COMMENT ON ALAN BRUDNER'S *PUNISHMENT AND FREEDOM*

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Prof. Brudner's important book, *Punishment and Freedom*,[1] is first and foremost a contribution to criminal law theory. Others more qualified than I in the field of criminal law theory are discussing its merits and flaws in this symposium and elsewhere; they will no doubt continue to do so for some time, given its depth, its ambitious scope, and the fact that it develops a very unusual, perhaps unique perspective, rather than performing the usual theoretical manouevre of siding with one existing camp against another.

Given my distance from criminal law theory, my comments will have to be somewhat tangential to the book's project. That may not be wholly inappropriate, however, since this book, despite its deceptively staid, seemingly straightforward style, turned out to have numerous tangents, offshoots, and subplots, many of which involve the most contentious issues in legal and social theory today. To the extent that the tangents and subplots cannot be completely incorporated into the resulting synthesis (an open question, in my view), the persistence of theoretical loose ends will arise not from any failure on the author's part, since the rigor demonstrated in this work is second to none, but rather from the brute historical fact that we do not live in 1811 but in 2011.

Of course theorists differ on the proper weight that should be given to evidence of historical change. Prof. Brudner does not give history much weight: he sees harmony and purposefulness where others, including myself, see an uncoordinated collection of mechanisms deploying heterogeneous

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1. Alan Brudner, Punishment and Freedom: A Liberal Theory of Penal Justice (2009). References in text are to this title.

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powers and knowledges. For many theorists, from legal pragmatists to Foucaultians, the starting postulate of any theoretical exercise carried out now is that it has become nearly if not completely impossible to see harmony, coherence, and justice in any collectively and contingently built, multipurpose assemblage, including the criminal law.

Since I do not see law as the sort of entity that can be theorized in a philosophical manner, I cannot help but disobey the customary law of scholarly commentary. I cannot help but look hard for evidence that history does matter, as well as emphasizing the tensions within the text in such a way as to push back against the synthesizing move. This is perhaps impolite, given the occasion. But, looking at the bright side, precisely because I am not already committed to any of the legal theories that are criticized, or more accurately put in their place, in this book, it should be possible for us here to find a bit of common ground, even if it this thin common ground is made up of little but shared dislikes.

Overall, this book extends an explicitly anti-postmodern but also somewhat anti-modern invitation to appreciate the criminal law as a harmonious but internally differentiated edifice, one that is unified but not univocal, coherent but complex. It is sure to alienate mainstream liberals, conservative moralists, and postmoderns alike—not a small feat for a single book. Thus, whereas philosophically and politically my own positions are diametrically opposed to Prof. Brudner's, I will seek inspiration from my favorite philosopher, Nietzsche, at least to try to lend a sympathetic ear to a colleague who is so valiantly defying all of the available intellectual fashions with work that is resolutely out of season. In this spirit, let me proceed to make two comments.

I. LAW AS LAW . . . AND LAW AS JUSTICE?

Punishment and Freedom sets up its own terrain (thus enacting the Kantian ideal of moral and intellectual autonomy) by refusing the stance that grounds most legal theory, which involves applying to law a more general theory. Brudner confines his critique of this reductionist and abstracting move, for the most part, to those who make criminal law a subcategory or a practical enactment of morality; but the book also performs a rejection of all projects that purport to theorize law but actually avoid doing so, since they apply to law analyses elaborated elsewhere. Those who see law as a

subcategory of patriarchy or a subcategory of colonial domination, or who assume that law reform must consist in making law follow the dictates of rational choice economics, stand indicted by this book as abdicating the fundamental task of legal theory.

I might add that Brudner's much-needed critique applies equally well to those outside of law schools who theorize law by using an all-purpose social theory cookie cutter—for example, European sociologists of law who argue about whether Niklas Luhmann or Pierre Bourdieu is a better theorist of law, when in fact neither of those thinkers have a theory of law, since all they do is apply to law their existing theories of social organization.

But even though returning from "law and society" to "law and law" is a welcome move, in the current intellectual climate of economic, social, and psychological determinisms, it seems to me that this book could be criticized for sweeping under the rug a distinction that many regard as crucial: that between law and justice. Justice is not directly discussed—indeed, it does not even rate an entry in the index. But here and there one gets a sense that a good and fair legal system is not simply more just than the alternative but is justice itself. For example, in criticizing moralism, Brudner writes, "By a legal theory of criminal desert I mean one that investigates the conditions under which coercion of the agent is *just* rather than one that investigates the conditions under which the censure of the character is appropriate" (17).

Many legal theorists, especially those who take Kant's work as applicable to today's legal system, may not find anything objectionable in this statement.

But I hope it is not overly "external" to offer the observation that an important tradition in ethical and political thought, one that goes from Walter Benjamin to Derrida, has argued that if we take legality as theoretically identical with justice, or even as theoretically coterminous with it, we lose the ability to see the necessary limits of any possible law. Justice, the Benjaminian tradition argues, is precisely that which law can never deliver. Justice always eludes us, in our personal interactions as much as in our legal system—but especially in the latter, which can never, by definition, pay the proper respect that is due to the concrete specificities of others, the concrete ethical demands that are owed to those who have gone before us and to the generations to come.[2]

2. This is elaborated by Jacques Derrida in his 1992 essay "Force of law," which is in large part a commentary on Benjamin's "Theses on the philosophy of history," and in the books

Derrida's work on friendship and justice is not as irrelevant here as it might seem. Admittedly, Derrida is known for his relentless separation of ethics from law, and for his insistence that justice is an intrinsically temporal and thus an always unfinished project—a position that is totally at odds with Hegel's elaboration of a self-contained state that incorporates the realm of ethics and thus cannot be criticized as ethically deficient, since ethics is no longer outside. However, Derrida is arguably the most important practitioner of dialectical thinking of our time and one who has had some influence on legal philosophy. Contextualizing Prof. Brudner's book in relation to other examples of current-day dialectical theorizations of law, instead of contrasting it to either the Kantian tradition or to moral philosophy (as others will no doubt do), it becomes apparent that the "negative dialectics" tradition—if one can call it a tradition—converges with Brudner's analysis in one important respect, namely in carrying out a dialectical critique showing that formal individual agency does not need any socialist or other external critique, since it undermines itself precisely by its very formality. By contrast, in keeping with the negative dialectics approach, Derrida's dialectical critiques, of individualism and of everything else, never result in syntheses. His notion of "différance"—the inevitable remainder that can never be incorporated through *Aufhebung* and synthesis—is in fact a sustained effort to repurpose dialectical analysis for use by those who no longer believe that a god's-eye view, of the criminal law or of anything else, is possible for human beings.

Contrary to the myth that all postmodern thinkers are moral relativists and do nothing but mock the long history of thinking about justice, Derrida, at least in his work on law, justice, and politics, argues that even if truth is dead, justice lives—but in a nonpositive sense. Justice is the inexpressible remainder that cannot be identified, tagged, and recuperated by any legal system, and that exists, like the ghost of Hamlet's father, insofar as it moves someone to act responsibly and ethically.

Personally, I have trouble with Derrida's invocation of justice, because in insisting so exclusively on that which separates law from justice, calculation from ethics, he refuses to give justice any determinate content whatsoever. In my view this indeterminacy is not in keeping with the dialectical method (and in addition, it smells suspiciously of religion).

Spectres of Marx and *The Politics of Friendship*. See Mariana Valverde, Derrida's Justice, Foucault's Freedom: Ethics, History and Social Movements, 24 Law and Social Inquiry 655–76 (1999).

But in the context of reflecting on a book that valiantly insists that Hegel's *Geist* is not a more or less useful fiction but an objective reality, it is interesting to note that, to argue that justice does make concrete demands but that these demands cannot be defined positively, Derrida has recourse to none other than the figure of the spectre. And more to the point, he does not shy away from the other word for ghost, "spirit."

No doubt a Hegelian would diagnose Derrida as being in a state of dialectical denial. Having realized that Enlightenment freedom is self-contradictory, but refusing to admit that incorporating Enlightenment freedom into a post-Enlightenment complex organic synthesis is either possible or desirable, Derrida probably appears to the strict Hegelian as standing forever at the edge of the spiritual. He is dipping his toes in, but persists in refusing the final synthesis that is Spirit with a capital S, an entity quite absent from Derrida's pluralistic menagerie of small-s spirits.

It is important to note that Derrida's negative and spectral justice does not constitute either a critique or an attack on Kantian or Hegelian legal theories. It is written in an incompatible, although still noticeably Hegelian, language. And as I just mentioned, a Hegelian theorist could easily incorporate Derrida's negative dialectics of law and justice into his system by regarding it as an early, "childish" moment of refusal (perhaps similar to the French Revolution as portrayed in the *Phenomenology*). I am not thus offering this part of my comment as a critique of this book, but simply as a reminder to those who cannot identify with either Kantian or Hegelian legal philosophy that the tradition of negative dialectics, although taking Hegel's method and using it against the grain, does have more to say about justice—and law—than is generally admitted.

II. DOES SYNTHESIS HAVE LIMITS? SOCIAL CONTRACT THEORY FROM A HEGELIAN PERSPECTIVE

Those criminal law theorists who are avowed Kantians will no doubt criticize this book for incorporating "foreign" socio-political elements into an intellectual enterprise that in their view ought to remain purer. But I think that non-Kantian readers of this book will find that a heavy dose of Kant, and an overlapping dose of social contract theory, sits at odds with the overt commitment to Hegel. This is the contradiction I wish to explore in my second comment.

Most of the substantive discussions in the first three quarters of the book owe a great deal to the Enlightenment ideal of personal intellectual and volitional autonomy for which Kant provided the most thoroughoing philosophical justification. And much of the discussion of the role played by formal autonomy in the reconciliation of state punishment with individual freedom relies not on Hegel but on a more or less Hobbesian argument. As is well known, for Hobbes, individuals who have freely surrendered the natural power to punish others that can only be exercised in the state of nature cannot, once they are in civil society, complain when state punishment is applied to them, since by willing the sovereign into existence—in the social contract—they have, consciously or not, also willed to receive punishment if they should break the sovereign's law. And as is equally well known, for Hobbes as for subsequent social contract theorists, an empirical, contractual, conscious decision to give up one's natural rights to the sovereign (or to the community) is not required to make punishment justifiable under liberal tenets. Eligibility for punishment is the price one pays for citizenship, one might say. And that is how our legal system operates, in theory.

But just as knowledge of risks and consequences is routinely imputed to persons, in law, so too consent is imputed by social contract theory; and the somewhat questionable, often counterfactual imputing manouevre is not thought to vitiate the consent at all. In Brudner's account as in other social contract theory, the difficulties of imputing the formative political act that is the consent to obey the sovereign's rules are circumvented by creating an intermediate layer, an in-between (spectral, Derrida would say) entity: the hypothetical, purified rational agent made famous in John Rawls's version of the social contract. As Brudner puts it, the empirical person may not actually consent to being punished; but it does not matter whether the actual criminal rejects the legal system's authority, even for good reasons. What matters is that a hypothetical rational agent would indeed freely consent, since the consent to being (fairly) punished is contained implicitly in the original social contract. Thus, the exercise of punishment is not incompatible with individual freedom, and could even be seen as one of the manifestations of that original political freedom that acts as the premise of liberal political theory. This solution to the problem of state coercion is consistent with the general outlines of social contract theory. But I wonder whether describing this imputed consent by legalistically stating that "the notional agent is a fiduciary of the real one" (5) is consistent with how citizenship is elaborated later in the book.

More generally, I am not sure whether it is possible to reconcile Hegelian notions of politics and the state with social contract theory. Clearly Alan Brudner believes that it is possible, and would perhaps point to Hegel's own synthesis of civil society and the state in *The Philosophy of Right* as the relevant authority.

But *Punishment and Freedom* does not end with an ode to the Hegelian state. It ends rather with a reflection on "dialogic community." In my view, both "dialogue" and "community" are misleading terms here, if the synthesis of individual agency and collective order that he has outlined in this book is meant to represent Hegel's *Geist*. I will thus end by (typically for a Nietzschean, he will complain) stressing the differences, the nonidentity, between Hegel's terminology and Brudner's.

"Dialogic community," today, connotes communitarian political theory and/or Habermasian explorations of communicative action. For example, in the restorative justice writings that Brudner uses to illustrate the role of community in criminal law, the idea is that, rather than having a judge apply state law to punish an offender, it is sometimes more appropriate for the relevant, small, face-to-face community, including the accused's friends and family as well as the victim's, to meet together and dialogue. (Although in most cases the dialogue is not regarded as sufficient, and is followed by some kind of restitutive or community-based sanction.) The notion of dialogue has some affinity with Hegel's famous dialectic of recognition in the "master and slave" section of the *Phenomenology*—but in my view there are too many fundamental differences between the two notions, since the liberal or communitarian notion of dialogue presumes that equal individuals exist from the start, whereas in Hegel's antiliberal account self-consciousness is the product, not the originator, of the master-slave dialectic. And that dialectic is anything but Habermasian and egalitarian. Thus, although "dialogue" has been deployed by many philosophers and political theorists to move away from the strict individualism of Hobbes and Locke, I am not sure whether there can be such a thing as a Hegelian dialogue. The servant who ends up realizing his freedom, thus undermining the master's illusion of autonomy, in the *Phenomenology*, doesn't use dialogue to move the dialectic along: he uses labor.

Be that as it may, let's now spend a minute on the other term, "community." Of course this term is as multivocal as "freedom," and there is no reason why it could not be deployed in a Hegelian manner, however unusual that move may be. However, to the reader of 2011, the term "community" has a

distinctly antistatist ring to it. We talk about "community agencies" when we mean social service organizations that are not branches of a ministry. We talk about "community safety" by contrasting it to the security of the state. We talk about "care in the community" to mean care outside of mental hospitals and prisons. And so forth. Governing through community is not exclusively a neoliberal strategy, since minority groups and feminists have also mobilized the considerable rhetorical resources of "community." But governing through community is definitely other than, and sometimes the opposite of, governing through state mechanisms and state personnel.

Can the various experiments in governing through community, sometimes dialogically, be subordinated by or recuperated in a nation-state[3] that has assumed the mantle of community but is in fact the Hegelian *Geist*? Logically, "state" can subsume and incorporate "community," both semantically and in terms of practical governance arrangements.

But for many of us, "community" is a useful word not so much because it invokes neoliberal enterprise rather than state planning, but because the term highlights and valorizes precisely the kind of intrastate differences that Hegel would have deplored as unfortunate hiccups in the slow actualization of Spirit. However they are diagnosed, these differences exist all around us and do not seem to be disappearing or being synthesized. They seem instead to be gaining strength and legitimacy, by contrast to the relative decline of the more unified citizen identity found in, say, T. H. Marshall's theories of citizenship and postwar Keynesian welfarist projects.

The historical development of community talk, which does not seem to be ephemeral, presents difficulties for any project to think about state punishment as a unified project by a unified entity. And it creates some serious ambiguities. For example, many Canadians will happily agree that "dialogic community" is an important part of the criminal justice process. But they will not agree to reading "community" as Hegel would. Brudner might argue that community justice experiments may believe that they are enacting small-scale, identity-based communities in opposition to the state, but that in fact they are helping, unknowingly, to take the criminal law away from strict individualism and into a higher, more organic condition. And he might even point to a number of more or less successful examples, within

3. On p. 318 in the concluding section, Brudner quietly mentions the United Kingdom and Canada as examples of political community. This imports Hegelian statism into a discussion that would otherwise have had civic-republican, communitarian connotations.

the Canadian criminal justice system, that involve combining due process with a concern for community cohesion.

But I think that the practical experiments in combining legal mechanisms that have contradictory philosophical presuppositions do not amount to a real synthesis. At the practical level it is not difficult for individualism and communitarianism, and even some statism, to coexist. The criminal justice system has many different, often legally separate processes, carried out by distinct sets of officials and professionals, and therefore the philosophical contradictions become less visible than they would be if the different processes happened in the same place at the same time. One can use Kantian ideas to convict and then quickly invoke community or therapy when making probation decisions. But pragmatic combinations (which are often not even combinations but mere juxtapositions) are the sort of ad hoc solution that any Hegelian approach would resist.

Indeed, juxtapositions that smooth things over superficially and prevent real challenge can be seen from a Hegelian perspective as very unhelpful, since the dialectic can only go forward when one element or moment insists (always unsuccessfully, of course) on being pure and autonomous.

In the end, I do not think that there is an objective way of settling the question of whether the variety of rationales and logics that do in fact exist in the criminal law can be theoretically, philosophically integrated, or whether peaceful coexistence on pragmatic grounds is all that is possible (or desirable). I am inclined to the latter view—predictably for someone who likes Nietzsche, and who in addition works among criminologists.

But for those who believe it is indeed possible to see the criminal law, and the state more generally, as a unified whole that successfully incorporates individual autonomy with social cohesion, within a single state institution, *Punishment and Freedom* gives a legally and conceptually rigorous answer. I do not think that proponents of either moralism or sociologism will find it easy to defend their views about the criminal law against the sustained and carefully constructed onslaught that is this book.