# PUNISHMENT: POLITICAL, NOT MORAL

*Thom Brooks**

## INTRODUCTION

Alan Brudner's *Punishment and Freedom* is a remarkable contribution to liberal and penal theory offering a well-argued and compelling theory of "legal retributivism."[1] This theory is an improved account of retributivism as alternative retributivist theories are thought to incorporate a problematic view of morality that only legal retributivism can overcome. Although I agree with much of Brudner's Hegelian-inspired account, I believe that it could be even further protected from problems facing retributivist theories more generally if he took greater account of insights into penal theory offered by British Hegelians. This article will explain what these insights are and how they might usefully inform Brudner's legal retributivism and further increase its attractiveness.

I will begin with a brief presentation of Brudner's legal retributivism, highlighting its attempt to inoculate itself from the common problems associated with retributivism that he identifies. I will then offer a few comments arising from the work of British Hegelians on punishment that are of direct relevance and may further assist Brudner in his task of reforming retributivism.

## I. A CRITIQUE OF "MORAL" RETRIBUTIVISM

Brudner offers a theory of legal retributivism that is meant to be a superior alternative to retributivist theories in general. He understands most alternative retributivist theories as variants of "moral" retributivism. I will first

*Reader in Political and Legal Philosophy, Newcastle University. MA, Arizona State University; MA, University College Dublin; PhD, University of Sheffield.

1. All references in the text will be to Alan Brudner, *Punishment and Freedom:* A Liberal Theory of Penal Justice (2009).

*New Criminal Law Review*, Vol. 14, Number 3, pps 427–438. ISSN 1933-4192, electronic ISSN 1933-4206.  DOI: 10.1525/nclr.2011.14.3.427.

explain his critique of moral retributivism before proceeding to his alternative in the following section.

The center of Brudner's critique of moral retributivist theories is that they claim that "moral blameworthiness for wrongful conduct and consequences is a suitable basis for liability to judicial punishment" (x).[2] Brudner says:

> the best theory of the penal law's general part . . . is not a theory about how the moral good of punishing evil is best served; nor is it a theory about when it is appropriate to express moral condemnation of blameworthy conduct or character through the penal power of the state; nor is it an account of what it takes for punishment to be a form of moral pedagogy addressed to a socially responsible agent rather than a tool for manipulating the behaviour of a rational hedonist. To put the point succinctly: the best theory of the penal law is a theory of penal right rather than one of penal morality. (15–16)

There is much to unpack in this important statement. Moral retributivists make the mistake of linking the justification and distribution of punishment with morality. That a moral good is best served is problematic because we may possess a reasonable diversity of views on what is the moral good. We do not punish the whole of morality, and Brudner is correct to offer the helpful distinction of criminal versus noncriminal immorality (49). If not all immorality is criminalized, then moral retributivists must offer us a theory of how we might distinguish between the two, and such a theory is often found wanting. Even if such a theory were offered, we lack any principle to determine how much suffering we should receive in terms of punishment proportionate to our wickedness: therefore, criminals would objectionably "be subject, not to a punishment they have imposed on themselves, but to the arbitrary opinions of the legislator and judge" (52).[3] Such a theory is unable to make best sense of the idea that the punishment should fit the crime (52). Therefore, moral retributivism is deeply flawed and an unattractive theory of punishment.

Moral retributivism runs into several other problems as well. For example, moral retributivism is wrong to believe that punishment should express moral condemnation or a form of moral pedagogy through the power of the

2. See also id. at 20.

3. "Judgments of wickedness are inherently variable and subjective, for they depend on how the individual judge weighs conduct, result, context, motive, and character" (148).

state. This is because retributivism would be reduced to an objectionable form of legal moralism whereby "it is permissible to use the criminal law to enforce the socially dominant opinion as to which evils are most deserving of public retribution" (49). Moreover, even if it were "intrinsically valuable" that the wicked are punished, it does not necessarily follow that state punishment is warranted.

For Brudner, we do not punish criminals because they have acted immorally, but because they have broken the law under certain conditions. This political and legal understanding of retributivism is Brudner's alternative theory of punishment, legal retributivism. I will now proceed to a brief explanation of what this theory is before recommending some potentially helpful theoretical refinements.

## II. PUNISHMENT: POLITICAL, NOT MORAL[4]

Brudner's alternative to moral retributivism is what he calls legal retributivism. We have seen that he rejects the view that punishment should be set in proportion to moral wickedness (50). He further argues that we ought not punish a harm with a harm, but a liberty for a liberty (53). Legal retributivism is a liberal theory of punishment. This theory then is "based on a fundamental belief common to all denominations of philosophical liberalism: that the individual agent is, by virtue of its capacity to set ends for itself, a locus of inviolable worth" (ix). This idea of the individual's inviolable worth is connected to the idea of the centrality of one's freedom. For Brudner, the difference between punishment and wrongful violence is that only the first "could be accepted by the sufferer, considered as a free and independent person" (2). Such punishment would be justified because it would be consistent with and respect his or her freedom. Wrongful violence is wrongful in its unacceptability to the sufferer as, at least in part, inconsistent with his or her freedom.

Brudner does not suppose that *actual* criminals freely chooses to be punished for their actions. So who, we might ask, accepts punishment on behalf

4. This section's title is a play on Brudner's "Penal law theory: legal, not moral" (15) and Rawls's understanding of "political, not metaphysical," as should become more clear in my discussion below. I note that Brudner later states that "[j]ustice is metaphysical and so the proper province of legal philosophy" (323).

of actual criminals? The answer is the Agent, modeled in many respects on familiar figures in the canon of the history of philosophy. Roughly speaking, the Agent is an abstraction lacking subjective ends (3–5).[5] We turn to a consideration of what the Agent would consider the appropriate response under certain conditions in assessing the permissibility of punishment. Much more could be said about the role the Agent, but I would rather turn our attention to another key part in Brudner's penal theory, which will be our focus for the remainder of this article.[6]

Brudner's legal retributivism is political and legal, not moral. He says:

> Penal law theory, on this view, is a branch of political and constitutional rather than of moral theory; for it is primarily a theory about when it is permissible to retrain and confine a free agent, not a theory about when it is appropriate to blame and make suffer an individuated moral will or character. (ix)

We determine any punishment not in relation to its immorality as such, but instead in relation to "the kind and extent of the harm caused or risked by a criminal interference" (10). Legal retributivist "desert" is not what I morally deserve as such, but rather "the connection between the recipient's wrong and the wrong he suffers" (39).[7] We understand wrongs as "the preemption of, or interference with, the capacity to choose ends" (31). This is crucial because legal retributivism does not justify punishment on the basis of harm (or at least not on harm alone). The fact that one person harms another need not justify punishment. This is because we may be able to consent to harm under certain conditions, such as "the prize-fighter" (31). What matters is our interference with the autonomous choice of others,

5. Although there are significant differences, the Agent builds upon the tradition of abstract others to whom we look in order to model more objective policy outcomes. See Jean-Jacques Rousseau, The Social Contract and Other Later Political Writings (Victor Gourevitch ed., 1997) for "the lawgiver" and Adam Smith, The Theory of Moral Sentiments (Knud Haakonssen ed., 2002) for "the impartial spectator."

6. I note in passing that the Agent's viewpoint then has an important role to play in this theory. It is therefore somewhat surprising that not much is said, relatively speaking, about this hypothetical person, and the index does not note the Agent. This is a pity because it would have been helpful to have a greater consideration of possible objections arising from the use of such a hypothetical thought experiment.

7. This is not to say that no element of moral responsibility is present in Brudner's view of free choice underpinning his theory of punishment.

not merely whether we have risked harming them (see 136). Crimes are more serious in proportion "to the importance to liberty of the interest harmed" (54).[8] Although his theory is not moral, Brudner accepts that it is not non-normative and that "there would be nothing wrong" with our calling his theory "a moral one of a certain sort," although morality plays a subordinate role to the political and constitutional (see 17).

John Rawls once wrote that his theory of justice was "political not metaphysical."[9] The idea was that our public conception of justice "should be, as fair as possible, independent of controversial philosophical and religious doctrines."[10] Justice may then possess metaphysical qualities, but our aim is to remove or limit as much as we plausibly can controversial doctrines. Likewise, Brudner's legal retributivism might be said to be political, not moral. This theory does not reject morality or normativity in toto, but it does permit them only a subordinate position in order to best inoculate this retributivist theory of punishment from the many problems affecting most other varieties of moral retributivism.

There is much that I find highly compelling in Brudner's account. I strongly agree with his critique of moral retributivism for many of the reasons noted above.[11] Additionally, I agree that some form of retributivism that is political, not moral, may be reformulated to best overcome the problems of moral retributivism while retaining many features of retributivism that possess intuitive merit, such as the idea of desert.[12] Nevertheless, there are some elements of Brudner's account that I believe we should refine and redevelop to provide a more compelling theory of legal retributivism. I will offer some possible amendments in the next section.

---

8. This theory of punishment appears to assume an interest theory of freedom that may be subject to critique from will theorists and others. For example, see Leif Wenar, The Nature of Rights, 33 Phil. & Pub. Aff. 223–53 (2005).

9. See John Rawls, Justice as Fairness: Political not Metaphysical, 14 Phil. & Pub. Aff. 223–52 (1985); John Rawls, Political Liberalism 10, 97 (1996); John Rawls, Collected Papers 388–414 (Samuel Freeman ed., 1999); and John Rawls, Justice as Fairness: A Restatement, xi, 11, 28–29 (Erin Kelly ed., 2001.

10. Rawls, "Justice as Fairness," supra note 9, at 223.

11. See Thom Brooks, Punishment (forthcoming).

12. See Thom Brooks, Punishment and British Idealism, in Punishment and Ethics: New Perspectives 16–32 (J. Ryberg & J. A. Corlett eds., 2010); and Thom Brooks, What Did the British Idealists Do for Us?, in New Waves in Ethics (Thom Brooks ed., 2011).

## III. RETHINKING RETRIBUTIVISM: INSIGHTS FROM HEGELIAN PHILOSOPHY

Brudner develops much of his theory of legal retributivism from his interpretation of Hegel's political and legal philosophy (see 45–48), but there is more we might take from Hegel's philosophy and the work of the British Hegelians, such as T. H. Green and James Seth, writing in the late nineteenth century.[13]

First of all, the British Hegelian analysis of punishment shares much in common with what Brudner offers. Amid the various disagreements between individual figures, there are some broad issues of wider agreement. One area of agreement is a rejection of moral retributivism and the central importance of freedom in their penal theories. For example, Green says:

> [Punishment] is a disapproval founded on a sense of what is necessary for the protection of rights. . . . It is founded essentially on the outward aspect of a man's conduct, on the view of it as related to the security and freedom in action and acquisition of other members of society.[14]

We do not criminalize in relation to moral depravity, but rather with a view to the security and freedom of other citizens. This rejection of immorality as a guide to criminalization may bear the influence of Kant, who says:

> The real morality of actions, their merit or guilt, even that of our own conduct remains entirely hidden from us. Our imputations can refer only to the empirical character. How much of this character is ascribable to the pure effect of freedom, how much to mere nature . . . can never be determined, and upon it therefore no perfectly just judgements can be passed.[15]

One further reason to reject moral retributivism is the difficulty in ascertaining the moral reasons behind why a person engaged in criminal

13. British Hegelians are also sometimes referred to as British Idealists. On their views of punishment, see Thom Brooks, T. H. Green's Theory of Punishment, 24 Hist. Pol. Thought 685–701 (2003); Thom Brooks, Hegel's Political Philosophy: A Systematic Reading of the Philosophy of Right (2007); Thom Brooks, Hegel and the Unified Theory of Punishment, in Hegel's Philosophy of Right: Ethics, Politics, and Law (Thom Brooks ed., 2012); and Thom Brooks, Is Bradley a Retributivist?, 32 Hist. Pol. Thought (2011).

14. Thomas Hill Green, Lectures on the Principles of Political Obligation, §197 (1882).

15. Immanuel Kant, Critique of Pure Reason, A552–B580 (N. K. Smith trans., 1929).

conduct. This is one objection that British Hegelians had of moral retributivism. A second reason is their belief that the purpose of the political state was not to enforce any particular view of morality, but to protect rights. The British Hegelians were all liberals in the classic sense, arguing that the development of our moral faculties would be inhibited if the state attempted to criminalize immorality. Freedom plays an important role in this political and legal, but not moral, theory of punishment.

There is clear overlap between British Hegelians and Brudner on their rejection of moral retributivism. Where they differ is on how we should formulate an alternative theory of punishment that incorporates a revised understanding of retribution. For example, the British Hegelian James Seth says:

> This view of the object of punishment gives the true measure of its amount. This is found not in the amount of moral depravity which the crime reveals, but in the importance of the right violated, relatively to the system of rights of which it forms a part. . . . The measure of the punishment is, in short, the measure of social necessity; and this measure is a changing one.[16]

We do not punish in proportion to wickedness, but in relation to the importance of the right violated. British Hegelians believed that laws are necessary for the continued maintenance of society and protection of individual rights. Some laws are more central than others. For example, murder is a crime violating a more central right than shoplifting. This fact offers some indication of how each crime might be punished differently. Crucially, there is no one fixed penal tariff for any crime: instead, we continue to revise our account as we reconsider the importance of the rights we have vis-à-vis each other.

These new considerations may lead to further refinement of Brudner's political and legal theory of punishment. Consider murder. Murder is clearly a case where one's autonomy is not merely infringed, but extinguished. Brudner's account cannot only offer us an analysis of why it should be criminalized, but also why it should be punished more severely than other crimes. British Hegelians can do likewise although for different reasons. They would highlight that there is perhaps no more central right worthy of protection than a right against being murdered. Likewise, both

16. James Seth, A Study of Ethical Principles 305 (1894).

Brudner and the British Hegelians are able to account for theft of private property. The property we own is linked with many of the choices we have made and is even perhaps an expression of who we are.[17] In contrast, British Hegelians might argue that there is a fundamental right to possess private property and this right must be protected from infringement. Despite differences on the reasons for justification, there is no difference in the outcome, and neither would find the theft of private property a more serious crime than murder.

Now consider a theft of public property. For example, suppose someone cut down a tree in a public forest in order to steal the wood for use in wood carving. It is unclear how such an action is wrongful because it prevents others from pursuing ends of their own choosing. Others may not enjoy woodwork nor even miss this fallen tree, given the great many others they might enjoy. An alternative is to say that the preservation of woodlands for public enjoyment may be understood as a right worthy of state protection. Stealing lumber from public forests infringes this enjoyment and deserves criminalization. Those who perform this crime deserve punishment on account of the crime's performance. The act is criminalized because it infringes a publicly protected right, not because the ends of others are somehow thwarted.

A political, not moral, conception of retributivist justice can account for this, and it does so best when changing its focus from a consideration of potential and real threats to the pursuit of ends, to the consideration of potential and real threats to rights. This is because it is possible to violate rights without preventing others from choosing their own ends. Speeding and traffic offenses are one example. No one may be prevented from acting as they choose nor be threatened by intentional or reckless behavior. This does not mean certain offenses should not be criminalized, but only that legal retributivism does not appear to account for them adequately, and so it requires some refinement. The fact that a right has been violated is what seems central to its wrongness. We may violate rights in preventing others from free choice, but it is not clear that all rights violations entail the prevention of free choice to others: the two come apart. This problem may be overcome if we incorporate some features from the legal retributivist-friendly penal theories held by British Hegelians.

17. See G. W. F. Hegel, Elements of the Philosophy of Right, §§50, 57, 62 (A. W. Wood ed., 1991).

Similarly, complications arise when we begin to consider so-called victimless crimes, such as drug offenses and many traffic offenses. The harm to others is unclear, if not nonexistent in many of these cases. More importantly, the infringement of the capacity to choose ends is even less certain. One illustration is speeding. Brudner says, "Someone who drives in excess of the speed limit does not prevent others from pursuing ends of their own choosing; yet he is liable to a penalty just for risking harm to others" (9). This position assumes all cases of speeding might involve a potential risk of harm to others.

The difficulty with this assumption is that it is problematic. For example, the United States lowered the speed limit on many interstate highways to 55 miles per hour for many years. The reason for the lower speed limit was not to improve road safety, but to ensure greater fuel efficiency in the wake of the 1973 oil crisis.[18] This is one major example of how speed limits are not always set primarily with road safety in mind, and thus, someone driving slightly faster is not necessarily wrongfully putting others at any unwarranted potential risk of harm. This may be true even where speed limits are set to ensure road safety. Thus, the limit is set for average people under good driving conditions. Although there may be good reasons pertaining to the easier administration of law to enforce the same speed limits for all, that a person drives a few miles above the speed limit need not entail that he or she knowingly (or recklessly) puts others at a risk of harm because such a person may simply be a much better than average driver.[19]

When we base our consideration of justification for punishment on the risk of harm to others understood in this way, we discover that some of the activities that we would want to criminalize fall outside such an understanding of law. Perhaps an improved account would say, following British Hegelians, that those who break the speed limit are open to punishment provided that the speed limit was established in a just way. We discern the gravity of the crime in balance against other crimes, which might suggest that aside from a minority of cases, most speeding incidents are relatively minor crimes. We can incorporate some refinement into our understanding of legal retributivism to overcome such worries.

18. The new speed limit came into force in 1974.

19. Moreover, it is worth noting that not only are traffic offenses one part of every state's criminal law, there are cases, although rare, where persons have been imprisoned for speeding offenses.

I would now like to raise a final worry concerning legal retributivism as a theory of retributivism. Brudner claims that his legal retributivism is not a mixed theory of punishment: "Legal retributivism is pure retributivism" (20; see 42, 50). This is one area where legal retributivism and British Hegelian may diverge the most. G. W. F. Hegel says:

> Punishment, for example, has various determinations: it is retributive, a deterrent example as well, a threat used by the law as a deterrent, and also it brings the criminal to his senses and reforms him. Each of these different determinations has been considered the ground of punishment, because each is an essential determination, and therefore the others, as distinct from it, are determined merely contingent relatively to it. But the one which is taken as ground is still not the whole punishment itself.[20]

This view is echoed by Green:

> It is commonly asked whether punishment according to its proper nature is retributive or preventative or reformatory. The true answer is that it is and should be all three.[21]

The purpose of criminal law and punishment is the protection of the freedom and rights of citizens. Criminals deserve punishment because they have committed a crime and not on account of wickedness. We punish in proportion to the centrality of the rights threatened. If our primary aim is the protection of rights, then this task may be achieved in different ways, and it will depend upon the particulars of a situation. For example, if criminals were educated to better understand how punishment protects the freedoms and rights of all, then they may become rehabilitated and refrain from offending upon release. Likewise, a punishment with a deterrent effect is preferable to one without, when both are otherwise equal. In neither case is rehabilitation nor deterrence the justification of punishment, with both playing a secondary role to the primacy of desert and the protection of rights. The difference is that British Hegelian accounts have the flexibility of incorporating rehabilitative or deterrent elements within their broadly

20. G. W. F. Hegel, The Science of Logic 465 (1969).

21. Thomas Hill Green, Lectures on the Principles of Political Obligation, §178 (1882). See also Bernard Bosanquet, The Philosophical Theory of the State 216 (4th ed. 1965) (1899): "The three main aspects of punishment which we have considered are really inseparable, and each, if properly explained, expands so as to include the others."

retributivist theories of punishment. This is permitted not because of consequentialist considerations, but where these elements might best address the protection of rights.

There is then some reason here for Brudner perhaps to reconsider the place of rehabilitative and deterrent elements within his avowedly "pure" retributivist theory of punishment. If our freedom and rights are better protected and preserved by incorporation of nonretributivist elements in specific circumstances under certain conditions, then it may be a mistake to reject such incorporation out of hand.

To summarize: I believe that the alternative to moral retributivism offered by the British Hegelians can account for both the crimes that Brudner may want his theory to address as well as crimes that his theory has more difficulty addressing. My recommendation is not that legal retributivism should be rejected, but that it be further refined to accommodate more closely the Hegelian elements at its heart. This move might assist Brudner's legal retributivism in becoming even more compelling than it already is. One recommendation is to conceive punishment as a response to an infringement of right.[22] A second recommendation is that legal retributivism need not be "pure"; a theory more open to considerations, such as rehabilitation and deterrence, might better engender the penal aim of the protection of rights.

## CONCLUSION

Brudner's critique of moral retributivism and defense of legal retributivism is genuinely highly compelling, and I offer mere refinements. Our views on punishment share far more in common than not, and I found much of his analysis first rate, provocative, and well argued. My criticisms concern only how this compelling, well-argued theory of legal retributivism might be even more convincing.

I believe the key lies in incorporating certain insights form British Hegelians—and this should be unproblematic as both they and Brudner find inspiration in Hegelian philosophy. In fact, they share much in common, but Brudner's views might be refined in two respects. The first is that

22. Such considerations need not entail any major revision of legal retributivism as this theory (see Brudner, supra note 1, at 34–35).

it might be more helpful to reconceive punishment as the protection of freedom and rights rather than the protection of free choice. The second is that Brudner's account should retreat from its pure retributivism and adopt nonretributivist elements under certain conditions. Brudner is correct that law is necessarily complex, and perhaps such a reformulation might best account for such complexity. In any event, Brudner has done us all a great service in offering such an attractive theory of punishment that will warrant much discussion in the years to come.