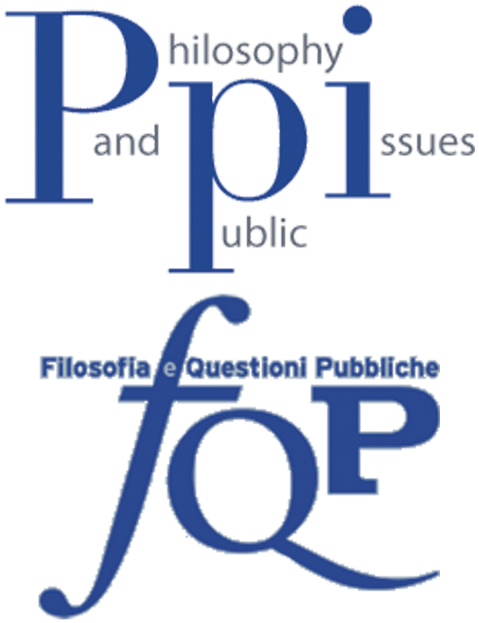
SYMPOSIUM

THE PHILOSOPHY OF PUNISHMENT



A PRÉCIS OF *PUNISHMENT*

BY

THOM BROOKS

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Thom Brooks

Punishment is a topic of increasing importance for citizens and policy-makers. The same can be said for academic researchers and students. Mass imprisonment has reached record high levels while public confidence is often lacking. New thinking is required urgently to address these challenges. Moreover, there have been several key developments in the philosophy of punishment over the last 20 years absent in leading guides including the communicative theory of punishment, restorative justice and my novel unified theory of punishment.

My book *Punishment* is a critical introduction to the philosophy of punishment attempting to offer a new and refreshing approach to benefit scholars and students alike.[1] While the book is primarily philosophical, it brings together relevant insights from law, criminology, criminal justice, politics and sociology. The aim is to provide both a comprehensive overview with new insights on many familiar theories of punishment.

The book begins with a brief introduction clarifying what is meant by punishment and its relation to morality. The following first part of the book examines what I call 'general theories' of punishment. These are theories that have a single purpose or aim.

[1] Thom Brooks, *Punishment* (London: Routledge, 2012).

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These include retributivism, deterrence, rehabilitation and restorative justice. The second part considers hybrid theories that attempt to bring together multiple penal purposes. The hybrid theories discussed are the mixed theory of Rawls and Hart, expressivism (including the communicative theory of punishment) and the unified theory of punishment. The final part of the book looks at how these different theories about punishment relate to certain case studies, such as capital punishment, juvenile offenders, domestic violence and sex crimes like rape and child sex offences.

In summary, I attempt to show why various theories of punishment attracts wide support and examine each in terms of theory and practice. I argue that each of the traditional theories of punishment has much to recommend it, but each also runs into real problems. My unified theory of punishment is my effort to show how we might bring together what is attractive about each of the other theories of punishment in a coherent framework, but without their problems.

This *Precis* will provide a brief overview of the book. The below sections cover the introduction and each of the three sections. My discussion is not exhaustive and only attempts to indicate to the general arguments and set the scene for considering the papers in this special issue that engage with my book.

The Introduction

I begin *Punishment* with an important definition. First, I argue that my discussion of punishment will be focused only on punishment *for breaking the law* (1). Punishment is a word used in

many different ways. Some speak of 'punishing' a misbehaving child or perhaps a pet. Or that a difficult physical activity like cycling steep hills can be 'punishing'. But these all point to different things. I am interested here only in the phenomena of punishment for a crime. Punishment by the state for a crime is different in form and content from these other activities. The parent who is said to punish a child does not do so because a law has been broken or even because the child has breached some rule he knew about in advance. Nor is there an appeal. Perhaps the only similarity between this idea of 'punishment' and (legal) punishment is both are impositions of some burden because of some earlier act or omission.

I believe this link between crime and punishment both crucial and too often overlooked: 'We will ask which theory of punishment is best if, and only if, a relevant law is justified. The possibility of justified laws reveals the horizon of just punishments'.[2] In other words, punishment presupposes a crime that is a trigger for the punishment. There can be no punishment without a crime—and the justification of punishment is bound up with that of its linked offence.

Punishment is *a response* to an offence. So when we think about punishment, we consider what should be the best response to an offence. This response must be of a person for breaking the law administered and imposed intentionally by an authority within a legal system that imposes a loss (4-5). Punishment would otherwise be arbitrary and, if not some form of loss, might become indistinguishable from rewards.

I further distinguish the definition of punishment from its aim and distribution, now a common feature of most analytic jurisprudence on this topic since H. L. A. Hart's *Punishment and*

[2] Brooks, *Punishment*, 3.

Responsibility.[3] Each asks different questions: how *is* punishment understood? What is the *aim* of punishment and how should it be *distributed* to individuals? My definition does not load the dice in favour or against any particular view. Retributivists, deterrent theorists and others can all accept the link between crime and punishment. But each will have different ideas about the purposeful aim of punishment, such as whether it should be deserved or deter. This will then impact on which individuals might be selected by a theory of punishment in order to fulfil its aims. Much of the book focuses on problems arising with the aims and distribution of various penal theories.

The Introduction closes with a consideration of two influential views about criminalisation that are relevant. The first is *legal moralism* and this is the idea that criminalization should be linked to immorality. The problem I raise is that legal moralism is undermined by what I call *the naturalist fallacy*: 'there is no necessary connection between crime and immorality, even if there is often this connection'.[4] My point is morality is no certain guide to identifying all crimes we would want linked to punishment. If no single view of morality can produce a list of all the crimes we would want to punish, then we must find some alternative. I am highly critical of moralistic and natural law-friendly views of the criminal law and sentencing throughout the book.

A second influential view is the *harm principle*. This is the principle first stated clearly by John Stuart Mill that the only purpose for which we may restrain someone is to prevent harm to others. This view often links harm with other-regarding harms, or harms that are imposed by one on another. Self-regarding harms are often missed. My criticism with this perspective is that

[3] H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon, 1968): 4.
[4] Brooks, *Punishment*, 10.

harm *simpliciter* is not compelling because not all harms are or should be criminalised, such as injuries suffered during the normal course of a contact sport or receiving surgery. My point is that morality and harm may have importance, but they do not determine in any obvious way what should be criminalised and, therefore, punished without qualification.[5]

Part 1 – General Theories

The first substantive part of the book considers four general theories about punishment. Each has something highly compelling at its core. Retribution gets right the importance of desert: that an individual must have done or omitted something to warrant punishment. Offenders must be deserving of their punishment. Punishment is not private vengeance, but public justice. Few would disagree with retributivists that the innocent should never be punished.

But this does not mean we would all agree on what is or is not 'deserved'. Retributivists often make serious mistakes in linking desert with some view of moral responsibility for wickedness. The greater the responsibility for an immoral wrong, the more a person 'deserves' punishment. But the problem is that not all crimes are linked to immorality in this way. Some crimes are strict liability offences where might be at best *causally* responsible, but moral responsibility is irrelevant. Not all crimes are evil and some might even be thought amoral. Even if we did think offenders should be punished to the degree they are morally responsible for some immoral deed, we cannot read the minds of others. This is

[5] See Thom Brooks, 'Criminal Harms' in Thom Brooks (ed.), *Law and Legal Theory* (Boston: Brill, 2014): 149—161.

important for retributivists because an individual's desert, at least on a classical 'positive' view of retributivism, should be determined entirely in accordance with an individual's mind-set at the time of an offence. Our best guesswork is not good enough.

There are also related issues about proportionality and desert. It must be noted that retributivism is a remarkably wide tent covering a diverse range of perspectives. Nothing brings this out more than considering its diverse views of 'retributivist' proportionality. For example, if someone should only be punished to the amount deserved (as some versions of retributivism claim), then this would suggest some form of strict equality between the crime and its punishment. However, this cannot be compelling for at least two reasons. First, this would render most crimes unpunishable. There is no like for like punishment available for many victimless offences like drug possession, speeding or perhaps even theft.[6] Secondly, even where we could do like for like, there are strong reasons against doing so. Capital punishment might be a controversial case, but sex crimes and torture are not: there is no reasonable advocate for doing unto others as they've done to their victims when it comes to these violent offences. *Punishment* considers these and other challenges for retributivism. My conclusion is that retributivism gets some things right like the importance of an offender's having committed an offence as central to whether or not that person is punished. But we must look elsewhere for a more plausible view of how crime and punishment might be linked up.

The next chapter considers deterrence. This is the view that punishment is justified by its deterring potential offenders in

[6] Consider theft. If I still your bicycle, then how might I be punished like for like if I do not have a bicycle or any comparably similar possession another might take from me?

future. This can be understood in terms of *macrodeterrence* where our aim is to create a deterrent effect among the general public or as *microdeterrence* where we aim to deter specific individuals. I also discuss this view with respect to incapacitation that crime can be reduced through imprisoning offenders. I argue that deterrence theorists broadly get right the importance of crime reduction: few of us would prefer a criminal justice system that made crime more likely.

But there remain significant questions about how this might work and I raise a number of problems. The first is the *problem of geography*: this is the false belief that crimes only happen outside prisons. Since crime can occur in prisons too, then putting offenders in prison does not mean they cannot perform crimes while they are incarcerated. A second problem is that wrongness does not play any fundamental role for deterrent theorists. Much as retributivism is perhaps burdened by its controversial moralistic commitments, deterrence is rendered problematic by its lack of any such commitment. In effect, deterrence is about telling us how much we should punish and not what we should punish. While retributivists can speak about what might be deserved, deterrent theorists are agnostic on the wrongness of crimes. We deter not in the degree an offence is wrong, but in terms of what might motivate others to avoid committing such an offence in future. This opens deterrence up to what I call the *problem of time and changing effects*: what might deter today may not deter tomorrow. So while other penal theories may seek a more fixed view of crime and punishment, deterrence can recommend a different punishment for the same crime as what would be required to deter changes over time. This is further complicated by the *problem of difference*, namely, that different people may react very differently to the same deterrent effects. But the biggest problem of all is whether we can know deterrence works. We can measure how many crimes were recorded, but can we ever know

how many crimes *might* have happened if punished did not have some deterrent effect? I illustrate this in class by asking students how many did not steal a bicycle on the way to the lecture *because they feared punishment*. In about every case, students say they avoid theft not out of the fear of punishment but because they do not want to steal anyway. And so evidence of crime reduction, if proven, might still be no evidence that deterrence has worked.

Chapter 3 focuses on rehabilitation. This is the idea that the great majority of offenders will one day leave prison and so prison should be used to assist their transition from criminal to law abiding citizen. Rehabilitative punishments can take many different forms such as therapeutic treatments like cognitive behavioural therapy or recreational therapy, but also education and training.

I raise several problems for rehabilitative theories. One is the role of morality. Most rehabilitative theories view themselves as some form of moral education.[7] But rehabilitation does not target every moral wrong, only those that are criminalised—and not all crimes are clearly immoral. So understanding rehabilitative punishment as a form of moral education makes for a poor fit with the criminal law. Another problem is that individuals committing the same crime in similar circumstances might be punished very differently depending on how quickly they might be morally educated. The murderer who is deeply and sincerely repentant might then appear to demand less punishment on this view than an unapologetic pickpocket because the latter will take much longer to convince of his need to reject his criminality. This links up with the problem of the unreformable: those who are resistant to reform. It is implausible to think they should be punished most of all no matter how trivial their offence.

[7] See Brooks, *Punishment*, 56-57.

Part 1 closes with a chapter on restorative justice. Restorative justice is different from other approaches. Retribution, deterrence and rehabilitation theories of punishment are typically conceived within a traditional setting of sentence and offender. Restorative justice is an alternative to the formal courtroom setting and sentencing procedures that prioritises informality and dialogue. It typically takes the form of victim—offender mediation or a conference setting where a trained facilitator manages a conversation between victim, offender and others. The purpose is to bring about greater mutual understanding and to 'restore' the status of the offender from lawbreaker back to full citizen. Restorative justice requires offenders to have acknowledged their wrongdoing and make some apology to victims. The results are promising: studies have shown participants show high satisfaction, there is less reoffending and all at lower costs.

But this masks some problems. Not all victims want to take part—and likewise not all offenders. Restorative justice might not even be thought to be a theory of punishment. This is because it rejects the use of prison to bring about restoration. A consequence is that it is often reserved for minor offences committed by youths. So its restricted set of possible outcomes limits its applicability to more types of crimes and offenders. There are also serious questions about who is being 'restored' to who and even what is being 'restored'.

These comments are a broad overview. There are many other points made and positions considered with further objections all in much greater detail. But I only wish to provide some indication of a few main points raised. The discussion is meant to show that each view gets something right. Retributivists are right that desert matters even if there are problems with how desert is understood by them. Deterrent proponents are right that crime reduction is an important goal even if we might not ever know if it was

brought about by a threat of punishment. Rehabilitation gets right that most offenders will one day leave prison and it can be crucial to assist their transition to law abiding citizen, otherwise we risk rendering such individuals even worse off at our peril. Restorative justice gets right its effects of fostering equality and dialogue with impressive results, but has problems with who should take part and what is being restored.

Part 2 – Hybrid theories

This discussion leads us to next consider three different ideas about how these different purposes might be brought together into what I call hybrid theories of punishment.

The first I cover in a chapter 'Rawls, Hart and the mixed theory'. Rawls and Hart endorse different ideas about punishment, but share a similar core. This is the idea that the legislature looks forward in setting out what is criminalised and how much it might be punished. This forward-looking perspective is utilitarian in its outlook. In contrast, the judiciary is backward-looking and retributivist in considering what *this* person might deserve for some past action. The main claim is that punishment brings together both forward-looking and backward-looking perspectives. They do not clash because they are considered at different points: the one when we think what should be punished, the other when we punish a particular person.

A problem with this view is that if offenders should only be punished as much as is deserved and as distributed by judges, it is then difficult to see how there is to be a deterrent effect on the whole. If everyone gets what is deserved, then there might not be

any deterrent effect unless what is deserved *also* deters. But either way what counts is desert and not deterrence. So the two do not have an equal status and one has more importance than the other.

I discuss this problem in the context of negative retributivism. This is the idea that desert is necessary for punishment, but not sufficient: whether or not we punish should be determined by non-retributivist factors. While this view has its vocal proponents, it is also conceptually incoherent. If desert is so vitally important that only it should matter for choosing who might be selected for punishment, why should it *necessarily* be not crucial for determining punishment's amount?

A second hybrid theory considered is expressivism. This view has many proponents, but its leading modern defender is Joel Feinberg. He argues that punishment was different from penalty in kind. Punishment is said to be prison and penalties other forms of sanctions. For Feinberg, punishment as imprisonment requires something different in its justification from mere penalties. He claims this is punishment's expressivist effect: that it can express public denunciation for performing a wrong.

This expressivist model is developed further by Antony Duff. He argues in what he calls his communicative theory of punishment that punishment is not only about the public expressing its denunciation to offenders, but offenders communicating their apologies back. Punishment is not a one way street, but a dialogue. Both Feinberg's and Duff's models are thought to be consistent with desert, to provide a deterrence and motivate rehabilitation. Only those persons deserving of public denunciation are selected for punishment, this is a message that citizens will not wish to receive and so avoid criminality and to be subject to such a message can give reason for what Duff calls 'secular penance'. In these ways, expressivism aspires to be a hybrid theory.

I raise several problems with this perspective. The first is that the commonly drawn line between punishments and penalties is too sharp and fails to reflect how sentencing actually works. Offenders do not face an option of prison *or* some alternative, but often some combination. A prison sentence can include a reparation order, for example. So to say that expressivism is about justifying punishment exclusively addresses only one part of how sentencing works. Moreover, there is no convincing reason given as to why a fine or community sentence cannot be understood as an expression of public denunciation. Any state imposed sanction can be understood in this way.

A second problem relates to communicative theories in particular. They argue that offenders 'communicate' an apology back to the community by serving their sentence as a kind of secular penance—and this is true whether or not the offenders does, in fact, communicate anything at all either way. I argue in *Punishment* that:

> If it does not matter whether any offender repents and all repentance is at minimum assumed, then what is the clear difference between retributivists and communicative theorists? Is the difference little more than that the latter *assume* that offenders repent through serving time in prison? […] A theory that says it's justified because offenders repent and they repent because it's assumed by the theory is not compelling.[8]

Even worse, there is no evidence that repentance is best served through imprisonment any way. In any event, expressivists do not actually justify punishing offenders by as much as the public does, in fact, wish to express its denunciation of their acts. What counts most is what offenders deserve: if the public wished for a more punitive sentence to send a message, this could breach what is deserved and lack support from expressivism. So public

[8] Brooks, *Punishment*, 120.

censure may be an important aspect of punishment, but it is unclear if it can and should serve more than a metaphorical role even by expressivist standards.

In summary, the book has surveyed these two major attempts at bringing multiple penal purposes together and found them unsatisfactory. But is there a model we can look to instead? I believe there is and I call it *the unified theory of punishment*. The first thing to note is that multiple penal purposes are a regular feature of sentencing guidelines. This might be traced back to the influence of the 1962 Model Penal Code that claimed sentencing had several justificatory principles such as retribution, deterrence and rehabilitation. This is echoed elsewhere, such as in section 142 of the Criminal Justice Act 2003 in England and Wales. The problem is that the judges and magistrates who determine sentences lack a framework for weighing these different penal purposes in a coherent and unified way.

I argue that a unified theory of punishment is not only possible, but compelling. But I am not the first to try. Credit must be given to Hegel and the British Idealists, as I argue in *Punishment* and elsewhere.[9] What they got right was a coherent, unified

[9] See Brooks, *Punishment*, 126—127; Thom Brooks, 'T. H. Green's Theory of Punishment', *History of Political Thought* 24 (2003): 685—701; Thom Brooks, 'Is Hegel a Retributivist?' *Bulletin of the Hegel Society of Great Britain* 49/50 (2004): 113—126; Thom Brooks, 'Does Bevir's *Logic* Improve Our Understanding of Hegel's *Philosophy of Right*', *The European Legacy* 11 (2006): 765—774; Thom Brooks, 'Punishment and British Idealism' in Jesper Ryberg and J. Angelo Corlett (eds), *Punishment and Ethics: New Perspectives* (Basingstoke: Palgrave Macmillan, 2010): 16—32; Thom Brooks, 'Is Bradley a Retributivist?' *History of Political Thought* 32 (2011): 83—95; Thom Brooks, 'What Did the British Idealists Ever Do for Us?' in Thom Brooks (ed.), *New Waves in Ethics* (Basingstoke: Palgrave Macmillan, 2011): 28—47; Thom Brooks, 'Punishment: Political, Not Moral', *New Criminal Law Review* 14 (2011): 427—438; Thom Brooks, 'Hegel and the Unified Theory of Punishment' in Thom Brooks (ed.), *Hegel's Philosophy of Right* (Oxford: Blackwell, 2012): 103—123 and Thom

theory of punishment requires a new framework. Different penal purposes may clash and so there must be some way to manage potential conflict. For example, the aim of punishing offenders as much as they deserve might clash with the aim of deterring others: the amount of punishment deserved by one aim might be insufficient to satisfy the aim of the other. It is because this penal pluralism can lead to conflict that we require a new framework. For reasons I will not pursue here, I argue that the reasons offered by the Hegelians on how to provide this framework are unsatisfactory and this may be why their suggested framework for unifying penal purposes has been widely rejected.[10]

I argue that punishment is a response to crime. We should understand one in relation to the other. The two are linked and "there can be no just punishment for an unjust crime … Penal justice is linked with just criminalization within a just legal system."[11] Laws are necessary to manage the inevitable conflicts between community members over time. These procedures form a legal system. The criminal law aims at the protection and maintenance of individual legal rights, understood as substantial freedoms worthy of protection for each member based on a political conception of justice.[12] This perspective does not endorse any particular view of justice or freedom, but claims to be consistent with most leading views. The idea is that these individual rights have importance and the criminal law gives effect to this by criminalising theft to honour property rights and so on. Some rights are more central than others. The right to life

Brooks, 'On F. H. Bradley's "Some Remarks on Punishment"', *Ethics* 125 (2014): 223—225.

[10] See Brooks, *Punishment*, chapter 7 and Thom Brooks, *Hegel's Political Philosophy: A Systematic Reading of the Philosophy of Right*, 2d (Edinburgh: Edinburgh University Press, 2013).

[11] Brooks, *Punishment*, 127.

[12] See Brooks, *Punishment*, 127.

has greater importance than the right to property insofar as the former makes possible the latter.

My unified theory of punishment is built on the idea that crimes are rights violations that threaten the substantial freedoms protected by law. Punishment is a response to crime and it aims at the protection of individual legal rights threatened by crime: 'Punishment is about the protection of rights.'[13] The unified theory of punishment is 'unified' because it provides a new framework from which to weigh how different penal purposes can be applied coherently. We consider how these purposes might best contribute to the protection and maintenance of rights. Desert will be crucial, but so will factors like crime reduction and rehabilitation. We must balance them together.

Some rights are more central than others and, likewise, their corresponding punishments will differ, too. The more important the right or need to protect it, the more substantive the necessary response. Crimes like murder should be punished more than theft or larceny because murder is a violation of a more central right. The relative importance of a right will depend on individual circumstances and a changing background context.

One example I give of the unified theory in practice is as *punitive restoration*.[14] This is a reformulated idea of restorative justice considered earlier. Restorative justice proponents are divided (and unconvincing) about what exactly is 'restored'. The unified theory claims we restore rights through their protection and maintenance. Restorative justice claims that possible outcomes should exclude hard treatment. However, if some

[13] Brooks, *Punishment*, 128.

[14] See Brooks, *Punishment*, 132, 136, 142-43 and Thom Brooks, 'Stakeholder Sentencing' in Julian Roberts and Jesper Ryberg (eds), *Popular Punishment: On the Normative Significance of Public Opinion for Penal Theory* (Oxford: Oxford University Press, 2014): 183—203.

forms of intensive hard treatment can be better than other alternatives at helping offenders overcome drug and alcohol dependency or other problems, then these more punitive options might better contribute to their restoration. I discuss several studies that provide evidence to support this view. The claim is not that we should always use punitive options or that greater punitive sentences are desirable, but rather that a restorative justice aiming to restore rights should have such options at its disposable for relevant cases. This can be a way of better embedding restorative justice into the criminal justice system as well: by expanding its options, we might expand its use. This reformulated view of restorative justice I call punitive restoration to draw attention to its being open to more punitive options. More is said about this example of the unified theory of punishment in the rest of the book as I defend the unified theory against its opponents.

Part 3 – Case studies

The last part of the book considers several case studies: capital punishment, juvenile offending, domestic violence and sex crimes. My purpose is to show how different theories of punishment relate to practices and the problems this can lead to.

One example is capital punishment. I argue restorative justice proponents reject hard treatment and so we might suppose reject capital punishment, too. However, standard theories of restorative justice is inapplicable to cases of serious violent crime. So restorative justice might be opposed to the death penalty, but we might accept that it might be justified in some cases because restorative justice is inapplicable. Or we might argue that rehabilitative theories are necessarily opposed to the death

penalty: if someone is executed, then they cannot be rehabilitated. But this is untrue. If someone were incapable of being rehabilitated, then this worry would no longer be relevant and capital punishment might become justified.

A more interesting case is retribution. It is widely thought that retribution is at least always open to justifying capital punishment. While we may have different ideas about what might be deserved, some might claim death is deserved and this raises questions about whether retributivists can oppose the death penalty. I argue they can because they take desert so seriously. If we are unable to say with certainty that someone has desert for a capital offence, then this is a retributivist reason to oppose the death penalty. This is relevant because there are several cases of people convicted and sentenced to death despite having a fair trial and where appeals were exhausted only to have their sentences quashed because of new DNA evidence exonerating them. This shows our judgement can be wrong despite our best efforts. This does not mean retributivists should oppose punishment in any case because of the possibility of making a mistake because most can be remedied, but an execution cannot.[15] The point of my chapter on capital punishment is to make clear that most theories of punishment lack any clear answer for one side or the other. This discussion of retribution is a good example why this is the case.

I also consider juvenile offenders. The punishment of non-adults separately from adults is relatively recent going back to the Illinois Juvenile Court Act of 1899. Youth justice raises interesting questions. Should non-adults be punished any

[15] See also Thom Brooks, 'Retributivist Arguments against Capital Punishment', *Journal of Social Philosophy* 35 (2004): 188—197 and Thom Brooks, 'Retribution and Capital Punishment' in Mark D. White (ed.), *Retributivism: Essays on Theory and Policy* (Oxford: Oxford University Press, 2011): 232—245.

differently from adults? If so, why? And what consequences might there be for the criminal justice more widely? I argue that different theories offer competing reasons for this distinction and which are rarely explored. A retributivist might argue that non-adults are incapable of possessing full moral responsibility for their actions and so would have less desert than if these actions were performed by an adult. But a deterrent proponent might send out different warnings for youths than adults if more effective at generating greater deterrence.

A key issue is age and its relevance. There is normally a distinction of the child where a person is never held responsible for a crime, juvenile offenders who are older than children and below 18 years old, and adults who are 18 or older. I argue that we should instead consider targeting separately the age ranges of 15 to 17, 18 to 24 and leave full adulthood status for 25 years old or more.[16] The reason is that mid-teens represent different types of criminal offenders from 18 to 24 year olds. More effective targeting of specific needs could possibly yield less offending—and less serious offending—at 18 and above.

I discuss the importance of *restorative recognition* through the idea of stakeholding.[17] The many risk factors associated with juvenile offending includes troubled home life, drug and alcohol abuse, peer group pressure and negative support networks. Of course, these factors do not determine offending: many people may be at risk, but nonetheless avoid crime. So what about having these risk factors can make some youths more likely to engage in criminal behaviour?

I argue that stakeholding is key. This about viewing oneself as having a stake in society. Someone who fails to see themselves as

[16] See Brooks, *Punishment*, 182.
[17] See Brooks, *Punishment*, 184.

having a stake is at greater risk. We should focus on reducing incidences of risk factors, but not for their own sake and instead with a view to promoting stakeholding. As I say in the book: 'There is a central need to promote stakeholding and assist young adults in taking greater control over their lives by helping them to see themselves as having a future stake in society'.[18] Reducing risk factors might not be enough. We should aim to reduce risks while promoting a conviction that a young offender does have a stake in the society. This kind of recognition may be difficult, but it is key.

Domestic abuse receives relatively little attention from most theories (and theorists) of punishment. One issue is a question about what kind of crime it is. Several U.S. states have laws criminalising domestic violence, but there can be important differences between how the crime is defined. In contrast, domestic violence has been prosecuted in England and Wales as one or more crimes: 'domestic violence' is not one offence, but a combination of offences. This feature renders it one of the most violent crimes or set of crimes: it may not only consist of sexual and physical abuse, but much more with repeated occurrences.

Again, different theories of punishment can move in different directions. So we might argue a retributivist would argue for a more severe punishment in proportion to the greater violent harms associated with domestic violence. But there are also arguments in favour of informal procedures like restorative justice.[19] This is because some victims do not want their partners imprisoned, but instead want the behaviour to stop. In the book, I favour a middle path and argue for punitive restoration as an option:

[18] Brooks, *Punishment*, 187.

[19] See Linda G. Mills, *Insult to Injury* (Princeton: Princeton University Press, 1999).

> Our choice need not be between prison or non-prison, but perhaps some combination. For example, a brief custodial sentence may serve as a beneficial 'cooling off' period for abusers where they immediately receive some of the therapeutic assistance they require to end their abusive behaviour […] Intensive sentencing is an option that may help offenders most when they are most in need.[20]

Punitive restoration is an option that not all victims will want to explore. But it is an option that has support from some victims and punitive restoration is one way of showing how a unified theory of punishment is possible and preferable bringing together considerations of desert, deterrence, rehabilitation and more with the overall goal of protecting and maintaining rights.

Finally, I consider the case of sexual crimes and, specifically, rape and child sex abuse. *Punishment* explores the different arguments available for their criminalisation and punishment. One issue that arises is a problem for deterrence. Conviction rates are relatively poor and this renders inconclusive what data we have on reoffending. Child sex offenders tend to receive relatively few reconvictions, but they also tend to be found guilty of more prolific crimes when convicted.[21] So if we wanted to punish in order to deter, the reconviction rate is fairly low and might suggest that a more punitive sentence unwarranted although this would receive little public support. My discussion considers a variety of issues concerning how punishment relates to this topic and makes a case for punitive restoration, inspired by work conducted by my Durham University colleague Clare McGlynn.[22]

The book concludes by highlighting the importance of linking the justification of punishment with the justification of its

[20] Brooks, *Punishment*, 197.
[21] See Brooks, *Punsihment*, 205.
[22] See Clare McGlynn, 'Feminism, Rape and the Search for Justice', *Oxford Journal of Legal Studies* 31 (2011): 825—842.

corresponding crime and implications for our viewing 'responsibility as accountability'.[23] Of course, all this rests on a wider view of justice and this is where the book ends. While I do not come out in favour of any particular theory of justice, I claim that whatever it is should be consistent with the idea of a stakeholder society where we each have a stake in our community's life.

Conclusion

Punishment ends:

> Punishment is a topic that never lacks debate. Nothing seems more fitting given the importance of the issues at stake. If you care about justice, then you should care about punishment. This book is an attempt to explain why.[24]

I leave it to readers to judge for themselves how successful I am at achieving this goal.[25]

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[23] See Brooks, *Punishment*, 215.

[24] Brooks, *Punishment*, 216.

[25] I am very grateful to Gianfranco Pellegrino, Michele Bocchiola, Vittorio Bufacchi, Michele Mangini and Mario Ricciardi for comments and discussion on *Punishment* during my visit to LUISS earlier this year.

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