

Retributive Justice in the Breivik Case: Exploring the Rationale for Punitive Restraint in Response to the Worst Crimes

David Chelsom Vogt*

Abstract: *The article discusses retributive justice and punitive restraint in response to the worst types of crime. I take the Breivik Case as starting point. Anders Behring Breivik was sentenced to 21 years of preventive detention for killing 69 people, mainly youths, at Utøya and 8 people in Oslo on July 22nd, 2011. Retributivist theories as well as commonly held retributive intuitions suggest that much harsher punishment is required for such crimes. On some retributivist theories, most notably on the influential theories of Kant and Hegel, the death penalty is warranted for murderers like Breivik. This suggests that the rationale for punitive restraint in a case like the Breivik Case can only be found in forward-looking, consequentialist theories of punishment, or by adding to retributivist theories a side-constraint in the form of a principle of parsimony. However, I argue that if we look closer at the function of punishment in the retributivist theories of Kant and Hegel, they too imply a rationale for punitive restraint, even for such horrific crimes as here discussed. Against Kant and Hegel's own views on the death penalty, I argue that their broader "freedom theories" of retributive justice do not imply the justice of the death penalty or life imprisonment. In the last part of the article, I explore differences in the concepts of freedom entailed by Kant and Hegel's theories, and I relate these to some of the background factors relevant to the Breivik Case.*

Keywords: *retributive justice; punitive restraint; the Breivik Case; Kant; Hegel*

1. Introduction

There is a scene in Dostoyevsky's novel *The Brothers Karamazov* in which Ivan Karamazov tells a story to Alyosha, his kind, younger brother, who is studying to become a monk. The story is about a child who throws a rock that accidentally injures the paw of a dog. The dog is the favorite hunting hound of a nobleman, who becomes furious. The nobleman summons his hunting companions, his servants,

and the child's mother. He orders the child to be stripped naked, makes him run, and then unleashes the rest of his hounds. The hounds chase and tear apart the young boy in front of his mother.

'What does this incredibly cruel nobleman deserve?' Ivan Karamazov puts the question to his brother, who is always preaching the gospel of love and forgiveness that he is taught in the monastery. 'To be shot?' Ivan asks. Alyosha reluctantly murmurs: 'To be shot'.

When we are confronted with an act that is so purely evil as that of the nobleman, most of

* Postdoctoral researcher in the Department of Philosophy at the University of Bergen.

us, I believe, intuitively feel that the perpetrator deserves to be punished. Indeed, even the most good-natured and forgiving persons like Alyosha can be overwhelmed with retributive emotions in a case like this, feeling that only the death penalty or an extremely harsh punishment is sufficient to give the offender what he deserves.

Similar attitudes were common after the conviction in 2012 of Anders Behring Breivik. Breivik was sentenced to 21 years of preventive detention for killing 69 people, mostly youths, at Utøya and 8 people in Oslo on July 22nd, 2011.¹ He targeted the Labour Party Youth Summer Camp and government offices, claiming that it was a pre-emptive strike against 'traitors who commit or plan cultural destruction, including deconstruction of the Norwegian ethnic group'.² After the verdict, many people expressed concern that his punishment was too mild. One commentator called it a 'measly twenty-one-year sentence for a remorseless, mass-murdering white supremacist', saying it was 'shocking to Americans', known for their considerably more punitive criminal justice system.³ Another commentator reacted to what he said amounted to less than four months in prison per person murdered.⁴ Yet others took of-

fense with what they saw as Breivik's luxurious prison conditions.⁵

Some of this concern is likely due to a lack of understanding of the Norwegian system of preventive detention ('forvaring'), which in Breivik's case entails that his incarceration can be extended consecutively by five years for as long as the courts consider him dangerous. However, he could in theory be released as early as after ten years, or anytime thereafter, if there is no longer reason to believe that he remains a threat to the life, health, or freedom of others.⁶ Such an early release would not sit well with the type of retributive intuitions expressed by Alyosha, and which are shared by many after horrendous crimes such as these.

It is not clear, however, that we ought to trust these retributive intuitions when considering what justice requires in response to crime. Do our intuitions properly track what justice requires, or are we led astray by our emotions? Our intuitions about punishment are likely at least in part the products of evolution: Our forefathers and -mothers who felt the urge to punish transgressors tended to gain an adaptive advantage. We can thus explain why such intuitions are seemingly widespread. But that does not mean they are justified, of course.⁷ Indeed, the urge to punish has for some a connotation of

1. The verdict in the Breivik Case is labeled RG-2012-1153, and is available at lovdata.no.
2. Breivik read this statement at his arraignment, reprinted by NRK, <https://www.nrk.no/norge/slik-begrunnet-breivik-sitt-krav-1.7984902> (translated by me).
3. The Nation, August 28, 2012, <https://www.thenation.com/article/archive/sentencing-criminals-norway-too-soft-or-are-we-too-harsh/>.
4. Washington Post, August 24, 2012, https://www.washingtonpost.com/blogs/blog-post/post/is-breiviks-21-year-sentence-enough/2012/08/24/6fd383f0-edfe-11e1-afd6-f55f84bc0c41_blog.html.

5. Sky News, August 22, 2012, <https://news.sky.com/story/mass-killer-breiviks-cell-has-private-gym-10472224>.
6. Cf. Norwegian penal code (1902) §§ 39 c and e. Since 2015, preventive detention has been regulated in the new penal code (2005) §§ 40-47. In January 2022, 10 years into Breivik's sentence, the courts heard and denied his first appeal to be released.
7. Nor is the fact that the intuitions have an evolutionary basis itself an argument for distrusting them. Such arguments would entail committing the genetic fallacy, cf. Michael S. Moore, *Placing Blame: A Theory of the Criminal Law* (Oxford: Oxford UP, 2010), 127. However, see Sharon Street, 'A Darwinian Dilemma for Realist Theories of Value', *Philosophical Studies* 127, no. 1 (2006), regarding the problems

vice, not virtue. ‘Mistrust all in whom the urge to punish is strong’, Nietzsche said, ‘For they are a people of a low sort and stock’.⁸ Nietzsche claimed that punishment is at least sometimes motivated by *ressentiment* and a wish to project one’s own weakness upon another. True virtue and moral strength, many have claimed, lies in being able to forgive and to turn the other cheek rather than to seek retribution. If this is so, it is hardly safe to base our moral judgment on our retributive intuitions. On the other hand, a leading contemporary retributivist, Michael S. Moore, argues that we do have reason to trust our retributive intuitions in cases like that of the nobleman. We ought to take such intuitions as evidence of the normative validity of retributivist justifications for punishment, Moore claims.⁹

In order to assess whether retributive intuitions in response to horrendous crimes track what retributive justice requires, we must subject our intuitions to rational scrutiny. In the following, I will consider the Breivik Case from the perspective of philosophical theories of the just function of punishment. The question I ask is whether theories of retributive justice might provide a rationale for limiting punishment even for the worst crimes, when commonly held intuitions suggest very severe punishments. Taking the Breivik Case as starting point, I consider whether a retributivist theory of punishment could justify the actual sentence of Breivik by Oslo Municipal Court, or whether retributivist theories suggest the same outcome as the retributive intuitions I have here described, namely that Breivik and offenders like him should never be released or should be executed. If we compare Breivik’s sentence to the sentences of similar domestic terrorists in the United States, the latter receive consider-

of trusting moral judgments that can be explained by evolution.

8. Friedrich Nietzsche, *Thus Spake Zarathustra* (New York: J. M. Dent & Sons, 1933), 91.
9. Moore, *Placing Blame*.

ably harsher sentences, either the death penalty or life imprisonment.¹⁰ Another way of framing my question, then, is to ask whether theories of retributive justice might take the side of the relatively lenient penal systems of Norway and the Nordic countries against the more punitive criminal justice systems of the United States and similar systems, when sentencing the worst crimes.

Note that I am asking about the justice, not the utility of limiting punishment for the worst crimes. I am asking about whether retributive justice provides a reason for showing punitive restraint. I am not asking about the beneficial effects that may or may not ensue from showing such restraint. From a utilitarian perspective, the problem of restraint is rather simple: A utilitarian penal theory requires restraint if restraint results in more utility than longer sentences or the death penalty. The utilitarian debate is thus an empirical one, where the aim is to determine whether more suffering is prevented with or without the death penalty or life sentences. Because punishment itself causes suffering, there is a presumption inherent to utilitarianism in favor of keeping punishment levels as low as possible. Jeremy Bentham explicitly advocated a principle of parsimony, saying that, “The punishment ought in no case to be more than what is necessary” to prevent yet more suffering, and that this should be achieved “at as cheap a rate as possible”.¹¹

The question I am posing, is whether there is an equivalent to the principle of parsimony inherent to theories of retributive justice. If there

10. Four examples: Timothy McVeigh (Oklahoma City bombing, 1994), death penalty; Dylann Roof (Charleston church shooting, 2015), death penalty; Patrick Wood Crusius (El Paso shooting, 2019), 90 consecutive life sentences; Robert Bowers (Tree of Life Synagogue shooting, 2018), death penalty.
11. Jeremy Bentham, *The Principles of Morals and Legislation* (New York: Prometheus Books, 1781/1988), 182.

is, then it is possible to say that justice (and not merely utility, potentially) requires less severe punishment than the death penalty or life sentences without parole, even for the worst crimes.

Retributivism is often seen as a starkly punitive approach to crime. The increased popularity of retributivism from the 1970s onward has been credited as a cause of the sharp rise in the use of punishment in many countries in this period, especially in the United States.¹² To suggest that a retributive theory inherently entails a principle of parsimony may thus sound strange. On the other hand, it is also in one sense entirely obvious, even trivial, that theories of retributive justice entail a principle of parsimony. Punishment beyond what the offender of the crime deserves is unnecessary for retributive justice, and therefore precluded. Or as Norval Morris formulated his principle of 'limiting retributivism': punishment must be 'not undeserved', in other words, neither too lenient nor too severe, but in between these extremes.¹³ This principle does not tell us what is not undeserved, however. If someone intuitively believes that the death penalty or life sentences are deserved for offenders of the worst crimes, limiting retributivism offers no counterargument. The interesting question, then, is whether a theory of retributive justice can provide a substantial reason for why restraint is required, even in such cases. Can the theory say *why* less punishment is more just in a case such as that of Breivik?

To this question, many scholars will answer no. Michael Tonry, for instance, denies that such a substantial limiting principle is entailed by theories of retributive justice. He claims instead that a principle of parsimony must be added to retributive theories, as a side-constraint on the pursuit of deserved punishment.¹⁴ Michael Moore similarly allows for other goods to override the intrinsic good of giving the offender what she deserves, such as the goods of autonomy and legality.¹⁵ Accordingly, on Moore's theory, it may be morally permissible to set aside retributive justice for other goods, but retributive justice itself does not provide a rationale for restraint.

Contrary to these views, I shall argue that there are retributive theories that do entail a principle of parsimony. The retributivist theories of Immanuel Kant and Georg Wilhelm Friedrich Hegel, I shall argue, entail a principle of restraint that is inherent to the very function of punishment that they propose. Both Kant and Hegel claim, however, that it follows from their theories that retributive justice requires the death penalty for murderers. Especially Kant is known for a rather blood-thirsty penal theory, famously arguing that if an island community were to dissolve itself, the authorities ought to execute the murderers in the prison before leaving.¹⁶ I shall claim, however, that contrary to Kant and Hegel's own beliefs about the death penalty, it follows from their broader theories that neither the death penalty nor life without parole serve justice, even after horrendous crimes such as those of Breivik. To make

12. For two nuanced discussions of the influence of retributivism on policy in the period, see Michael Tonry, 'Can Twenty-first Century Punishment Policies Be Justified in Principle?', in *Retributivism Has a Past: Has It a Future?*, ed. Michael Tonry (Oxford: Oxford UP, 2011), and Matt Matravers, 'Is Twenty-first Century Punishment Post-desert?', in *Retributivism Has a Past: Has It a Future?*, ed. Michael Tonry (Oxford: Oxford UP, 2011).
13. Richard S. Frase, 'Limiting Retributivism', in *Why Punish? How Much?*, ed. Michael Tonry (Oxford: Oxford UP, 2011), 256.

14. Michael Tonry, 'Fairness, Equality, Proportionality, and Parsimony: Towards a Comprehensive Jurisprudence of Just Punishment', *Minnesota Legal Studies Research Paper* 17, no. 4 (2017).
15. Moore, *Placing Blame*, 187.
16. Immanuel Kant, *The Metaphysics of Morals*, The Cambridge Edition of the Works of Immanuel Kant: Practical Philosophy (Cambridge: Cambridge UP, 1996), 6:333.

this point, I shall look closer at the function of punishment on the Kantian-Hegelian theories.

According to these theories, which may be labeled ‘freedom theories’ of criminal law, the purpose of punishment and criminal law in general is to promote and to instantiate the norm of mutual freedom for all citizens, including the offender. Just punishment entails respecting the autonomy of the offender, while at the same time denying the offender’s ability to deny the norm of mutual freedom for all. As we shall see, the theme of autonomy was highlighted in the Breivik verdict. The way the trial was conducted, as well as the sentence and its implementation, further served to underscore the value of autonomy or freedom, in the vein of Kant and Hegel. Their theoretical frameworks provide an argument for restraint, limiting the severity of punishment for reasons of justice, and not merely for reasons of utility. They provide a theoretical response to retributive intuitions of the kind I have mentioned. This response says that justice requires restraint, by inflicting only so much punishment as is consistent with the freedom or dignity of the offender.

In the last part of the article, after having shown the suitability of the Kantian-Hegelian perspective for understanding and justifying the Breivik trial and sentence, I discuss what this perspective leaves out of considerations of retributive justice. As with all theories of punishment, some things are deemed irrelevant or of less importance when determining just punishment according to these freedom theories. In the Breivik Case, it becomes quite evident that background conditions and the defendant’s social relations have only limited relevance on this understanding of criminal law. Applying Hegel’s richer conception of freedom, which includes a form of social freedom, we see that the abstract notion of freedom of the Kantian theory of criminal law does not exhaust the meaning of justice in a case like the Breivik Case.

2. A brief introduction to the freedom theory

I start with a brief general introduction to the Kantian-Hegelian freedom theory of criminal law. I then apply this perspective to a discussion of retributive justice in the Breivik Case. I will focus on how Kant and Hegel laid out this perspective, but I will also draw on modern interpretations of the freedom theory of criminal law.¹⁷ Kant and Hegel’s views differed on some relevant points, as we shall see, especially in the last part of the essay, but I will begin by presenting their shared general framework for criminal law.

‘The idea of right is freedom’, Hegel says.¹⁸ In Kant’s words: ‘Right is therefore the sum of conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom’¹⁹. This means that legal right (German, ‘Recht’) is what we for short can call *mutual freedom*: the norm that each has freedom to the extent compatible with everyone else’s equal freedom. My legal freedom extends to where your legal freedom begins. And not only is right and mutual freedom the same. According to Kant: ‘Right and the authorization to use coercion mean one and

17. Examples of modern versions of the freedom theory can be found in Arthur Ripstein, *Force and Freedom* (Cambridge, MA: Harvard UP, 2009); Alan Brudner, *Punishment and Freedom* (Oxford: Oxford UP, 2009); John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford: Clarendon Press, 1990). This author’s exposition of the freedom theory can be found in David Chelsom Vogt, ‘The Natural Meaning of Crime and Punishment: Denying and Affirming Freedom’, *Criminal Law and Philosophy* (2021).
18. G. W. F. Hegel, *Philosophy of Right* (Mineola, NY: Dover Publications, 2005), § 1.
19. Kant, *The Metaphysics of Morals*, 6:230 Hegel formulates his principle or mandate of abstract right differently, but its content is consistent with Kant’s principle: ‘Be a person and respect other persons’, *Philosophy of Right*, § 36.

the same thing'.²⁰ In other words: right, freedom and authorized coercion mean the same thing according to this freedom theory. How can we explain this?

The reason that authorized coercion and right mean the same thing, is that right only makes sense if right can be enforced. Without the possibility of enforcement, legal rights are effectively void. If others could breach my rights as they wished, and it would not be right to prevent them, then my sphere of freedom would be unprotected by right. I only *actually* have freedom if my right to freedom is enforced. Therefore, just like minus minus is plus, so 'a hindering of a hindrance to freedom is consistent with freedom', Kant says.²¹

Let us now connect this to the issue of crime and punishment: Punishment, when justified, is a hindering of a hindrance to freedom. To see why this is so, let us start by looking at the hindrance that punishment is a response to, namely crimes.

Crimes are legal wrongs, the opposite of right. However, applying Hegel's distinctions, crime is a specific type of legal wrong. It is a specific type of hindrance to freedom. Distinguishing between these types will let us see the specific function of punishment in remedying criminal wrongs.

Hegel distinguishes between three types of legal wrongs, of which I will here concentrate on two: Unpremeditated wrongs, or civil wrongs, and crimes.²² The difference between the two lies in the meaning of the acts in question. Civil wrongs and crimes do not necessarily differ materially, that is, in their real consequences. Civil wrongs may be equally or more

harmful than crimes. But they entail different meanings. Another way of putting this, using Kant's vocabulary, is to say that civil wrongs are *material wrongs*, while crimes are also *formal wrongs*.²³ To see this distinction, consider the following example:

Assume that my neighbor has taken my car and crashed it. Here are two scenarios: In the first scenario, there was a misunderstanding between me and my neighbor. He thought I had given him permission to use my car, but in fact I had not. My neighbor has wronged me by violating my property rights to my car. We might say he has denied me the occasion to determine the use of my car. We would not say, however, that he has generally denied that I have a right to my car. On the contrary, if he did put weight to what he thought was permission from me, he implicitly respected my property rights. In Hegel's words, a person who commits such an unpremeditated, civil wrong 'negates only the particular will; but pays respect to the general right'.²⁴ That is, he denies the specific instantiation of my right, but he respects my general right to have rights.

In the second scenario, my neighbor stole my car. He did not only deny my specific right to my car, but he implicitly denied the general norm by which my property rights are to be respected. He signaled that he could treat me as he pleased, that property rights do not apply equally to me. Thereby, he denied the very idea of equal rights for all. Theft, and crimes in general, are therefore attacks upon the norm of equal rights, and not merely denials of specific rights. In Hegel's words, 'neither right in general nor my personal right is respected'.²⁵

Materially, the two scenarios are identical. I am in both cases without a car. In form, or in meaning, the wrongs against me differ. The form of the act in the second scenario is not compat-

20. Kant, *The Metaphysics of Morals*, 6:232 In Hegel's formulation, 'Abstract right is a right to use force', *Philosophy of Right*, § 94.

21. Kant, *The Metaphysics of Morals*, 6:231.

22. Hegel, *Philosophy of Right*, §§ 82-104 Hegel's third category of wrongs is 'fraud', which I leave out, because it is unnecessary for my purposes here.

23. Kant, *The Metaphysics of Morals*, 6:308.

24. Hegel, *Philosophy of Right*, § 86, addition.

25. Hegel, *Philosophy of Right*, § 90, addition.

ible with everybody's equal right. Crime thus entails a *formal wrong* against mutual freedom. In both cases, my neighbor will be under obligation to (materially) compensate me, that is, to remedy the material wrong against me. But in the second scenario, punishment serves to remedy the formal wrong against mutual freedom. In Hegelian terms, punishment functions as a 'negation of a negation' of freedom.²⁶ In Kantian terms, it is a 'hindering of a hindrance to freedom'.²⁷

How does punishment serve this function? In two ways: 1) By promoting mutual freedom. 2) By respecting or instantiating mutual freedom. We can think of the first as making sure that there really is mutual freedom in society. We can think of the second as concerning the *way* that we promote mutual freedom. The way must itself respect right, by expressing and instantiating the value of mutual freedom. Promoting is prospective, looking toward the future, maximizing mutual freedom going forward. Respecting is retrospective, looking toward the past, to determine how the crime can be negated and mutual freedom affirmed.

3. Promoting Mutual Freedom

Let us consider the promoting function first.²⁸ As I said above, if one's rights can be denied without consequences, they are effectively empty. Rights must be backed up by force, so that a hindrance to one's freedom is hindered. That is how freedom is secured *in reality*. It is not sufficient that we have freedom merely as a normative ideal; a utopic principle; a mere idea. Freedom must also be ensured in the empirical

reality of our society.²⁹ Take an example: If there are many muggings in the park where I live, I will likely avoid walking through it at nighttime. I will have the right to do so. As a matter of principle, as an idea, I still retain the freedom to walk through the park. But in reality, I will start to take a detour around it, and my freedom will thus *actually* be restricted.

Crime not only denies the idea or principle of mutual freedom; it damages freedom in real life. It causes fear and anxiety. It creates material obstacles to exercising one's freedom, e.g., when a crime victim is deprived of money or paralyzed from their neck down. And for many victims, it produces a disabling feeling of self-blame and self-loathing, which prevents them from functioning in their daily lives and from having normal, trusting relationships with other people. Prevention of crimes, through general deterrence, rehabilitation, incapacitation, etc., may address some of these real-life consequences of crime. Punishment can thus serve the function of *promoting* mutual freedom.

If we now turn to the Breivik Case, we can see that this function of promoting mutual freedom can supply a rationale for the type of sentence Breivik was given. He was sentenced to 21 years of preventive detention ('forvaring'). This type of sentence differs from a prison sentence ('fengselsstraff') by the fact that the latter is time-limited, with a maximum length of 21 years for the crimes Breivik committed. Both types of sentences are served in prison and differ only by their rationale and time-limits. Breivik's preventive detention has a minimum time of 10 years, which means he could in theory be released much earlier than if he had gotten a regular prison sentence. However, he can also be held much longer than if he had gotten a prison sentence. If, after 21 years, the courts determine that there is an imminent danger that Breivik will commit a new serious crime against the life, health, or freedom of others, then his

29. See Ripstein, *Force and Freedom*, 315.

26. Hegel, *Philosophy of Right*, § 97, addition.

27. Kant, *The Metaphysics of Morals*, 6:231.

28. The first to recognize this prospective function of punishment in Kant, was B. Sharon Byrd, 'Kant's Theory of Punishment: Deterrence in its Threat, Retribution in its Execution', *Law and Philosophy* 8, no. 2 (1989) See also Ripstein, *Force and Freedom*, 300.

preventive detention can be extended by five years.³⁰ After five years, if the conditions are still met, the preventive detention can be extended again by a maximum of five years, and so forth consecutively.

For as long as Breivik is considered an imminent threat upon his release, it can be said to be *necessary*, in order to ensure the freedom of potential victims, to hold him imprisoned. Further, it is *fair* that he, rather than potential victims, bears the burden of his threat to mutual freedom.³¹ That said, one will upon the freedom theory be wary of the overuse of such preventive measures.³² If applied when not clearly necessary, preventive detention will imply a denial of the autonomy of the person imprisoned, and it will not, then, be consistent with mutual freedom.

Thus, on the one hand, the freedom theory can justify very long sentences when the defendant remains a serious threat to the freedom of others. On the other hand, it can only justify this to the extent that such sentences respect mutual freedom, including the freedom of the offender. This brings us to the second function of just punishment: the function of expressing and instantiating respect for mutual freedom. It is here that we find the rationale for limiting punishment, even in the worst cases.

4. Respecting Mutual Freedom

Punishment is only justified if it entails respect for mutual freedom. If we do not respect the

freedom of the offender, we contradict the value we are promoting. For instance, if we punish someone disproportionately harshly in order to prevent crime, then we are using the offender only as means. This rationale for punishment, Hegel famously said, 'is much the same as when one raises a cane against a dog; a man is not treated in accordance with his dignity and honour, but as a dog.'³³ But how can punishment respect the freedom of the person who is punished? Most offenders do not wish to be punished; they do not consent to their treatment. How, then, are we respecting their freedom when we are contradicting their (free) will?

Kant answers, 'No one suffers punishment because he has willed *it* but because he has willed a *punishable action*'.³⁴ He may not actually consent to being punished. As an empirical fact, he does not will his punishment. But that is beside the point, Kant says. What matters is that he *would*, if he were truly rational, consent to a law that prescribes punishment for his action. Thus, the offender is treated *as if* he were purely rational, that is, *as if* he were fully autonomous, free from heteronomous compulsion. Kant, nor anyone else, would claim that we always are completely autonomous in practice. We all have inclinations that we follow. We all act in ways that are less than rational. But we are presumed to be capable in principle of being guided by reasons and of overriding our inclinations, even though we often do not exercise this capacity. The freedom theory thus entails a certain *normative attitude* toward the offender, not a certain belief about the actual, *empirical* causes of the offender's actions. It accords the offender the moral status of a free person, thereby presuming only that the offender could have acted rationally, and hence that he was not entirely compelled to act as he did.³⁵

33. Hegel, *Philosophy of Right*, § 99, addition.

34. Kant, *The Metaphysics of Morals*, 6:335.

35. This assumption is consistent with both a libertarian and a compatibilist metaphysical the-

30. Norwegian Penal Code, Chapter 7, 'Forvaring', §§ 40 and 43.

31. Joel Feinberg calls this 'weaker retributivism', a version of retributivism emphasizing comparative desert, by which 'the principle simply asserts the moral priority, *ceteris paribus*, of the innocent party', *Doing and Deserving* (Princeton: Princeton UP, 1970), 218.

32. In a Norwegian context, this point has been made by Linda Gröning, Jørn RT Jacobsen, and Erling Johannes Husabø, *Frihet, forbrytelse og straff: en systematisk framstilling av norsk strafferett* (Bergen: Fagbokforlaget, 2016), 618.

How, then, does punishment respect the defendant as a free and rational person? By interpreting her deeds as rational claims about what is right. In Kantian terms: By interpreting them as universalizable maxims, meaning that the purposes of her deeds can apply universally, that is, equally to all persons. What is rational is the same for every rational person. A system of right that would be consented to by one rational person, would therefore be consented to by all rational persons. Thus, right must be 'omnilateral', Kant says, valid from all sides.³⁶ All rational persons could not allow one person to singlehandedly change the rights of others. A system of right where one person could unilaterally change the rights of others, would not be rational, because it cannot be universalized without contradicting the very notion of right.

Hence, if we are to take the offender seriously as a rational person who does not contradict himself, we cannot interpret his act as making this irrational claim that he can unilaterally change the rights of others. Rather, we must interpret him as making a rational claim about his own rights. While it is irrational to think

that the offender could withdraw the rights of others by his own will, it is not irrational to think that he could withdraw *his own equivalent* rights. We are all free to withdraw rights on our own behalf, for instance, to withdraw a right to get paid according to a contract.³⁷ So while it is irrational to suggest that one can withdraw other people's rights not to be coerced, it is not irrational to give up one's own right not to be coerced, in this case by the state, through punishment. The maxim of the offender is rational, in other words, universalizable, only if it is taken as applying to himself. Or put differently: The offender cannot appeal to the omnilateral principle of right as grounds for unilaterally denying the very same principle. Hence, the principle of mutual freedom does not protect the right not to be hindered in hindering mutual freedom. On the contrary, by consenting to the principle of mutual freedom, which a purely rational person would do, one also consents to being hindered in hindering the actualization of the principle. Thus, by treating the offender as he 'suggested' through his own act, we 'bring his misdeed back upon himself', as Kant says.³⁸

ory of free will. On the latter theory, what matters for the possibility of freedom, and hence for responsibility, is that the offender was not compelled to act, but acted in accordance with his or her own wishes. See Michael S. Moore, 'The Quest for a Responsible Responsibility Test: Norwegian Insanity Law After Breivik', *Criminal Law and Philosophy* 9, no. 4 (2015). Whether responsibility also requires free will in the libertarian (metaphysical) sense, is much debated and something I will remain agnostic on in this context. What is anyway clear, is that the freedom theory is not compatible with hard determinism. But neither are most of our moral practices. If hard determinism is true, then, not only criminal law, but morality itself must be reconceived. See Joshua Greene and Jonathan Cohen, 'For the Law, Neuroscience Changes Nothing and Everything', in *Why Punish? How Much?: A Reader on Punishment*, ed. Michael Tonry (Oxford: Oxford UP, 2011).

36. Kant, *The Metaphysics of Morals*, 6:259.

5. Just Punishment in the Breivik Case

Let us now look at this notion of respecting mutual freedom in the Breivik Case. The idea that to punish someone is to respect their freedom is indeed a rather remarkable way of framing punishment. In Hegel's formulation, this idea is even more astonishing: Punishment, he says,

37. Ripstein, *Force and Freedom*, 311. But note that we are not free to withdraw our general right to have rights. We can only rationally withdraw particular rights. This point will be important when we consider the rationale for restraint in the Breivik Case and similar horrendous cases.

38. Kant, *The Metaphysics of Morals*, 6:363. Ripstein, *Force and Freedom*. Vogt, 'The Natural Meaning of Crime and Punishment: Denying and Affirming Freedom'.

is 'a right of the criminal himself'³⁹. A right to be punished? Who would want to claim that right?

In the Breivik case we saw a perfect example of a defendant who fought for the right to be punished. He wanted, more than anything it seemed, to be found criminally liable, and hence, to claim a right to be punished. Why? Because the alternative was to be deemed insane, which would mean that the political message he was trying to convey would be completely undermined. He could not have claimed to be the political savior of Europe, as was implied by his manifesto.⁴⁰ He would simply be taken as a lunatic on a killing spree, comparable, perhaps, to those school shooters in the United States who do not state political reasons for their crimes.

In the Breivik verdict, the judges explicitly note the value of being held accountable:

It is as a matter of principle dubious to revoke a defendant's capacity for guilt, and thereby also their moral and legal autonomy, by an unjustified pathologizing of their minds. For society and those who are directly affected by a crime as well, the concern for just retribution implies punishment of offenders with a real capacity for guilt.⁴¹

Oslo Municipal Court here expresses the importance of the value protected by the right to be punished: moral and legal autonomy; freedom.

However, if Breivik so desperately wanted to be taken seriously as a political agent, why grant him that pleasure? Ironically, sentencing him to treatment could constitute a worse punishment for him, since it would undercut his

political project.⁴² It would make it difficult for him to see his own incarceration as a sacrifice for a political cause. His acts would have been deemed meaningless, and so would his suffering. Hence, if the ultimate point of punishing Breivik was to make him suffer, then it seems that the court missed an opportunity by declaring him responsible.

The ultimate purpose is not, however, Breivik's suffering. The ultimate purpose, if we accept the freedom theory, is to express our society's commitment to uphold mutual freedom. This means that it is the message conveyed by punishment, not the suffering itself that is its purpose.

To see this difference, it is useful to backtrack a little bit. I said that the difference between a civil wrong and a crime is not its material aspect. Two acts may cause an equal amount of material damage, but one may be a civil wrong and the other a crime. What distinguishes them is the different *meanings* that the acts have. A crime has the meaning of denying not only a specific right, but the norm of mutual right itself. Crime is thus a formal wrong against mutual freedom, and it is this irrational form or meaning that punishment denies by 'bringing the deed back upon the criminal'.

This emphasis on the formal or symbolic, rather than on the material consequences of crime and punishment, sets the Kantian-Hegelian theory apart from other retributivist theories. On Michael Moore's theory, for instance, 'the suffering punishment entails is an intrinsic

39. Hegel, *Philosophy of Right*, § 100.

40. Breivik sent a manifesto of 1500 pages to more than a thousand people on the same day that he committed the atrocities. In the manifesto, he set out to justify the acts he was about to commit.

41. RG-2012-1153, on page 73. Translated by me.

42. The Official Norwegian Report NOU: 2014:10, which evaluated the criminal insanity rules in the aftermath of the Breivik Case, concluded generally that a sentence to psychiatric treatment according to the Norwegian penal code § 62 often does not involve a less punitive sanction than prison. The report states that compared to a prison sentence, treatment of criminally insane defendants 'could cause a significantly heavier burden for the defendant' (chapter 10.4.2.2.2, translated by me).

good when inflicted on those who deserve it'.⁴³ It is the suffering inflicted on the offender – i.e., the material aspect of the punishment – that Moore considers an intrinsic good and the basis of retributive justice. This view is the dominant view among retributivists, according to Mitchell Berman.⁴⁴ On the Kantian-Hegelian view, however, it is the meaning of the criminal act that is to be denied, and it is therefore the meaning of punishment, and not its material aspect, that ultimately serves the function of retributive justice.

Keep that in mind when we look at this quote by Kant, which specifies how punishment brings the misdeed back upon the criminal: 'Whatever undeserved evil you inflict upon another within the people, that you inflict upon yourself. If you insult him, you insult yourself; if you steal from him, you steal from yourself; if you strike him, you strike yourself; if you kill him, you kill yourself.'⁴⁵ This sounds a lot like an eye for an eye, and Kant even explicitly calls his principle *ius talionis*.⁴⁶ But because punishment is supposed to negate the formal wrong – the denial of the norm – and not the material wrong, we must understand this proportionality as *symbolic proportionality*, and not as *material proportionality*.

If it were material proportionality, proportionality would be achieved by letting the suffering caused by the crime – e.g., a lost eye – meet a proportional suffering in the form of punishment – another lost eye or an equivalent amount of suffering in prison. Not only is material proportionality *impossible* for many types of crime (how could you create material proportionality for the crime of insider-trading or for carrying a gun without a license?) – material

proportionality is also *unacceptable* for many types of crime. This point is important for the Breivik Case. On a Kantian-Hegelian theory, it would be wrong to torture a torturer or to rape a rapist because it is degrading. It defiles the humanity of the person who is punished, and that person could not, then, rationally consent to his punishment. One cannot consent to being treated inhumanely. Or put differently: One cannot withdraw one's right to have rights; doing so is not universalizable.⁴⁷ Therefore, Kant says, 'there can be disgraceful punishments that dishonor humanity itself, such as quartering someone, having him torn by dogs, cutting off his nose and ears.'⁴⁸

The amount and type of punishment cannot match the crime materially in such cases because that would be unacceptable. The punishment must instead, through symbolic proportionality, express the seriousness of the crime. Symbolic proportionality simply means that the message of the crime meets a proportional 'counter-message' conveyed by the sanction of the crime. The idea is familiar from other practices where we use a material medium to convey a message, such as the practice of giving gifts. If a friend has mowed your lawn while you were on holiday, you might convey your gratitude by giving her a bottle of wine. Another time, when your friend has done you a greater favor, you might buy her a whole case of wine, to really show that you appreciate her effort. But if you give her a case of wine when she has only taken your newspaper in for you, it will seem strange, because your gratitude is out of proportion to her favor. In short, we are quite familiar with the idea that the intensity of the message can be

43. Moore, *Placing Blame*, 162.

44. Mitchell N Berman, 'Two Kinds of Retributivism', in *Philosophical Foundations of Criminal Law*, ed. R. A. Duff and Stuart P. Green (Oxford: Oxford UP, 2011), 438.

45. Kant, *The Metaphysics of Morals*, 6:332.

46. Kant, *The Metaphysics of Morals*.

47. In Kant's terminology, one has a 'perfect duty to oneself' not to deprive oneself of one's capacity for being a moral agent and for having rights, for instance by suicide, by selling oneself into slavery, by stupefying oneself through excessive drinking, etc. Kant, *The Metaphysics of Morals*, 6:421–6:444.

48. Kant, *The Metaphysics of Morals*, 6:463.

adjusted by increasing or decreasing the size of the medium, creating a proportional response for the occasion.⁴⁹

The gift example also makes it clear that what we deem an appropriate amount and type of medium depends to some extent on the cultural practice of the society. For instance, it would be strange to pay your friend for mowing your lawn. But spending the equivalent amount on a bottle of wine is fine. In some families, you could give your wife a pair of gloves for her 50th birthday and still convey your love and appreciation; in other families, you would be expected to give something much more valuable on such a big occasion, like a diamond necklace or a trip to the south of Spain.

The same applies to punishment: The appropriate amount and type of punishment depends to some extent on the culture of punishment of that society. As Hegel put it, 'a penal code belongs to its time and to the condition in which the civic community at that time is'.⁵⁰ He also noted that 'Thought itself cannot determine how every single crime is to be punished ... By the progress of civilization the estimate of crime becomes milder.'⁵¹ Pure rational argument – i.e., 'thought itself', or in Kantian terms, pure deduction of 'the metaphysics of morals' – can only get us so far. It can establish the right of the state to uphold the norm of mutual freedom through punishment. But this still leaves considerable room to determine how much punishment is needed to do so, a determination which depends to some extent on historical and contextual matters.

If we are to assess the amount of punishment Breivik received, we must therefore take

into account the penal culture of Norway. Norway and the other Nordic countries are generally less punitive in their approach to crime than other countries.⁵² Punishment levels are comparatively low. The prison population makes up a comparatively low share of the general population. Prison conditions are better for inmates than in most other countries, affording the inmates more autonomy than in other countries, for instance to choose work or school programs, to move around in the prison, to cook one's own meals, etc.

From this relative mildness it does not follow that Norway and the other Nordic countries take more lightly on crimes, not even on the worst crimes, which are punished considerably milder than in other countries. If a murderer in Norway gets 17 years in prison and is released on parole after 11 years, while a murderer in the United States gets a life sentence, that by itself does not suggest that the act of murder is more strongly condemned in the United States. The degree to which a sentence communicates censure or condemnation depends also on how other crimes are sentenced. As Andrew von Hirsch explains it, censure depends on the ordinal, and not (or not only), the cardinal punishment scale. 'This is because the censure expressed through penal deprivations is, to a considerable degree, a convention.'⁵³

In Norway in 2011 the convention was such that the maximum punishment for crimes of the type Breivik committed was 21 years of preventive detention. He got the longest sentence that it was possible to give him.⁵⁴ His sentence

49. I elaborate on the meaning conveyed through punishment in Vogt, 'The Natural Meaning of Crime and Punishment: Denying and Affirming Freedom'. See also Joel Feinberg, 'The Expressive Function of Punishment', *The Monist* 49, no. 3 (1965).

50. Hegel, *Philosophy of Right*, § 218.

51. Hegel, *Philosophy of Right*, § 96.

52. John Pratt, 'Scandinavian Exceptionalism in an Era of Penal Excess: Part I: The Nature and Roots of Scandinavian Exceptionalism', *The British Journal of Criminology* 48, no. 2 (2007).

53. Andrew von Hirsch, 'Proportionate Sentences: A Desert Perspective', in *Why Punish? How Much?*, ed. Michael Tonry (Oxford: Oxford UP, 2011), 212.

54. As explained above, he would have the right to be released after ten years if he no longer

thereby communicated that his acts belong to the category of the worst criminal acts possible. Norway had not reserved a higher punishment for anything that would be worse.

But was it enough? Or was the ordinal scale in Norway not anchored properly, so that the maximum punishment did not properly reflect the seriousness of the crime? Recall Alyosha's reaction to the nobleman's crime: 'Shoot him!' If we look to Kant and Hegel, we see that both would agree with Alyosha. Kant meant it literally when he said, 'if you kill him, you kill yourself'. Another place he says: 'If he has committed murder he must die. Here there is no substitute that will satisfy justice.'⁵⁵

Kant and Hegel's views are perhaps understandable in light of the culture of punishment of their time. In the same way, we might say that their opposition to granting women voting rights is understandable in light of the political culture of their time. I believe, however, that in both cases, it is more consistent with the broader philosophical frameworks of Kant and Hegel to deny these particular views.⁵⁶ The key to this conclusion is the notion of dignity or humanity, that is, of everyone's equal right to have rights. Recall Kant's own justification for why torture and rape are unacceptable punishments. Punishment that denies the humanity of the person

posed an imminent threat to the life, freedom and health of others. If he had gotten a regular prison sentence of 21 years, he would have had to serve 2/3 of the time before release upon good behavior, which is slightly longer. Realistically, however, preventive detention ensures the longest possible sentence for Breivik, because it can be extended beyond 21 years.

55. Kant, *The Metaphysics of Morals*, 6:333.

56. Kant, *The Metaphysics of Morals* 6:314. I will not here discuss their view that women are 'passive citizens' but will simply state that I believe we can ignore this categorization without thereby changing anything of importance in their systems of right. For a discussion of how to 'update' Kant's views, see Nelson T. Potter, 'Kant and Capital Punishment Today', *The Journal of Value Inquiry* 36 (2002).

who is punished cannot at the same time respect the humanity of that person. Such punishment is not universalizable. Therefore, Kant says: 'Nonetheless I cannot deny all respect to even a vicious person as a person; I cannot withdraw at least the respect that belongs to him in his quality as a person, even though by his deeds he makes himself unworthy of it.'⁵⁷ Even a prisoner should not be denied all respect, in spite of the fact that his deeds make him unworthy. He does not lose the right to have rights.

We saw this clearly in the Breivik trial. He got the same treatment as any defendant. He was not placed in a cage, as defendants are in some countries. He did not have to wear an orange prison uniform or similar. He wore a suit, just like anybody else. He got to take his handcuffs off during the trial. The prosecutors came over to him and shook his hand before the trial started. Breivik, on the other hand, gave a Nazi salute. Certainly, his deeds make him unworthy. His actions do not deserve the respect he was given. But by giving him rights, it symbolizes equality. It manifests *our*, not his, commitment to mutual respect.

6. The Injustice of the Death Penalty and Life Without Parole

The death penalty does not express a commitment to everyone's equal right to have rights. For in death, one loses one's capacity for rights. Kant recognizes this when it comes to the issue of suicide, which he calls a crime. He says: 'A human being cannot renounce his personality as long as he is a subject of duty ...; it is a contradiction that he should be authorized to withdraw from all obligation.'⁵⁸ He says explicitly in *this* context of suicide that to authorize the termination of one's very capacity for having rights and obligations, is not something to which one can rationally consent. It is not universalizable. Or put differently: To annihilate

57. Kant, *The Metaphysics of Morals*, 6:463.

58. Kant, *The Metaphysics of Morals*, 6:422.

one's subjectivity 'is to root out the existence of morality itself from the world', and it is therefore not something morality itself could condone without contradiction.⁵⁹

This applies also to the death penalty: it annihilates the offender's subjectivity and does therefore not respect his capacity for having rights. Hence, it implies a denial of the principle of universal, mutual freedom, and this denial cannot be condoned by the same principle of universal, mutual freedom. By denying the offender's freedom, capital punishment expresses the opposite of the message that just punishment expresses.

The same can in my opinion be said of life sentences without parole. If we deny a person any possibility of ever regaining full freedom, it is the same as denying their capacity for autonomy, which is not something to which they could have consented. Michael Tonry makes the same point, saying that full life sentences are incompatible with the dignity of the offender. He says, partly quoting David Luban, that "'subjectivity" lies at the heart of human dignity and that "having human dignity means having a story of one's own"'.⁶⁰ If you take away a person's hope of ever regaining their autonomy, you thereby rob them of their ability to create their own life-story. Biological life remains as the convict lives out his life sentence. But life as a free human being is forever taken away, and with it, a life in dignity.

Benjamin Yost has attempted to defend Kant's view on capital punishment by denying the analogy between suicide and the death penalty.⁶¹ He points out, correctly I believe, that even for Kant, not all forms of suicide are inconsistent with dignity. Imagine, for instance, that

a person enters a burning building to save a child, knowing that to do so will cause her own death. The person dies with dignity, while fulfilling duty. She can rationally consent to such a death. Yost argues that the death penalty is similar to this kind of 'suicide'. The murderer who consents to his own execution retains his honor, while other suicides, those who choose death as a way out, to escape from duty, forfeit their honor. Because 'the honourable man wants ... justice to be done', Yost argues, he 'would clearly choose' execution⁶² Other scholars have taken a similar view, claiming that capital punishment could indeed be consistent with dignity on Kant's view, but they have found other reasons to reject the conclusion that the state ought to carry out the death penalty.⁶³

What I find lacking in these arguments, is a convincing explanation for why it would be rational for a murderer to consent to their own death, thereby eliminating their own freedom. The claim rests on the premise that retributive justice requires material proportionality between crime and punishment. But as we have seen, it is symbolic proportionality that is required on a Kantian theory of punishment, because it is the formal wrong of the crime, and not the material wrong, that is properly addressed by punishment. It is the murderer's denial of the norm of mutual freedom that is symbolically denied by hindering him from infringing upon right without consequence. Of course, the material medium through which this symbolic message is conveyed must be fitting. But no specific material medium can be deduced from the

59. Kant, *The Metaphysics of Morals*, 6:423.

60. Tonry, 'Fairness, Equality, Proportionality, and Parsimony' 15.

61. Benjamin S. Yost, 'Kant's Justification of the Death Penalty Reconsidered', *Kantian Review* 15, no. 2 (2010).

62. Yost, 'Kant's Justification of the Death Penalty Reconsidered', 16. Kant, *The Metaphysics of Morals*, 6:334.

63. Steven S. Schwarzschild, 'Kantianism on the Death Penalty (and Related Social Problems)', *Archiv für Rechts- und Sozialphilosophie* 71, no. 3 (1985): 363–67. Robert A. Pugsley, 'A Retributivist Argument Against Capital Punishment', *Hofstra Law Review* 9, no. 5 (1981): 1520.

metaphysics of morals – by ‘thought itself’.⁶⁴ Hence, no specific punishment is required by the honor of the offender, and therefore there is no reason to impute consent to execution to the rational offender.

A punishment that is disgraceful and dishonors the humanity of the offender ought, with Kant’s words, to make us ‘blush with shame as belonging to a species that can be treated that way’.⁶⁵ The quote is instructive, I believe. For what Kant is saying here, is that the way we punish reflects on us; it is *we* who should be ashamed if we deny the offender his capacity for having rights, as we do if we torture someone or if we deny his possibility of ever regaining equal freedom, whether by the death penalty or by life without parole.

Thus, the reason for showing restraint when punishing Breivik is not that his deeds deserve it, but that *we* show our commitment to our *own* mutual freedom by doing so. We could even say that the punishment is really less about Breivik than about us. It is less about his suffering than about what his suffering communicates about our values – about our commitment to equal rights.

7. Abstract or Social Freedom?

Having now provided a justification for Breivik’s punishment based on Kant and Hegel’s freedom theories of criminal law, let us look at one thing to which a critic might reasonably object: The conception of freedom that the theory entails. Justification of punishment builds on the idea that the pure rational self of the criminal has freely consented to punish-

ment. That, admittedly, seems almost fictitious, far removed from how things are in the real world. The theory thus entails a thin and abstract conception of freedom, in contrast to a more realistic understanding of the offender’s conditions of freedom.

Hegel made just this type of critique against what he took to be the abstract, ‘Kantian’ concept of freedom. Such a concept provides an insufficient account of the real freedom of an agent, Hegel claimed. There is more to our freedom than our mutual capacity for having rights. The recognition we gain through legal relations is a necessary part of our freedom – he therefore accepted that ‘abstract right’ was one aspect of our freedom.⁶⁶ But there are other forms of recognition that we achieve through other social institutions than legal institutions, and which are also necessary for our freedom. We might for short call this broader conception, *social freedom*.

Family is one important social institution of freedom, according to Hegel. Relationships of love that we find in the family provide the basis for one necessary ingredient of freedom. Especially important are the relationships with one’s primary caregivers at an early age, which lay the foundations for emotional and mental health. Axel Honneth, who develops a social psychological interpretation of Hegel’s recognition theory, points to the role of these primary relationships for developing *self-confidence*.⁶⁷ Without confidence in the value of your own needs – a confidence that is first ‘learned’ by experiencing the value that your caregiver places on filling your needs – you cannot develop your freedom in the full sense.

Other sources of freedom, according to Hegel, are the relations that are formed at work,

64. As Schwarzschild points out, there is evidence from Vigilantius’ notes of Kant’s lectures that Kant acknowledged just this point: ‘If the punishment is ... just, then its degree and kind and whether a physical means of punishment is necessary will be chosen with intelligence and mercy’, quoted in ‘Kantianism on the Death Penalty (and Related Social Problems)’ 366.

65. Kant, *The Metaphysics of Morals*, 6:463.

66. The first part of *The Philosophy of Right* is indeed called ‘Abstract right’.

67. Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (Cambridge, MA: Polity Press, 1995).

in school, and in the institutions of civil society. These are arenas where the individual can develop the freedom to do and to be what he or she desires. Through these arenas a person can find her place in civil society, thereby gaining a sense of being important and appreciated. This feeling of *self-esteem*, Honneth claims, is one necessary ingredient of freedom.⁶⁸ Your freedom thus requires that you receive recognition, as a colleague, a neighbor, a community member, a worker, or otherwise – in short, recognition through the social roles that you fill.

These other types of relationships of recognition, or rather lack thereof, are relevant to the Breivik Case. Breivik's first few years of life were by many accounts very troublesome.⁶⁹ Especially unhealthy was his relationship with his mother, who suffered mental illness and who, according to reports made by psychologists at the time, tended to blame her son for her unhappiness.⁷⁰ Psychologists overheard her tell him at the age of three that she wished he was dead. The observing psychologists wrote: 'Anders' care situation is so deficient that he stands in danger of developing more serious psychopathology'.⁷¹ They recommended that he be placed in foster care, but that was never carried out. As a child, and later as an adult, there are many signs that Breivik had trouble functioning socially. He was bullied, and he failed

miserably at his attempts to make something of himself as a businessman, as a member of a political party, and otherwise.⁷²

We cannot, of course, say exactly how all this affected his development and how it influenced his decision to commit the atrocities of July 22nd, although many people have indeed looked to his childhood for an explanation.⁷³ If we consider more generally the typical characteristics of those who do commit crime and end up in prison, however, it is safe to say that Breivik shares some of these traits, such as dysfunctional family relations and weak social ties through workplace and school.⁷⁴

Among Breivik's fellow inmates in Norwegian prisons, a large majority (81 percent) has suffered childhood traumas, such as parental neglect, mental illness in the home, alcoholism, domestic violence, sexual abuse, and more.⁷⁵ Almost all prisoners (96 percent) have problems in some areas of life at the time they are incarcerated, related to economy, education, work, health etc.⁷⁶ Prisoners have on average much lower education, are substantially poorer, most

68. Axel Honneth, *Freedom's Right: The Social Foundations of Democratic Life* (New York: Columbia UP, 2014). The third ingredient of freedom is self-respect, which is gained through relationships of equality in abstract, legal relations, Honneth, *The Struggle for Recognition*.
69. Atle Møen, 'Fall og raseri: Om Behring Breiviks ubestemmelege livsløp, nedgåande sosial mobilitet og tap av mening', *Tidsskrift for ungdomsforskning* 16, no. 2 (2016); Aage Storm Borchgrevink, *En norsk tragedie: Anders Behring Breivik og veiene til Utøya* (Gyldendal, 2012).
70. Åsne Seierstad, *One of Us: The Story of Anders Breivik and the Massacre in Norway* (Little, Brown Book Group Limited, 2016).
71. Quoted in the verdict, RG-2012-1153, 25.

72. *Ibid.*, 25–28; Møen, 'Fall og raseri: Om Behring Breiviks ubestemmelege livsløp, nedgåande sosial mobilitet og tap av mening'; Seierstad, *One of Us: The Story of Anders Breivik and the Massacre in Norway*; Borchgrevink, *En norsk tragedie: Anders Behring Breivik og veiene til Utøya*.
73. Fredrik Bjercknes, "Mener tragisk barn- dom skapte terroristen," *Dagsavisen* (Oslo), 05.10.2012 2012.
74. Searching for general characteristics of those who tend to commit most crimes, Braithwaite concludes that the strongest predictor of criminal behavior is 'low interdependency', that is, weak social ties to community, family, workplace, school etc., *Crime, Shame and Reintegration* (Cambridge: Cambridge University Press, 1989), 44–48 and 105.
75. Mathias Killengreen Revold, *Innsattes levekår 2014: Før, under og etter soning*, Statistics Norway (Oslo, 2015), 18.
76. Revold, *Innsattes levekår 2014: Før, under og etter soning*. 63.

are unemployed at the time of incarceration, and a majority of inmates are drug-users.⁷⁷ This socioeconomic disparity between those who are punished and the general population provides us with a glimpse into the influence on our lives of our social surroundings.

Through the lens of abstract freedom, we cannot see these social influences. We are all fundamentally free, capable of withstanding heteronomous impulses on our will. And we are all equal, with the same capacity for freedom, regardless of our backgrounds. With a richer concept of *social freedom*, however, we see that social structures and social relationships do influence our life choices – and, indirectly, we see how we as a society create conditions that are more or less conducive to crime.

Let us go back again to *The Brothers Karamazov* for a moment. One of the central themes of the book is the notion of universal guilt. Alyosha and his teacher at the monastery, Father Zozima, preach the idea that ‘we are all responsible for all sins’. It is hard to know what to make of this idea. Perhaps we can see it in relation to this notion of social freedom. We are collectively responsible for each and every sin because our lives are interconnected. We are all influenced by our relationships with others. The ways we develop, including the development of our evil dispositions, depend on how other people develop, in an expanding network. In this perspective, Breivik is ‘One of Us’, as is also the title of Åsne Seierstad’s book on Breivik.

Another way of looking at Father Zozima’s notion of universal guilt, is to see it as a moral imperative to look at your own life in a certain way. It suggests that you take into account that the way that your life actually turned out, is only one way it could have gone. If we could, as a thought experiment, simulate our lives

and re-play them thousands of times, like in a Monte Carlo-simulation, subjecting them over and over again to the many random events that have formed them, then perhaps it is safe to say that eventually, after enough re-runs, we would have been *guilty of all sins*. Father Zozima is right, then, if we include not only our actual lives but all the potential ways our lives could have gone.

Looking at your own life in this way, you might try to vary in your mind one single thing: Try to imagine how you would have turned out if you had not experienced love from your parents during the first few years of your life. You would certainly have developed a completely different personality, and who knows what you would have done as a result. You do not even have to imagine that your personality had developed differently. Normal people are capable of great evil if only the right social conditions are in place, such as in wartime or in a prison.⁷⁸ All you have to do, then, is to vary in your mind the circumstances you have been subjected to. Perhaps you too could have committed atrocious acts if the conditions were ripe.

Once we recognize the influence of social conditions and childhood trauma upon criminal behavior, the next, and difficult question, is whether such a background ought to influence the punishment that an offender deserves. Should, for instance, an offender’s socially deprived background possibly count as a mitigating factor in his sentencing? This raises the issue of the link between social freedom and abstract, legal freedom, and specifically of what weight each should be accorded when they conflict, as they might in sentencing. I cannot venture further into this complex topic here. We might note, however, that jurisdictions vary in how they deal with the conflict. The United States Federal Sentencing Guidelines explicitly state that

77. Revold, *Innsattes levekår 2014: Før, under og etter soning*. Christine Friestad and Inger Lise Skog Hansen, *Levekår blant innsatte*, FAFO (Oslo, 2004).

78. See e.g., Philip Zimbardo, *The Lucifer Effect: How Good People Turn Evil* (London: Random House, 2011).

‘socio-economic status’ and ‘Lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing’ are both ‘not relevant in the determination of a sentence’.⁷⁹ In Norwegian criminal law, however, the law opens for such mitigating factors, and there are several examples of Supreme Court verdicts that have put considerable weight to the defendant’s deprived social situation.⁸⁰

In the Breivik Case, Oslo Municipal Court did not consider his childhood trauma a mitigating factor. The threshold is high in Norwegian law for how severe the defendant’s deprived background must be to merit a mitigated sentence. Breivik’s background would likely not be sufficient to exceed the threshold under any circumstances. But in the Breivik Case, the aggravating circumstances pulling in the other direction would anyway likely have outweighed any mitigating factors. Breivik’s crimes massively exceeded the threshold for the maximum punishment, and the court would therefore hardly consider a deprived upbringing sufficient to set his punishment below the maximum level, even if it were acknowledged as a mitigating factor.

That does not mean that the issue of social freedom is irrelevant to the Breivik Case. Breivik’s background was afforded several pages in the verdict, a clear sign that the court found his childhood experiences relevant for understanding his motives. In the political aftermath, and even in the trial, a broad range of issues were raised, for instance, regarding the

social consequences of neglect and abuse at an early stage in life; and regarding the cultural climate and social conditions that fuel the hatred that Breivik and an alarming number of other people feel.

There *is* more to the Breivik Case than the question of just punishment. And there *is* more to freedom than merely the abstract capacity for having rights. We cannot deny, when it comes to this richer notion of social freedom, that we are unequally placed. But we should also acknowledge that it is the job of the courts to express that even though we come from different backgrounds and even though we are unequal in so many ways, we are also always equal. Our rights are equal. Breivik denied this fundamental equality on July 22nd. And through our courts, we have denied his denial.

References

- BENTHAM, J. 1988. *The Principles of Morals and Legislation*. New York: Prometheus Books, 1781/1988.
- BERMAN, M. N. 2011. Two Kinds of Retributivism. In *Philosophical Foundations of Criminal Law*, edited by R. A. Duff and Stuart P. Green. Oxford: Oxford UP.
- BJERKNES, F. 2012. “Mener Tragisk Barndom Skapte Terroristen.” *Dagsavisen* (Oslo), 05.10.2012.
- BORCHGREVINK, A. S. 2012. *En Norsk Tragedie: Anders Behring Breivik Og Veiene Til Utøya*. Gylendal.
- BRAITHWAITE, J. 1989. *Crime, Shame and Reintegration*. Cambridge: Cambridge UP.
- BRAITHWAITE, J. and PETTIT, P. 1990. *Not Just Deserts: A Republican Theory of Criminal Justice*. Oxford: Clarendon Press.
- BRUDNER, A. 2009. *Punishment and Freedom*. Oxford: Oxford UP.
- BYRD, B. S. 1989. Kant’s Theory of Punishment: Deterrence in Its Threat, Retribution in Its Execution. *Law and Philosophy* 8, no. 2: 151–200.
- FEINBERG, J. 1970. *Doing and Deserving*. Princeton: Princeton UP.
- FEINBERG, J. 1965. The Expressive Function of Punishment.” *The Monist* 49, no. 3: 397–423.
- FRASE, R. S. 2011. Limiting Retributivism. In *Why Punish? How Much?*, edited by Michael Tonry. Oxford: Oxford UP.
79. United States Federal Sentencing Guidelines, § 5H1.10 and § 5H1.12.
80. In a recent verdict, HR-2022-731-A, the Supreme Court writes: ‘We have a long tradition of letting personal circumstances play a decisive role in sentencing’ (translated by me). In one case, Norwegian penal code § 78 h was invoked by the Supreme Court to suspend a six-year sentence due to the difficult personal circumstances and recent positive prospects of rehabilitation of the defendant, case HR-2019-1643-A. For another example, see case Rt. 2003 s. 841.

- FRIESTAD, C. and Hansen, I. L. S. 2004. *Levekår Blant Innsatte*. FAFO.
- GREENE, J. and COHEN, J. 2011. For the Law, Neuroscience Changes Nothing and Everything. In *Why Punish? How Much?: A Reader on Punishment*, edited by Michael Tonry. Oxford: Oxford UP.
- GRÖNING, L., JACOBSEN J. and HUSABØ E. J. 2016. *Frihet, Forbrytelse Og Straff: En Systematisk Framstilling Av Norsk Strafferett*. Bergen: Fagbokforlaget.
- HEGEL, G. W. F. 2005. *Philosophy of Right*. Mineola, NY: Dover Publications.
- HONNETH, A. 1995. *The Struggle for Recognition: The Moral Grammar of Social Conflicts*. Cambridge, MA: Polity Press.
- HONNETH, A. 2014. *Freedom's Right: The Social Foundations of Democratic Life*. New York: Columbia UP.
- KANT, I. 1996. *The Metaphysics of Morals. The Cambridge Edition of the Works of Immanuel Kant: Practical Philosophy*. Cambridge: Cambridge UP.
- MATRAVERS, M. 2011. Is Twenty-First Century Punishment Post-Desert?. In *Retributivism Has a Past: Has It a Future?*, edited by Michael Tonry. Oxford: Oxford UP.
- MOORE, M. S. 2010. *Placing Blame: A Theory of the Criminal Law*. Oxford: Oxford UP.
- MOORE, M. S. 2015. The Quest for a Responsible Responsibility Test: Norwegian Insanity Law after Breivik. *Criminal Law and Philosophy* 9, no. 4: 645–93.
- MØEN, A. 2016. Fall Og Raseri: Om Behring Breiviks Ubestemmelege Livsløp, Nedgåande Sosial Mobilitet Og Tap Av Mening. *Tidsskrift for ungdomsforskning* 16, no. 2: 23–41.
- NIETZSCHE, F. 1933. *Thus Spake Zarathustra*. New York: J. M. Dent & Sons.
- POTTER, N. T. 2002. Kant and Capital Punishment Today. *The Journal of Value Inquiry* 36: 267–82.
- PRATT, J. 2007. Scandinavian Exceptionalism in an Era of Penal Excess: Part I: The Nature and Roots of Scandinavian Exceptionalism. *The British Journal of Criminology* 48, no. 2: 119–37.
- PUGSLEY, R. A. 1981. A Retributivist Argument against Capital Punishment. *Hofstra Law Review* 9, no. 5.
- REVOLD, M. K. 2015. *Innsattes Levekår 2014: Før, under Og Etter Soning*. Statistics Norway.
- RIPSTEIN, A. 2009. *Force and Freedom*. Cambridge, MA: Harvard UP.
- SCHWARZSCHILD, S. S. 1985. Kantianism on the Death Penalty (and Related Social Problems). *Archiv für Rechts- und Sozialphilosophie* 71, no. 3.
- SEIERSTAD, Å. 2016. *One of Us: The Story of Anders Breivik and the Massacre in Norway*. Little, Brown Book Group Limited.
- STREET, S. 2006. A Darwinian Dilemma for Realist Theories of Value. *Philosophical Studies* 127, no. 1.
- TONRY, M. 2011. Can Twenty-First Century Punishment Policies Be Justified in Principle? In *Retributivism Has a Past: Has It a Future?*, edited by Michael Tonry. Oxford: Oxford UP.
- TONRY, M. 2017. Fairness, Equality, Proportionality, and Parsimony: Towards a Comprehensive Jurisprudence of Just Punishment. *Minnesota Legal Studies Research Paper* 17, no. 4.
- VOGT, D. C. 2021. The Natural Meaning of Crime and Punishment: Denying and Affirming Freedom." *Criminal Law and Philosophy*.
- VON HIRSCH, A. 2011. Proportionate Sentences: A Desert Perspective. In *Why Punish? How Much?*, edited by Michael Tonry. Oxford: Oxford UP.
- YOST, B. S. 2010. Kant's Justification of the Death Penalty Reconsidered. *Kantian Review* 15, no. 2.
- ZIMBARDO, P. 2011. *The Lucifer Effect: How Good People Turn Evil*. London: Random House.

