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ELABORATING
NEGATIVE RETRIBUTIVISM

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Elaborating Negative Retributivism

Richard L. Lippke

Thom Brooks' smartly-argued overview of punishment theory and some of its practical implications provides an excellent opportunity to think further about some issues with which I have wrestled previously. In particular, I have come to believe that some version of negative retributivism might be the most defensible approach to legal punishment's justification. Negative retributivism is an intuitively plausible theory because it incorporates both crime reduction and retributive elements into a unified approach. One question, as Brooks notes, is whether this unity is more apparent than real.¹ Can it really be possible to bring together into a coherent theory the "forward-looking" elements of a crime reduction approach with the "backward-looking" elements of a retributive one? A second question, as Brooks also notes, concerns how to understand the retributive constraints on our efforts to reduce future offending that the theory incorporates. How do these constraints amount to anything more than arbitrary stipulations, taken on by crime reductionists in order to craft a theory that is more palatable?² Brooks is skeptical about negative retributivism, preferring instead a "unified theory" that conceives of legal punishment's task as the "protection and restoration" of rights.³ My aim in the discussion that follows is

¹ Thom Brooks, *Punishment* (London: Routledge, 2012), p. 98.

² *Ibid.*, p. 99.

³ *Ibid.*, p. 131.

both to elaborate negative retributivism and suggest that it offers a clearer and more compelling approach to the justification of legal punishment than Brooks' unified theory.

The discussion is divided into three sections. In the first, I clarify what negative retributivism is, arguing that Brooks has to some extent mischaracterized it. In the second section, I address the two challenges to the theory that Brooks poses: In effect, these come to the question whether it is a coherent theory or a patched together set of more or less arbitrary stipulations about legal punishment. In the third section, I briefly consider Brooks' unified theory, contending both that Brooks' account is underdeveloped and that negative retributivism can be usefully conceived as instrumental in securing a system of legal rights.

I

What Negative Retributivism Is

As it is standardly formulated, negative retributivism posits that the general justifying aim of legal punishment is the reduction of crime, whether such reduction is effected by deterrence, incapacitation, or rehabilitation. However, negative retributivism insists that the pursuit of that aim is to be limited by two retributive constraints, one forbidding the intentional or knowing punishment of the innocent, the other forbidding disproportionate punishment of the guilty. According to negative retributivism, as contrasted with positive retributivism, we need not punish the guilty (if doing so would not, for some reason, reduce crime) or proportionately punish the guilty (again, if doing so would not, for some reason, reduce crime). It is undeserved punishment that negative retributivism rules out; deserved or

(fully) proportional punishment is not required by it. Brooks' characterization of negative retributivism includes the first constraint, but misses the second, as he claims that the theory permits disproportionate punishment of the guilty if crime reduction considerations so dictate.⁴ This is mistaken, or so I contend. Negative retributivism is premised on an awareness of the pitfalls of a simple crime reduction approach to legal punishment's justification. It has been argued that such an approach permits both punishment of the innocent and over-punishment of the guilty. The two retributive constraints have been thought necessary to address these defects. Recently, I argued for a third constraint, one forbidding degrading punishment of the guilty.⁵ I come back to this in the next section.

Brooks also suggests a rule-utilitarian grounding of the retributive constraints.⁶ This, in turn, leads him to question whether they should be seen as operating in cases in which adhering to them would not produce the best overall crime reduction consequences. Why not punish the innocent, or over-punish the guilty, if doing so would, in a given set of circumstances, reduce future offending more than other measures that we might take? However, the retributive limits on legal punishment that negative retributivism incorporates are more commonly conceived as deontological side-constraints. Thus, they rather more firmly forbid punishment of the innocent or excessive punishment of the guilty, even if doing so would reduce crime. Yet as Brooks might point out, this raises the question of what sort of grounding, if any, these constraints have. We might also wonder how "firm" they should be conceived to be.

⁴ *Ibid.*, p. 33.

⁵ Richard L. Lippke, "Some Surprising Implications of Negative Retributivism," *Journal of Applied Philosophy* 31 (2014): pp. 49-62, at 55.

⁶ Brooks *Punishment*, p. 98.

II

Addressing Brooks' Challenges

Is there a plausible account of the retributive constraints, or are they little more than stipulations taken on by crime reductionists desperate to save their theory? I believe that there is such an account, though I also believe that its elaboration might produce a more retributively-flavored theory of legal punishment than negative retributivism is often conceived to be.

To begin with, we should not intentionally or knowingly punish the innocent because they do not deserve legal punishment's characteristic censure and hard treatment, neither of which make sense unless imposed on individuals who are capable of morally responsible action and have engaged in seriously wrongful and therefore proscribed conduct.⁷ The innocent have not violated the criminal law, or if they have done so, they lack the kind of culpability that makes their conduct worthy of legal punishment's condemnation.⁸ Also, legal punishment of those who have violated the criminal law ought to reflect the gravity of their wrongs.⁹ If it does not, then it is not responsive to them as individuals, censuring their conduct in ways that are appropriate given the nature and extent of their wrongs.

Anticipating Brooks own unified theory of punishment, with its grounding in a scheme of justified legal rights, we might say that the innocent have acted in ways consonant with their legal rights and have thereby respected, or at least deferred to, the

⁷ For the notion that legal punishment involves censure and hard treatment, see Andrew von Hirsch, *Censure and Sanctions* (Oxford: Clarendon Press, 1993).

⁸ Retributivists standardly recognize a variety of exemptions, excuses, and justifications which shield from penal sanctions those who have technically violated the criminal law.

⁹ See von Hirsch, *Censure and Sanctions*, p. 15.

equal rights of others. Or, if the innocent have infringed upon others' rights, they have done so accidentally, justifiably, or excusably and so do not merit punishment. It would seem deeply incoherent to set up a system of legal rights, with the aim of seeing to it that all citizens can fully and equally enjoy them, and then to devise institutions of legal punishment that are indifferent to, or worse, scornful of, whether individuals have remained within the bounds of their rights and so behaved responsibly. Of course, it might be wondered why we should not, on occasion, infringe the rights of the innocent, by legal punishment, in order to deter future right violations of more numerous or grave kinds.¹⁰ But negative retributivism should be conceived as forbidding trade-offs among citizens' rights of this kind, because they would allocate censure and hard treatment in ways that is unresponsive to the conduct of individuals. For similar reasons, negative retributivism forbids excessive punishment of the guilty, even if it would better deter future right violations. Excessive censure and hard treatment are also unresponsive to the character of the misconduct of offenders, not taking proper account the ways and extent to which they infringed others' rights and allocating blame accordingly.

However, there are hard cases for negative retributivists and these suggest that its constraints need not be conceived as absolute. For instance, Antony Duff and Stephen Morse have both argued, though in different ways, that preventive detention of "dangerous" individuals past the point of their deserved punishment for previous offenses might be warranted in some

¹⁰ Such an approach would be one which Robert Nozick once referred to as involving "utilitarianism of rights." See his *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 28.

cases.¹¹ Such detention can be conceived as deliberate punishment of the “innocent,” in the sense of confining individuals when they do not deserve it. Or it can be conceived as disproportionate punishment of the guilty—above the level at which they deserve it for their past crimes. In either case, if the arguments of Duff or Morse are convincing, they suggest that the retributive constraints might be construed as presumptive only, albeit strongly so. Importantly, the trade-off of rights contemplated in such cases is responsive to the conduct of the individuals to be detained in ways that do not run afoul of the retributive insistence that punishment be imposed only on the blameworthy. This is because there might be individuals whose past actions strongly suggest that they have enduring dispositions towards violence, such that we might believe that we have little choice but to abridge their rights in order to protect the rights of others. This, in turn, suggests that the retributive constraints, though not entirely inflexible, can be rebutted only by certain kinds of considerations. Moreover, it could be argued that the “dangerous” individuals whose rights are thereby abridged ought to be compensated for their losses or at least that the conditions under which they are detained ought to be made as non-punitive as possible.¹²

Beyond the two standard retributive constraints, a third one seems needed. Given the ways in which the legal punishment of individuals makes sense only against a conceptual and normative

¹¹ R. A. Duff, “Dangerousness and Citizenship,” in A. Ashworth and M. Wasik (eds.), *Fundamentals of Sentencing Theory: Essays in Honor of Andrew von Hirsch* (Oxford: Clarendon Press, 1998), 141-63, and Stephen J. Morse, “Blame and Danger: An Essay on Preventive Detention,” *Boston University Law Review* 76 (1996), pp. 112-55.

¹² For doubts about the feasibility of non-punitive detention, see my “No Easy Way Out: Dangerous Offenders and Preventive Detention,” *Law & Philosophy* 27 (2008), pp. 383-414.

backdrop according to which they are conceived as capable of morally responsible action, legal punishment should not be allowed to turn them into beings of another kind, thereby degrading them in the process. In Jeffrie Murphy's memorable words, we should not turn those punished into "terrified, defecating, urinating, screaming animals."¹³ Punishment that does so cannot be rationally engaged with by its unfortunate recipients as expressing appropriate public opprobrium of their conduct; neither can it be taken to heart by them and thereby used as an impetus to moral self-improvement. Beyond the obvious cases of torture or mutilation, sanctions such as prolonged solitary confinement or imprisonment under radically corrupt or insecure conditions, can make it nearly impossible for offenders to retain and exercise their moral capacities. Even more ordinary imprisonment of the wrong kinds can degrade, especially if prolonged.¹⁴ Like the more familiar retributive constraints, the non-degradation constraint can be cast negatively; it need not entail devising legal sanctions designed to positively promote the moral capacities of offenders. Nonetheless, a well-informed and thoughtful approach to crime reduction must acknowledge both the cost and limited efficacy of legal punishment, and thus recognize the advantages of convincing and enabling offenders to refrain from further misconduct all on their own. This points us in the direction, I believe, of raising the profile of rehabilitation within the crime reduction element of negative retributivism. Put simply, we will see less crime in the future if offenders are not

¹³ Jeffrie G. Murphy, "Cruel and Unusual Punishments," in M. A. Stewart (ed.), *Law, Morality, and Rights* (Dordrecht: D. Reidel, 1979), pp. 373-404, at 387.

¹⁴ See, for instance, Craig Haney's disturbing account of the effects of supermax confinement in his "Mental Health Issues in Long-Term and 'Supermax' Confinement," *Crime & Delinquency* 49 (2003), 1pp. 24-56.

degraded (as the retributive constraint enjoins) but also prodded and helped to be more morally responsible.¹⁵

Assuming that the preceding provides an intelligible backstory for the retributive constraints, how should we conceive their normative character within a theory of legal punishment? As noted earlier, Brooks posits a rule-utilitarian grounding for them, which he sees as fragile. I have suggested that they are better construed as deontological side-constraints on legal punishment, though perhaps not absolute ones in all cases. But are they ever absolute? And if they are presumptive only, then what kinds of considerations will rebut the presumptions and how strong must those considerations have to be? I can do little more here than adumbrate answers to these important questions.

Even if punishment's censuring and hard treatment components must be keyed to the nature and severity of the legal wrongs individuals have committed, it is apparent that the concept of proportionality in punishment is a somewhat loose constraint on the sanction scale, unless sanctions become either cardinally or ordinally disproportionate in the extreme.¹⁶ Very harsh sanctions for minor offenses might be absolutely ruled out by desert considerations. Shoplifters, for instance, should not be punished with life sentences, no matter if doing so would optimally reduce crime. Similarly, though somewhat more controversially, very mild sanctions for serious offenses seem to sleight the victims of crimes and thus fail, absolutely as it were, to censure offenders proportionally.¹⁷ Murderers should not be

¹⁵ See Lippke, "Some Surprising Implications of Negative Retributivism," p. 57.

¹⁶ For the distinction between cardinal and ordinal proportionality, see von Hirsch, *Censure and Sanctions*, p. 18.

¹⁷ Some theorists broadly sympathetic to negative retributivism argue that it should be conceived as placing only upper limits on sanctions, not as requiring

punished with modest fines, or the rights of their victims will be diminished to the point of insignificance.

When it comes to ordinal proportionality, again, the constraint seems close to absolute when the comparative injustices are extreme. Murderers should be punished more harshly than shoplifters come what may, or else punishment will utterly fail to be apportioned to blame. Yet as we move away from clear instances of either cardinal or ordinal disproportionality, matters become murkier. It is widely agreed that there are no uniquely proportional sentences for the various crime types.¹⁸ At most, considerations of cardinal and ordinal proportionality might yield sentence ranges for each of the various different crime types, within a sentencing scheme that ranks crime types from less to more serious. Such a scheme could permit some overlap of the sentence ranges for higher and lower-ranked crimes types, in recognition of the possibility that some crime tokens will be unusual in the harms they produce or the culpability with which agents acted.¹⁹

Offense tokens should be assigned sentences within the relevant ranges. So long as the ranges are not permitted to become too large, like offenses will be sentenced roughly alike, in accordance with a plausible ordinal proportionality constraint. In determining sentences for offense tokens, we could conceive of desert considerations as being weakly presumptive. This would mean that like offenders ought to receive like sentences, unless

some minimal level of punishment for crimes. On this, see Richard S. Frase, *Just Sentencing: Principles and Procedures for a Workable System* (New York: Oxford University Press, 2013), pp. 25-31.

¹⁸ See R. A. Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001), pp. 133-34, and Jesper Ryberg, *The Ethics of Proportionate Punishment: A Critical Investigation* (Dordrecht: Kluwer Academic, 2004), p. 131.

¹⁹ Frase, *Just Sentencing*, pp. 48-49.

clear and empirically validated crime reduction considerations support moving them upward or downward within the relevant sentencing range.²⁰ To move the sentence for a crime token out of the relevant range, we might insist that only very powerful considerations would suffice, such as those cited previously in cases of offenders whose persistent violent dispositions have been amply demonstrated.

The non-degradation constraint seems near absolute in strength when it comes to the more extreme ways in which punishment practices can destroy or defeat the moral capacities of offenders. Proscriptions against torture or mutilation ought to be stringent; the same seems true of bans on extended solitary confinement, slow starvation or exposure to constant physical brutality or insecurity, or the failure to treat prisoners' medical conditions. Again, if legal punishment is to communicate censure to offenders, which is to be understood and taken to heart by them, then sanctions which disable moral understanding or render it moot must be avoided, more or less at all costs. There are other forms of hard treatment that will reduce crime without resorting to such sanctions. Still, legal sanctions can be somewhat at odds with preserving the moral capacities of offenders without being starkly so, or might be at odds with doing so only if they persist over the fairly long term. And there might be reasons to employ sanctions of these kinds that are sufficiently compelling in some cases. For instance, there might be circumstances in which it makes sense to isolate offenders from the rest of the prison population for some period of time—to discipline them or foil

²⁰ Frase argues that recidivist premiums—that is longer sentences for offenders with previous criminal histories—might be justified in some cases because empirically validated. However, such premiums should not be typically permitted to move an offender's sentence for her most recent offense out of the relevant sentencing range. See Frase, *Just Sentencing*, Chapter 4.

repeated escape attempts by them—even if doing so is in tension with the non-degradation constraint. This, in turn, suggests that the constraint is presumptive only when the losses or deprivations imposed by legal punishment are less blatantly degrading. Still, the authorities should have to prove that the conduct of the individual in question is the basis for the further infringement of his rights when it risks degradation. Also, the constraint might be held to leave a trace, requiring the authorities to undertake positive measures to ameliorate the impact of whatever losses or deprivations are needed to protect the rights of others.

III

Brooks' Unified Theory

I believe that Brooks is right to seek a theory that both (a) incorporates as many of the standard justifying aims of legal punishment as can be coherently accommodated, and (b) does so in a principled—as opposed to patched-together—fashion. I say this as someone who has over the years defended positive retributivism but who has gradually come to the conclusion that crime reduction plays an ineliminable role in legal punishment's justification. It is not the censoring or communicative component of legal punishment that gives me pause, but the hard treatment component. As von Hirsch wisely pointed out some years ago, it seems difficult to account for that component without conceding that its role is partly to discourage future offending or render individuals less capable of it for some period of time.²¹

²¹ von Hirsch *Censure and Sanctions*, p. 12. Of course, there have been attempts to explain the hard treatment element of legal punishment according to

Importantly, conceding a crime reduction element to legal punishment need not render us vulnerable to Hegel's charge that a deterrent element to legal punishment means we are simply threatening people, as a man "lifts his stick to a dog."²² As von Hirsch noted, the censuring aspect of legal punishment can be conceived as communicating with us as beings capable of understanding the justified character of legal constraints on our conduct and the importance of observing them. At the same time, we can acknowledge the powerful internal and external forces that incline us towards wrongdoing, and thus the need to provide ourselves with a (not disproportionate) prudential incentive back-up to shore up our resolve to behave responsibly, even if this might mean that some of us will abide by the law for purely prudential reasons.²³

I also believe that Brooks is on the right track in pointing to a theory of human rights and the protection of such rights within a legal scheme as providing some of the conceptual and normative backdrop for a theory of legal punishment. However, I am less convinced than he appears to be that an account of human rights can be quickly or easily mined for a complete theory of legal punishment. Numerous approaches to legal punishment seem consistent with its serving a scheme of legally defined and protected human rights.

Brooks' unified theory is premised on the notion that legal punishment "protects and restores" the legal rights violated or infringed by criminal offending. Yet Brooks does not spend

retributive logic. See, for instance, John Kleinig, "Punishment and Moral Seriousness," *Israel Law Review* 25 (1992), pp. 401-21, and R. A. Duff, *Trials and Punishments* (Cambridge: Cambridge University Press, 1986), pp. 240-54.

²² G. W. F. Hegel, *The Philosophy of Right*, T. M. Knox (trans.), (Oxford: Oxford University Press, 1965), p. 246.

²³ von Hirsch, *Censure and Sanctions*, p. 13.

enough time unpacking this crucial notion. There are at least three different ways in which legal punishment might be held to “protect and restore” rights: First, it could require those who have violated others’ rights to provide them with restitution, in an attempt to make them whole again. Such an account faces various difficulties, among them the fact that many crimes violate or infringe no one’s rights directly, yet seemingly must still be punished. Also, it is civil law, more than criminal law, which seems concerned with making the victims of irresponsible conduct whole again. Indeed, some rights violations seem appropriate dealt with entirely by the civil law (e.g., violations of contracts). Further, there is the risk that well-off offenders will commit crimes and pay restitution with relative ease. This threatens to blur the important distinction between crimes, which involve wrongful conduct, and torts, which involve “priced” but not outright prohibited conduct.²⁴

Second, legal punishment could “protect and restore” rights through its censuring aspect, condemning violators and, more positively, communicating emphatically the importance of rights to both offenders and other citizens. As previously noted, whether such an account can explain the characteristic hard treatment aspect of legal punishment is less clear. It is also unclear whether, without hard treatment, such an account would provide much crime reduction, unless the idea is that by communicating the importance of rights, we shore up the collective resolve to abide by them.

Third, legal punishment could “protect and restore” rights by assuring members of the law-abiding public that those who refuse to abide by reasonable restrictions on their conduct will not get

²⁴ John C. Coffee, Jr., “Paradigms Lost: The Blurring of the Criminal and Civil Law Models—and What Can Be Done About It,” *Yale Law Journal* 101 (1992): pp. 1875-93.

away with it, but will instead suffer censure and hard treatment.²⁵ No society can tolerate for long law-breaking in its more serious forms, ones that violate fundamental rights, without becoming de-stabilized. A scheme of rights will be imperiled if fearful citizens engage in anticipatory violence or predation, or if angry or vengeful ones believe that they have to take matters into their own hands in dealing with lawbreakers. When the criminal law is reliably enforced, incentives to abide by it are in place and the law-abiding can see what happens to those who are indifferent to or defy the law's strictures.

In his chapter on unified theory, Brooks appears to embrace all of these accounts of how legal punishment can “protect and restore” rights. Yet I think it is fair to say that he does not spell out carefully how these accounts are to be integrated into a coherent whole. Simply repeating that legal punishment aims at the “protection and restoration” of rights, as he too often does, leaves in place all of the problems that would have to be addressed in articulating a unified theory. Also, it is worth noting that legal punishment, as Brooks admits, curtails or infringes the rights of offenders, and imperils the exercise and enjoyment of them by ex-offenders through its intensely stigmatizing and disabling qualities. Hence, to say that legal punishment's role is to “protect and restore” rights requires more by way of a complex and nuanced explanation than Brooks provides.

I believe that a suitably developed form of negative retributivism might be of service to Brooks in his endeavor to articulate a unified theory. We should seek to secure human rights not only by communicating their importance, but also by threatening and enacting punishment of individuals who violate laws designed to

²⁵ Consider in this regard the notion of “dominion” as it is developed and defended by John Braithwaite and Philip Pettit in *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford: Clarendon Press, 1990): pp. 64-65.

protect the enjoyment and exercise of rights. But we must take stringent measures to ensure that those we punish have indeed violated the law, can be held legally accountable for doing so (because they were morally responsible beings at the time who behaved unacceptably), and are not punished disproportionately to their wrongs. We must also ensure that they are punished in ways congruent with their coming to understand and taking to heart the censure communicated by legal punishment, so that they can work to bring their future conduct in line with defensible legal restrictions.

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