T. H. Green on punishment
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Thomas Green’s ideas and theories have had a far-reaching effect all the way into the twentieth century.

Every important philosopher in Britain between 1880 and 1914 responded in some way to his work. This influence was not confined to Britain. His work was considered seriously in the USA, Italy, and more particularly in Japan (Oxford Dictionary of National Biography 2004).

Much has already been said about his works, but this essay will focus on Green’s theory of crime and punishment, which, surprisingly, has been largely ignored throughout the world. There are various theories on punishment, which seem to be incompatible with each other. In his book The Principles of Political Obligation [1879] Green states that ‘it is commonly asked whether punishment according to its proper nature is retributive or preventive or reformatory. The true answer is that it is and should be all three’ (1986, 181:178). In ‘Chapter L’ of this book Green attempts to unite these different theories. Beccaria had previously attempted to do the same with a theory of deterrence and an aspect of retributivism, but he failed to keep his theory consistent (Beccaria [1767] 1995). This essay will examine whether Green was successful in uniting the aspects of deterrence with those of retributivism. Some background information on Green will also be provided, as and when it is needed, to better appreciate the text and to improve the understanding of his ideas and concepts. Before launching into Green’s work on crime and punishment, it is important to acquire a basic knowledge of the two theories, namely retributivism and deterrence, which Green is attempting to unite. This brief examination of these concepts should indicate why they are so difficult to unite. This is only a short overview, however, as an in depth analysis of each theory would be out of the realm of this essay.

Retributivism, a concept advocated by Kant, obtains its right to punish from the social contract theory. To this end Kant formulated a framework that he called the categorical imperative: ‘act only according to that maxim whereby you can at the same time will that it should become a universal law’ (Kant [1785] 1993, 30). Kant argues that punishment restores injustice that has been done when the moral or laws are broken. The offender has transgressed the moral law and has therefore brought the punishment upon himself (Kant 1963). The punishment according to Kant needs to be fixed and has to be of equal value to the crime committed. Thus for murder, the punishment would be execution. For each crime there is an ‘equal’ physical punishment and once this is set no discretion can be used (Kant, 1965, 101). Factors such as reform and deterrence have no place and cannot be used as mitigating factors. Hence someone who has reformed still needs to be punished ‘equal’ to the value of
his crime. However, this does not mean that retributivism punishment may not lead to reformation. Deterrence and reform may be a side product of punishment under the ‘lex talionis’ model, but nothing more. This effect may even be desirable (Hopton 2006, 2). Retributivism focuses on the personal responsibility rather than the greater good. Various flaws already become apparent, as there is not always a physical punishment which is equal to each crime. It also does not take the circumstances or crime rates into consideration. This is, however, not the place to discuss the flaws of this theory.

Thus, although retributivism can appear lacking in compassion, it does according with ideas of individual responsibility, dignity and worth that are largely absent from utilitarianism (Hopton 2006, 5).

The deterrence theory is the complete opposite to the theory of retribution. A main advocate of this utilitarian theory of deterrence is Bentham. The right to punish is derived from concept of good or ‘the greatest happiness of the greatest number’ (UCL, 2007). The development of happiness is the key and any actions that cause harm to the greater good need to be deterred. This shows that the idea of reform falls mainly within the idea of this theory (Hopton 2006, 6). Punishment in itself is harm or unhappiness. Punishment should therefore be avoided unless it produces more happiness then harm (Hudson 1996, 18). Deterring harm becomes the main aim. Hence the punishment does not need to correlate with the crime committed. The punishment is designed to deter the individual and others of committing similar acts. This theory allows making examples of the individual when the crime rate goes up for example, or even allows the punishment of innocent people if the outcome creates more happiness for the greater number. This is not, of course, desirable. If, however, it leads to greater happiness it is acceptable (Bentham [1789] 1967, ch. 14-15). On closer examination then, it becomes ‘clear [sic], when it is a question of the amount of the penalty, the virtue of one theory is the vice of the other’ (Hopton 2006, 7).

What follows now is Green’s attempt to join aspects of both theories together. Green begins by asking himself: when does the state have the right to punish? As noted above, both theories have different justifications for punishment. Green’s theory is one that is based on rights: ‘The right ... of free life in every man rest on the assumed capacity in every man of free action contributory to social good’ (Green [1879] 1986, 180:176). He continues to argue that men cannot possess natural rights in a state of nature. Rights can only truly exist if there is a society that controls these for the purpose of achieving a recognized common interest (77-78:103). ‘Natural rights’, he argues:

so far as there are such things, are themselves relative to the moral end to which perfect law is relative. A law is not good because it enforces ‘natural rights,’ but because it contributes to the realisation of a certain end. We only discover what rights are natural by
considering what powers must be secured to a man in order to the attainment of this end. These powers a perfect law will secure to their full extent (15: 20)

This framework of the shared ‘common good’ forms the basis of our society’s existence as well as the morality of the individual (Green [1897] 1986, 85:104). Green shared Kant’s view of the ‘categorical imperative’ and believed that this formed the content of morality (Brooks, 2003, 688). Green extends Kant’s idea, claiming that possession of these natural rights include none interference of other members of the same society and a recognition by the individual of the other’s rights. This means that a person should accept the moral agency of others as long as these actions do not impede the common good (Green [1897] 1986, 105:140). Green maintains that therefore ‘associated men’ have the right on their part to hinder and even prevent

actions as interfere with the possibility of free action contributory to social good. This constitutes the right of punishment, the right to use force ... as may be necessary to save others from this interference’ (180:176).

The purpose of punishment is not to punish moral wickedness; rather its purpose is the ‘protection of rights, and the association of terror with their violations’ (148:196). This means that a framework of rights ultimately brings with it a framework to enforce these rights – punishment (180:177). The logical conclusion is therefore that the state has to do what is necessary to maintain the rights and the common good that comes with it. A punishment however is unjust if the action is not a violation of a known right or fulfilling a ‘known obligation of a kind’ (Milne 1962, 148- 49).

So far Green has established a framework of punishment. This framework is only in place because there are rights that are associated with each punishment. To accomplish just punishment Green states that the following aspects need to be incorporated into any theory of punishment.

Punishment of crime is preventive in its object; not, however, preventive of any or every evil or by any and every means, but ... justly preventive of injustice: preventive of interference with those powers of action and acquisition which it is for the general well-being that individuals should possess, and according to laws which allow those powers equally to all men. But in order effectually to attain its preventive object and to attain it justly, it should be reformatory. (Green [1879] 1986, 154: 204)

To understand what Green is trying to do and how he does it, each aspect of his theory needs to be scrutinized. He explains that although punishment should be just and retributive, it should not be mistaken with private vengeance (135:178 ff). Only the state and its agencies have the right to inflict
punishment. No individual has such a right, except in self-defence. This right has been given to the state on the understanding that it will prevent harm and if it fails to do so to punish the offender. At this point Green mentions that the amount of punishment to be used, is as much as is necessary to ensure future protection (137: 180). With his theory of punishment, he is trying to avoid the extremes of both the Kantian as well as the Utilitarian views. ‘Kantianism and Utilitarianism are defective theories which must be rejected as they stand, but which can be exploited for their special insights’ (Nicholson 1990, 62).

So how does Green combine the two concepts? A crime, as mentioned above, is an action that violates a real right. ‘Crime should be punished according to the importance of the right which it violates, and to the degree of terror which in a well-organized society needs to be associated with crime in order to protection of the right’ (Green [1879] 1986, 150:198). Although Green advocates that the object of punishment is deterrence, he does not neglect the fact that punishment needs to be retributive and reformatory (Milne 1962, 151). Like Hegel and Kant he agrees that punishment is in its own right an act returning on himself, in the sense that it is the necessary outcome of his act in a society governed by the conception of rights, a conception which the offender [sic] appreciates and to which he does involuntary reverence (141: 186).

Retributivists would argue that in order to have a just punishment one must inflict the equal physical harm that the crime has caused thereby making amends for the crime committed. Again Green agrees that the violation of a right demands retribution and that the criminal should ‘have his due, and [sic] should be punished justly’ (139: 183). This is the point where Green and Kant’s views part. Green argues that a just punishment is not the same, as a punishment where equal suffering is inflicted. This is because the suffering, which is caused by a crime, is generally incalculable. If the harm, a crime causes is not quantifiable then how can equal harm be applied when inflicting punishment? Even then the exact suffering could not be ‘reconstructed’ as the suffering depends entirely on the circumstances. The example Green gives is that of hard labour. How cans this, he asks, be in any way shape or form be equal to the robbery? (140: 184)

It is this dilemma that Green used to his advantage. Green maintains that retributive elements, form part of just punishment.

The already difficult task of assessing the penalty must not be further complicated by adding to it the aim of trying to make the severity of the penalty proportional to the moral evil of the criminal. No such proportion can be established in any case (Milne 1962, 151-52).
The law, however, still needs to determine in which category each crime falls and fixes certain limits to the penalty. This is because the punishment should not be completely out of proportion with the right that is violated. The severity of the punishment is determined by this. This means: the more central the right the more severe the punishment (Brooks 2003, 695). If it is seen in these terms, it could be said the greater the crime the harsher the punishment should be. ‘It amounts to this, that the crime which requires most terror to be associated with it in order to its prevention should have most terror thus associated with it’ (Green [1879] 1986, 144: 190). Green contends that a just punishment is one that in its proper nature is preventive. This does not mean that the retributive element is taken away from punishment. Although the punishment may not be physically equal to the crime the offender still receives his fair deserts. Punishment should not be ‘preventive of any or every evil or by any and every means, but ... justly preventive of injustice’ (154: 204). This means that the state can only punish the offender for the crime that has been committed and not for anything else. Punishment looks back at the wrong done in the crime which it punishes; ... in order to the consideration of sort of the terror which needs to be associated with such wrong-doing in order to the future maintenance of the rights (154: 204).

He claims that punishment cannot be justified unless a real right has been violated. This means that the Green would condemn the punishment of innocent people even if this deterred others from committing similar crimes. And that right has to be intentionally violated. Once this occurs the punishment is justified and its objectives can be reached, as an innocent man cannot be deterred from doing an act he has not committed (141: 186). How can one possibly judge an individual’s acts not yet committed and remain just? Such a principle is open to abuse and justifications are easily found.

Up to this point Green’s concept seems to be more of a deterrence theory than a theory that is based on retribution. As mentioned above, Green makes it quite clear that the first object of punishment is deterrence (154: 204). However, the utilitarian’s only objective is to deter people from causing harm and thereby disturbing the greatest happiness of the greatest number (Bentham [1789] 1967, chap. 14-15). Despite using deterrence as the main point of his concept, Green does give some examples that contradict this principle. He argues that to hang a man for sheep stealing does not satisfy the principle of just punishment. Even if this became a common problem this would still not justify such harsh punishment. If his were a purely utilitarian concept hanging a thief to deter others would be acceptable. Green, however, argues that ‘a society where there was any decent reconciliation of rights no such terror as is caused by the punishment would be required for the punishment of death’ (142: 187). This shows that, despite having a deterrence theory, the punishment needs to accord with the
right that has been violated. Green further maintains that a violation of rights must be punished. It can only be punished in the way which for the time is thought most efficient by the associating terror with its violation. This however, does not alter the moral duty, on part of the society authorising the punishment, to make its punishments just by making the system of rights which it maintains just. The justice of the punishment depends on the justice of general system of rights (144: 190).

The amount of punishment that is inflicted is the crucial part when determining whether a punishment is just or unjust. As stated above, the Kantian concept has the flaw that it is very difficult to actually determine what the physical equivalent of a violation of a right is. ‘The amount of pain which in any kind of punishment causes to the particular person depends on his temperament and the circumstances, which neither the state nor its agent the judge, can ascertain’ (Green [1879] 1986, 145: 191). The retributive approach also would actually not be just. So what does Green believe a just punishment is? As mentioned a just punishment must have aspects of retributivism, deterrence and reform. The role that retributivism should play has been discusses above and not much else needs to be added. In the case of deterrence one of the main questions that remain unanswered is that of who is actually supposed to be deterred by the punishment? Green maintains that the state punishes not to the effect of the punishment on the person punished but to its effect on others. The considerations determining its amount should be prospective rather than retrospective. In the crime a right has been violated. No punishment can undo what has been done, or make good the wrong to the person who has suffered. What it can do is to make less likely the doing of a similar wrong in other cases. Its object, therefore, is not to cause pain to the criminal for the sake of causing it, nor chiefly for the sake of preventing him, individually, from committing the crime again, but to associate terror with the contemplation of the crime in the mind of others who might be tempted to commit it. And this object, unlike that of making the pain of the punishment commensurate with the guilt of the criminal, is in the main attainable (145: 193).

This leaves only the aspect of reform. Green insisted that a punishment, in order to be effectively preventive and just, also needed to be reformatory. If the punishment is preventive then by its mere nature it should not only deter society from committing crimes but should deter the criminal too. If the criminal lays aside his criminal habits, the punishment has been preventative, just and reformatory. Reform is a desirable by-product of a preventive punishment (155-56: 205). As the criminal has lost some of his rights due to his actions, it desirable that he should be able to reform and thereby regain the rights he has forfeited. Dealing with the criminal in this matter, punishment will hopefully awaken
him to the nature of his anti-social acts (156: 206).

Finally, after examining Green’s work on crime and punishment, it is possible to come to a conclusion on how successful Green’s concept is in providing a theory of deterrence which also allows for the strength of retributivism and reform. It is not hard to see that Green’s theory is one of deterrence. Numerous times throughout his text he states that the main objective is prevention. At the same time he argues that punishment must be just and by exploiting the flaws of the retribution theory and building upon them, he is able to make a strong case for a combination of the theory. The flaw identified is that it is very difficult to find the physical equivalent to the crime committed and therefore to find a just punishment. Green determines the amount of punishment by how central the right that has been violated is. Green, like Kant, agrees that a fixed limit for each punishment must be set. Green, however, contrary to Kant, leaves some room discretion on part of the judge. At the same, by using this model Green successfully irons out some of the flaws that make the deterrence theory unattractive; for example the punishing of innocent people as well as severely harsh punishments for minor violations. His theory is still mainly one of deterrence and although retribution is incorporated into it he has not followed the tradition of Kant. This, nonetheless, does not mean that he did not successfully improve the flaws of Kant’s work as well as some aspects of the deterrence theory.

References


