

James Seth on Natural Law and Legal Theory

Thom Brooks¹

Abstract. This article argues that James Seth provides illuminating contributions to our understanding of law and, more specifically, the natural law tradition. Seth defends a unique perspective through his emphasis on personalism that helps identify a distinctive and compelling account of natural law and legal moralism. The next section surveys standard positions in the natural law tradition. This is followed with an examination of Seth's approach and the article concludes with analysis of its wider importance for scholars of Seth's work as well as legal philosophers more generally.

Introduction

James Seth (1860-1925) has become an obscure figure in the literature about British Idealism. Virtually nothing has been published offering any substantive examination of his thought.² This has remained unchanged despite renewed interest in British Idealism in recent years. It is all the more surprising when we consider that Seth was a major figure during his lifetime. For example, he held prestigious posts at several universities: Seth was Professor of Metaphysics and Ethics at Dalhousie College (later honorary President of the Canadian Club), Professor of Philosophy and Elton Professor of Natural Theology at Brown University, Professor of Moral Philosophy at Cornell University and for nearly thirty years Seth held the Chair of Moral Philosophy at Edinburgh University (Pringle-Pattison 1926: xix-xxv). Seth also served as editor of the *Philosophical Review*, a flagship journal then as now. This gave him a unique international presence through his achievements in securing major positions at leading departments with an enviable career few might enjoy even today. Obituaries declared him 'a man in a million' and one of 'the great Scottish prophets' (Pringle-Pattison 1926: xxxii, Mabbott 1986: 73). John Muirhead noted that during Seth's time in Edinburgh he 'made a place for himself in the life of the university and the city that would bear comparison with the most distinguished in the long line of his predecessors' (Pringle-Pattison 1926: xxxiv). Yet this distinctive presence has failed thus far to translate into lasting philosophical importance. Seth's relative obscurity is compounded further by the general neglect of British Idealism by legal philosophers. Law may not occupy a central place in the British Idealist literature, but it has received some attention on topics such as punishment and social policy.

¹ Correspondence address: Durham Law School, Durham University, Durham DH1 3LE, United Kingdom. Email: thom.brooks@durham.ac.uk.

² James Seth's work receives only limited attention, for example, in William Mander's magisterial *British Idealism: A History* (2011) and no substantive coverage in all comprehensive surveys of British Idealism (Boucher 1997, Boucher and Vincent 2000, Nicholson 1990, Tyler 2006, Vincent and Plant 1984). Bengtsson (2009) and Brooks (2012) offer rare more lengthy treatments although there is no one stand-alone piece dedicated to Seth's work. Westlaw lists Brooks (2011a) and a reply to this piece by Brudner (2011) as the only articles in law journals or reviews mentioning Seth's name. The Web of Science contains no work referring to Seth's contributions. JSTOR lists several important reviews of books by Seth, but the only substantive discussions not already mentioned are Atkinson (1957) and Raphael (1955) where both primarily debate Seth's reading of Mill's *Utilitarianism* instead of Seth's original work.

What contributions to legal philosophy does Seth offer and why should these receive renewed attention now?

This article argues that James Seth provides illuminating contributions to our understanding of law and, more specifically, the natural law tradition. Seth defends a unique perspective through his emphasis on individual rights that helps identify a distinctive and more compelling account of natural law and legal moralism.³ The next section surveys standard positions in the natural law tradition. This is followed with an examination of Seth's approach and the article concludes with an analysis of its wider importance for scholars of Seth's work as well as legal philosophers more generally.

A Critical Survey of the Natural Law Tradition

The natural law tradition is diverse and encompasses a wide range of ideas united about the view that law and morality are inextricably linked (Freeman 1994: 79-130). Illegality is often best understood as some form of immorality although how this is defended differs from one proponent to the next. James Seth offers a distinctive account about law within the natural law tradition. I will briefly survey leading theories about natural law in this section so we might better appreciate the novelty and potential future promise of Seth's theory in the following section.

The best starting place is the classical natural law theory presented by the Roman Stoics. In *De Re Publica*, Cicero argues:

True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to repeal any part of it, and it is impossible to abolish it entirely . . . there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reasons of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishments (Bix 1996: 224).

This passage reveals several key elements of classical natural law. There is the distinction between 'law' and 'true law'. Not all laws share equal standing because some are more 'true', or rather more 'just', than others. Laws that are inconsistent with morality are not merely

³ My argument is that Seth offers 'a distinctive and *more* compelling account of natural law and legal moralism'. I will demonstrate why I believe his account may overcome various problems better than other such accounts. This is not to say that its work is done. Much more space is required to set out the larger case for whether Seth's account is not only better on certain problems than other natural law accounts, but whether it is better than other views in jurisprudence. This is a project beyond the scope of this article where, in effect, my goal is to draw greater attention to Seth's views on law and legal theory to overcome its widespread neglect.

corrupt, but not truly law, properly speaking (Brooks 2012b: 168). The more that law is consistent with morality, the more 'true' or 'just' it becomes. Crucial is which view about morality we use as our standard for the assessment of the justice of law. This is unsurprisingly a matter of some controversy among natural lawyers past and present that I will not address here. Nonetheless, the use of morality to inform our assessment about law is an idea that has had deep attraction from the time of Cicero through to today.

The moral standard we use to assess the justice of law is universal, timeless and God is its author. The idea rests on an assumption that moral standards are not subject to change over time in response to new conditions or different contexts. It also assumes that morality is divinely sanctioned. This view has been revised in modern conceptions of natural law. I will draw upon the examples of Kant, Finnis and Fuller.

Immanuel Kant accepts something like this view in arguing for law's consistency with his idea of 'the moral law' developed through his categorical imperative (1996: 9-11, 15-20). His emphasis on the requirement for morality as involving consistency has led famously to charges by Hegel and others that Kant's moral law is nothing more than an 'empty formalism' (see Brooks 2013, Freyenhagen 2012, Stern 2012). One difference between the ideas about natural law defended by Cicero and Kant is that only Kant argues that we may grasp natural law through reason and without any direct reference to God. Natural law's authority may be secured through the use of reason. A second difference is that, for Kant, law should be consistent with morality, but not *vice versa*. This distinction between (legal) right and (moral) virtue is important: while all just laws should conform to the moral law, the moral law need not and should not be fully incorporated into positive law. Kant argues that individuals have some moral duties that should not be enforced by law, such as in areas of conscience (1996: 147-48). This is not because these duties are unimportant, but rather they may be unenforceable.

John Finnis offers a further revision of natural law. He argues that there are seven basic forms of the human good, including knowledge, play and sociability (Finnis 1980: 85-90). Each is discoverable through the use of practical reflection on considering the basic forms of the good we might possess. In so doing, 'they lay down for us the outlines of everyone one could reasonably want to do, to have, and to be' (1980: 97). We determine these basic forms of the good first and then apply them to our assessment of law and legal systems. Finnis's views are controversial, in part, for endorsing a view about the human good that is too wide.⁴

Lon Fuller identifies principles that form what he calls 'the inner morality of law' (1969: 42). These are eight principles any legal system should satisfy (Fuller 1969: 39-49). These principles include our ensuring to 'make the law known' and 'make it coherent and clear' (1969: 42). Fuller argues that a 'total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all' (1969: 39). So the idea is that some legal systems are more 'lawful' than others

⁴ More specifically, Finnis argues that religion is a part of our human good that law must accommodate. This has attracted criticism from secularists that argue law and religion lack the close link which Finnis endorses.

where they better incorporate principles such as publicity and the rejection of retrospective legislation.

Kant, Finnis and Fuller represent important innovations of the natural law tradition. Each shares certain features in common. For example, all three argue that law can and should be assessed through moral criteria to determine how 'just', or 'lawful', law is. These criteria have relevance for every individual across diverse societies. A further, and crucial, shared perspective for our later discussion of Seth's theory is this: where moral standards may be applied and enforced in law, each claims that they should be. Kant's moral law informs positive law where such positive law might be enforceable. Finnis's forms of the human good should find expression in our legal system and ought to do so where they can do so. Fuller's 'internal morality of law' is a morality that should be incorporated into the law at every point.

This brief critical survey of the natural law tradition is not meant to be comprehensive. Instead, I have drawn attention to certain features common to leading representatives of this tradition. These features include the central importance of the distinction between law and just law, the universal character of the moral standards used to make this assessment and that where moral standards may be applied and enforced in positive law then they should be. Whilst the natural law tradition is a broad tent encompassing a diversity of views, these features are characteristic for many of the views of its more famous proponents. My task has been to identify them rather than offer some defence.

Seth on Natural Law

James Seth was not primarily a legal theorist, but a moral philosopher. Nonetheless, we are able to discern a coherent position about law and legal theory in his work, such as in his major treatise *A Study of Ethical Principles* (1898). Seth's views are distinctive from other British Idealists. He defends 'an ethics of personality' he calls 'eudaemonism' that attempts to unify sensibility with reason (1898: 82, 186, 188-240; see 1926:165-66). Seth argues that our emotions and reason need not remain in conflict, but rather the latter should govern the former not unlike Plato's famous charioteer in the *Phaedrus* (1997: 246a-254e). Reason has a special priority, but it is only one part of Seth's moral philosophy (Seth 1898: 123). Adopting Kant's phrasing, Seth argues 'that if reason without feeling is empty, feeling without reason is blind' (1898: 122). He also claims that 'a merely rational life, excluding sensibility, is as impossible for man as a life of mere sensibility without reason' (1898: 147). Together, reason and sensibility contribute to 'the complete self or personality of the individual' (1898: 213, see 242). For Seth, 'character is nature disciplined': 'sensibility needs the education of reason, before it is capable of government; it must itself be governed, before it is fitted to govern' (1898: 241, 242).

Seth offers us a liberal theory about individual rights and the relation between law and morality must be understood within this context. Political society exists for the individual and his or her pursuit of virtue.⁵ Seth argues:

Society exists for the individual, it is the mechanism of his personal life. All social progress consists in the perfecting of this mechanism, to the end that the moral individual may have more justice and freer play in the working out of his own individual destiny . . . Social organisation is never an end in itself, it is always a means to the attainment of individual perfection (1898: 271-72).⁶

The State must be regarded as a means, not as in itself an end. The State exists for the sake of the person, not the person for the sake of the State. The ethical unit is the person; and the mission of the State is not to supersede the person, but to aid him in the development of his personality—to give him room and opportunity. It exists for him, not he for it; it is his sphere, the medium of his moral life . . . the true function of the State is to mediate and fulfil the personal life of the citizen (1898: 287-88, see 303).

We must then consider how this goal might be best achieved in clarifying his views on law. One important consideration is that, for Seth, part of the moral goodness in choosing to do a morally good action is found in the free choice to decide for ourselves.⁷ Moral progress is earned through a ‘struggle . . . not with evil in general, or with nature in the abstract’, but rather ‘the task is always one of self-conquest’ (1898: 243). Seth argues that ‘the ethical value of life, both in its length and in its breadth, in the duration and in the wealth of its activities, is to a considerable extent within our own power’ (1898: 250). For Seth, ‘the primary function of the State is not to make its citizens good’ (1926: 172). He adds: ‘Not even God can *make* a man good. Goodness, by its very nature, must be the achievement of the individual: each must work out his own salvation’ (1898: 272). This sets important limits on legitimate state interference. Not only is the state unable to make men moral, any attempt is likely to be self-defeating.⁸ For Seth, ‘the moral life is essentially a personal life; in this sense all morality is private’ (1898: 273).⁹

This fact highlights a key distinction in Seth’s understanding of the relation between law and morality. We ought not use law to ensure individuals perform morally approved actions because the morality of our actions requires free choice and, preferably, without the threat of

⁵ ‘The end of life is an ideal of character, to be realised by the individual, and his attitude to it is one of obligations or duty to realise it. It is not something to be got or to be done, but to be or to become. It is to be sought not without, but within; it is the man himself, in that true or essential nature’ (Seth 1898: 16).

⁶ Seth’s constant focus on the importance of the individual may derive from his deeply held religious beliefs: ‘It is of the essence of Protestantism to reject all external authority, and to affirm the right of the individual to judge for himself in moral as well as in intellectual matters’ (1926: 13).

⁷ ‘it is the deepest self of humanity that makes its constant claim upon the individual man, and demands its realisation’ (Seth 1898: 215).

⁸ ‘It is forgotten that men cannot be made moral by Act of Parliament, that men cannot be *made* moral at all’ (Seth 1898: 337).

⁹ ‘The most perfect State will be that in which there is least repression, and most encouragement and development, of the free life of a full individuality in all the citizens’ (Seth 1898: 304).

state sanction. We have a right to choose wrong in order to give value to our choosing good. The law should not be designed to ensure no one acts wrongly, but rather to better enable individuals to live more virtuously (see 1898: 206, 269). Righteousness is a product of moral character and not the object of legislation (see 1926: 62).

There are clear limits on what wrongs may be tolerated. Seth argues that the appropriate limits are individual rights. Our rights are a core part of each person's good. Seth insists repeatedly that the only good worth its name is the good of individuals: 'the person, not society, is the ultimate ethical unit and reality' (1898: 18, see 204-5, 211). The 'protection of the fundamental rights of the individual' is the paramount goal for the state (Seth 1926: 172).

An essential part of this good is the rights that individuals enjoy and these command legal protection.¹⁰ Individual rights, for Seth, form an essential moral justification for the law. Legal systems may be assessed on their success at securing the maintenance and protection of individual rights. Legal systems have greater moral justification as ethical institutions where this is guaranteed (see Seth 1926: 177). Seth claims it is a mistake to hold the view of law 'as mere obedience to a code of rules or precepts—to think of morality as something to *do* (or *not* to do) rather than as something to *be* or to *become*' (1898: 16; see Seth 1926: 156; Taylor 1896: 48).¹¹ He rejects this 'mechanical' view about law and legal obligations in favour of the view that law must help facilitate individual 'self-realisation' and 'self-fulfilment' (1898: 198; see Seth 1926: 166, 168-69).¹² In fact, our self-realisation is our 'ultimate and inalienable human right' (1898: 423). Seth claims that 'we ought not to be always trying to "do good"; the first requisite for doing good is to be good' (1898: 253).

Crimes are not merely public wrongs, but infringement of rights; crimes are rights violations that invite the possibility of punishment. Any punishment must be justified and distributed according to whether it helps to secure the rights of individuals, including the rights of the criminal (1905: 306). If the wrong of crime is the violation of rights, then punishment cannot be justified where it renders rights less secure or stable. Instead, punishment must contribute to rights protection. To this end, Seth argues that punishment aims at a restoration of rights that may refer to multiple penal principles as part of what I have called the 'unified theory of punishment' (Brooks 2010, 2011b, 2012a, 2012b). Punishment must be deserved, contribute to crime reduction and help facilitate criminal rehabilitation (1898: 315-16; see 1926: 178-79). These different penal goals may be coherently brought together without conflict because they serve the larger goal of securing the protection of individual rights (see 1898: 305). Seth argues that 'the total conception of punishment may contain various elements indissolubly united' (1892: 237).

¹⁰ 'The right of the State to coerce the individual . . . is grounded in the fact that it exists for the sake of the interests of personality' (Seth 1898: 293).

¹¹ Seth later argues: 'The living throbbing experience of the moral man—remorse and retribution, approbation and reward, all the grief and humiliation of his life, all its joy and exaltation—imply a deep and ineradicable conviction that his destiny, if partly shaped for him by a power beyond himself, is yet, in its grand outline, in his own hands, to make it or mar it, as he will' (1898: 363).

¹² Seth draws a distinction between being a mere individual and becoming a person, or 'total self' (1898: 199-200).

Seth argues that the proportionality of punishment is set not in terms of the gravity of moral wrongness, but the centrality of the right violated within the wider legal context. The idea is that justified laws each serve to protect rights and secure individual liberty (1898: 285). Seth argues:

This view of the object gives the true measure of its amount. This is found not in the amount of moral depravity which the crime reveals, but in the importance of the right violated, relatively to the system of rights of which it forms a part . . . The measure of the punishment is, in short, the measure of social necessity; and this measure is a changing one (1916: 311).¹³

Some rights may require greater protection than others. For example, the right to life may require greater protection than a right to private property because the former is necessary for the enjoyment of other rights. We punish crimes in proportion to the importance of the right violated. This measure may fluctuate over time so that what is criminalized and its importance relative to other possible infringements of rights may change.¹⁴ For Seth, ‘the ideal State is never reached’ and cannot be achieved (1898: 216).

This *developmental* view about the relation between law and morality coheres with an Aristotelian strand of the natural law tradition.¹⁵ This strand defends a view about legal development and Seth’s theory of law is best characterized as falling within this strand of the tradition. Of course, Seth arrives at this position for different reasons than Aristotle although both defend ideas about the importance of self-realisation and the need for law to avoid becoming a hindrance of this project.¹⁶ Seth’s views are distinctive for their clear focus on the individual and how best to enable her to secure her self-realisation where law serves as one means amongst others, including civic associations. While Seth’s natural law theory is very different from other canonical figures in the tradition, such as Kant, Finnis or Fuller, Seth nonetheless represents a distinctive and more attractive alternative that endorses a more narrow view about the relation between law and morality along with a clear focus on individual liberty.¹⁷

Seth’s Contribution

¹³ This passage was added after the publication of the 3rd edition. This is part of a two page addition from the eighth edition of *A Study of Ethical Principles* that further clarifies Seth’s views about punishment. His comments are additions and there are no revisions of his previous remarks in earlier editions. His brother, Andrew Seth Pringle-Pattison, says of the latter amendments to *A Study of Ethical Principles* that ‘certain changes were introduced from time to time in successive editions—changes of emphasis for the most part—as a result of the author’s continuous reflection on the subject-matter. But in all the essentials of its standpoints and method, the book, now in its sixteenth edition, has remained substantially the same’ with the possible exception of a new chapter on ‘Moral Progress’ added in the third edition (1926: xxiv).

¹⁴ Seth argues that law and morality might never perfectly cohere, in part, because ‘a moral law is that which ought to be, but perhaps never strictly is’: it is ‘the eternal claim of the ideal upon the actual’ (1898: 15, 139).

¹⁵ Many thanks to [deleted] for pushing me to clarify this important aspect of Seth’s views.

¹⁶ See Finnis (2002) on Aristotle’s understanding of natural law.

¹⁷ Seth’s views on law are also distinctive from the broader Hegelian tradition in important respects (Brooks 2007).

Seth's contribution to natural law theory has many attractions. The first is the way in which it attempts to situate the relation between law and morality. Seth does not argue or claim that law and morality must aspire to perfect unity.¹⁸ Nor does he argue that we should criminalize any immorality we could enforce. He does not begin with a view about what is wrong and then move to develop a view about criminalization. Instead, he begins from the importance of the individual and the need for the protection of individual rights. Law is concerned with the maintenance and protection of individual rights, a position that is sensitive to changing social contexts and historical transformation. Seth argues that the state is a 'custodian' of our rights: 'Its function is to recognise, to establish, and to formulate them in law; its law is only a version of moral law' (1898: 299).

A second attraction of Seth's theory is its view about legal moralism. The latter is an important perspective on criminalization endorsed by most natural lawyers. The view is that the law should aim to prohibit certain immoral conduct where criminality overlaps with immorality and perhaps even wickedness. For example, Kant argues that murder should be criminalized and punished severely because it is no mere moral wrong, but an instantiation of inner wickedness (1996: 106-7).

Standard criticisms of legal moralism often appeal to the *mala in se* versus *mala prohibita* distinction (Brooks 2012a: 6-10, 111). *Mala in se* crimes are wrongs independent of their illegality, or sometimes explained as public wrongs we should expect any attractive legal system to criminalize. Examples may include crimes such as murder, theft and child sex offences. *Mala prohibita* crimes are wrongs because declared illegal by the state. Common examples include drug offences, prostitution and traffic offences. Critics of legal moralism argue that their view is flawed because it cannot account for *mala prohibita* crimes. If criminality is linked with immorality, then legal moralists have a problem where not all crimes we would want to include as criminal may be accounted for.

Legal moralists appeal to one of two responses. The first response is to argue for decriminalization of *mala prohibita* crimes. So some might respond that drug offences are not *mala in se* crimes, but this is only a problem for legal moralism if legal moralists wanted to punish drug offences. One escape is to support the decriminalization of drug offences to avoid this problem. This leaves other problematic cases, such as traffic offences, less easily avoided and which point to a second response legal moralists offer. This is to deny there is any such distinction between *mala in se* and *mala prohibita* crimes at all (Duff 2000: 67, 87-88; Duff 2006: 90-91). The argument is that the criminal law is inherently normative in setting out prohibited conduct and as such it must secure some degree of moral justification. So it is a mistake to say that even traffic offences are amoral because their justification arises from some deeper, foundational normative source such as the agreed procedures to determine laws. The problem here is that if all laws share the same source of justification, then this renders unclear how we might determine the relative wrongness of each crime from another (Brooks 2012a: 111-14). If all crimes possess equal normative justification, then what might

¹⁸ 'The primary function of the State is not to make its citizens good: its law and order are not intended to coincide with the moral law and order' (Seth 1926: 172).

justify the distribution of different punishments on account of normative considerations? Instead of claiming that we look to each individual potential crime and consider its possible immorality, we consider the broader system and ask whether it is consistent with some moral standard. Yet, the morality of the wider system may be a separate consideration from the morality of practices falling under this system.

Seth's theory of natural law helps us avoid these problems.¹⁹ Law is about the maintenance and protection of rights whatever else it may be. Criminalization is justified where crimes may violate rights. Furthermore, some crimes should be punished more than others because of the relative importance of the right violated. Seth is able to usefully address the first set of worries concerning the *mala in se* and *mala prohibita* distinction in that the only crimes his theory is addressing are crimes that violate rights. There should be no problem about the potential for punishing crimes that do not violate rights because no such potential may exist. So he need not offer a retreat by way of decriminalization to avoid this criticism about legal moralism because he offers a more narrow understanding of criminalization through rights protection. Crimes are not only wrongs; they are rights violations.

Seth may also overcome the second challenge where some legal moralists have tried to deny *mala prohibita* crimes in order to address the problem that if such crimes exist then it undermines legal moralism. This category is denied by arguing that all crimes share the same justification, but this leaves open the problem of how to determine proportionality where each crime is justified on the same basis. Seth's theory offers a more convincing response. He can claim that all illegality satisfies the moral standard of being a violation of rights: all crimes are public wrongs in a more narrow sense than other legal moralist views, but without reducing them to *mala in se* which includes the idea of wrongness independent of legal recognition. Furthermore, Seth's justification of criminalization in terms of rights violations is set within a wider context where law serves the end of the maintenance and protection of individual rights (see 1898: 315). So he is able to account for proportionality in criminal seriousness and punishment in ways that other legal moralists cannot.

Conclusion

James Seth was not a lawyer or legal philosopher and yet his work offers a valuable contribution to legal thought more than a century later. Seth's legal theory is an illuminating alternative account within the natural law tradition that prioritizes individual rights and respect for moral choice. His views contribute to a more compelling view about punishment and its justification as a unified theory with the aim of the restoration of individual rights. Seth also defends a more persuasive alternative understanding of legal moralism that overcomes problems that continue to confound legal moralists today.

Perhaps it is then surprising to recall the general obscurity that Seth's work has endured and the overall neglect by legal philosophers about the contributions British Idealists offer us today. My ambition is that this piece may help inspire others to re-examine British Idealism more generally and James Seth's work in particular for the real contributions to contemporary

¹⁹ Seth is alive to the need 'to avoid moral scepticism' in his defence of a natural law theory (1898: 120).

debates they continue to offer. We have witnessed a renaissance of interest in British Idealists on metaphysics and political philosophy. It may be time for a new wave regarding their work in law and legal theory next.²⁰

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