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Should We Aim for a Unified and Coherent Theory of Punishment? A Review of Thom Brooks: Punishment --Manuscript Draft--

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Corresponding Author:	Mark Tunick, Ph.D. Florida Atlantic University Jupiter, FL UNITED STATES
Corresponding Author Secondary Information:	
Corresponding Author's Institution:	Florida Atlantic University
Corresponding Author's Secondary Institution:	
First Author:	Mark Tunick, Ph.D.
First Author Secondary Information:	
Order of Authors:	Mark Tunick, Ph.D.
Order of Authors Secondary Information:	
Abstract:	Thom Brooks criticizes utilitarian and retributive theories of punishment but argues that utilitarian and retributive goals can be incorporated into a coherent and unified theory of punitive restoration, according to which punishment is a means of reintegrating criminals into society and restoring rights. I point to some difficulties with Brooks' criticisms of retributive and utilitarian theories, and argue that his theory of punitive restoration is not unified or coherent. I argue further that a theory attempting to capture the complex set of rules and behaviors that constitute the practice of legal punishment cannot persuasively be unified and coherent: legitimate features of the practice advance goals and promote values that in some cases conflict.

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“Should We Aim for a Unified and Coherent Theory of Punishment?”

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By Mark Tunick

Professor of Political Science

Wilkes Honors College, Florida Atlantic University

5353 Parkside Drive, Jupiter, FL 33458

Email: tunick@fau.edu

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I. Introduction

Thom Brooks says one of his goals in *Punishment* is to “alert readers coming to the subject for the first time of the leading theories of punishment”(11). I will eventually address whether Brooks succeeds in providing newcomers a clear and reliable exposition. But I begin by turning to his more ambitious goal. Almost as if echoing the utopian socialist Robert Owen, who declared that he had discovered a blindness with which his fellow-men are afflicted (Owen 1816), Brooks says he seeks “to cast light where there is much darkness”(12, 216). He offers what he calls a coherent (132) and unified theory that he says is “the most compelling theory of punishment that makes best sense of the world” (148), is a “major advance”(126), and points toward a “bold new vision”(148). Brooks rejects what he takes as the traditional retributive view that punishment is a moral response to evil, inflicted not to prevent future crime but solely to right a past wrong. He also rejects utilitarian theories that regard punishment solely as an instrument to prevent and deter rights violations. Instead he claims to incorporate retributive and utilitarian goals into a new theory, which he calls punitive restoration (147, 212), that sees punishment as a means of reintegrating criminals into society and restoring rights. Brooks draws on this theory to recommend concrete reforms such as less reliance on prisons for non-serious offenses; use of only brief prison terms in domestic abuse cases if needed as a cooling off period; and permitting non-violent offenders to work during the week and return to prison at night (143). While I agree that current penal systems that rely heavily on prisons need reform, I do not think Brooks keeps his promise of offering a unified or coherent theory of punishment. Nor am I sure that a theory attempting to capture the complex set of rules and behaviors that constitute the practice of legal

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4 punishment *can* persuasively be unified and coherent: legitimate features of the practice advance goals
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6 and promote values that sometimes conflict. A unified and coherent theory of legal punishment is not
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8 obviously superior if it requires that we reject some of these goals or values.
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10 11 12 II. Retributive and Utilitarian theories of punishment 13

14 Though he occasionally refers to non-legal punishment by non-state actors, as when he notes
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16 how an employer might decide not to hire someone because of their past crime (76), Brooks focuses on
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18 legal punishment by the state. He defines punishment as a “loss” intentionally imposed by a legal
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20 authority on someone because they committed a crime (1-2). It is precisely its character of inflicting
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22 some loss or setback that has led philosophers to demand a moral justification for the practice. Often
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24 punishment is characterized as hard treatment or as the infliction of harm, which makes the demand for
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26 a sufficient justification all the more pressing.¹ But Brooks says the loss can be painless yet still count as
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28 punishment, as in a suspended sentence (5). It is hard to know if Brooks really means this since at one
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30 point he refers to punitive measures as those which inflict pain for the sake of inflicting pain (196); but if
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32 he does, that would be an important concession because if punishment can be understood as requiring
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34 only censure but not pain, some of the objections to it might have less force.
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40 Brooks wants to distinguish his theory of punitive restoration from the standard retributive and
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42 utilitarian theories of punishment. These standard theories articulate reasons why we have the practice
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44 of punishment as opposed to some alternative means of responding to crimes—thereby addressing
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46 what H.L.A. Hart (1971) has called the general justifying aim of punishment; they also address how we
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48 should go about distributing punishments. They provide justifications in at least two ways: they might be
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50 employed to persuade those who do not think we should punish at all that the practice is indeed
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56 ¹ See Roebuck and Wood (2011); Menninger (1966), pp. 202, 218 (defining punishment as the vengeful infliction of
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58 pain or “long-continued torture”); and Kaufman, W. (2013), p. 4 (regarding punishment as inflicting harm).
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4 justified (as when a deterrent theory that holds that we have the practice to deter people from
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6 committing crimes is used to justify punishing as opposed to doing nothing); or they might be employed
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8 to defend the infliction of a particular kind of punishment (as when a deterrent theorist argues that use
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10 of the death penalty is not justified since it would not deter crime more effectively than a sentence of
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12 life in prison without possibility of parole).
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16 One of the difficulties that philosophers have addressed for some time is that neither of these
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18 theories seems to be entirely adequate. Utilitarian theories justify punishment insofar as the practice
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20 benefits society, which it might do by reducing crime through individual (micro) and general (macro)
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22 deterrence; by incapacitating criminals so they are unable to commit further crimes; and possibly by
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24 reforming them so they commit fewer crimes when released. The problem with utilitarianism as a
25
26 general theory is that it seems to justify the punishment of innocent people or wildly excessive and
27
28 undeserved punishment if such punishment would effectively reduce crime and have a net benefit to
29
30 society, and most philosophers regard such punishment as morally unacceptable.² Another objection to
31
32 a utilitarian theory that justifies punishment as a deterrent is that it regards individuals as a means to an
33
34 end, which is unacceptable to those who endorse a Kantian moral philosophy (Kaufman 2013, ch. 2).
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40 Retributive theories are harder to group together but generally hold that punishment must be
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42 deserved and proportionate to the seriousness of the offense; they thereby avoid the problem of
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44 punishing the innocent or of excessive punishment. A retributivist would object to punishment of non-
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46 culpable producers of mischief or pain, be they young children, the insane, or non-humans such as dogs.
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48 A retributivist might note that grammatically it is not possible to ‘punish’ an infant or a dog, except
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50 metaphorically, since to punish means to blame, and infants and dogs are not worthy of blame as they
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56 ² Brooks does not address this objection at length; but see p. 40 (only those who fail to heed the threat are to be
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58 punished).
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4 lack the capacity to distinguish right from wrong. If that is a correct account of the grammar of ‘punish’
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6 it would presumably guide even the utilitarian’s use of the word; but it might not be since it is possible
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8 to inflict pain or hard treatment or loss, with the requisite punitive intention, on those who are not
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10 blameworthy and in that sense punish them though doing so might be inappropriate.³ A utilitarian might
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12 offer a very different account of why we should not punish young children or the insane: they are not
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14 deterrable. But that account might fail-- on utilitarian grounds--if punishing those who are non-culpable
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16 has a substantial general deterrent effect: punishing even infants and the insane might strongly signal
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18 how serious society is about punishing those who cause mischief, a signal that might deter the public at
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20 large from even thinking about committing crimes (Hart 1971, p. 369). The retributivist would object to
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22 such punishment because it would be undeserved and unjust. But retributivism has been criticized for
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24 failing to give a clear account of what punishment is deserved; or a convincing account of why the state
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26 should be in the business of meting out just deserts if not for utilitarian reasons such as reducing future
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28 crime: the state does not reward all meritorious action so why should it punish all blameworthy action?
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30 (Kaufman 2013, pp. 63, 70)
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37 Brooks argues that neither retributive nor utilitarian theories are adequate standing on their
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39 own, though for reasons I shall turn to one might sometimes doubt that the theories he knocks down
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41 were presented in their most favorable light. Nor, Brooks continues, are they compatible with each
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43 other; he devotes a chapter to why he thinks past efforts of theorists such as Rawls and Hart to combine
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45 or mix the theories were unsuccessful. Yet he claims to offer his own breakthrough argument that
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56 ³ Cf. Primoratz (1989), p. 6; Kaufman (1959), p. 13. For a detailed discussion of the definition question, see
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58 Armstrong 1961.
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4 “unifies multiple goals” into one coherent theory.⁴ I do not believe the theory he settles on is coherent:
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6 it still contains a tension between competing goals. Brooks makes an effort to avoid that tension by re-
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8 conceiving the retributive ideals of desert and proportionality but in Section III I shall offer reasons to
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10 doubt that he succeeds.
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14 Brooks rejects the retributive theory, but only after characterizing it in a less than charitable
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16 fashion. Retributivists are often regarded as backward-looking: concerned only with righting past
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18 wrongs and not with future consequences. Brooks, at times, says this is an essential criterion for being a
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20 retributivist. He writes, the retributivist “finds consequences irrelevant” (16) and a few pages later, that
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22 “[r]etributivists are not consequentialists” (18). Later he will say that it is really only “traditional”
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24 retributivists who reject appeals to consequences (40) and that a retributivist *can* regard consequences
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26 as relevant—and he is not the only theorist recently to insist that a retributivist cannot appeal to
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28 consequences only to then say the opposite.⁵ But relying on the view that retributivism is a
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30 nonconsequentialist theory, Brooks rejects it as an account both of the general justifying aim of
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32 punishment and of how punishment should be distributed. The retributivist answer to why we should
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39 ⁴ Brooks, p. 130; cf. p. 126: “The idea is not that different *theories* are compatible, but instead that different penal
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41 *goals* are compatible” (my emphasis).
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44 ⁵ Kaufman (2013) criticizes those who regard retribution as anything but a “backward looking theory”—for
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46 example, he criticizes a version of retribution that I have discussed for being “crypto-consequentialist” (48); yet he
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48 himself sneaks consequentialism into his own version of retributivism, which holds that punishment is justified as a
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50 means of upholding the honor of the victim or of society: “[t]here is nothing intrinsically problematic about a non-
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52 consequentialist moral theory that nonetheless justifies some actions in terms of the good consequences they
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54 bring” (34); and, “[p]roperly speaking, retribution is neither backward-looking nor forward-looking but present-
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56 looking...Or, even better, punishment is forward-looking in that it aims to create a situation in which one’s honor is
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58 restored. But it is not forward-looking in the sense implied by utilitarian theories...” (140).
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4 punish is, he says, that we must respond to evil by inflicting pain. Why? "Pain is a necessary response to
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6 evil actions because God has decreed it"(27). The retributivist addresses questions of distribution, he
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8 says, by insisting that punishment should be proportional to the "wickedness" or "evil" of the criminal's
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10 action (20-1). One "cannot claim to be a retributivist while refusing to punish criminals to the degree
11
12 their crimes deserve"(32). Brooks does not think a retributivist can approve the use of a table of
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14 proportionate punishments (punish the 2nd most serious crime with the 2nd most serious punishment,
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16 etc.) because this fails to focus on the criminal and will not guarantee that the criminal gets what he
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18 deserves.⁶ Brooks then proceeds to reject retributive theory on the ground that the judgment that a
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20 crime is an evil, and the judgment of how wicked or evil a crime is, are matters of personal conviction or
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22 faith, and "it seems unfair to assert one's view of morality over others" (21; cf. 158).
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28 One might respond to that particular objection by arguing that there are objective bases for
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30 determining that murder is more wicked than trespassing and that it is no more unfair to assert that it is
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32 more wicked than it is unfair to assert that Copernicus's theory of the movement of planets is superior
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34 to Aristotle's. But there is no need to engage in debates about moral relativism or theology to assess
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36 retributive theory because there is a fundamental problem with Brooks' depiction of it: the theory need
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38 not rely on a religious belief about what God decrees; and retributivists need not invoke the idea that
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40 crimes are an evil—if they do, the word evil need have no religious content, as when it refers simply to
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42 some mischief or harm, which is what Bentham means by it.⁷ Brooks uses his assumption that a
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47 ⁶ This is a puzzling argument: why couldn't a retributivist hold that rape deserves a punishment within a certain
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49 range that is laid out in a table of punishment, and a particular individual deserves a punishment within that range
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51 insofar as he committed rape, and the particular punishment he deserves within that range is determined by
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53 considering aggravating and mitigating factors because we think that where aggravating factors apply he deserves
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55 more punishment and where mitigating factors apply he deserves less?
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58 ⁷ Bentham (1988), Ch. 13 §1: punishment is used to "exclude some greater evil" or "mischief."
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4 retributivist by definition regards punishment as a response to evil to explain why a retributivist would
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6 punish rape, rape being an evil (198). But a retributivist can explain why we punish rapists without
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8 referring to the concept of evil by, for example, relying on Mill's harm principle or a Hegelian theory
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10 about rights to personhood.
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14 Brooks may be pushed to reject retributivism in this way because he had just defined a
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16 retributivist as someone oblivious to consequences. If in trying to explain why we should respond to
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18 mischief we are precluded from appealing to consequences such as avoiding future mischief or harm or
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20 promoting the recognition of individual rights, and we do not think it will do to say 'just because', and
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22 we think 'because justice demands it' fails to explain why justice demands it, or why the state must
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24 establish institutions that do what justice demands, then very few options remain: 'because God
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26 demands it' might be what we are left with unless we decide to reject retributivism.
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31 But I think we need to rid ourselves of the view that retributivists are precluded from
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33 considering consequences. A retributivist can, for example, hold that we adopt a practice that punishes
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35 culpable wrongdoers, and only them, in order to reduce future harm. Hegel argues that we punish to
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37 vindicate right, not for its own sake but because people are more free in a society that respects rights;
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39 and in determining the sentence a criminal deserves Hegel says the retributivist can consider factors
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41 such as which specific punishment would most ensure the security of a society. Brooks says that
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43 someone who takes this position and imposes a punishment without getting at the exact "evil done"
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45 does not merit the name "retributivist"(33)—yet Hegel does merit that name. Brooks, at times, imposes
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47 on the retributivist a burden he thinks it is impossible to bear so it is no wonder he rejects the theory.
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52 Brooks eventually allows that one might be a retributivist yet think consequences are relevant.
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54 At this point he concedes that a retributivist need not require that punishment strictly match a
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56 criminal's desert. He calls such a retributivist a "negative retributivist." That term is often used to refer
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58 to those who see desert as a necessary but not sufficient condition for punishing an individual. But for
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4 Brooks, a negative retributivist also rejects the view that an individual's sentence must be proportional
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6 to their desert and appeals to other factors in settling on the severity of one's punishment. Brooks says
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8 the negative retributivist is willing to punish a thief more than a murderer if society needed greater
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10 deterrence against thieves, and he criticizes that view because "most of us do think murderers deserve
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12 greater punishment than thieves because they deserve it" (34). Brooks knocks down negative
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14 retributivism because it denies "any" link between punishment and desert (34). Yet surely negative
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16 retributivists do not deny this link; if they really are a sub-species of retributivist, they insist that to be
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18 punished one must be culpable. Even a negative retributivist would refuse to impose legal punishment
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20 on a four year old.
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26 After rejecting retributive theories, Brooks then turns to forward-looking or consequentialist
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28 theories. Unfortunately there are some serious deficiencies in his account. For one, he conflates
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30 deterrence with incapacitation (37: incapacitation is a "form" of deterrent punishment). But they differ
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32 crucially. If I am incapacitated—as would happen if I were executed—I am unable to commit a crime, and
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34 that is true regardless of whether I am deterred, or whether punishing me deters others. To deter me is
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36 to affect my will: the state decreases the expected utility of committing a crime by announcing that
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38 anyone convicted of the crime will face punishment, and I am free to take this risk into account when
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40 deciding whether to break the law. But to incapacitate me is to affect me without regard to my will.
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42 Brooks at one point even characterizes reform as a form of deterrence (37), though he correctly
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44 distinguishes them soon after (38). His overlooking of incapacitation as a distinct reason for punishing
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46 some crimes weakens his discussion of capital punishment in particular. Incapacitation of those who are
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48 simply too dangerous or pose too great a threat to escape from prison is one of the more compelling of
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50 all the reasons one might have for ever using the death penalty—which is not to say that it would be a
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52 sufficient reason, or that it would be a compelling reason in any but the most extraordinary of cases.
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58 Brooks argues that deterrence fails as a general justifying aim of punishment empirically
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4 because at best the deterrent effect is a 2-5% reduction in crime. At first he correctly reports that
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6 according to one study this is the effect of a 10% increase in the prison population (44), but he later
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8 wrongly implies that it is the entire deterrent effect of punishing and not merely the marginal effect of
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10 the 10% increase (59). He does not say what reduction would suffice to justify a practice of punishment;
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12 and his reliance on this figure is a problem. The studies he draws on try to assess the elasticity of the
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14 prison/crime effect (Liedka, et.al.; Marvell and Moody). Marginal increases in imprisonment may not
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16 have a substantial impact on crime, but were we to abolish the criminal justice system there very well
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18 could be a large effect on crime.⁸
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23 Another of Brooks' reasons for rejecting deterrence theory is also suspect. He says "most
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25 citizens lack knowledge about what is criminalized"(46; cf. 114). He points to the fact that different
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27 states have different penalties for crimes such as arson, and he leaves it to the reader to reflect on
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29 whether they know what the penalty is in their own state (224 n.49). Of course it is true that people will
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31 typically not know what the precise punishment will be for a given crime, not only because few people
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33 familiarize themselves with the law in that detail, but because sentencing schemes typically include
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35 substantial discretion. Brooks concludes that punishment cannot have "a" deterrent effect where
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37 citizens do not know how crimes might be punished (46) or where citizens do not know the likelihood of
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39 arrest (47). But that does not follow. Most everyone recognizes that there is some chance of getting
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41 caught if one commits a crime, and that if convicted there is some punishment. Even though they may
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43 err in estimating the expected disutility of committing a crime, there will still be a deterrent effect. If I
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52 ⁸ See Kleck and Barnes (2010): modest reductions in police strength may have little or no impact on crime, but
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54 "near-total eliminations of the police may well have large effects on crime." One of the studies Brooks cites makes
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56 a possibly related point: at low levels of incarceration the negative relation between incarceration and crime may
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58 be underestimated, see Liedka et.al.
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4 mistakenly believe there is a 10% chance of getting caught and that my punishment would be 10 years
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6 in prison, when in fact there is a 25% chance of getting caught and the punishment is 4 years, then I will
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8 calculate the expected value of punishment by figuring an estimated sentence of 1 year in prison, and
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10 that may deter me, even though I clearly do not know the correct likelihood of arrest or actual
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12 punishment--though as it happens my calculation in this scenario reached the correct figure of 1 year; in
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14 other scenarios I might over or under-estimate the expected disutility of committing a crime but there
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16 will still be a deterrent effect if I believe I could face some punishment.
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21 Brooks tempers his claim in the concluding part of the chapter on deterrence: instead of
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23 rejecting the theory outright, he says "the jury is still out" as to whether punishment deters; and he
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25 concedes that "the threat of punishment is clearly one possible factor" for reducing crime (49). But very
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27 little he said in this chapter foreshadows this sudden reversal in his assessment of deterrence theory.
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31 Eventually Brooks defends a theory he calls "restorative punishment" that draws on existing
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33 theories of restorative justice but retains a punitive element (67, 212). But before turning to this theory I
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35 want to address another route some theorists have taken who were unsatisfied with a purely retributive
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37 or purely utilitarian account. Doing so will pave the way for my discussion of whether we should aim for
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39 a coherent and unified theory of punishment.
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43 John Rawls attempted to reconcile utilitarian and retributive theories of punishment in
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45 advancing a theory of rule-utilitarianism. He argued that the two theories share a division of justificatory
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47 labor: utilitarians explain why we have the practice of punishment as opposed to some alternative, while
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49 the retributivist gives an account of at least one of its crucial rules regarding the distribution of
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51 punishment: that we may punish only the guilty. Each theory answers different questions: the principle
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53 of utility guides the legislator in deciding whether to adopt a practice of legal punishment and what
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55 rules should guide it; the retributivist explains to the judge or jury which particular individuals may
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57 properly receive punishment. Brooks says that many retributivists will not be satisfied with the role that
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4 Rawls gives to their theory: they might argue that the retributivist, too, offers a justification for the
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6 practice as a whole and is not concerned only with who is punished (91). While Rawls does not deny that
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8 there are retributivists who justify the institution as a whole, he says that the retributivist surely does
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10 not *need* to take the position that the essential purpose of having a practice of legal punishment is to
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12 “preserve a correspondence between moral turpitude and suffering”(Rawls 1955, p. 7). But according to
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14 Brooks’ account of traditional retributive theory, that is precisely what a retributivist needs to do. This
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16 objection to Rawls’ approach might be avoided if Brooks conceded, as he eventually appears to do, that
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18 one can be a retributivist of a sort without holding that the purpose of the state adopting institutions to
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20 punish is so that evil-doers suffer.
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25 Brooks also argues that the utilitarian will not be satisfied with Rawls’ account: Rawls does not
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27 leave any room for utilitarians to have a say in who gets punished and to what extent because, he says,
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29 Rawls thinks this is determined solely by retributive considerations (92). As a result, he finds Rawls’
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31 theory “incoherent”: it relies on a utilitarian justification of the practice, but in distributing punishment
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33 “solely on the basis of retributive desert,” “no offender is punished in order to contribute to beneficial
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35 future effects”(92).
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40 But this mischaracterizes Rawls’ position. For Rawls, the decision whether to have a practice of
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42 legal punishment, and the selection of rules that are employed for punishing, are for legislators to make.
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44 Legislators are permitted to invoke a principle of utility in selecting the rules and so the principle of
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46 utility *could*—and if he meant to defend rule-utilitarianism Rawls would say *should*--be used to
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48 determine the rules governing the distribution of punishment, perhaps with a mind to reduce crime,
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50 incapacitate, or rehabilitate. Conceivably for Rawls utilitarian considerations could enter into the
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52 determination not only that theft should be a punishable crime, but that the range of punishments for
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54 theft should be x to y years, a range the legislator might settle upon in part based on evidence that such
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56 a range could reduce future crime. Since utilitarian principles can be invoked by legislators, it is not true
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4 that no offender is punished in order to benefit society in the future. Even the rule that no one can be
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6 punished unless they are guilty is a rule the utilitarian legislator would adopt on utilitarian grounds: a
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8 practice that inflicted pain on or imprisoned innocent people would not promote social utility (Rawls
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10 1955, pp. 11-12). The judge cannot decide to punish an innocent person on a particular occasion if doing
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12 so would increase social utility because he or she is bound by the legislatively imposed rules of the
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14 practice; but those rules themselves can be selected because they, in Brooks' words, "contribute to
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16 beneficial future effects."
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21 Rawls' position might seem incoherent if it was the case both that (1) on his view the
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23 retributivist insists not only that we punish only the guilty but that punishment must be proportional,
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25 and (2) the utilitarian legislator would not propose a sentencing scheme that required proportional
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27 punishment. In this scenario, one aspect of the practice—the insistence on proportional punishment—
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29 might conflict with the practice's goal of reducing crime or otherwise increasing social utility. As to the
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31 first condition: Rawls at one point says that "[w]hat retributionists have rightly insisted upon is that no
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33 man can be punished unless he is guilty, that is, unless he has broken the law"(Rawls 1955, p. 7).
34
35 Conceivably he could think that a retributivist need insist only on this and not on proportional
36
37 punishment. But Rawls also says that on the retributive view "[i]t is morally fitting that a person who
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39 does wrong should suffer in proportion to his wrongdoing"(Rawls 1955, pp. 4-5). So let us assume Rawls
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41 thinks that a proportionality rule *is* an essential component of retributivism. The position could still be
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43 what Brooks might regard as coherent if a proportionality rule could be justified on utilitarian grounds,
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45 and that is not inconceivable.⁹
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51 But even if it could not, we need not see Rawls' rule-utilitarian approach to punishment as an
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56 ⁹ Bentham uses the principle of utility to justify proportionate punishment, see Bentham (1914), Pt III, Ch. 2; and
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58 Bentham (1988), ch. 15, §§7-8.
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4 incoherent instance of a utilitarian theory, or as incoherent in a way that is deeply problematic, unless
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6 we agree with Bentham in regarding the principle of utility as what I shall call a ‘totalizing’ theory’--a
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8 theory that captures the entire truth of a practice and that must be used exclusively to settle all
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10 questions that the theory is capable of addressing; and that is certainly not Rawls’ position. Rawls says
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12 not that legislators necessarily invoke utilitarian principles, only that they may. His position is that we
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14 must appeal to the rules of a practice if we are to engage in the practice and that the principle of utility
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16 may and should guide legislators in formulating those rules. But on the practice conception that Rawls
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18 articulates, there is no reason to rule out the possibility that the practice of punishment can include
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20 some rules that are selected because of a commitment to other principles besides utility, such as justice
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22 and fairness; and that some rules may have no other justification than ‘this is how we have always done
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24 things’. Practices like punishment are the result not only of principled reflection but of custom and
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26 compromise. Rawls himself suggests that the rules of a practice are not necessarily the best that can be
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28 imagined.¹⁰ He is not saying, of course, that we should never review the rules of our practices and
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30 subject them to criticism, or that one should always accept the practices of one’s society.¹¹ On Rawls’s
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32 practice conception, the practice of punishment need not be guided by a single monolithic principle,
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34 although according to the rule-utilitarian account of the practice we ought to distribute punishment
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36 with an eye towards promoting social utility. The practice may be incoherent in the specific sense that it
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38 pursues goals and embodies values (utility, justice) that sometimes conflict. But, I will argue, the practice
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40 depicted by Brooks’ theory is incoherent in a similar way (Section III); and I will suggest that this sort of
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42 incoherence is not deeply problematic (Section IV).
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51 Negative retribution is another possible hybrid theory; it holds that the retributivist tells us who
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56 ¹⁰ Cf. Rawls, p. 26 (imagining that baseball might be better with a rule allowing 4 strikes).
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58 ¹¹ Rawls, p. 32 (“There is no inference whatsoever...”).
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4 we may punish—only the deserving—but how much punishment we inflict or whether we decide
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6 actually to punish the deserving is determined with regard to consequences. In contrast, a positive
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8 retributivist might insist we punish all those who are deserving of punishment: desert is not merely a
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10 necessary but is a sufficient condition for punishing (97). Brooks prefers negative retributivism because
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12 he does not think we should punish in a particular case unless doing so will be helpful and constructive
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14 (97): we should not punish merely to be vindictive or restore the balance of good and evil in the world.
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16 But another position is available—a positive retributivist position of the sort I take Hegel to defend. On
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18 this view, we must punish all who are deserving, but we may still take consequences into account in
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20 determining the mode of punishment.¹² Where a crime was committed but there is little need for
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22 deterrence or incapacitation, Hegel could support minimal punishment that imposes little cost on the
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24 criminal or society but that still expresses condemnation and vindicates right. Whereas the negative
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26 retributivist would sometimes not want to punish the deserving, on Hegel’s view we would always
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28 punish in some way, perhaps only with a verbal reprisal. The reason Hegel gives for why we always must
29
30 punish is not that we must respond to evil because God demands it, but that unless we punish
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32 wrongdoing, we fail to vindicate right (Hegel 1991, §218 Addition: “[I]t would be impossible for society
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34 to leave a crime unpunished, since that would be to posit it as right”). Unfortunately Hegel is not very
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36 clear about this argument and there are different ways to construe it. It might be understood as a
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38 conceptual or logical argument: declaring that an action is a crime just means that anyone who performs
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40 that action must be punished—not necessarily with a prison sentence, of course—but in *some* way (see
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42 Cooper 1971). But it could also be construed as a sort of consequentialist argument: if we do not blame
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44 a culpable person who commits a crime it is as if what they did was not wrong and we should not send
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46 that message, our rationale being that a society that upholds rights is better than one that does not—in
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58 ¹² See Hegel (1991), §218, Addition; discussed in Tunick (1992a); and cited in Brooks, p. 138.
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4 the former society, Hegel would say, people are more free.
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6 Brooks raises an objection to positive retributivism: it cannot justify pardons even of someone
7 whose punishment would cause a civil war (97). It is true that positive retributivists might insist that we
8 punish even in this case, though they might insist only on minimal punishment. But they are not helpless
9 to pardon, at least when the pardon would be supported by retributive reasons, as when it is uncertain
10 whether the criminal was guilty and deserving. Nor is the retributivist precluded from granting mercy:
11 mercy is not consistent with the positive retributive position that all who are guilty must receive some
12 punishment; but positive retributivists could regard this demand to punish as prima facie only, one that
13 could give way for a compelling reason or competing value—as long as they do not insist that
14 retributivism must be a totalizing theory.
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28 **III. Brooks' 'unified' theory**

29 Brooks says that the standard and “widely shared position” is that we must choose either
30 between retribution or deterrence and that there is no middle ground (125, 123), and that it would be
31 “incoherent” to take a pluralist view, as does the Model Penal Code, that appeals to multiple goals at
32 once even though those goals may conflict (125). Yet Brooks seeks a pluralistic approach himself. But he
33 says we require something other than the Model Penal Code, which is insufficiently principled: “we
34 require coherent pluralism”(132). To explain why, he appeals to a metaphor: coherence is needed to
35 make sure “the cake is edible” and not just a hodgepodge of our favorite ingredients (132). Brooks
36 asserts that his new, “grand unified” theory of punitive restoration is coherent (133) while incorporating
37 multiple goals (126); it brings together “desert, proportionality, and other penal goals” in a “larger
38 unified framework” (133). I now turn to his theory. I will argue that by touting it as unified and coherent,
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56 Brooks thinks we need to be forward-looking and consequentialist in determining whether we
57 should have the practice of punishment and how punishment should be distributed. He does not think
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4 we should punish to be vindictive or to respond to evil or to stigmatize—punishment should not be a
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6 morality play. He argues instead that we should punish with a view to restoring society—the criminal,
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8 the victim, and the wider community.
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11 Brooks believes a significant cause of crime is that people do not feel they have a stake in
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13 society. For what he calls “compelling evidence” in support of this stakeholder theory he cites the final
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15 report of the Riots Communities and Victims Panel (146), which examined the causes of rioting that
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17 broke out across England in August of 2011 and pointed to the need for people to be given more
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19 opportunities to live positive lives. But if the Panel chair is correct in observing that the August riots
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21 “were unique,”¹³ then the Report may not provide compelling evidence for why people commit crimes
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23 in ordinary times, or non-economic crimes such as DUI’s, crimes of passion, rapes and other sexual
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25 offenses, and crimes motivated by greed rather than a feeling of marginalization or alienation. But I will
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27 leave aside the question of whether the stakeholder theory has sufficient empirical support.
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33 Brooks’ point is that society should seek to reintegrate criminals back into society (65). Given
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35 this goal, we might think prison is not an ideal punishment; indeed some proponents of the theory of
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37 restorative justice that Brooks draws on recommend penal abolition (64). But Brooks calls his theory not
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39 restorative *justice* but restorative *punishment*, in part because he thinks we will need prisons to deal
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41 with serious crimes (67). Brooks does not rule out even the death penalty, though he says we should be
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43 slow to conclude that a criminal is beyond rehabilitation (61).
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47 Restorative punishment seeks also to restore the victim. Brooks could be clearer about what
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49 that means. It might refer to restitution—to having the criminal pay back what he took from the victim--
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51 though that raises the question of how one restores a victim of a non-property crime such as rape or
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56 ¹³ Riots Communities and Victims Panel (2012), “Forward,” available at
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58 <http://webarchive.nationalarchives.gov.uk/>.
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4 murder. Brooks sometimes suggests that it also means restoring the peace of mind of the victim and
5 providing them justice. He says that rape should be punished more than battery because punishment
6 should be proportional to the violation of the right, and the victim of rape may be deeply affected (207).
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9 As this passage intimates, other factors besides what best reintegrates the criminal are relevant for
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12 Brooks in deciding upon a punishment. Brooks still sees a role for desert, culpability, punitive measures,
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14 and proportionality in a criminal justice system, considerations usually regarded as retributive.
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18 Brooks attempts to reconcile his view that punishment is not a morality play, or the imposition
19 of a moral judgment, with his view that it incorporates retributive concepts of desert, culpability, and
20 proportionality by construing these concepts as morally neutral. Desert is based on “illegality and not
21 immorality” (130) and punishment expresses disapproval not of criminals’ moral wrong-doing but of the
22 threat they pose to legal rights.¹⁴ For Brooks the reason we have the practice of legal punishment is to
23 protect legal rights, ultimately so that the community can survive (127-8). Brooks then applies this
24 theory to questions of distribution by saying that the punishment for a particular crime should hinge on
25 the “importance of the rights violated”(129). If no rights are threatened, punishment is not justified
26 (129).¹⁵ If we can protect rights without punishing, we need not punish (130).
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40 To truly shed punishment of its moral baggage Brooks might have said that we punish not those
41 who deserve punishment but those who have standing to be punished—but he is unwilling to do
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45 ¹⁴ In this respect his theory resembles that of J.D. Mabbott (1939), who expressly disavows the view that we punish
46 to morally blame. Cf. Husak (2008), p. 89 (characterizing Mabbott’s view as “legal retributivism”).
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49 ¹⁵ What about victimless crimes in which no right is violated, such as prostitution or drug use? Brooks appeals to
50 the idea of a stakeholder: people have a stake in living in a society where these activities don’t occur (cf. 79-80).
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52 Later he argues that these offenses may after all “represent potential threats to rights” (139). How? Brooks
53 responds with the unexplained view that the prostitute or drug user threatens “the violation of rights of ...
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58 themselves” (140).
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4 without the idea of desert; and it is unclear he succeeds in eliminating moral judgments from his
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6 account of punishment. We have seen that Brooks criticizes negative retributivists because he thinks
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8 they might punish a thief more than a murderer and that would be wrong because “murderers deserve
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10 greater punishment”(34). He does not want us to regard this as a moral judgment: we punish not
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12 immoralities but illegalities, and punishment is proportional not to the evil committed but to the
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14 importance of the right being violated. Yet we punish murder more than theft not because it is more
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16 illegal to murder, but because murder causes more harm, and that involves a moral judgment. Brooks
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18 would explain that we punish rape more than battery because the right not to be raped is a more
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20 important right; but in explaining why it is, one would invoke moral considerations including the value of
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22 personal autonomy. We punish adults more severely than we punish juveniles for the same crime, and
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24 do not legally punish infants, not because violations of rights by adults are more illegal, but because
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26 adults are more culpable than juveniles and infants are not culpable or blameworthy at all. The moral
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28 considerations underlying the ‘punishment as morality play’ view that Brooks had rejected seem also to
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30 enter into his account of how we should punish the crime of domestic abuse. He refers to the need for
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32 “custodial sentences” in cases of serious crimes (197), which need not involve a “punitive response”
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34 intended to morally judge; but he also says we can adopt “more punitive possible outcomes” when
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36 doing so would best secure the “restoration of rights” (146). Unfortunately what Brooks means by
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38 restoration of rights, as opposed to prevention of future rights violations, is unclear. But he says it can
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40 involve a punitive response (132; 197, “our restorative effort is also punitive”) and punitive measures,
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42 he implies in one passage, are measures which “inflict pain for its own sake”(196). One gets the
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44 impression that it is not just because we need to incapacitate or deter that Brooks insists we still use
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46 prisons, and even allows for the death penalty, and calls his theory restorative punishment as opposed
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48 to restorative justice.

49 Though Brooks attempts to remove the tension between retributive and utilitarian goals so that
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4 he can say his theory is unified and coherent, the goals his theory incorporates—to rectify past wrongs
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6 by restoring rights, which can require a punitive element, and to prevent future rights violations (131-2,
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8 170) and reduce crime (213), can be in tension. Consider the question of how Brooks would deal with a
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10 14 year old who commits murder. His theory insists that punishment be proportionate to desert, and
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12 Brooks recognizes that children are not as responsible as juveniles, who in turn are not as responsible as
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14 adults (175). Yet the 14 year old may pose a danger to society, and punishing him could prevent future
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16 rights violations and reduce crime, and so Brooks allows that in exceptional cases juveniles may be
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18 treated as adults (176-7). We are led in two different directions by goals that in this case conflict.
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23 In seeing the goal of punishment as protecting rights by preventing future rights violations,
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25 Brooks' theory would seem to support the use of wildly disproportionate punishment, such as that
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27 meted out by Alexander's "Doomsday Machine," which zaps into oblivion people who intentionally
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29 commit a crime no matter how serious the crime in order to achieve a society with zero crime
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31 (Alexander 1980). But the theory also insists that punishment must be proportionate to the importance
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33 of the right being violated, which suggests that we should zap people who attempt murder but not
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35 those who trespass. Yet Brooks' theory also holds that punishment reintegrates the criminal into
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37 society, and that suggests that nobody should be zapped. The theory again pulls us in different
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39 directions.
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44 As a final example consider the question of how much restorative punishment would be
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46 assigned for someone who steals \$1,000 compared to someone who steals \$50,000. There is a violation
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48 of a property right in both cases. Is the loss of \$50,000 a loss of a more important right? One might think
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50 that the very same right is involved and that both crimes are equally illegal, and so the theory might
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52 suggest they would receive the same punishment. Yet the theory also has us consider which punishment
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54 would best reintegrate the criminal into society. In doing so, the decisive factor in setting a sentence
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56 may be whether the thief had a drug addiction or is unemployed or otherwise alienated from society,
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4 not how much was stolen.¹⁶ And yet the theory also seeks to restore rights, and if this means providing
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6 restitution, whether one of the thieves had a drug addiction would be beside the point: whoever stole
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8 more must payback more. The different goals the theory points to recommend different punishments—
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10 the same difficulty faced by defenders of the pluralist approach of the Model Penal Code from which
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12 Brooks wants to distinguish his own theory.
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16 I do not think Brooks has provided a unified and coherent theory; in the next section I consider
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18 whether that is deeply problematic. But first I want to briefly address a further question: Why should we
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20 prefer the theory of punitive restoration to competing theories? In other words, what *grounds* the
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22 theory? Brooks does not explicitly address this and apart from his cake metaphor we are left with
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24 occasional passages that offer reasons for endorsing the theory. At one point he says he prefers his
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26 unified theory to expressivist or retributivist theories because there is no essential difference between
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28 those two theories, which he thinks is a ‘problem’ his theory avoids--but that argument is hard to
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30 fathom (177-8). On several occasions he appears to defend the theory of punitive restoration because it
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32 recommends a policy that the public wants. For example, even though Brooks has a favorable view of
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34 rehabilitation, and cites a study suggesting that reconvictions using a rehabilitative system could
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36 decrease 5-10%, which he says is roughly twice the effect of deterrence (59), he rejects a rehabilitative
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38 approach because for the most serious violent crimes it “does not have wide support” (63). We have
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40 seen that Brooks rejects a theory that could punish a thief more than a murderer, because “most of us
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42 do think” murderers deserve more punishment than does a thief (34). He criticizes the harm principle
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44 because he thinks it has difficulty accounting for victimless crimes (10), and while the advocate of the
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46 harm principle might therefore criticize the punishment of victimless crimes, Brooks responds that the
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56 ¹⁶ Brooks, 136: a thief who engages “in crime to support his drug and alcohol dependency” should be treated
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58 differently than a thief without such a dependency.
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4 view that there should be victimless crimes is “widely endorsed,” and so the harm principle fails (10).
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6 One of his reasons for arguing that domestic abuse is worse than violence against strangers is that “most
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8 will argue it is worse”(190-1); and Brooks thinks victims should be brought into the penal process by
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10 noting that this is what people are now demanding.¹⁷ While it would be uncharitable to conclude from
11
12 these passages that Brooks ultimately thinks we should base our theory and practice of punishment on
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14 public opinion polls--especially since he rejects traditional retributive theory because he thinks the
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16 judgment about what punishment “evil” deserves is subjective--he does not provide any other clear
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18 basis for choosing one theory of punishment over another.
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23 Even if his theory reaches a conclusion we agree with, Brooks does not show that it provides a
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25 more compelling reason for reaching that conclusion. Most theorists of punishment would agree that
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27 we should punish juveniles less than adults. For Brooks the reason is that juveniles should be seen as
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29 stakeholders and we should not punish them in a way that makes them less likely to come to realize
30
31 they have a stake in society (177). The traditional retributivist would punish juveniles less because they
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33 are less culpable; the deterrent theorist, because they are less likely to be deterred as they are less able
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35 to assess risks (though on Brooks’ view the deterrence theorist might want to punish them more, 178).
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37 And of course there are other reasons such as not exposing them to the dangers of adult prisons. Now
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39 suppose the juvenile who committed a crime has a fatal disease that will certainly kill him in a few
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41 months. He has no future stake in society and so the reason Brooks points to for not sending him to
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43 prison as an adult may have little if any force. But there are still compelling reasons for not punishing
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45 him as an adult, that only the other theories capture.
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56 ¹⁷ Brooks, 69: there is a “growing recognition for the need to bring victims back into the heart of the criminal
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58 justice system”; cf. 71: “it is thought” that we should include victims.
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IV. Must we have a 'unified' and coherent theory of punishment?

I believe, like Brooks, that we must acknowledge that punishment not only serves but ought to serve a plurality of functions. For example, it can express blame (which can be an effective means to ensure that people comply with the norms of a civilized society); it can incapacitate dangerous people; it can deter people from committing crimes and violating rights; it can provide restitution to victims; it can reintegrate criminals into society; it can vindicate right by reinforcing the idea that certain behavior is not condoned. The first and last goals can be called retributive even though each can be understood as forward looking insofar as each points to future benefits that result when people comply with social norms and respect the rights of others. Some critics of retributivism may think that blaming is not a legitimate function of the state. Nietzsche at times suggests if not that this is an illegitimate function, that it is one a self-assured people could forego (Nietzsche 1974, §276, 321). But one might respond that it is better for the state to have a monopoly on blaming than to leave this to private individuals, who are unlikely to make a coordinated and therefore measured response. Elsewhere I have argued that because of the coordination problem and in the face of new technologies that allow people's misdeeds to be memorialized and broadly disseminated, non-legal punishment by non-state actors, in contrast to legal punishment, is likely to be disproportionate and undeserved (Tunick 2013).

The question that now remains, and to which earlier sections have been leading up, is this: How can one intelligibly hold that we ought to pursue retributive and utilitarian goals in one and the same practice? Don't we need to choose between these theories? Don't we need a unified and coherent theory?

Many utilitarians would answer that question affirmatively. Utilitarianism is often thought by its proponents to govern all decisions about human action—it is thought to be a totalizing theory. Bentham writes that the only rational basis for deciding what we ought to do individually or collectively is to appeal to the principle of utility—it should be our standard on all matters (Bentham 1988, ch.1, §1).

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4 Utilitarians sometimes say that to be guided by considerations other than utility or efficiency—such as
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6 fairness or justice—is to be irrational, inconsistent, incoherent, even unintelligible (Kaplow and Shavell
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8 2002). The utilitarian theorist of punishment sees the principle of utility as providing an account of why
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10 we have the practice or what its general justifying aim is—to increase social utility--and uses that
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12 account to determine whether actions taken from within the practice are promoting the purpose of the
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14 practice or whether we have strayed from that purpose. When faced with ethical objections to plea-
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16 bargaining, or an entrapment defense, or the death penalty, the utilitarian would have us consider
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18 whether these features of the practice in fact promote social utility: if they do not, we should abandon
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20 them. (For rule-utilitarians, though, the principle of utility is not permitted to provide a guide to a judge
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22 or jury in deciding whether a particular individual should be punished or punished in a certain way: they
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24 must be guided by the rules adopted by lawmakers.) That critical power is something Brooks sometimes
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26 fails to recognize. He notes that deterrence theory is associated with utilitarian theory (35-6), but he
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28 tends to treat it as a stand-alone reason for punishing rather than as part of a general theory. Brooks
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30 criticizes deterrence theory because he says it would recommend executing thieves if that is what would
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32 best deter theft (167). But had he linked deterrence theory to its utilitarian foundation he could have
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34 allowed that a utilitarian might regard execution for stealing as over-punishment. The utilitarian would
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36 choose only punishments that effectively deterred with the least cost.
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44 If one adopts utilitarianism as a totalizing theory one must reject retributivism because it asks us
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46 to be guided by principles other than utility. It is certainly possible to adopt a forward-looking theory of
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48 punishment without being a utilitarian. Deterrent theorists *could* think we should adopt rules of
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50 punishment and perhaps even decide whether or how to punish particular individuals solely based on
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52 whether deterrence would be promoted, yet not be utilitarians because they do not think the principle
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54 of utility should guide us in all of our actions. It is doubtful, though, that such a deterrent theory would
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56 be persuasive if it ignored broader utilitarian concerns (as I just noted in explaining why a deterrent
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4 theorist should oppose a death sentence for theft), or—and this is the point I want to emphasize-- if it
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6 ignored other accounts of why we punish.
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9 A pure retributivist—one who adopts retributivism as a ‘totalizing theory’--also provides a
10 theory of why we have a practice of legal punishment: to mete out justice. The retributivist can invoke
11 this account of the purpose of the practice to criticize features of the practice that diverge from this
12 purpose. For example, the retributivist might criticize the practice of plea-bargaining insofar as it allows
13 a guilty person to receive a reduced sentence for a lesser offense they did not actually commit; or the
14 punishment of those who are insane; or ‘Three Strikes and You’re Out’ laws which allow someone to be
15 sentenced to life in prison for a non-serious third felony. In each of these cases the purpose of the
16 practice—providing just deserts—is not being advanced.
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28 There is a problem with a pure retributive theory, however, insofar as it takes as the general
29 justifying aim of legal punishment the meting out of just deserts: it would be unreasonable to support a
30 practice the purpose of which was solely to provide justice regardless of the cost (Kaplow and Shavell,
31 2002, pp. 308-310). Whenever we adopt institutions we cannot avoid assessing their value because it is
32 impractical to maintain inefficient institutions that cost much more than they are worth. Even Kant, a
33 traditional retributivist, recognizes this and distinguishes moral from legal punishment. Kant says there
34 is a moral demand to punish all wrongdoers; but the point of legal punishment by the state is to prevent
35 crime and protect rights, and so Kant says there is no point legally punishing someone who could not be
36 deterred since doing so would not promote the purpose for which we have the institution (see Tunick
37 1996). Now if we do not think the pure retributivist’s account of *why* we must have an institution of
38 legal punishment that metes out justice is persuasive because it fails to weigh the costs and benefits of
39 such an institution, the entire project may seem to fall apart: for why should we apply a theory about
40 the purpose of the practice to questions that arise from within the practice if we find that theory
41 unpersuasive? If we reject retribution as an account of the general justifying aim of punishment and
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4 instead adopt what appears to be the utilitarian view of that aim, must we reject retributivism?
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6 As I have already indicated, I think the answer is that one can still meaningfully be a retributivist
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8 if one thinks that considerations of justice must be taken into account when we punish, such as moral
9 demands that we punish only the deserving and culpable, and that punishment must not be
10 disproportionately excessive, even if one thinks that a society would not be justified in setting up legal
11 institutions to mete out justice unless those institutions provided benefits that are worth the cost,
12 benefits such as preventing future rights violations. And one can think that the general justifying aim of
13 legal punishment is to achieve some future good even if utilitarianism is not one's guiding philosophy on
14 all matters. A pluralist approach to punishment recognizes that the practice serves multiple goals. A
15 retributivist who adopts a pluralist approach would be consequentialist in a way, but not a 'crypto-
16 consequentialist' who adopts a totalizing theory such as utilitarianism.
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30 One can recognize that punishment pursues multiple legitimate goals without endorsing an ad-
31 hoc approach where one is a retributivist in the morning and a utilitarian in the afternoon, simply
32 picking whichever theory provides the best rationalization for decisions one really makes just on gut
33 instinct. A retributivist who accepts a pluralist approach will of course have to confront situations where
34 the different goals of punishment pull us in different directions. A retributivist convinced that the death
35 penalty does not protect rights or prevent harm more effectively than a sentence of life in prison may
36 nevertheless defend its use on Adolf Eichmann because they think no member of the human race can be
37 expected to want to share the earth with him in light of his war crimes (Arendt 1964, p. 279). But
38 recognizing that a goal of punishment is to prevent future rights violations, the same retributivist might
39 agree that the state may reduce the punishment of someone who cops a plea if they provide valuable
40 information that can lead to the conviction of those who are engaged in far more serious offenses, even
41 though this would fail to mete out punishment that is proportional to what they deserve for their crime;
42 or they might not; it will depend on how they weigh competing values. There are difficult cases; but we
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4 should not blind ourselves to the difficulties that arise when legitimate values conflict merely because
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6 we desire coherence. Social practices as complex as punishment evolve over a long period of time as
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8 people legitimately pursue different goals and seek compromises; it would be remarkable if such
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10 practices reflected only a single set of coherent goals. I believe we need to reject totalizing theories of
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12 punishment such as Bentham’s utilitarianism or ‘pure retributivism’. The theories we are left with depict
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14 a practice that is not coherent, but I think this incoherence is unavoidable and not deeply problematic.¹⁸
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19 **V. The exposition**

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21 As I noted in the introduction, a primary goal of Brooks’ *Punishment* is to provide a critical guide
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23 to theories of punishment to a wide audience including students coming to the topic for the first time. I
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25 now want to return to this point and express some reservations I have about what in many respects is
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27 an engaging work.
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31 The book sometimes gives the impression of being written in haste;¹⁹ and some of its arguments
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33 are confusing. Brooks tries to show that punishment does not effectively deter crime by quoting a 2002
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35 Bureau of Justice Statistics (BJS) study on recidivism that he says is supported by international studies
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37 also casting doubt on the link between time served and reoffending. But oddly, the quote says: “no
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39 evidence was found that spending more time in prison *raises* the recidivism rate”(42, my emphasis). The
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41 quote is accurate, but one would expect a study challenging the deterrent benefit of punishment to say
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43 the opposite: that no evidence was found that spending more time in prison *reduces* recidivism. The
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49 ¹⁸ For one elaboration of this view, see Tunick (1992b), chapter 5.

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51 ¹⁹ A few examples: “Punishment need not be either retributivist, deterrent, or rehabilitative, but all at once”(211);
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53 “retributivists punish a criminal’s moral responsibility for his act” (19); “[rehabilitation theories]’s possibility is
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55 potentially suspect”(51); “the fact that Cindy hurt the feelings of David is not itself a clear case of
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57 criminalization”(10).
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4 study in fact goes on to say that those who served very long sentences (31-70 months) had a
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6 significantly lower re-arrest rate than those who served 25 to 30 months (Langan and Levin 2002, p. 11).
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8 Later Brooks acknowledge that recidivism drops for those in prison over a year but without mentioning
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10 that this was the finding of the BJS study (43).
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14 Brooks' account of retributive theory may also confuse the neophyte student. In addressing
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16 Michael Moore's argument that the retributivist must oppose mercy (17), he says that not all
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18 retributivists agree with Kant's position that we must punish all wrongdoing, and that some retributivists
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20 can endorse mercy "and believe consequences matter"; yet he also says that nevertheless, retribution is
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22 not "easily compatible with mercy"(18); and a few pages earlier he writes "retributivists are not
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24 consequentialists."
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28 Brooks' discussion of expressivism serves as an example of how the book can at times mislead.
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30 Brooks characterizes the expressivist theory as one which bases punishment on the "public mood" and
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32 on the "strength of public disapproval addressed in each case," and he counts Joel Feinberg as a
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34 proponent. He says that theorists like Feinberg regard prison as an essential feature of expressive
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36 punishment (115), and then argues that if we have no persuasive reason to believe that prisons can
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38 reform, this would be a powerful argument against expressivist theories (117).²⁰ Brooks, here, associates
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40 expressivism with rehabilitative theories, which he also does when he criticizes expressivism for being
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42 unclear in its stance towards the death penalty. He says "expressivism is retributivism by another name"
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44 and implies that on this basis it could justify capital punishment for murder; but then he says it could
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56 ²⁰ Feinberg, though, does not think there is an essential means of punishment: prison is regarded as appropriate
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58 hard treatment only given our customs and norms; see Feinberg (1970), p. 100.
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4 not, since the death penalty serves no rehabilitative purpose.²¹ But there surely are expressivists who
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6 would not think their views should be grouped with rehabilitative theories.²²
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9 10 **VI. Conclusion**

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12 Brooks recognizes that punishment is a complex practice that pursues a number of goals. But he
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14 also insists that his theory is an advance because it is coherent and unified. I have tried to show how it
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16 contains some of the tensions that have long characterized discussions of punishment theories. The
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18 purpose he focuses on—punitive justice—is really two different purposes—restoring rights, and
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20 preventing future rights violations—and they can conflict.
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24 The theory of punitive restoration is worth thinking about, and it might be helpful to give more
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26 attention to one of the goals Brooks emphasizes—reintegrating the criminal into society: that could be
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28 to the benefit of criminals, their families, and society overall. As an interpretation of why we have the
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30 practice of punishment, the theory could help guide us when we ask whether what we are doing
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32 promotes the goals of the practice. For example, the view that we punish to reintegrate the criminal
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34 would support reforms such as allowing offenders to retain voting rights so that they will have some
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36 stake in society (214). But can we do with just this view? Brooks concedes that we need to retain a
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38 punitive element in punishment, and that punishment must involve a loss. His theory of *punitive*
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40 restoration appeals to goals other than reintegrating criminals, and unfortunately he devotes more
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49 ²¹ Brooks, 168: “One purpose of expressivist punishment is to foster criminal rehabilitation”; and 169.

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51 ²² Menninger (1966) defends rehabilitation while vehemently opposing the view that we ought to punish to
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53 express our condemnation of the criminal; Hegel, who would agree with Feinberg’s expressivist view that we
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55 punish to vindicate right, would disagree with Menninger’s view that we should treat rather than punish the
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57 criminal (Hegel 1991, §99 Addition).
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4 attention to claiming his theory is coherent than to exploring the tensions between the goals he
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6 integrates.
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