

¹¹⁶. Liszt, “Der Zweckgedanke.”
Today, punitive strategy has shifted from treatment to containment, from rehabilitation to incapacitation. Any residual faith in the possibility of psychological manipulation has been eradicated by the "nothing works" assault on rehabilitationism, so much so that the criminological marker search has begun to rediscover the offender's body. As recently as the fall of 1995, a conference in Maryland was devoted to the genetic origins of crime. The exploration of physical criminality markers, however, holds no promise of rehabilitative treatment because the perceived immutability of distinguishing characteristics of criminality stands in direct proportion to their perceived physicality. After all, the manipulation of the offender's body, say through psychosurgery or mutilation, continues to be frowned upon in important (but fuzzy) contrast to the manipulation of his soul, say through aversive conditioning or solitary confinement. As a result, it is the very aphysicality at the heart of rehabilitationism that now makes rehabilitation impossible.

Given that rehabilitation and incapacitation have been joined at the hip since Plato, the move from the former to the latter is not a change of punitive paradigms but a shift along the treatment continuum. Incapacitation replaced rehabilitation as the proportion of curable offenders evaporated. Incapacitation is rehabilitation without the possibility of manipulation and, therefore, of reform.

After more than a century of searching for criminal markers, we have yet to advance beyond Fichte's original suggestion that the criminal act itself identifies the offender as deviant. At least, this is how dangerous offenders are in fact identified by the criminal justice system. Criminologists may have assembled impressive lists of criminality indicators, but punishment continues to be imposed on the basis of present and past offenses. Recidivist statutes provide the starkest examples of this identification method as they impose severe mandatory penalties, including life imprisonment without the possibility of parole, on the basis of present and past offenses alone.


120. The persistence of capital punishment in the United States is not to the contrary. Paradoxically, rehabilitationism's medical model of punishment remains most influential in the infliction of the one punishment that can never rehabilitate, the death penalty. See Markus Dirk Dubber, "The Pain of Punishment," Buffalo Law Review 44 (1996): 545.


Even the tripartite punishment system of the German Penal Code of 1871, a relatively sophisticated attempt to differentiate among offenders, relied on the offender's crime of conviction. Three kinds of punishment were to correspond to three kinds of crime. Violations (Übertretungen) were to be punished by correctional detention (Korrektschaft), misdemeanors (Vergehen) by incarceration in a prison (Gefängnis), and felonies (Verbrechen) by incarceration in a penitentiary (Zuchthaus). The commitment to different institutions was to ensure that offenders were treated according to their different correctional needs. By 1905, however, according to one commentator not unsympathetic to the rehabilitative enterprise, the distinctions among the three institutions were "not at all as essential in practice as one often tends to believe; in practice, they even disappear almost completely."\textsuperscript{123}

German law since has abandoned the distinction among different types of punitive incarceration. As we have seen, however, this distinction has been replaced by that between punitive and preventive detention. From the perspective of the German prison inmate and his guards, incarceration for purposes of "punishment" does not differ from incarceration as a preventive "measure" any more than did correctional detention from incarceration in a prison or a penitentiary at the turn of the century.\textsuperscript{124} American inmates today often experience similar difficulties differentiating life in the "treatment" and "correction" sections of the same prison.\textsuperscript{125}

IV. Conclusion

The search for characteristics of deviance that the rehabilitationists initiated and that continues to this day marked a fundamental shift in the conception of offenders and punishment. The rehabilitative project in the end repudiated and abandoned the Enlightenment effort to legitimate punishment based on a conception of offenders as equal members of the community of rational autonomous persons. The Enlightenment had attempted to justify punishment based on the empathic identification of equal persons; rehabilitationism called for punishment based on pity for the deviant and the inferior.

\textsuperscript{123} Rudolf Quanter, \textit{Deutsches Zuchthaus- und Gefängniswesen von den ältesten Zeiten bis in die Gegenwart} (Leipzig, 1905), 192.


\textsuperscript{125} \textit{King v. Greenblatt}, 52 F.3d 1 (1st Cir. 1995) (operation of "Massachusetts Treatment Center for Sexually Dangerous Persons" at the "Massachusetts Correctional Institution" in Bridgewater, Massachusetts).
Whereas the Enlightenment developed an account of punishment as intracommunal and autonomous, rehabilitationism redefined punishment as a heteronomous and extracommunal practice. The offender might have retained his right to punishment, but both he and his right had changed dramatically. He no longer claimed the right to be punished because an autonomous member of the community of rational persons would demand no less; he was now on the outside looking in, desperately seeking treatment for his pathology or, according to Fichte, the permission to reenter the community after a suitable period of expiation.

By placing punishment on a heteronomous foundation, the rehabilitationist reformers reverted to the very pre-Enlightenment punishment practices of European states that they (and their Enlightenment precursors) had so vehemently attacked. Before the Enlightenment, the consolidation and maintenance of the monopoly of punishment required that the central authority in possession of that monopoly provide occasional public illustration of its awesome might over anyone who dared challenge its power in any way. There was no suggestion (or requirement) that the condemned man belong to the community of his judge or executioner, nor that his gruesome death at the stake affirm his membership in that community. On the contrary, the public infliction of punishment conclusively demonstrated both that the offender was vastly different than and vastly inferior to those who judged and disposed of him.

Rehabilitationism reintroduced this distinction between judge, executioner, and offender, but added the pretense of pity and beneficence. As a result, the rehabilitationist state could dispense punishment for the offender’s sake and base its entire punishment system on the claim that punishment benefited the offender. In pre-enlightened times, the notion of beneficial punishment would have been dismissed as absurd, if only because it would have been far more difficult to argue that offenders benefited from publicly being burnt at the stake or branded on the cheek than it was to suggest several centuries later that prolonged periods of solitary confinement were conducive to the offender’s moral reformation.

Rehabilitationism developed and enforced the distinction between judge and judged in an implicit and subtle, and therefore particularly effective way. Once the Enlightenment had heightened even (and particularly) the empathic sensibilities of those who contribute to the operation of the state, it would have been difficult to proclaim publicly the return to heteronomous punishment based on the distinction between offenders and all other persons. Rehabilitationism’s reactionary foundations and implications remained unnoticed precisely because rehabilitative punishment was claimed to benefit the offender, who had been identified as suffering from a moral sickness that cried out for treatment with the help of the developing sciences of the soul. The state was obligated to fulfill the sick man’s need, much as it was obligated to provide anyone else with treatment for other, nonmoral and noncriminal, diseases.
All in the name of benefiting the troubled offender, the rehabilitationists sharply differentiated between offenders and ordinary citizens, even defined offenders by their deviance from and inferiority to the ordinary norm. As Liszt explained, it was precisely the offender’s deviation from the norm of the honest citizen that permitted the state to massively interfere with his life plans and to subject him to reeducative punishment. By contrast, it was out of the question similarly to burden the ordinary citizen, because he was, after all, a rational autonomous person. It is of course exactly this problem, justifying the punishment of autonomous persons, that the Enlightenment had attempted to solve. The rehabilitationists escaped this dilemma, first, by denying that punishment was a wrong in need of justification, and, second, by arguing that the undeniable coercion of punishment was justifiable because those who suffered it had proved themselves to be incapable of autonomy.

The deficit of intracommunal empathic identification between judge and judged lies at the heart of the problem of crime and punishment today. Rehabilitationism contributed to this deficit insofar as it proceeded from the assumption of difference between judge and judged, observer and offender. The Enlightenment had revealed the importance of recognized identity for moral judgment and had sought to expand the definition of the relevant identity to a formal characteristic shared by all humans, rationality. Rehabilitationism, by contrast, rested on difference and inferiority, not identity and equality. It did nothing to expand the circle of empathy that defines the moral community beyond the unconsidered bonds of mutual consideration that bind persons in a family and—less so—in an ethnic group or a social class.

Today, the gap between judge and judged, between the subject and object of criminal punishment, runs deep and wide. Those who influence, make, and implement the state’s punishment practices are incapable and unwilling to identify with those upon whom these practices are inflicted. For example, as Robin West has shown, Supreme Court opinions in death penalty cases that attempt to enforce limitations upon the state’s power to punish fail to provide information that would permit their audience better to identify with the defendant. By contrast, opinions seeking to justify a relaxation of controls upon the state’s punishment power freely and frequently provide the reader with detailed information about the victim and her death. Empathic identification is limited to victims and considered beyond the pale for violent offenders.

The very same indifference toward the victims of state punishment that the Enlightenment reformers of criminal law critiqued and sought to overcome is still with us. William Bradford’s remarks in 1793 about Pennsylvania lawmak-

126. Schmidt, Einführung, 381–82, 397.
ers eerily capture today's legislative and public attitudes toward state punishment in general, and toward the infliction of state punishment in particular: "Legislators feel themselves elevated above the commission of crimes which the laws proscribe, and they have too little personal interest in a system of punishments to be critically exact in restraining its severity. The degraded class of men, who are the victims of the laws, are thrown at a distance which obscures their sufferings and blunts the sensibility of the Legislator."  

As in Bradford's Philadelphia, certain victims of state punishment today are closer to the circle of empathic identification of observers of and participants in the state's punishment system. The debtors of the golden age of criminal reform are the white middle- and upper-class "white collar" criminals of today. On the outskirts of criminality and more similar to their judges in class and race than the vast majority of violent criminals, these offenders rarely inspire the self-righteous hatred one often finds among prosecutors of murderers and drug dealers. Like the debtors of the early nineteenth century these privileged few are separated from other inmates. Yet revelations about their special privileges at so-called country club prisons do not lead to calls for abandoning the separate treatment of inmates either by discontinuing the special privileges or by improving conditions at other prisons. Instead, public anger seizes on the allegedly lax treatment of prison inmates generally.

If anything, empathic identification between judges and judged has become more difficult since the Enlightenment. The prison reformers of the late eighteenth and early nineteenth century may have struggled to empathize with violent offenders, but struggle they did. Perhaps they had witnessed with their own eyes how even the convicted murderer suffered on the gallows or in the prison cells; perhaps they at least had heard of the misery of punishment from the scores of gentlemen who at the time publicized their observations of public executions and prison conditions. The deep and pervasive misconceptions about the realities of punishment infliction today are possible because only those unfortunate enough to either work or live in prison, and their friends and families, have any idea of what the inside of a prison looks like.  

The privatization of the infliction of punishment initiated by the prison reformers of the turn of the nineteenth century has proved an unconditional success; it has removed the infliction of punishment entirely from the view of the public and, as a result, has precluded empathic identification with inmates. The differentiating method of rehabilitative theory thereby slowly but surely eroded the moral foundation of enlightened prison reform, the recognized identity of judge and judged, of observer and offender.

In the end, the absence of mutual identification, that is, of empathy, has resulted not only in the public’s failure to check the state’s exercise of its punishment might. More disturbingly, it has deprived modern punishment of its central claim to legitimacy based on the right to be punished. Offenders who do not identify themselves with the institutions that threaten, impose, and inflict punishment on them will not regard their punishment as autonomous, that is, as self-threatened, self-imposed, and, most important, self-inflicted. Instead of viewing punishment as the recognition of their membership in the community of rational persons, these offenders perceive it as the heteronomous and therefore illegitimate use of community violence against an outsider. As a result of the differentiation between observers and offenders, to which rehabilitationism has contributed by transforming punishment from the recognition of identity into the treatment of deviance, the state’s exercise of its punishment power today is both unchecked by empathy and unjustified by autonomy.