

A DEFENSE OF PURE RESTITUTION

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ABSTRACT

In this thesis I argue that legal punishment is far from perfect, and that the most common defenses used to justify it prove to be unsuccessful when examined closely. I propose that if there exists an alternative, non-punitive, practice capable of achieving the same benefits, then that practice should be preferred over punishment. I then proceed to introduce one such alternative, the theory of pure restitution, and resolve some problems raised by its critics. I ultimately demonstrate not only that pure restitution is capable of achieving the same benefits as punishment, but that it is capable of achieving even further benefits.

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Introduction

The issue of legal punishment is far from uncontroversial given the amount of literature written on justifying the practice, reforming the practice, and abolishing it altogether. In this thesis, I take part in this conversation and make further additions to the list of reasons why punishment is not needed in our criminal justice system, and how it can be replaced with another practice that is capable of achieving the same (as well as further) benefits. This alternative practice that I will be defending in this thesis is that of pure restitution. Pure restitution, in short, involves two main components: refraining from punishing offenders and requiring offenders to compensate their victims. The version of pure restitution that I will be defending here is a somewhat modified version of the one first introduced by Randy Barnett. My aim is to demonstrate that it is not only a plausible alternative to punishment, but that it is, in fact, a better alternative.

In the first chapter, I briefly discuss some benefits as well as some problems with the practice of punishment. I argue that while there are several benefits to punishment (namely, deterrence, enhancement of victims' wellbeing, expression of disapproval of wrongful behaviour, and the achieving of justice and order in society), the practice is also morally questionable. I conclude by suggesting that if an alternative, non-punitive, practice proves capable of achieving the same benefits, then that practice should be favoured over punishment.

In the second chapter, I take a closer look at several defenses of punishment. In particular, I discuss consequentialist defenses of punishment (focusing primarily on the act-utilitarian and rule-utilitarian justifications) and go on to demonstrate why both defenses are

unsuccessful. I then turn to discussing several retributivist defenses of punishment. In particular, I discuss the desert-based defense, the fairness-based defense, the forfeiture-based defense, and the debt-based defense. I argue that all these retributivist justifications of punishments are also problematic and ultimately fail to justify the practice.

In the third chapter, I present the theory of pure restitution and address some objections raised by its critics. In particular, I address the following objections: (1) That the theory is unable to account for the restoration of the wellbeing of secondary victims. (2) It disregards the effect of crime on the state. (3) It is incapable of repairing irreparable harms (especially in cases of rape and murder). (4) It leads to the trivialization of crime. (5) It is incapable of accounting for cases of failed attempts at wrongful behaviour as well as cases of non-harmful endangerment. (6) It is incapable of deterring the very rich as well as the very poor potential offenders from engaging in criminal activity. After responding to these objections, I conclude that there are no serious problems that the theory is not capable of overcoming, and that, consequently, this goes to show that the theory is, in fact, quite plausible.

In the fourth and final chapter, I compare and contrast the benefits of punishment with the benefits of pure restitution. I further discuss the benefits of punishment that were introduced in the first chapter and explain how these same benefits can be achieved by a system of pure restitution. I then go on to show that there are even further benefits to pure restitution that punishment does not account for, thus concluding that pure restitution is, in fact, a better alternative to punishment.

Chapter 1

Questioning the Practice of Punishment

The practice of legal punishment may appear, at least to those who have never thought to truly examine the issue, to be a necessary part of a well-ordered society. It may, at first glance, appear as though the idea of legal punishment is simple and straightforward: in order to have a well-ordered society, we need people to abide by the laws of that society. In order to ensure that people abide by these laws, there need to be consequences in place as reinforcement, and those consequences must be severe enough to deter potential lawbreakers from breaking the law. If legal punishment did not exist, they may argue, we would be living in a place closely resembling the Hobbesian state of nature with people roaming around killing, raping, assaulting, and stealing from one another. Thus, if we want to refrain from living in such a world, they may suggest, we must show that this kind of behaviour is not to be tolerated in our society, and the only way to show this is by introducing the threat of punishment. Thus, the issue of legal punishment, left unexamined, appears to be not only morally permissible, but morally required. In fact, to some, it may seem as though defending the practice is not necessary. It may even appear to be a waste of time to place the issue into moral discussion for it is clear that this practice works - it has been working for as long as we have had order in society and, as some may assert, why try to fix something that is not broken?

In order to answer just this very question of “why fix something that is not broken?”, I must first show that the practice of punishment is, in fact, somewhat “broken”. However, before I can do this, I must first show that punishment is a complicated moral issue, and not as simple and straightforward as what I have stated above. Even prior to this, however, I must explain exactly what I mean by “punishment” for two reasons: (1) So that I may refrain from causing my

readers any confusion later on, and (2) So that in the chapters to follow, I may be able to contrast punishment with alternative (non-punitive) ways of responding to crime.

The term “punishment” is generally used in everyday language in a very broad sense, to mean something like “causing displeasure”. A child may think that his parents are “punishing” him by forcing him to eat broccoli or a teenager may think that her teacher is punishing her by assigning extra homework. These things, however, do not at all convey what I have in mind when I use the term “punishment”. What I mean by punishment is something more like parents not allowing their son to go out with his friends because he was disrespectful to them earlier that week, or a teacher giving one of her students detention for using an inappropriate word in class. The difference between the first and second set of examples is that the second set of examples are all treatments that are *intended* to be unpleasant as a response to wrongful behaviour. The first set of examples, however, are only unpleasant accidentally or unintentionally.

The definition of legal punishment that I will be operating under is very similar to this (but with a few extra criteria added). From this point on, when I refer to the practice of punishment, I will be referring to the definition used by H.L.A Hart, which contains five criteria: “(i) It must involve pain or other consequences normally considered unpleasant. (ii) It must be for an offence against legal rules. (iii) It must be of an actual or supposed offender for his offence. (iv) It must be intentionally administered by human beings other than the offender. (v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.”¹ However, I would like to make one small adjustment to Hart’s definition. In particular, I would like to alter the first criterion so that it states: “[punishment] must involve *intentional* exposure to pain or other consequences normally considered unpleasant”. What this means is that when the state punishes an offender for a crime, the

¹ Hart: 1959: 4-5

treatment that the offender is subjected to is *intended* to be unpleasant or it is purposely made to be unpleasant (either for the purpose of causing pain or for some further end to be derived from subjection to this pain) and is not simply unpleasant by accident. In other words, the displeasure is necessary for achieving whatever end the punishment aims to achieve (i.e. deterrence, retribution, expression of disapproval of the offender's actions, etc.). The best and most clear example of this is a prison sentence. Prison is not merely a place to keep offenders so that they are unable to reoffend, it is also a place, which by its very nature, is meant to be unpleasant. It is meant to be a place where people do not want to go.² Solitary confinement is another, even more clear example, of what I have in mind when speaking of punishment. Sending a prisoner off to solitary confinement for a certain amount of time is a way of saying that the prisoner is to be made to suffer for that period of time. To be clear, by making the claim that punishment requires the intent to cause displeasure, I do not necessarily mean that this intent must be linked to retributivist reasoning. In fact, the state could have the intent to subject an offender to pain or displeasure, but want to do so in order to deter crime, for example (i.e. the pain or suffering is necessary in order to make an example of the offender so that others do not follow in his footsteps) or in order to deter the offender from reoffending in the future, etc. All that matters, however, is that even in those cases, the only way that the state feels it is possible to achieve its goal is by intentionally subjecting the offender to some pain or displeasure.

Now that I have clearly defined what I take legal punishment to mean, I would like to turn to discussing the question of whether or not this practice should be questioned, morally

² Some may argue that the pain or displeasure of prison life is merely a byproduct of a restriction on the inmates' freedom of movement, which is the main aim of a prison sentence. However, it would also be a mistake to disregard the fact that prisons are unpleasant for plenty of reasons other than their mere restriction on the freedom of inmates. Doug Husak, for instance, notes that "even at its best, prison life is boring and empty, and overcrowding has made many aspects of incarceration worse. Inmates are assaulted by guards and by other inmates, and homosexual rape is not uncommon. Prisoners retain virtually no privacy rights". (Husak, Doug. *Overcriminalization: The Limits of the Criminal Law*, 2007:5-6).

speaking. As I previously stated, to some it may appear as though there is really nothing to discuss, for the practice of punishment simply makes sense - it helps maintain order in society and punishes those who “deserve it”. So why is there so much literature written on this topic? Why is the practice of punishment a controversial issue? How could it possibly be immoral to, in a sense, simply do what needs to be done?

The moral issue here comes from the fact that any legitimate state is required to protect individuals’ rights and freedoms. We understand that subjecting others to pain or displeasure, in a general sense, is seen as immoral or wrong, and if this was done to someone who had not, himself, committed any injustice or wrong, we would think that it was unquestionably immoral. However, the issue becomes questionable when we take into account that those who are subjected to legal punishment are those who have done something immoral or unjust themselves - they have, themselves, violated the law, and in doing so, violated the rights of others, thus subjecting them to pain or suffering. The question, however, is whether we are justified in doing this. Does the fact that someone has committed a wrong completely alter our moral view of intentionally subjecting them to pain? What is it about breaking the law that makes it such a special case as to warrant a second-thought about the morality of intentionally subjecting human beings to suffering³ (and perhaps even justifying it)?

It is important to note that punishment not only causes suffering for the offender, but can also bring about suffering for the offenders’ loved ones (parents of offenders being hurt by awareness of their child suffering, for example, or children of offenders being left without a father or mother around, etc.), it violates the offenders’ rights (i.e. right to freedom of movement,

³ Pain and suffering are used here interchangeably.

right to privacy, etc.)⁴ and in doing so, it also prevents the state from fulfilling its duty to protect the rights of its citizens. What's more, punishment not only causes suffering for the offender while the punishment is taking place, but its effects remain long after the punishment itself ends. Aside from the lasting emotional and psychological effects that punishment has on those upon whom it is inflicted, Douglas Husak notes the following with regard to imprisonment:

Ex-offenders⁵ lose political, economic, and social rights. Approximately 4 million such persons are currently disqualified from voting; several states also deem them ineligible to be elected to public office or to serve as jurors. Many of these individuals are explicitly denied benefits under welfare and entitlement programs. Ex-offenders face difficulties finding employment and housing. They emerge from prison with financial debts, as increasing numbers of states attempt to offset the expense of operating their criminal justice system by requiring defendants to pay for the costs of trying, incarcerating, and monitoring them.⁶

Thus, it is safe to say that there is a lot at stake here and that the topic of punishment is worth looking into, for if the practice of punishment turned out to be unsubstantiated, a significant amount of injustice will have been inflicted on quite a large number of people.

Perhaps, given the considerations mentioned above, punishment is never justified, or perhaps it *is* justified because, simply put, the offenders “deserve it”. Or perhaps they do not necessarily “deserve it”, but it is morally justified because the benefits that punishment produces far outweigh the costs. These are all views that I will discuss in much greater detail at later points in my thesis. However, thus far, my goal has been to simply show that the practice of punishment is not as morally irrelevant a topic as some may at first glance believe. It is, at the very least, morally questionable and up for debate, especially considering how much is at stake for those

⁴ Although some, such as proponents of the rights-forfeiture view of punishment, may reject this on grounds that an offender's rights are not “violated” but rather that the offender simply forfeited them by violating the rights of others.

⁵ Those who had previously been incarcerated.

⁶ Husak, 2007:6

who are subjected to it. If it is morally questionable, then this would mean that if there was an alternative practice in place that was less morally questionable than punishment but allowed us to achieve similar ends, then that alternative practice should be preferred over punishment.

I would now like to turn to discussing the ends that punishment achieves (or at least aims to achieve) in order to see if the same ends can, in fact, be reached through an alternative (less morally questionable) practice. In other words, if a defense of the practice of punishment is to be successful, it must show not only that it achieves great benefits, but that it can do so better than any other alternative. There are several benefits to having a system of punishment in place - these benefits, however, can be summed up and divided into four categories: (1) deterring crime, (2) restoring victims' wellbeing, (3) expressing disapproval of wrongful actions, and (4) allowing for justice and order in society.

The first is perhaps the greatest benefit that is believed to result from the practice of punishment. Punishment is thought to be able to deter crime in two ways. The first is by making it (or attempting to make it) less likely for offenders to reoffend⁷. The idea here is that when an individual violates a law and is caught, he must suffer some punishment for his crime. If this punishment is painful (as it is intended to be), he will likely not want to commit another crime again for fear of suffering the same pain he previously had to endure. For instance, if someone attempts to rob a bank and is caught and punished, then after his punishment is over, he will be less likely to rob another bank because he will have learned that the benefits of robbing a bank are not worth the punishment he will have to endure all over again. The second way that punishment is thought to deter crime is by making an example of previous offenders in order to prevent future offenders from committing crimes, out of fear of suffering the same consequences as those who committed similar crimes before them. For instance, if an individual was tempted

⁷ Though, as I will go on to argue in Chapter 4, it does not always succeed in doing so.

to rob a bank but she knew that, if caught, she would have to endure the suffering that other bank-robbers before her had to endure, she may conclude that the benefits of robbing the bank are not worth the potential pain and suffering she will have to endure if she is caught. Thus, in order to deter crime, it may seem, punishment is necessary, for it is this very pain (or fear of this pain) that causes many individuals to refrain from breaking the law.

The second benefit of punishment, its proponents may argue, is that it serves to restore the wellbeing of victims. It is important for any system of dealing with crime to be able to restore (or at least attempt as much as possible to restore) the wellbeing of victims. This is because it would be unfair for some individuals (especially those who have been abiding by the law and respecting the rights and freedoms of others) to be at more of a disadvantage than others when it comes to having their own rights and freedoms respected. Thus, when a crime has been committed against a victim, it is important to ensure that every plausible attempt is made to bring the victim back to the state of wellbeing (or something close to the state of wellbeing) they enjoyed prior to the crime and prior to the violation of their rights. This criterion is, in a way, just as important as deterring crime, for the main reason for deterring crime is to ensure that fewer victims suffer and little injustice is done. Thus, when victims *do* suffer and an injustice *is* done, then it is of great importance to fix it as much as possible. The way that punishment restores victims' wellbeing is by providing victims with a sense of security⁸ as well as a sense of retribution through the suffering of the offenders who caused them pain. Whether or not this is a good or moral thing to do is up for debate, but it can at the very least be noted that punishment of the offenders does, generally speaking, make victims *feel* better (perhaps by allowing them to feel as though their rights have been vindicated, allowing them to experience a sense of cosmic

⁸ When the punishment is imprisonment of the offender.

balance, allowing them to feel a sense of closure, etc.). Thus, once again, it can be argued that punishment is necessary for the restoration of victims' wellbeing⁹.

The third benefit that punishment appears to serve is the achieving of justice and order in society. It is not difficult to imagine what life would be like in a society where criminal activity was not dealt with at all, or simply to imagine living in a society that operated without any laws whatsoever. Such a state would be absolutely chaotic and simply horrific. Punishment allows for there to be order in society by using people's fear of pain and suffering as a tactic to deter them from engaging in wrongful behaviour. In other words, punishment creates an incentive for people to abide by the laws of the state (that incentive being freedom from the pain that would be inflicted on them otherwise). Abidance by the law, in turn, allows for there to be order.

Punishment also allows for justice by punishing those who attempt to tip the scales of justice in their favour or against someone else. This creates an incentive for people to be just, because they understand that if they were to act unjustly by either being a free rider¹⁰ and tipping the scales of justice in their favour or by violating the rights and freedoms of others and tipping the scales of justice against someone else, they would have to suffer some punishment (which is meant to be severe enough so that the pain outweighs the benefits of the crime). By allowing for justice and order in society, it also allows for all members of society to have the freedom to live their lives peacefully and make plans for the future without fear of having their rights and freedoms violated.

The final end that punishment achieves is that of conveying disapproval of the wrongdoer's behaviour. According to Joel Feinberg, punishment is expressive in two ways: (1) it

⁹ Note that this is certainly not the only retributivist defense of punishment (other retributivist views and defenses will be discussed in further detail in the next chapter). This is simply one very basic (perhaps even simplistic) view that is nonetheless worth noting and taking into account when considering victims' response to criminal activity.

¹⁰ I use "free rider" here to refer to those who enjoy living in a state where their rights and freedoms are protected, but who fail to respect the rights and freedoms of others.

allows society to distance itself from wrongful acts by demonstrating that such behaviour is unacceptable, and (2) it allows society to clear (and uphold) the name of the law.¹¹ In short, punishment serves to express that the wrongful act committed was not permissible and will not be tolerated. As a proponent of the expressive account of punishment, Jean Hampton asserts that by engaging in criminal activity, offenders express disregard for their victims' rights. Punishment serves to correct this - it serves as a retraction of the offender's declaration. Without punishment, the offender's declaration would remain and be implicitly endorsed.¹²

Thus far, I hope to have done three things. I hope to have shown, first and foremost, that the issue of punishment is, at the very least, morally questionable and up for debate¹³. Second, that if punishment is deemed to be a justified practice, it is because it achieves four main benefits: the deterrence of crime, the restoration of the wellbeing of victims, the expression of disapproval of offenders' actions, and the maintenance of justice and order in society. Third, I hope to have shown that, since the practice of punishment is morally questionable and up for debate, if we were to be presented with an alternative, non-punitive, and less morally questionable system of responding to crime which served to provide the same (and perhaps even further) benefits, then that system would be preferable to punishment.

In the chapter that follows, I will present two prevalent theories of punishment which contain several arguments in defense of the practice. My aim will be to demonstrate that these defenses all fail to successfully provide a moral justification for punishment. In the third chapter, I will present and defend an alternative practice of punishment which, as I will argue in the

¹¹ Feinberg, 1965

¹² Hampton, 1988, 1992

¹³ Note that there are further problems with the institution of punishment that I will discuss in greater detail in later chapters (such as its responsibility for the high rates of recidivism and its inability to truly restore the wellbeing of victims, among others).

fourth chapter, will be able to provide the same benefits as a system of punishment (as well as additional benefits not found in a system of punishment).

Chapter 2

Critiquing Defenses of Punishment

My purpose in this chapter is to show that the most prominent theories of punishment, consequentialism and retributivism, fail to provide a successful defense of the practice. I begin by providing an overview of each theory's defense of punishment and presenting some common problems they face. Aside from the problems with the arguments presented by their proponents, I argue that both theories in general, by focusing more of their attention on the offender than the victim, fail to appropriately account for the wellbeing of victims (a factor which should be among the highest of priorities when dealing with the aftermath of criminal activity). I will follow this up with a discussion of what sort of a system we would need to have in place in order to truly allow for this.

Before I begin presenting the consequentialist and retributivist defenses of punishment, it is important to make note of the fact that there are other defenses of punishment aside from the ones that I will be discussing here - such as the "punishment as education" defense¹⁴ where it is argued that punishment is permissible because it acts as a form of education for the offenders, informing them of their wrongdoings; or the "punishment as permissible due to consent" defense¹⁵ where it is argued that by breaking the law, offenders are implicitly consenting to being punished; or the defense of punishment by appeal to necessity or practicality¹⁶ where it is argued that punishment is simply more practical than the alternative, and perhaps even necessary.

However, seeing as how the dominant views in the literature on punishment are consequentialist and retributivist, I will focus on unpacking each of these views and their accompanying arguments and proceed to point out not only the problems with the arguments

¹⁴ Hampton, 1984

¹⁵ This idea is presented (though not defended) by David Boonin, 2008

¹⁶ Hill, 1997

presented, but the problems with the theories, in general. The point of structuring the chapter in this way is to show that not only do each of these theories' arguments on their own fail, but that even if the objections to these arguments were to be overcome, each theory as a whole would nonetheless still fail as a result of failing to do what any successful criminal justice system must: properly restore the wellbeing of victims.

2.1 The Consequentialist Defense of Punishment

Consequentialism is one of the prominent theories used to justify punishment. The consequentialist defense of punishment is plain and simple: any practice that produces positive overall consequences and reduces negative consequences should be deemed morally permissible. Punishment, according to consequentialists, produces many positive consequences and reduces negative ones. Therefore, the practice of punishment should be deemed morally permissible. The consequentialist views I will be focusing on in this chapter are primarily act-utilitarian and rule-utilitarian¹⁷. I will begin by presenting and critiquing the act-utilitarian defense of punishment. After I have done so, I will then proceed to briefly explain why the rule-utilitarian alternative also fails.

2.1.1 The Act-Utilitarian Defense

¹⁷ Note that there are non-utilitarian consequentialist defenses of punishment that appeal to a different criterion for what constitutes good overall consequences. For example, Avio argues that punishment maximizes social wealth (Avio, 1993:250-62); Perkins argues that punishment minimizes the chances that people will privately seek revenge (Perkin, 1970); Lippke argues that punishment maximizes the preservation of "a system of equal rights" (Lippke, 2001:85). However, as Boonin persuasively argues, each of these consequentialist defenses ultimately come to face the same problems that the act- and rule-utilitarian defenses face (Boonin, 2008:79-84).

The act-utilitarian justification¹⁸ of punishment is the following: Punishment promotes utility in three very clear ways. If the punishment we are discussing is incarceration, then the first way that punishment can be said to promote utility is by keeping the offender far away from the rest of society so that he or she is unable to harm anyone else. This consideration operates under the idea that those who commit crimes are likely to commit similar crimes in the future if no measures are taken to stop them from doing so. Thus if, for instance, a rapist is locked away, although not much can be done to repair the physical and emotional damage done to his victim, at least his future potential victims can be protected (and thus, their wellbeing will not be at risk of being affected by his actions). Not only will the potential future victims of crimes benefit from the offender being locked up, but the remainder of society will also feel safer knowing that there is one less criminal roaming the streets, posing a danger to them and their loved ones. Consider, for instance, the numerous amounts of people who may refrain from going to Times Square on New Year's Eve due to fear of being caught up in a terrorist attack. This fear, alone, produces disutility regardless of whether or not a terrorist attack will actually take place. If, however, civilians were aware that, because all terrorists are being caught and locked away for life, there would be very few of them out there, and thus, the chances of being caught up in such an attack are extremely low, they will feel more comfortable in going wherever they please and freely doing what they choose to do (including going to Times Square for New Year's Eve). Thus, an act-utilitarian would argue, the very idea of criminals being behind bars and incapable of harming anyone else, in itself, maximizes utility and minimizes disutility.

The second way that punishment minimizes disutility, act-utilitarians believe, is by reducing the chances of offenders reoffending after their punishment comes to an end. The idea here is this: punishment is meant to be unpleasant – it is meant to make offenders suffer to the

¹⁸ Endorsed by Bentham (1830); Smart (1973); Lyons (1974); and Phillips (1985), among others.

extent of wishing they could take back what they had done simply so that they do not have to suffer the punishment that is inflicted on them. Thus, because punishment is so unpleasant, the offender will be unlikely to repeat the same (or commit a similar) crime after his punishment ceases, out of fear that reoffending will cause him to be punished all over again. Consider, for instance, the case of an individual who experiences a thrill from stealing and collecting very expensive cars. If this offender is punished when caught, then, after he is released from prison, he will not be likely to steal another car for fear of being caught and having to endure another prison sentence. Thus, because the offender is less likely to reoffend after being punished, this means that society can be more comfortable knowing that crime has been reduced and, again, the potential future victims of the offender will be safe from his re-offenses.

However, the most important aspect of punishment (and that which produces the most utility), according to the act-utilitarians, is that the very threat of it acts as a deterrent. Having the threat of punishment in place will stop many individuals, who may have otherwise committed crimes, from doing so. Consider, for instance, the crime of drinking and driving. While there are many people who have, at one time or another, been tempted to drive home after having a few too many drinks, most refrain from doing so for fear of being caught drinking and driving, suffering a criminal charge and facing the accompanying punishment. However, if no such threat of punishment was in place, the act-utilitarian would argue, then most people would take the risk, thinking that they are perfectly capable of driving under the influence of alcohol, and, consequently, many more accidents would occur on the road, resulting in harm and potential death for many more people than there would be in a system where drunk-driving is punishable. Therefore, the act-utilitarians argue, the deterrent effect of the threat of punishment, in itself, promotes utility and minimizes disutility.

2.1.1.1 Problems with the Act-Utilitarian Defense of Punishment

So far it seems as though the practice of punishment is undoubtedly morally permissible, especially if our main concern is promoting utility. However, the act-utilitarian defense of punishment also faces some problems that the proponents of the theory must overcome if they are to successfully defend the practice of punishment. The first problem is that, under this defense of punishment, the act-utilitarian would have to hold that it is perfectly permissible for punishment¹⁹ to be used not only in cases where an individual violates the law, but also in cases where an individual may be completely innocent²⁰. Recall that the only thing that the act-utilitarian is concerned with is maximizing utility and minimizing disutility for the greatest number of people. However, nothing in the theory states that only the guilty must suffer for the sake of the innocent, and nothing prohibits the innocent from suffering for the sake of the majority. Consider, for instance, that one of the employees in a supermarket is caught on camera stealing money from the cash register. However, the camera cannot quite make out who the employee is and is only able to capture the green uniform. The other employees at the supermarket hear about this, but nobody confesses, and so the manager must determine a way to deal with the situation that would best maximize utility. Since the main concern here is deterrence (stopping the rest of the employees from feeling free to steal whenever they please), the act-utilitarian would suggest that the manager punish (perhaps by firing) someone at random, regardless of whether or not this person is guilty²¹. Thus, the act-utilitarian would find punishing an innocent person for the crimes of someone else to be completely acceptable as long as doing

¹⁹ Or “telishment”, as Rawls refers to the punishing of innocents.

²⁰ Examples of this have been presented by Mabbott, 1939:39; Hawkins, 1944:14; Lewis, 1949:305; McCloskey, 1957:468-9; Armstrong, 1961:152; Braithwaite and Pettit, 1990:46; Gavison, 1991:256, 352; Golash, 2005: 43-4; and Boonin, 2008:41

²¹ Note that this example also assumes that the original thief will not repeat the crime out of fear of being the next one to be fired.

so promotes utility. However, this is something that even the proponents of punishment would not be willing to accept²², and we would find any criminal justice system that allows for the punishing of innocents to be a very corrupt one, for it conflicts with our inherent views of justice.²³

The second problem with the act-utilitarian defense of punishment is that it allows not only for the innocent to be punished, but it allows for the guilty to not be punished in cases where not punishing them will promote utility.²⁴ Imagine, for example, that there exists a much beloved leader of a country who does an excellent job in maintaining peace and order, is able to promote the growth of the country's economy, and somehow manages to satisfy most of the citizens of his country. However, this leader also has a secret - he derives pleasure from abusing animals. If convicted of this crime, however, it is likely that he will forfeit his presidency and be replaced by an unqualified, racist, sexist, and homophobic president who will likely destroy the country within a year. The act-utilitarian, in this case, would suggest that the morally right thing to do in this situation is simply to refrain from punishing the animal-abusing president, because punishing him would cause a much greater amount of disutility than not punishing him would. However, if we allow for a system of punishment to be in place, we would surely be uncomfortable with the idea of certain guilty people being punished while other people (guilty of similar crimes) are not punished at all. Once again, this is not consistent with our idea of justice.

The third problem with the act-utilitarian defense of punishment is that it allows for disproportionate punishments.²⁵ When we think of a proper system of punishment, what we

²² Except the act-utilitarian proponent of punishment.

²³ Even act-utilitarians will agree that it is unjust. They endorse it nonetheless, however, because they simply believe that utility outweighs considerations of justice.

²⁴ Gavison, 1991: 352

²⁵ This objection is presented by Hawkins, 1944:14; Armstrong, 1961:152; Hampton, 1984:126; Primoratz, 1989a:37-8; Braithwaite and Pettit, 1990:46; Gavison, 1991:356; and Cragg, 1992:47-8

normally have in mind is a system where the punishment is somewhat proportionate to the crime – so, for instance, small crimes, like rolling at a stop sign, deserve small punishments (like a fine), while larger crimes, like murder, deserve much harsher punishments (like a long prison sentence). However, act-utilitarianism makes no room for such proportionality of crime to punishment. In fact, act-utilitarianism would very much be content with allowing there to be harsh punishments for small crimes and small punishments for serious crimes. This would be the case if, for instance, the state happened to notice that a fine was not doing enough to deter people from making rolling stops at stop signs and, as a result, many accidents were occurring and many people were getting hurt (some accidents even resulting in deaths). However, it is also very clear that if the penalty for making a rolling stop at a stop sign was as severe as life time imprisonment, then almost everyone (with the exception of a few daredevils) would make complete stops at stop signs. Act-utilitarianism would suggest that because doing so would promote utility (in that more lives would be saved due to much fewer accidents, and only very few lives would be ruined, as opposed to many more that would be lost and damaged due to accidents), then it follows that it would be morally permissible for the state to endorse such a harsh penalty for making a rolling stop at a stop sign²⁶. Similarly, a very minor punishment (such as a \$500 fine) can be imposed on someone for committing a serious crime, such as burning down a house, if the \$500 fine was enough to deter most people from doing it, and if anything more than that would simply not make a difference²⁷. Thus, the act-utilitarian defense of punishment cannot account for proportionality between the severity of the crime committed and the extent of the punishment inflicted.

²⁶ A very similar example is presented by Boonin, 2008:55-56

²⁷ This example is taken directly from Boonin, 2008:57

The final problem with the act-utilitarian defense of punishment is that the theory does not allow for excuses to play a role in whether or not (or the severity to which) someone is punished²⁸. Those who endorse punishment generally also endorse two ideas: 1) that sometimes those who commit the same crime can be sentenced differently, depending on the circumstances and reasons that caused each of them to commit the crime and 2) that only the criminally responsible should be punished. However, as was previously emphasized, the theory's main concern is deterrence (for it promotes utility and minimizes disutility). This means that there will be cases where certain offenders, who we believe should receive a less severe punishment than other offenders, will actually receive a harsher punishment. Consider, for example, the following two cases: in the first case, A punches B as a result of B provoking him, and in the second case, C punches D for absolutely no reason. We would surely think that C deserves a harsher punishment than A, because at least A had an understandable reason for punching B, whereas C had no reason to punch D. However, this fact plays no role in the act-utilitarian theory of punishment. In fact, an act-utilitarian may even want to impose a harsher punishment on A because, if the theory's main concern is deterrence, then it is clear that since assault due to provocation is much more common than assault for no reason, then a harsher punishment would lead many more people to think twice before punching someone who may have provoked them. This will, in turn, lead to less cases of assault and more overall utility. The crime of punching someone without being provoked, however, is not very common, and thus, the act-utilitarian may argue that the punishment need not be very harsh, because very few people would engage in such an act in the first place, so increasing the amount of punishment will not lead to a significant

²⁸ This objection is noted by Ten (1987) and Primoratz (1989)

increase in overall utility.²⁹ Moreover, it also cannot account for cases of those who are not criminally responsible (due to insanity, for example). Once again, appealing to criminal responsibility would be to appeal to nonconsequentialist reasons. However, the only thing that matters on the act-utilitarian account of punishment is that utility be maximized. Thus, disregarding excuses and criminal responsibility, the act-utilitarian would be in favour of punishing the insane as severely as the sane, so as not to risk the sane pretending to be insane and getting away punishment-free. This disregard for excuses as well as the idea of criminal responsibility, however, is surely something that the majority of those who endorse punishment would not be comfortable with. Thus, this demonstrates another way that the act-utilitarian solution to the problem of punishment fails.

2.1.2 The Rule-Utilitarian Defense of Punishment

A utilitarian may nonetheless argue that while the act-utilitarian solution may fail to provide a successful defense of punishment, perhaps the rule-utilitarian solution is a better alternative. The rule-utilitarian solution to the problem of punishment is similar to the act-utilitarian solution in that its only concern in defending the practice of punishment has to do with the consequences and, in particular, the utility produced by the practice. However, instead of judging aspects of the practice on a case-by-case basis, rule-utilitarianism is concerned with establishing a rule which, if followed, would increase utility (even if, in some cases, utility may not be maximized)³⁰ Thus, the rule-utilitarian may attempt to overcome the issues with the act-utilitarian solution by recommending that there be certain rules in place that can make the

²⁹ This example is very similar to one Boonin uses involving Larry, Moe, Curly, and Shemp (Boonin, 2008: 58)

³⁰ This position is most commonly associated with John Rawls's paper, "Two Concepts of Rules" (1955). It is important to note, however, that Rawls does not himself suggest that rule utilitarianism should be accepted. He simply endorses using rule-utilitarianism over act-utilitarianism in order to overcome some of the strongest objections against the utilitarian defense.

defense more palatable. This may include, for instance, endorsing the rule that no innocents may be punished or the rule that all punishments must be proportional to the crimes or that better excuses must warrant less severe punishments, etc. These rules would then be followed regardless of the fact that, in some particular cases, following them will result in disutility. This is because following them would ultimately increase utility in the long run. Thus, the rule-utilitarian may argue, it is possible to have a system of punishment operating on a utilitarian framework without that system being as messy as the one described above.

2.1.2.1 The Problem with the Rule-Utilitarian Defense

However, for a rule-utilitarian to be able to implement a rule, it would need to be shown that this rule will, in fact, maximize utility in the long run if abided by. However, it is not so clear that implementing rules such as those discussed above would, in fact, maximize utility. For example, there is no reason to implement the rule that crimes committed with good excuses must warrant less severe punishments than those committed with no excuses at all because, as was discussed above, doing the opposite would, in the long, maximize utility in many cases. Thus, the rule-utilitarian would have no justification for such a rule. Similarly, our discussion above demonstrated that the proportionality of punishment to crime is insignificant to the utilitarian because imposing harsh punishments for small crimes would, in many cases, actually generate more utility. Thus, once again, the rule-utilitarian would have no grounds for implementing a rule stating that punishments imposed on offenders must be proportional to the crimes they have been charged with. This ultimately means that rule-utilitarianism cannot provide any better a defense of punishment than act-utilitarianism.

2.1.3 Why the Utilitarian Defense of Punishment is Ultimately Not Satisfactory

So far I have discussed the act-utilitarian and rule-utilitarian defenses of the practice of punishment, as well as their accompanying issues. These issues, in particular, were that the implications of the theories would lead to a somewhat disturbing system of punishment - one very different from how we tend to think of it now. However, even if these issues were all somehow to be successfully overcome, the utilitarian theories' defense of punishment would still be problematic. My biggest concern with the utilitarian defense has to do with the bigger picture – that is, it has to do with utilitarianism's (only) concern of maximizing utility in an egalitarian way, without any concern for prioritizing certain people's wellbeing over others – in particular, the wellbeing of victims. On the face of it, it may seem as though the utilitarian defense of punishment has the victims' well-being in mind (especially considering that one reason they use to defend punishment has to do with the offender being unable to harm his victims again, either because he is locked up and far away from them or because after he is released, he will not want to reoffend). However, it is important to note that this is only a very small fraction of the defense of punishment. The theory's main concern is the wellbeing of the members of society (those not directly affected by the offenders' crimes) – this is why the theory is heavily focused on the issue of deterrence. However, if it turned out that minimizing the wellbeing of the victims would somehow result in a maximization of utility for the rest of society, then the utilitarian would happily risk the wellbeing of the victims. This is problematic because when dealing with the aftermath of criminal activity, it is of great importance to ensure that great measures are taken to restore the victims' wellbeing to what it was prior to the offense. This also means that it is important to determine what is required for their wellbeing to be restored, and to work towards

doing so. Utilitarianism's defense, however, makes no room for prioritizing the restoration of the victim's wellbeing, and in this way, fails to adequately defend the practice of punishment.

2.2 The Retributivist Defense of Punishment

So far I have discussed the most common consequentialist defenses of punishment and the problems that they face. I would now, however, like to turn to another prominent theory of punishment and explore the retributivist defense. There are four main types of retributivist arguments that I will be considering in this chapter³¹: desert-based retributivism, forfeiture-based retributivism, fairness-based retributivism, and debt-based retributivism. The one thing they all share is the lack of concern about the consequences of punishment. In other words, retributivists (of any kind), unlike consequentialists, do not believe that punishment is beneficial because it will come to produce good consequences (i.e. through deterrence). Rather, they believe that the practice of punishment should be in place because punishing an offender is simply the morally right thing to do (even if doing so produces negative consequences). Thus, this fact alone may appear to make retributivism a better alternative to consequentialism because it is able to overcome the problems associated with only caring about consequences. However, as we will come to see, the retributivist defense of punishment comes with its own set of problems that make it no better of a theory than consequentialism when it comes to providing a justification for punishment.

2.2.1 Desert-Based Retributivism

³¹ I will present one further retributivist argument, defended by Ripstein, in chapter 4.

The first retributivist justification of punishment that I will be considering comes from the desert-based retributivist stance. Desert-based retributivism³² is the idea that it is morally permissible to punish offenders because they simply deserve it. Desert-based retributivists typically appeal to cases in order to justify their view. They present examples of rapists and murderers who commit crimes in a very culpable way³³ in order to elicit an inclination in the reader to want the offenders to be punished, ultimately arguing that “most people react to such atrocities with an intuitive judgment that punishment is warranted”.³⁴ To demonstrate that “our intuitions about desert [is not necessarily] tainted by the emotions of resentment³⁵”, Michael Moore, a desert-based retributivist, proposes a brief thought experiment:

Imagine an offender who does a serious wrong in a very culpable way - e.g., Dostoevsky's Russian nobleman in *The Brothers Karamazov*, who turns loose his dogs to tear apart a young boy before the eyes of the boy's mother; imagine further that circumstances are such (e.g., Kant's island society about to disband) that no non-retributive purpose would be served by punishing this offender. Now imagine two variations: (1) you are that offender; (2) someone else is that offender. Question: should you or the other offender be punished, even though no other social good will thereby be achieved? The retributivist's "yes" runs deep for most people.³⁶

Moore argues that the reason we would want to be punished if we committed such a heinous act has little to do with vengeance or anger. Instead, it has to do with guilt. Moore writes, “a virtuous person would feel great guilt at violating another's rights by killing, raping, assaulting, etc. And when that emotion of guilt produces the judgment that one deserves to suffer because one has culpably done wrong, that judgment is not suspect because of its emotional origins in the way that the corresponding third person judgment might be”.³⁷ Thus, in short, the desert-based

³² This view is defended by Michael Moore (1987, 1993) and Stephen Kershnar (2000, 2001).

³³ E.g. Moore, 1987: 98-99

³⁴ *Ibid.*, 99

³⁵ Emotions of resentment, fear, revenge, sadism, and cruelty.

³⁶ Moore, 1993: 25

³⁷ *Ibid.*, 26

retributivist solution presents particular cases that draw out moral outrage (or, in Moore’s first-person example, cases that draw out guilt) in the reader, accompanied by an inclination or an intuitive judgment to want the offender to be punished for his actions, and proceeds to draw generalizations from these cases in order to justify the practice of punishment.

2.2.1.1 Problems with the Desert-Based Retributivist Defense

There are several problems with this version of retributivism. The first, as David Boonin correctly notes, is that it does not provide a defense or a justification of punishment. Instead, all it does is simply point out the very problem of punishment. In other words, it is clear that most people have the inclination to want to see wrong-doers suffer, but this is precisely why the issue of punishment is a moral dilemma, and precisely why we are discussing the question of its morality at all. Simply put: we seem to think that punishment is morally permissible. However, is it morally permissible for us to think that it is morally permissible to punish? This is the question we should be aiming to answer. A defense of punishment, thus, must be able to justify the practice by relying on something other than our mere inclinations towards it. Moreover, Boonin writes, “there are...many inclinations that many people naturally have – inclinations to feel envy, jealousy, lust, vindictiveness – that they do not consider permissible to act on” and our inclinations towards punishing wrongdoers should not be seen as an exception.³⁸

However, even if this problem was disregarded and the theory was seriously considered, this would still leave us with two issues. The first is that the theory cannot account for not punishing those who act immorally but do not deserve to be punished. The second is the theory cannot account for those who must be punished but who do not necessarily deserve to be

³⁸ Boonin, 2008:91

punished, for their acts are not immoral.³⁹ The first issue can be made clear when we consider cases where individuals do just about every immoral thing in a given situation, without crossing the line of legality. For instance, Boonin presents the example of a man constantly yelling at his wife, insulting her, ordering her around, etc. However, this man, being knowledgeable about how far he can go before his actions are considered illegal, stays within legal bounds.⁴⁰ Under the desert-based retributivist account of punishment, then, we would be inclined to think that this man, acting immorally, deserves to be punished. However, we also tend to think that anyone who has not broken a law should not be punished, and many immoral acts are not considered illegal.⁴¹ Similarly, the desert-based retributivist account cannot make sense of cases where individuals break the law but do not necessarily deserve to be punished. One good example that can be used to illustrate this is that of Robin Hood. Robin Hood, in stealing from the rich to give to the poor, had good intentions in mind, and as a result, it would be difficult for us to determine that he was clearly acting immorally (though some may disagree, I like to think of Robin Hood as a protagonist – a good guy). However, if we endorse a system of punishment, we must be willing to punish all those who break the law, whether they deserve to be punished (because they clearly acted immorally) or not.⁴² Thus, for these reasons, the desert-based retributivist defense of punishment fails to be successful.

³⁹ Ibid., 93-101

⁴⁰ Ibid., 99

⁴¹ This raises the question of why some immoral acts are not considered illegal. This, however, is a topic to be undertaken in another paper. For the purposes of this discussion, we will assume that there are some rights that individuals have (i.e. free speech) which justifiably cannot be punished by the state, regardless of their immorality (i.e. being rude to a barista, demonstrating road rage through obscene gestures, or constantly pointing out faults in one's spouse and destroying their confidence and sense of self-worth).

⁴² Even if Robin Hood appealed to defenses of justification, excuse, and necessity, it is unlikely that the state would refrain from punishing him for the crime of stealing from the rich to give to the poor. His case may, at best, draw attention to the socio-economic problems in that society, but it will not be enough to simply allow him to continue doing what he is doing without any punitive consequences, for doing so would come at the expense of the freedom of the wealthy individuals in that society.

2.2.2 Forfeiture-Based Retributivism

Another version of retributivism that I would like to consider is the forfeiture-based account⁴³. According to this account, punishment is permissible because, in breaking the law, an offender usually violates someone else's rights, and in violating someone else's rights, he forfeits his own (or similar) rights. This claim arises out of the idea that moral rights are tied in with moral duties. Simply put: in being granted certain rights (i.e. the right to life, the right to freedom of movement, etc.), we also acquire the duty to respect other people's rights to these things. However, if we violate other people's rights, then we forfeit our own rights. When one forfeits his rights (say, to freedom of movement) by violating someone else's rights (say, by kidnapping and holding him hostage), then it is morally permissible for the state to incarcerate the kidnapper and take away his freedom of movement. Simply put, under this account, it is argued that "one continues to enjoy rights only as long as one respects those rights in others [and] violation [of others' rights] constitutes forfeiture [of one's own]"⁴⁴

2.2.2.1 Problems with the Forfeiture-Based Retributivist Defense

However, there are also two main issues with this retributivist account. The first is that this account fails to provide a persuasive justification for why moral rights go hand-in-hand with moral duties. In fact, as Boonin points out, there are cases where we grant rights to those to whom we do not even attribute moral agency. "Very young children, infants, nonhuman animals, and people with severe mental disorders" are a few examples of such cases.⁴⁵ Those who lack moral agency cannot be said to have moral duties. Yet the examples mentioned above are all

⁴³ This account has been defended by Pilon, 1978; Goldman, 1979; Rothbard, 1982; Haksar, 1986; Kershnar, 2002; Wellman, 2012, 2017.

⁴⁴ Goldman, 1979: 33

⁴⁵ Boonin, 2008: 107

cases where rights are given without the expectation of any abidance by a moral duty to respect others' rights.

A proponent of the forfeiture-based account, however, may argue that (at least in most cases) offenders are neither children, nor infants, nor non-human animals, nor people with severe mental disorders. Thus, if the only cases in which moral duties are unlinked from moral rights is in those cases, then the critique does not apply to those who do, in fact, have moral agency and are capable of having moral duties (which, once again, is the majority of offenders). In that case, I would appeal to a second problem with the forfeiture-based account.

The second problem with the forfeiture-based retributivist account is that it would lead to some seriously immoral implications. Recall that the forfeiture-based argument for punishment rests on the claim that it is morally permissible to violate the rights of those who have violated others' rights. However, what this suggests is that it would be morally permissible to kill a murderer, rape a rapist, torture a torturer, refuse to give an unfair judge a fair trial, take away the religious freedom of someone who violated others' rights to their religious freedom, etc..⁴⁶ However, surely any criminal justice system that would allow for such inhumane treatments of human beings would be deemed corrupt and unacceptable by even the majority of those who endorse punishment. This is precisely because we tend to believe that individuals have certain inalienable human rights that protect them from being treated cruelly and inhumanely, regardless of what they have done or failed to do. In other words, we tend to think of these rights as unconditional upon anything - they do not need to be earned and they cannot be lost or forfeited. Thus, the forfeiture-based account of retributivism, in failing to account for the inhumane treatment of offenders (or, worse, perhaps being content with it), also fails to provide a successful defense of an *appropriate* practice of punishment.

⁴⁶ Boonin, 2008:110

One persistent proponent of the forfeiture-based defense of punishment is Christopher Wellman, who argues that “a particular gratuitous punishment that would otherwise violate someone’s rights might become permissible when the person being made to suffer has forfeited her rights against this hard treatment [and that] a punishment that serves no other purpose might nonetheless be morally permissible”⁴⁷. Wellman even goes so far as to defend the permissibility (though not the encouragement) of sadism as long as no rights are violated by it (either because these rights have been waived or forfeited). Wellman presents an interesting argument centered around the case of Armin Meiwes. In short, Meiwes was a German man with vorarephilia⁴⁸ who posted an advertisement on the forum of a cannibal fetish website, looking for a young male volunteer (aged 18-30) who wanted to be slaughtered and consumed. This advertisement was answered by a man named Bernd Brandes, whom Meiwes later killed and consumed (with his consent). Wellman uses this case to argue that what Meiwes did, though terrible, was actually permissible because Brandes waived his right to his own life, and thus, no rights were violated by Meiwes’s actions⁴⁹. He then creates a link between the waiving of rights and the forfeiture of rights, stating that “if Meiwes’s sadism is permissible when Brandes has waived his right against these gruesome acts, why should we be any less confident that Meiwes’s sadism is permissible when Brandes has forfeited his right against this punishment?”⁵⁰

However, I would like to respond to Wellman by pointing out that regardless of whether or not sadism is permissible when pain is inflicted on one who has waived his rights to not be harmed, what is true of the waiving of rights may not necessarily be true of the forfeiture of

⁴⁷ Wellman, 2017:24

⁴⁸ A condition that causes an individual to be sexually aroused by the idea of cannibalism.

⁴⁹ Note that Wellman argues that Meiwes’s actions are permissible only in the context of rights. He does acknowledge that there are other factors (such as the illegality of murder and the fact that Brandes likely had loved ones, etc.) which make the act repugnant.

⁵⁰ Wellman, 2017:19

rights. Wellman appears to be treating the waiving and forfeiture of rights as if they are two sides of the same coin while failing to provide a compelling argument for treating them as such. What he fails to acknowledge, however, is that there is one major difference between the two: consent. In disagreement with Wellman, my view of exercising rights is closely analogous with having body parts to do with as one pleases. What I mean by this is that one may donate her own kidney if she wishes, but her kidney may never be taken from her against her will (even if, for instance, she is responsible for causing a car accident which left the other driver in need of a kidney). Similarly, rights operate in much the same way. Thus, it may be possible to waive one's own rights because they are her rights to do with as she pleases, but if she does not consent to having such rights taken away, then these rights cannot be said to have been forfeited.

2.2.3 Fairness-Based Retributivism

The next retributivist account of punishment I would like to consider is called the fairness-based account.⁵¹ This account rests on the idea that, as members of an orderly society, we get to enjoy peace and order due to the fact that the majority of the people around us abide by the law. But this benefit comes with a price: that we pitch in and, ourselves, also refrain from breaking the law. However, if a member of society gets to enjoy living peacefully and in a well-ordered society but does not contribute to this peace and order (and, instead, decides not to abide by the laws that everyone else abides by), he becomes a free rider (refraining from paying the price that everyone else must pay), and thus, according to the fairness-based account, he is at an unfair advantage. Thus, imposing punishment on offenders is justified because it will restore the distribution of benefits and burdens to its original (fair) level, so that everyone is, once again, on

⁵¹ This account is mostly commonly associated with Herbert Morris's paper "Persons and Punishment" (1968) and George Sher's book, *Desert* (1987), but it has also been defended by Finnis (1999:98-103), Dagger (1993), and Murphy (1973).

an even playing field. In short, as Murphy puts it, on this account, punishment can be seen as a kind of “debt owed to the law-abiding members of one’s community”.⁵²

2.2.3.1 Problems with the Fairness-Based Retributivist Defense

There are, of course, many issues with this account, as well. The most obvious objection against this account is that it does not coincide with our general views on crime and punishment. In other words, the free rider issue is definitely not the first reason that comes to mind when we consider whether or not someone should be punished for a crime. While this account may make sense of why punishment is permissible for some crimes (such as speeding or tax evasion) where many people are tempted to break the law but refrain from doing so, it does not make sense for the majority of other, more serious, crimes like assault, rape or murder. As Duff points out, what is wrong with rape, for example, is not that it allows the rapist to have some unfair advantage that others in society do not have, what is wrong with rape is its effect on the victim (which this theory completely overlooks).⁵³ When it comes to these more serious crimes, Braithwaite and Pettit point out that not only is this theory incapable of capturing what is seriously wrong with them, but it simply cannot make sense of them at all. Most people, for example, do not *want* to rape or kill or molest children. So the rapist or murderer or child molester cannot be said to have any kind of unfair advantage over them.⁵⁴

The second issue with this account is that it fails to take into consideration the cases of offenders who were victims at one point. This consideration, when accounted for, would lead to the outrageous conclusion that offenders who were victims one point should not be punished for

⁵² Murphy, 1973:15

⁵³ Duff, 1986:211-216

⁵⁴ Braithwaite and Pettit, 1990:158

their crimes even when others are punished for those same crimes.⁵⁵ Consider the following example as an illustration: Alex steals Bob's car, so now Bob is at a disadvantage, and Alex is at an unfair advantage. However, now that Bob no longer has a car, he steals Calvin's car. So while Calvin is now at a disadvantage, Bob is not at an unfair advantage, because he does not have any more than he did in the very beginning. Thus, on this account, we would be committed to the claim that Bob should not be punished. The fairness-based account, then, in failing to account for victimized offenders, fails (in yet another way) to provide a proper defense for the practice of punishment.

Another problem that goes hand-in-hand with the victimized offender objection is that this theory simply assumes that everyone starts off on an even playing field and that the distribution of benefits and burdens in society is completely fair. It fails to take into account, for example, that a child molester has a burden (his strong desire for molesting children) that those who have no desire to do such a thing do not have to bear. Or that someone who developed the urge to torture animals as a result of being abused as a child bears a burden that those who were not abused as children do not have to bear. Or, more simply, that not everyone is equal in terms of wealth, education, upbringing, etc. So, for instance, someone who cannot afford a car and resorts to stealing one in order to get around bears a burden that the son of a billionaire does not have to bear. Thus, because, according to the fairness-based account of retributivism, in any one of those cases, it would be deemed unfair to punish these offenders since the crimes they committed did not put them at an unfair advantage (but simply put them on the same playing field as everyone else), it fails to properly provide a justification of punishment as we tend to think of it (i.e. a system that allows us to punish all the guilty regardless of whether or not their crimes put them at an unfair advantage).

⁵⁵ This objection is pointed out by Kershnar, 1995:477-478

Another problem with the fairness-based account of retributivism is that it fails to allow room for excuses. Recall that this account's only concern is that by committing an offense, the offender gets to do something that others in society do not get to do. However, consider the earlier case used of A punching B as a result being provoked, and C punching D for no reason. While we would surely feel that A deserves less of a punishment than C, under the fairness-based account, both A and C would receive the same punishment because they are both enjoying an advantage that others do not get to enjoy (namely, that of being able to punch people). The same issue occurs when we consider, for instance, that the insane cannot receive a lesser sentence because they, too, are equally guilty of enjoying a freedom that others do not get to enjoy. Since we tend to think that excuses should play a role in determining whether or not (and to what extent) someone should be punished, it is clear that the fairness-based account's disregard for excuses is a major problem⁵⁶.

Another problem with the fairness-based account is that there are cases where even if punishing free-riders would be the fair thing to do to balance out the burdens and benefits in society, it still does not follow that punishing them (or, in a sense, coercively extracting payments from them) would be permissible.⁵⁷ To better illustrate this point, consider the following scenario: imagine you are living in a dangerous neighbourhood (because you are unable to afford to live elsewhere). You hear of your neighbours' houses being broken into and vandalized, but there is not much that the police can do about it. In order to improve the neighbourhood, your neighbours organize a block patrol, where the neighbours take turns keeping watch every night, to ensure that no harm is done to anyone. Now suppose that all your neighbours volunteer to do neighbourhood patrol, but you refuse to do so. You will surely be a

⁵⁶ Unless, of course, we treat cases of mental illness or provocation as victimized offender cases, which (as discussed previously) would also pose a problem for the fairness-based account of retributivism.

⁵⁷ This objection has been pointed out by Ellis, 1997: 93-95

free-rider in this case (benefitting from the safety of your neighbourhood at the cost of your neighbours' time and energy). This will surely also give you an unfair advantage. However, most can agree that it would not be deemed permissible for your neighbours to coerce you into joining the neighbourhood patrol or take money from you against your will in order to pay someone else to do it in your place⁵⁸. Thus, punishment on the basis of free-riding is not always permissible, as this account implies.

The final problem with the fairness-based account of retributivism is that it would be committed to punishing those that are (legally speaking) innocent.⁵⁹ Simply put, there are many legal ways for people to have unfair advantage over others. Some examples include promise breaking, lying, and cheating. We take comfort in thinking (or hoping) that those around us do not lie to us, break their promises, or cheat on us. Thus, if we, ourselves, were to do any (or all) of these things, we would have an unfair advantage over them. However, while the fairness-based account may be forced to commit itself to the claim that we should be punished (in order to balance out the benefits and burdens), surely it would not be permissible for the state to punish us for these acts, for (while perhaps immoral) these acts are not illegal.

2.2.4 Debt-Based Retributivism

The final version of retributivism I would like to consider is the debt-based account⁶⁰. This account rests on the idea that when a crime is committed against a victim, the victim suffers two kinds of losses: a material loss (i.e. money, a car, etc.) and a moral loss due to “not

⁵⁸ This example is taken from David Boonin, 2008:139.

⁵⁹ Braithwaite and Pettit, 1990:49-51

⁶⁰ This account is attributed to Daniel McDermott and has been defended in his paper “The Permissibility of Punishment” (2001).

receiv[ing] the treatment due to him as a rights-holder”.⁶¹ These are both things that the offender must return to the victim. However, while the prior (the material good) can be paid back, the latter (the moral good) cannot, because moral goods are non-transferable. So punishment is permissible, on the debt-based account, because it acts as a “means of denying these forfeited moral goods to the wrongdoers”.⁶² In other words if, for instance, Derek’s car is stolen, not only does Derek suffer the loss of his car, he suffers the loss of his right to his own property (which was violated when his car was stolen). So while the car thief can return the car to Derek and restore his material loss, the thief will still owe Derek the moral good that he took from him by stealing his car. Thus, the use of punishment is permissible on this account because it ensures that the thief pays back his moral debt.

2.2.4.1 Problems with the Debt-Based Retributivist Defense

There are two main issues with this account. The first one is noted by Boonin, who criticizes the account for failing to show that moral goods cannot be repaid. In fact, he argues that we can list a few ways in which these moral goods can be repaid – i.e. “[the offender] might be obligated to apologize to [the victim], to publicly affirm [the victim’s] moral standing, to promote some of [the victim’s] ends, and so on”.⁶³ Thus, it is not clear that punishment is the only way to restore the moral goods lost.

The second issue that I find with this account is that, not only is punishment not the only way to restore the victim’s lost moral goods, it is not a way at all. It is difficult to see how punishing the offender will do anything to return the victim’s moral goods back to him. Consider, for instance, that Derek’s car was stolen, the thief caught, and the car returned to

⁶¹ McDermott, 2001:411

⁶² *Ibid.*, 424

⁶³ Boonin, 2008:151

Derek. The idea behind this account of retributivism is that Derek is still at a loss (his rights have been violated), and so the car thief must be punished in order to take away the moral goods that he now holds on to. However, it is unclear how this will help Derek at all. Derek's rights have still been violated and punishing the offender will not restore them. Moreover, this account, in a way, disrespects victims by simply assuming that what they want, for the restoration of their wellbeing or the restoration of their moral goods, is for the offender to be punished – this is not the case for many victims. This account's biggest flaw is that it fails to consider that there may be ways to actually return (or at least attempt to return) the victims' moral goods back to them, instead of simply taking them away from the offender.

2.2.5 Why Retributivism Fails as a Defense of Punishment

At this point, I have pointed out the main problems that retributivist defenses of punishment face which makes them inconsistent with how we view a proper system of punishment. However, once again, and similar to the consequentialist solutions, even if all the problems with every version of retributivism I have discussed thus far were resolved, there would still remain a major issue in the theory as a whole (and every version of it): its disregard for the victims. Retributivism, in general, focuses more on taking away from the offender than on giving back to the victim. The desert-based retributivist account has to do with our attitude towards offenders – about our instinct to want to punish them. It does not, however, consider our instincts to want to help the victims. What's more, it focuses on society's view of the offender, but fails to take into account what the victim of the crime wants (or needs) to be done in this situation in order for their wellbeing to be restored. In other words, perhaps from an outsider's perspective, the inclination may arise to want to punish someone who vandalized a house. However, perhaps all that the owner of the house wants is for the vandal to repaint his house, or

perhaps he just wants the vandal to apologize and explain to him why he vandalized his house. Thus, the desert-based account focuses more on the perspective of those who are not involved in the situation, and less on the perspective of those directly affected by it.

Similarly, the forfeiture-based account focuses on taking away the rights of offenders rather than restoring the victim's wellbeing after their rights have been violated. What the forfeiture-based account fails to acknowledge is that in punishing the offender who has forfeited his rights, the violation of the victim's rights (and the harm associated with it) does not simply disappear.

The fairness-based account, however, is perhaps the worst version when it comes to concern for victims' wellbeing, for it completely disregards victims in its defense of punishment. In fact, it devalues and disrespects victims by suggesting that the reason crimes are morally wrong has less to do with the victims' wellbeing and everything to do with the rest of society having to follow rules while free-riders refrain from doing so. Once again, this theory's disregard for victims causes it to fail in its defense of punishment, and more so fail in not even *attempting* to figure out a way to restore the victims' well-being in the aftermath of criminal activity.

Finally, the debt-based account of retributivism may appear to have the victims' wellbeing or the victims' "moral goods" in mind, but in actuality, this theory considers the victims not in the sense of caring for the restoration of their wellbeing, but only insofar as it provides the theory with a reason for why the offender incurs a kind of debt, thus justifying punishing him. Once again, its focus is on the offender rather than the victim. This theory, in deciding *on behalf of the victims* what the best course of action for the restoration of their wellbeing will be, fails to truly restore their wellbeing. Since the victims' wellbeing should be among the highest priorities when dealing with the aftermath of criminal activity, this defense

(and any other defense of punishment that disregards the restoration of victims' wellbeing) fails to be successful.

2.3 The Importance of Restoring the Wellbeing of Victims

Thus far I have emphasized numerous times the importance of the restoration of the wellbeing of victims. I have also pointed out that doing so should be among the highest priorities when dealing with the aftermath of criminal activity⁶⁴, and I have proceeded to argue against any criminal justice system that either fails to realize the importance of this or fails in its attempt to truly restore the wellbeing of victims. However, I have yet to discuss why the restoration of victims' wellbeing is of such great importance or why it should be a factor to take into consideration at all.

There are three main reasons why attending to the wellbeing of victims after they have been subjected to harm and rights violations should be deemed a priority. The first is that the state has a duty to uphold the rights of its people and must do everything in its power to ensure that these rights are not violated. However, once a right has been violated, then the state has a duty to continue to uphold that victim's rights by attempting to restore the damage caused by the offender as much as possible. If the state were simply to disregard the victims' wellbeing or fail to do its best to restore it, it would thereby fail to truly protect the rights of its people.

The second is that a major reason for having a criminal justice system in place is in order to deter crime as much as possible, protect individuals from harm and rights-violations, and ultimately create a well-ordered society. If the state's concern is the wellbeing of its people,

⁶⁴ Note that I am not suggesting that it should be the *only* priority or even that it should be the highest priority, but simply that it should *among* the highest priorities.

however, then this must include those who have already been subjected to harm, as well. It is important to remember that victims of crime are not simply a lost cause - they are still people of that state. Thus, when crime does occur, it would be a mistake for the state to focus its efforts only on preventing further crime, yet fail to aid and restore the wellbeing of those who have already been subjected to it. In failing to truly restore the wellbeing of victims, the state is, once again, failing to fulfill its main purpose: to ensure the security and wellbeing of its people.

Finally, part of having a well-ordered society means that people can have the freedom to do what they choose, go where they choose, and plan a future for themselves however they please and without fear. The only way this freedom is truly possible, however, is if the people of that state are aware that if they were to suffer the misfortune of being the victims of crime and that if they were to suffer harm and have their rights violated, that these rights, along with their wellbeing, will be restored afterwards. If they believed that the damage would be unlikely to be restored, however, then they will not be likely to genuinely enjoy a true sense of security or a true sense of freedom.

Thus, given the importance of the restoration of the victims' wellbeing (and given that in order for the wellbeing of victims to truly be restored, the victims, themselves, must be given a voice in the matter), it becomes clear why the utilitarian and retributivist defenses of punishment (as well as any defense of punishment that fails to allow for the victims to have a say in how their wellbeing will be restored) will fail to truly be successful. In the next chapter, I will proceed to present the theory of restitution - an alternative, non-punitive, way of dealing with criminal activity that does allow for the true restoration of the wellbeing of victims.

Chapter 3

Pure Restitution

In the previous chapter I established that any defense of punishment that can be presented by its proponents will ultimately fail to be satisfactory. This, once again, is because any system of punishment will fail to truly restore (or even attempt to restore) the wellbeing of the victims involved - a factor that should be considered of great importance when dealing with the aftermath of criminal activity⁶⁵. Recall that the reason that any system of punishment will fail to meet this criterion is because in dealing with criminal activity by punishing offenders however the state sees fit, there remains no room for the victims to have a say in what should be done⁶⁶ (i.e. how to deal with the situation in a way that will promote their wellbeing⁶⁷), which is essential to actually restoring their wellbeing⁶⁸. In this chapter, I present an alternative (non-punitive) way of dealing with criminal activity that not only allows for the restoration of the victims' wellbeing, but, in fact, makes this a priority. This is what is referred to as the theory of pure restitution⁶⁹. This theory, put briefly, endorses a system where, instead of punishing offenders, the state compels them to compensate their victims for the damages they caused. My aim in this chapter is to introduce this theory and respond to some objections raised by its critics. The objections I will be responding to are: (1) The theory is unable to account for the restoration

⁶⁵ Other factors include deterrence, expression of disapproval in the criminal act, and the restoration of justice and order in society - these criteria will be discussed in further detail in the next chapter.

⁶⁶ Note that while victim impact statements may give victims a voice to be taken into consideration in the sentencing process, it is not always enough and the final sentencing is still ultimately up to the discretion of the judge, which may not always coincide with what the victim wants. This is especially true in cases where victims do not support taking punitive measures, but still want the offense to be acknowledged and dealt with in a way that would restore their wellbeing.

⁶⁷ The term "wellbeing" is not intended to refer to any specific thing. On the contrary, when I speak of a factor which promotes the wellbeing of victims, what I have in mind is a factor which the victims, themselves, deem to be beneficial for the restoration of their own wellbeing in that particular case.

⁶⁸ I discuss this in further detail in the next chapter.

⁶⁹ This theory was first presented by Randy Barnett (1977) and has been defended by Mane Hajdin (1987), Joseph Ellin (2000), and David Boonin (2008), among others.

of the wellbeing of secondary (non-immediate) victims. (2) It disregards the effect of crime on the state. (3) It is incapable of repairing irreparable harms (especially in cases of rape and murder). (4) It leads to the trivialization of crime. (5) It is incapable of accounting for cases of failed attempts at wrongful behaviour as well as cases of non-harmful endangerment. (6) It is incapable of deterring the very rich as well as the very poor potential offenders from engaging in criminal activity.

The theory of pure restitution proposes, instead of punishment, a system of criminal law that operates, in some ways, similarly to tort law. Under this system, instead of punishing offenders for wrongdoings, the state would, instead, compel them to compensate their victims for the harm and damage they caused. This, of course, is restricted to cases where offenders are responsible for wrongfully harming their victims. This means three things: 1) it is restricted to cases where a harm (or, as we will see, potential harm) is brought about through the actions of some person(s). 2) it is restricted to cases where offenders can be held criminally responsible for their actions (i.e. the offender was not coerced into performing the criminal act). 3) It is restricted to cases where a *wrongful*⁷⁰ act is done to bring about harm.

Now that I have presented the basics of the theory⁷¹, I will move on to examining and responding to some of the objections raised by its critics. My aim in this chapter is to show that, at the very least, this theory is plausible and has the resources to adequately respond to the most serious problems raised by its opponents.

⁷⁰ In a legal sense.

⁷¹ Note that while the basics of the theory have been presented, different proponents have different ways of filling in the specifics of their version of the theory. For instance, Randy Barnett seems to have in mind a system where restitution for all crimes is compensated in monetary means while David Boonin allows for compensation in the form of imprisonment in some cases. The specifics for the version of the theory that I will be defending will be filled in throughout this chapter.

3.1 Harm to Secondary Victims Objection

The first objection against the theory claims that when a criminal act is committed, it is not only the immediate victim that is harmed. Rather, those around them (i.e. their family, friends, neighbours), not to mention that society as a whole, is harmed as well, and this theory simply cannot account for harm experienced by anyone other than the immediate victim⁷². What the critics mean in raising this objection is that, for instance, if a crime has occurred in a given neighbourhood, it is true that the immediate victim will be harmed and will need to be compensated for his loss. However, he will not be the only individual harmed by this. His neighbours will now be living in fear knowing that there is crime in the area, the value of the neighbours' homes may drop, perhaps everyone living on that block may feel the need to invest in a new security system, the neighbourhood will develop a bad reputation, etc. This will be true of crimes like rape, murder, robbery, vandalism, etc. Thus, the theory's focus on only repaying the immediate victim of the crime, the critics maintain, results in unfairness for those secondary victims who will receive no compensation for the harm they, too, were subjected to.

One way to respond to this objection, as Randy Barnett has done is simply to bite the bullet and agree that the theory cannot satisfy anyone other than the immediate victim, but that this is also true of a system of punishment. Barnett argues that while proponents of punishment may claim that a system of punishment can satisfy all those affected (i.e. primary and secondary victims) by satisfying their "lust for revenge", that this is an exaggeration, and that, in actuality, in punitive criminal justice systems, members of the community as well as the victims

⁷² This objection is presented by Miller, 1978: 359; Kleinberg, 1980: 277; Hoekema, 1991: 343; Tunick, 1992: 158ff.

themselves, act as “mere spectators of the criminal justice system”. The theory of restitution, he argues, allows victims to be involved, and in that sense, it is a better alternative to punishment.⁷³

Boonin, another proponent of the theory of restitution, offers a different response to the secondary victims objection. He claims that Barnett fails to answer to the objection that “individuals other than the victim deserve *some* kind of satisfaction from the offender”.⁷⁴ Thus he, instead, provides an alternative response to the objection by simply arguing that there is nothing in the theory that precludes it from allowing for the compensation of secondary victims, as well. He suggests that an estimation of the harm caused to each secondary victim may be determined by the state, and the offender would be required to compensate each one of them along with the immediate victim. Boonin acknowledges that this is “completely impractical” but argues that estimating how much harm an offender has caused so that he can be made to suffer as much as the suffering he had caused, is also impractical. Thus, the difficulty of figuring out how much compensation is owed to each person affected should not stop us from trying our best to come up with a way to do so. If, for instance, too many secondary victims are harmed by a neighbour being robbed, the robber may be required to not only compensate the immediate victim, but also perhaps pay a lump sum of money to the city so the money can be used to hire extra patrol officers to restore the neighbourhood to the safety level it was in prior to the offense.⁷⁵

While I agree with Boonin’s claim that the theory of restitution is certainly capable of allowing for the compensation of other non-immediate victims, I do not believe that Barnett’s response should be so quickly rejected. Barnett makes an excellent point in asserting that punishment does not compensate secondary victims any more than it compensates immediate

⁷³ Barnett, 1977: 295

⁷⁴ Boonin, 2008: 226

⁷⁵ *Ibid.*, 226-228

victims⁷⁶. Moreover, I would like to add that if a critic were to argue that punishment at least provides satisfaction for the non-immediate victims, then I would respond by arguing that restitution of the immediate victim would also help to restore the wellbeing of the secondary victims. In other words, the wellbeing of secondary victims could be maximized from observing that the victim has been compensated for the harm that he was subjected to and from knowing that the crime has, in fact, been acknowledged and dealt with. This, I would also argue, is a more healthy and more virtuous sense of satisfaction than the satisfaction derived from the infliction of pain on the offender. Thus, once again, I agree with Boonin's claim that the theory can be made so that compensation can also be paid to secondary victims, which would certainly be better for their wellbeing than punishing the offender would be (given that these secondary victims will also be given the opportunity to have a say in how they would like to be compensated). However, even if the theory was not capable of allowing for the compensation of secondary victims in much the same way that it allows for the compensation of immediate victims, it still would not follow that secondary victims of crime are better off under a system of punishment.

One objection against the claim that the theory of pure restitution can allow for secondary victims, according to the critic, is that if we allow for the compensation of secondary victims through, for instance, a lump sum payment by the offender to the city to be used to restore the wellbeing of the secondary victims, then this would be the same as requiring the offender to pay a fine. Paying a fine, however, is a punishment. Thus, requiring the compensation of secondary victims under the theory of restitution would mean that the theory would have a punitive aspect to it, and this is precisely what the theory is arguing against.

⁷⁶ Some may argue that while punishment may not exactly compensate the immediate and secondary victims, it does reaffirm their rights and values and express disapproval of the actions of the offender. This is a defense of punishment well pointed out by Feinberg, Hampton, and Ripstein (among others), which will be considered and responded to in greater detail in the next chapter.

I would like to respond to this objection in a similar way that Boonin does. Boonin suggests that there is, in fact, a difference between paying a fine and paying a lump sum amount of money as restitution. This difference is that in the prior case, the fine is meant to be punitive - it is meant to be burdensome for the offender. In the latter case, however, this is not the intention. The intention with restitution is simply to restore the wellbeing of the secondary victims, and if the way to do this is by extracting payments from the very person who is responsible for their suffering, then this is what must be done.⁷⁷ I would like to add on to Boonin's response, however, and also suggest that restitution (even in cases of secondary victims) does not have to be purely monetary. In other words, if it turns out that what the neighbours have decided is that the best thing for an offender (say, someone who vandalized one of the neighbours' homes after having too much to drink) to do is seek rehab for his drinking problem so that he is unlikely to repeat the offense, then this is what should be required of him.⁷⁸ However, if what the neighbours want is simply an amount of money that will allow the city to hire an extra patrol officer to maintain their sense of security, then the offender who caused there to be fear, a lack of security, and discomfort in the neighbourhood will be required to pay for that.

Another objection raised against the idea of compensating secondary-victims involves the issue of certain crimes gaining more or less attention by the public than others.⁷⁹ The idea behind this objection is simply the following: Suppose that the same crime is committed by two different people, but the second crime generates more publicity than the first (causing more people to feel afraid and insecure) and, thus, the second crime generates more secondary victims. The theory of pure restitution would seem to imply that the crime that generated more publicity

⁷⁷ Boonin, 2008: 229

⁷⁸ Note that this is only one suggestion for a non-monetary way of seeking compensation. I understand that perhaps not very many victims would be satisfied with this alone. However, the point here is simply that the victims will have a say in what this compensation may be, and it need not be purely monetary.

⁷⁹ This objection is presented by Wilkinson, 1996:40

would have to require the offender to pay more than the other offender for the same crime. However, this does not seem to be fair. In fact, this objection is part of an even bigger problem - that in some cases, the harm that an offender's crime generates will be outside of his control. Another issue arises when, for instance, two different people in different situations both happen to get into bar fights for similar reasons. However, in one case, the victim was physically much weaker or had a medical condition (a fact unknown by the offender) and experienced much more physical damage than the victim in the other situation. It would appear that under the theory of pure restitution, the second offender would owe more restitution than the first - but this does not seem fair considering the fact that both offenders committed the same crime⁸⁰

Boonin mentions that there are three ways of responding to the objection regarding the involvement of luck in criminal activity: The first is to suggest that an offender is always responsible for his crime and all the harm that it has resulted in. The second is to suggest that an offender is only responsible for the harm that a reasonable person could have foreseen. The third is to suggest that, depending on the case, the offender either has to take full responsibility for unforeseeable harms or only for reasonably foreseeable harms.⁸¹ Boonin, however, does not provide an answer as to which of the above should be endorsed by the theory, but simply asserts that the theory need not provide a specific answer in order to justify itself. The theory only needs to show that any one of several plausible answers can be given in response to the objection. Moreover, he goes on to note that while the question of luck may make cases of determining restitution difficult, it is important to keep in mind that punishment also faces the same problem.⁸²

⁸⁰ A very similar example is presented by Boonin, 2008: 230

⁸¹ Boonin, 2008:230

⁸² Ibid., 231

While I agree with Boonin's point, I would still like to offer up a more specific answer for those who are simply not satisfied with not having enough detail. My position on this issue is to promote the third option presented by Boonin - that in some cases, an offender will be required to compensate for all the harm he caused (regardless of whether or not the harm could have been foreseen), but in other cases, the offender will only be required to compensate for the harm that could have reasonably been foreseen. This is because I think it is important to avoid cases where a small crime could potentially get out of hand and cause much more damage and harm than was anticipated. For instance, consider the following scenario: As a prank, someone decides to cover a neighbour's house with toilet paper. The neighbour wakes up in the morning to find his house covered with toilet paper, and in getting the toilet paper off a tree in his yard, he falls and suffers major injuries. His mother, whose health is already in terrible condition, hears about her son's injuries and suffers a heart attack as a result. Because her son is in the hospital, he cannot get to her fast enough to take her to the hospital, so she is left untreated and eventually dies. In this case, it would be ridiculous to charge the individual responsible for covering the house with toilet paper with the death of the victim's mother. It might perhaps even be unfair to require him to compensate his victim for the hospital fees because in this particular case, it would have been difficult to foresee any of this happening. The most that could have been foreseen as a result of this prank was an angry neighbour and nothing more. However, I would also like to avoid cases where unforeseen harm is completely ignored. For instance, if an armed robber plans to rob a convenience store but does not intend on using his gun, yet, after being provoked by the store owner, instinctively fires his weapon at the store owner and ends up causing injury or potentially death of the owner, then I believe in such a case, the robber should be held responsible for the injury or death of the store owner. This is because although he may

not have planned on using the gun, he surely could have foreseen the potential harm that going in with a gun would cause. These are two easy cases to use in judging responsibility. In short, when attempting to determine how much damage an offender is responsible for in hard cases, I believe judges and individuals with the right expertise may be able to analyze the case and determine responsibility in much the same way that they would under a system of punishment. The important point to note here, however, is simply that this is not an issue for the theory of pure restitution.

3.2 Forms of Compensation

So far I have been discussing the concepts of restitution and compensation without fully explaining what form the compensation may be in (i.e. what is acceptable and what is not acceptable). Since the next few objections will deal with this very issue, I will briefly elaborate on it before moving forward. While some (such as Barnett) seem to only focus on compensation in a monetary form (which includes, for instance, an offender giving up his property or future earnings in order to repay his victims), others (such as Boonin) allow for compensation to be in monetary as well as non-monetary form (including, for instance, placing an ankle monitor on an offender or incarcerating him in order to restore the security of his victims). My position on acceptable kinds of compensation falls somewhere in the middle. Of course compensation in monetary means will be acceptable in many cases. However, recall that one of the biggest reasons for why I am promoting the theory of pure restitution is because it allows victims to truly have a say in the criminal justice system. Thus, because of this very reason, I must allow for non-monetary means of compensation, as well, for all those cases where the victim wants something from the offender other than money, or cases where monetary compensation will not be enough to restore the victim's wellbeing. I, however, disagree with how far Boonin goes with the non-

monetary means of compensation that he deems permissible under his version of the theory. This is because, as Scott Gallagher suggests, non-monetary interventions such as imprisonment “strain the concept of restitution to its breaking point” and that they “stray so far from the concept of restitution that the justification becomes implausible”⁸³. I also believe that a line should be drawn at a point where human rights are in question⁸⁴, and thus, my view on non-monetary compensation does not include imprisonment⁸⁵, but may include, for instance, requiring the offender to manually fix a shop that he vandalized or clean up the toilet paper he spread all over the neighbour’s house. The important thing to note for the upcoming discussion is that I will be operating under the view that the theory of pure restitution is one that allows for monetary as well as non-monetary forms of compensation, depending on what will best restore the victim’s wellbeing⁸⁶. With that said, I would like to move on to the next objection against the theory of pure restitution.

3.3 Crime’s Effect on the State Objection

Thus far I have addressed the issue of compensating victims of crime. However, a critic may argue that the immediate victims (and even the secondary victims) are not the only ones harmed by crime. In fact, the state, itself, has its own reason for requiring that the offender be punished. This is perhaps why criminal charges (unlike torts) are brought forth by the

⁸³ Gallagher, 2016: 86

⁸⁴ Especially the rights to freedom of movement and bodily integrity.

⁸⁵ At a later point in this chapter, I discuss an alternative way of dealing with dangerous offenders at risk of reoffending.

⁸⁶ I use the term “wellbeing” here to mean that which the victim, himself, deems appropriate for restoring his wellbeing. This, of course, must be within reasonable limits and must not violate the offender’s basic human rights. The victim also cannot make a request that a judge would deem to be unreasonable. What counts as an “unreasonable request”, however, is not something to worry about at this stage; the logistics of a system operating under the theory of pure restitution is a topic for another paper.

government (partly because it acts as a representative of the people, but also as a representative of itself). The critic may even suggest (as Arthur Ripstein has)⁸⁷ that when *mala prohibita*⁸⁸ crimes are committed, “there is typically no particular victim other than the state, and so we might suppose that the state alone has an interest in punishing wrongdoings against it” and when *malum in se*⁸⁹ crimes are committed, the offender not only wrongs their victim, but also “commits a wrong against the public order, [and] because the public order is violated, the state has an interest in vindicating it”. Crime harms the state itself, and so, the critic may argue, punishment is permissible on the part of the state for three main reasons.

The first reason is that crime harms the state by challenging the supremacy of the law. When an offender knowingly acts against a given law, he is, in a sense, implying that he is above it. Thus, a proponent of punishment will argue (as Ripstein has)⁹⁰, “punishment for such crimes serves to uphold the laws that were broken. As such, they can be seen as a form of punitive damages owed to the state”. Ripstein also adds an example, suggesting that “if a tax evader simply must repay the taxes owed, the view that the tax system is merely a parameter in light of which one may take risks is confirmed”. This is certainly unacceptable. Thus, the state must resort to “adding a substantial penalty [in order to] condemn the attitude that the law is merely a parameter to be exploited”.

The second reason that the state is justified in punishing an offender, one may suggest, is because crime hinders the state’s ability to fulfill its duty to protect its people. Ripstein claims that “the law’s claim to protect people equally...[is] violated by crime. As a result, the appropriate response to a crime must both vindicate the law and vindicate the rights of the

⁸⁷ Ripstein, 1999: 156

⁸⁸ An action prohibited by statute but not committed against persons or property.

⁸⁹ An action evil in itself (i.e. assault, rape, murder, etc.)

⁹⁰ Ripstein, 1999: 156

victim”⁹¹. In short, punishing an offender serves to reassure the people of the state that they are still protected and that the state has not failed them.

The third reason is that punishment is a way for the state to denounce wrongful actions. It serves to communicate to the offender (as well as the members of the state) that the offender’s actions (which often include prioritizing his own private ends over the rights and freedoms of others) are not permissible and will not be tolerated.

Simply put, the overall objection here implies that the theory of pure restitution cannot account for these considerations since, in focusing all of its attention on compensating the victims of crime, it fails to take into account the state and the state’s reasons for requiring punitive measures to be taken against offenders.

While I do not deny that the state can be harmed by crime nor that the state has a significant role to play when the violation of the law is at issue, I do not accept the implication that punishment is the only way to achieve these ends (or that pure restitution is incapable of achieving them). In order to demonstrate that pure restitution is capable of achieving these ends, it is important to make note of two things. The first is that the state’s main concern is the wellbeing of its people. This means that while it appears as though the state (as an institution) is harmed by crime, it is only harmed by crime because individual members of the state are harmed by crime. *Mala prohibita* crimes, for instance, are only harmful to the state because they negatively affect (or have the potential to negatively affect) the people of the state. This means that the state can vindicate the name of law *by* vindicating the rights of the victims. This vindication, however, need not be done through punishment. Vindication can be achieved simply through the state requiring that the offender compensate his victim(s). This power to require the offender to compensate his victim(s) will also serve to denounce wrongful actions and

⁹¹ *Ibid.*, 157

demonstrate to the offender the supremacy of the law and the power of the state, ensuring that he understands that he is not above it. The second thing to note is that it is not incompatible with the theory of pure restitution to require that an offender pay his victim (through money, resources, or effort) more than just the factual losses that the victim suffered. Thus, restitution need not be like the tax payer example used by Ripstein. In fact, restitution will likely require a compensation from an offender that ensures that his crime does not pay.⁹² Thus, the fact that the state has reasons for punishing offenders that go beyond the wellbeing of victims (such as denouncing crimes or upholding the name of the law) is not an issue for the theory of pure restitution.

3.4 Irreparable Harms Objection

The irreparable harms objection maintains that while the theory's goal is to compensate victims for the harms they suffered, it fails to take into account harms that simply cannot be repaired. Rape and murder are two such harms. A major worry for the critic is that if the harm cannot be repaired and punishment is out of the question, then when serious crimes do occur, no measures at all will be taken to deal with them. What this will ultimately mean is that a thief will have to compensate his victim for the loss of property while a rapist may commit his crime and continue to go about living his life normally as if nothing happened. This, of course, is not something a critic or even a proponent of the theory will be comfortable with.

One way to respond to the irreparable harms objection is to claim, as Boonin does, that “if pure restitution must be rejected because, in some cases, we cannot extract the restitution to which we would be entitled, then punishment would also have to be rejected because, in some cases, we cannot impose the punishment to which we would be entitled”.⁹³ He then proceeds to

⁹² This point will be discussed in further detail in the next chapter.

⁹³ Boonin, 2008: 236

present an example of a murderer who is dying of cancer and only has a few days to live (with a quality of life so poor that he is essentially indifferent to living or dying). Boonin argues that in the case of punishment, too, sometimes it is impossible to inflict the amount of harm on an offender that he is believed to have caused, but this does not mean that the state should refrain from doing anything at all. The same can be said of restitution.

I find Boonin's response to be somewhat unsatisfactory, however. This is because in equating the example of a dying murderer to cases of irreparable harms, he fails to acknowledge that the prior case is a rare outlier case while the latter are very common, in that many crimes do, in fact, cause irreparable harms. I do, however, agree with Boonin's point that perhaps there are cases where the damage cannot be repaired, but that this does not entail that we allow offenders to be free from paying *any* restitution. It is a mistake to think that this is a case of "all or nothing" (that if we cannot *fully* repair the damages, then we should not even try).

Moreover, to add on to Boonin's argument: I think it is important to think of restitution as doing as much as is possible to restore the victim's wellbeing (within limits). If restitution is thought of in this way, then even if an offender cannot fully restore the wellbeing of his victims, then at least he will have made them better off than they would have been under a system without restitution.

3.4.1 Trivializing Crime Objection

Another objection claims that there is something unsettling about putting a dollar amount on what, for instance, a rape victim has been through and suggesting that this is what will make the damage go away. In other words, putting some monetary value on harms caused by serious crimes such as rape would, in a sense, underplay the harm suffered by the victim.

Boonin attempts to respond to this objection by claiming that if a doctor were to make a serious mistake in treating a patient and, as a result, paralyzes him, no one would suggest that the patient accepting money for compensatory damages would mean that he did not suffer or that the doctor's actions were permissible. Similarly, a rape victim accepting monetary compensation would not mean that what the victim went through was not a big deal or that the rapist's actions were in any way acceptable.⁹⁴

Once again, however, I am not satisfied with Boonin's answer. This is because it is understandable that some rape victims may feel uncomfortable accepting money from their rapist (perhaps because they would feel like putting a monetary amount on the damage caused to them would imply that their trauma, psychological health, and self-worth is something that people could put a price on or, worse, that people may not believe their accusations due to the assumption that they are simply after someone's money).

My alternative response to the objection is the following: the theory of pure restitution allows victims to have a say in what they want - so if they desire monetary compensation and feel comfortable asking for it, knowing that this is what will help restore their wellbeing, then they may do so. If, however, what they want is merely an acknowledgement that they were wronged and harmed or if what they want is to regain their sense of security or seek counselling, then that can also be a way in which the offender can restore their wellbeing. The important thing to note here is simply that the victims, under the theory of restitution, in having a say in how the crime should be dealt with and a say about that which would best promote their wellbeing, are better off than they would be under a system of punishment where they do not have that same voice.

⁹⁴ Boonin, 2008: 238

The answer to the objection that I have just addressed rests on the assumption that while full compensation may not be possible in some instances, the victim may still be partially compensated for the harm suffered. The next objection, however, questions how the theory of pure restitution will deal with cases where even partial compensation is not possible - in particular, how the theory can account for cases of murder, where the victim can no longer be compensated at all.

3.4.2 Compensating Murder Victims⁹⁵

One simple answer to this objection, as presented by Abel and Marsh, is that the murder victim's immediate family or close ones would be compensated in such cases.⁹⁶ Another answer, given by Boonin, is that there are three claims that are hard to deny: the transferability claim (that money "owed by one person to another can be transferred to a third party [if] the original person who is owed [money] dies before the debt can be repaid"), the substitutability claim (that if one person cannot repay another what he owes him, he is required to substitute what he owes for something of equal (or close to equal) value), and the pricing claim (that "it is possible, at least in principle, to put a dollar value on a person's life" and that "to deny this claim would be to say that [someone's] life was worth nothing at all"). The combination of these three claims provides a response to the objection presented above. In short, pricing means that there is a price to the life lost, substitutability means that the loss of life can be repaid back with something of comparable value (in this case, money would be an acceptable substitution), and transferability means that if the immediate victim cannot be repaid, then the money owed to him may be

⁹⁵ Note that my discussion of murder cases here only applies to cases of manslaughter (i.e. involuntary manslaughter or crimes of passion). Cases of extremely dangerous murderers at risk of reoffending will be discussed at a later point in this paper.

⁹⁶ Abel and Marsh, 1984: 161, 183-4

transferred to his estate (or, in cases where no one is left behind to collect the money, the state would collect it)⁹⁷. Thus, according to Boonin, anyone who accepts the transferability, substitutability, and pricing claims must be willing to accept the response that even in cases of murder, restitution can still be extracted from the offender.

My main concern with Boonin's response is that he does not explain why the state would acquire the monetary compensation if the victim does not leave behind an estate⁹⁸. It appears as though he only suggests this in order to ensure that the offender must pay *something* or *someone*. I would like to, instead, propose an alternative response: in cases of murder, those who are immediately affected⁹⁹ by the murder should be the ones to be compensated for their loss. This means that they are the ones who will be given a say in what it will take for their wellbeing to be restored. In cases where the murder victim does not have any family or loved ones, the offender will still need to pay restitution to the secondary victims (i.e. the immediate victim's neighbours, for instance) whose sense of security, comfort, and overall wellbeing are affected by the murder (perhaps through money paid by the offender to increase security or some other appropriate form of compensation decided upon by the secondary victims).¹⁰⁰

3.5 Failed Attempt at a Wrongful Act Objection

⁹⁷ Boonin, 2008: 241-243

⁹⁸ Boonin could argue that the state was harmed by the murder and deserves to be compensated. This, however, does not explain why the state is not compensated in cases where a murder victim *does* leave behind an estate.

⁹⁹ This is purposely made vague, to be determined on a case-by-case basis.

¹⁰⁰ A critic may object to my response by arguing that if, for instance, one individual murders someone who was loved (and depended on) by many, while another individual murders a recluse, the first murderer will have to pay much more compensation than the second for the same crime. However, it is important to point out that the two crimes are not, in fact, the same. The first crime will have caused much more harm than the second, and under the theory of restitution, the focus is not on how much the offender must suffer, but on how the victims can recover.

The next objection questions how the theory of pure restitution can account for cases where someone intends to cause harm but fails (and, thus, causes no harm whatsoever). An example of this would be a case of attempted murder where a gun misfires. Recall that, under this theory, if no harm is caused, the state cannot punish the offender or require any kind of compensation from him.¹⁰¹

One way to respond to this is simply to bite the bullet and assert that if no harm is done, perhaps the would-be offender need not compensate anyone for anything, because no compensation is required. Once again, the purpose of the theory is to restore the wellbeing of the victims by compensating them for the harm. If no harm is done or if there are no victims, then nothing needs to be done.

The biting the bullet response, however, is not one I find to be persuasive or satisfactory. This is because attempting to kill someone or attempting to rob a bank or slipping drugs into someone's drink in an attempt to take advantage of them, are crimes whether or not the perpetrator goes through with them all the way, and I am confident in asserting that most people would not be comfortable with a legal system where such attempted crimes were not dealt with.

Another answer to the failed attempts solution is that failed attempts cause fear and anxiety for the victim, and fear and anxiety are a kind of harm. Therefore, compensation is still required in those cases. Dagger, however, objects to this response and argues that it “amounts to saying that the discovery of an unsuccessful attempt at crime, and not the crime itself, is what makes the attempt criminal”.¹⁰² In other words, Dagger worries that on this explanation, cases where the victim is unaware of the offender's intent to cause harm will not be deemed harmful, and thus, will not require compensation. However, I would simply respond to Dagger's worry by

¹⁰¹ This objection is raised by Miller (1978: 359) and Dagger (1991: 30, 33-34).

¹⁰² Dagger, 1991:33

pointing out that in most cases, if a crime is attempted against an individual and the offender is caught, then the victim will either immediately know about it or will eventually come to learn about it, and when this attempted harm comes to light, the victim will come to suffer a harm which the offender must then compensate for. In the rare case that a failed attempt is never discovered by the victim, then perhaps biting the bullet may be necessary - after all, no harm at all has occurred and, thus, no compensation is necessary. However, it is also important to note that punishment also cannot account for cases of failed attempts in which the victim never comes to learn of the attempted crime. For instance, someone who attempts to drug someone but fails and goes unnoticed is not punished even under a system of punishment. He is only punished if he is caught, and if he is caught, then the victim will most definitely come to learn of it.

Another response to the failed attempts objection (meant to overcome the problems with the previous two responses) is the ‘harm by exposure to risk’ response.¹⁰³ This response suggests that failed attempts expose victims to a risk of being harmed, and since individuals with a higher probability of being harmed are worse off than those with a lower probability of being harmed, it follows that offenders, by causing the victims to be in a worse off state, are harming them and, thus, must pay restitution.

However, I disagree with this response. It is simply not true that a higher probability of being harmed¹⁰⁴ makes someone “worse off” - this is so for three reasons: (1) if this were the case, no one would voluntarily engage in thrill-seeking activities such as skydiving or bungee jumping. (2) Often times when something unfortunate *almost* happens, it creates a sense of relief and appreciation - a good feeling. Consider, for instance, dropping your phone and realizing that there is not a single scratch on it, or noticing the car in front of you brake hard suddenly and yet

¹⁰³ Presented by Ellin, 2000:309 and Boonin, 2008:251-2.

¹⁰⁴ Wrongfully or otherwise.

being able to hit the brakes just in time to avoid hitting it. In both cases, the rush of adrenaline followed by relief is, for many, considered a good feeling. (3) This argument implies that it is irrelevant whether or not someone is *aware* of the fact that they were almost harmed (hence why Boonin prefers this response to the previous one). However, if someone is unaware that they are in a riskier situation (and they never come to learn of it), it is difficult to see how they could suffer any harm. Thus, for these reasons, I prefer the second response over the third response.

3.6 Non-harmful Endangerment Objection

The next objection against the theory of restitution is similar to the failed attempts objection. However, this objection focuses on cases where an individual exposes others to risk unintentionally but negligently (and without actually causing harm).¹⁰⁵ In other words, critics of the theory question how this account can deal with crimes such as drunk driving. It would appear that, once again, because no harm is done to anyone, the drunk driver need not pay any restitution or compensate anyone, and thus, is free of any consequences for his drunk driving. The fear here, of course, would be that if there were no consequences for drunk driving, for instance, then many more people would attempt to drive drunk and the percentage of road accidents would increase, thus harming many more people than would be the case under a system where drunk driving is punishable even in cases where no accidents are caused.

Once again, I would respond in the same way that I did to the previous objection: that the fear of being harmed by a drunk driver is harmful in itself. In order to feel secure on the road, we need to know that everyone else on the road is fully alert, sober, and competent in their driving. When we become aware of a drunk driver swerving on the road, we become nervous and feel uneasy, and that, in itself, is a harm that we must be compensated for. Thus, a drunk driver

¹⁰⁵ Objection presented by Miller, 1978:359-60; Dagger, 1991: 30, 34; Wilkinson, 1996: 45-6

would need to compensate the other drivers (and perhaps pedestrians) on the road by, for instance, paying an amount of money to the state for extra police officers to patrol the roads, or be required to go to rehab, perhaps, etc.¹⁰⁶

Boonin, however, argues that this response cannot be used to explain cases where a drunk driver is not noticed by others (and thus, the other drivers on the road suffer no harm from fear of being harmed by the drunk driver).¹⁰⁷ However, if an individual's drunk driving is completely fine (i.e. they are not swerving on the road or hitting anything or anyone) to the point where no other driver can tell that they have been drinking, then (1) perhaps they do not need to pay any restitution (the deterring factor in this case would be that they would have to pay restitution *if* anything were to happen). (2) Drunk drivers that are not noticed by others are unlikely to be caught and dealt with under *any* system (even the system of punishment that we have now). Thus, this shows that this objection is not a problem for the theory of pure restitution.

3.7 Rich Offender Objection

Another objection against the theory of pure restitution is what is referred to as the 'rich offender objection'.¹⁰⁸ On this objection, the critics' worry is that if a particular crime requires a certain amount of money to be paid to the victim as compensation for the harm, and if that amount of money is (more or less) the same for all offenders who commit that particular crime, then middle-class offenders will suffer much more than wealthy offenders (who would barely notice the loss of the money). This, however, clearly does not seem fair. Moreover, a second

¹⁰⁶ Since compensating each victim individually in this case would not be plausible, the type of compensation that the victims would prefer may be voted on collectively.

¹⁰⁷ Boonin, 2008: 256

¹⁰⁸ This objection is noted by: Koehl, 1968:50; Pilon, 1978:351; Hoekema, 1991:338-9; Tunick, 1992:158; Fatic, 1995: 153-4

worry is that rich offenders will not be deterred from engaging in criminal activity if the amount of money they pay for restitution is an amount they will be barely notice and/or miss.

Barnett's response to this objection is simply that wealthy people care about social standing, so even if they do not miss the money they will lose by compensating their victims, the fact that being prosecuted will put their social standing in jeopardy will be a good deterrent.¹⁰⁹ However, I do not find Barnett's response to be compelling for two reasons. The first is that this surely cannot be the case for *all* wealthy offenders. The second is that if we take Barnett's response seriously, then we might as well not have a system in place at all in dealing with criminal activity because we would be operating under the idea that no one who would like to secure their social status would commit a crime in the first place.

Abel and Marsh attempt to respond to this objection by suggesting that the rich as well as the middle class or poor offenders should be required to work off their debt and should not be allowed to simply buy off their crime.¹¹⁰ However, I also do not find this response to be compelling. If all we want to ensure under the theory of pure restitution is the wellbeing of the victims, it is not clear how forcing wrongdoers to work off their debt will make any difference to the victim who will receive the same compensation¹¹¹. If anything, it would actually take longer for the victim to be compensated. Thus, it is not clear how this response can be defended without the risk of making restitution a form of punishment.

Boonin attempts to respond to this objection in two ways. The first is by suggesting that the rich offender will cause more harm by the same crime than the middle-class offender because

¹⁰⁹ Barnett, 1998: 182

¹¹⁰ Abel and Marsh, 1984:185

¹¹¹ If this is what the victim desires as compensation (given that it does not violate the human rights of the offender), then the offender may be required to pay restitution by working off his debt (e.g. a vandal may be required to manually fix a store he vandalized). The point here, however, is that if what the victim wants is, in fact, a monetary compensation, then Abel and Marsh's suggestion would not be an acceptable one.

the victim of his crime will feel that by only paying an amount of money that is perhaps insignificant to the rich offender, he will not have learned his lesson and may be likely to reoffend. Thus, the victim's sense of comfort and security will continue to be at risk, and his or her wellbeing will not be restored. However, that same victim's wellbeing is more likely to be restored if that same amount of money came from a middle-class offender, for the victim may feel that the middle-class offender (who will have had to give up a sum of money that will clearly have an impact on him) will be much less likely to repeat the crime. Thus, Boonin suggests, to overcome this issue, the theory would have to require that the rich offender compensate his victim with more money than the middle-class offender for the same crime. In some cases, he proposes, it would be necessary to impose a non-monetary form of compensation on the rich offender in order to restore his victim's wellbeing (this may include, for instance, wearing an ankle monitor, paying to have police follow him around at all times, or even incarceration).¹¹²

However, I disagree with Boonin's response for two reasons: (1) It seems unfair that the rich offender will have to, for instance, lose his freedom simply because he is rich, while a middle-class offender will only have to pay monetary compensation. In short, I believe similar crimes should require restitution of (more or less) equal value from the offenders. (2) It seems somewhat unfair for the victims of the poor or middle-class offenders to receive less money than the victims of the wealthy offenders for experiencing the same harm.

The second way that Boonin responds is by arguing that if one rejects the theory of pure restitution for this reason, he must also reject punishment because wealth plays a major role in the amount of burden a punishment will have on an offender. For instance, many punishments take the form of paying a fine, which is much more burdensome for the middle-class offender

¹¹² Boonin, 2008: 260-1

than it is for the rich offender. Even with a punishment like incarceration, it is obvious that someone with money will be able to return to his normal life after prison much more easily than the middle-class offender.

However, there is a difference that Boonin does not seem to acknowledge between punishment and restitution in this case, and this is that, under the theory of pure restitution, it is possible that someone who is wealthy may simply figure out how much it would cost, for instance, to rape someone or kill someone, and be prepared to pay that amount of money if he is caught. However, the same cannot be said of a system of punishment, where an offender, rich or poor, will have a lot more to lose (i.e. his freedom).

Thus, I would like to provide an alternative response to the rich offender objection. My answer is simply that the compensation does not have to be purely monetary. I have stressed this point several times thus far. The important part of the theory of pure restitution is that it allows victims to have a say in what should be done (up to a certain point). What this means is that there will be a negotiation about what the victim wants and what it is permissible to expect from the offender. There will not be a set amount of money that the offender can be prepared to give up before committing a crime, or in other words, “buy his crime”. Moreover, as I will go on to mention later in this chapter, there will also be an alternative (non-punitive) solution for dealing with individuals who prove to be incapable of being deterred (such as a rich offender who thinks he is invincible) and who continues to be a serious threat to society.

3.8 The Poor Offender Objection

The poor offender objection is quite the opposite of (yet somewhat similar to) the rich offender objection. This objection argues that in cases where the offender is extremely poor or destitute, two problems will occur: 1) the victim will not be compensated for the harm suffered,

and 2) the offender will not be deterred from engaging in criminal activity, knowing that he has very little (if anything) to lose.¹¹³

However, my response to this objection is simply this: restitution can, once again, be non-monetary. This may include, for instance, requiring the offender to go to rehab or to get an education or acquire a job in order to pay off his debt to the victim.¹¹⁴ Moreover, it is important to note that not only is it the case that punishment also fails to be a deterrent in cases where an offender has almost nothing to lose, but that punishment also fails to compensate the victim in those cases, as well. In other words, sentencing an extremely poor man to a life in prison, where his life may be of equal quality (or perhaps better, in some circumstances) than it was on the streets, will not only fail to deter the offender, but the victim will also not receive any kind of compensation or have the ability to voice their opinion about what should be done in order for their wellbeing to be restored. What's more, if both prison as well as, for instance, requiring the offender to acquire an education or a job or seek rehabilitation, fail to deter poor individuals from committing crimes, then at the very least it can be argued that the second option will be better, overall, for everyone involved, given the fact that an education and a job will result in fewer reoffences in the future. Incarceration, on the other hand, has been known to fail as a deterrent in many cases, especially due to the fact that after serving a prison sentence, previous offenders find themselves unable to find jobs and rebuild their lives, thus resorting back to a life of crime. Jose Vivar, a previous inmate at Collins Bay Institution in Kingston, Ontario, writes: "I no longer wanted to be a drug dealer [after leaving prison], but there were times where the

¹¹³ Objection presented by Hoekema, 1991:338-9; Hershenov, 1999:84n

¹¹⁴ A critic may worry that these things may incentivize a poor individual to commit crime. Note, however, that if this were the case, then we would need to turn our attention to a much larger issue at hand - that is, we would need to understand (and resolve) the issue of why it is that there are individuals out there so poor that they would resort to committing crimes in order to get an education or a job in the first place. This is not a problem with the theory of restitution.

system made me feel like that was all I would ever amount to”. This, he says, is due to prisons not encouraging higher education or providing inmates with opportunities to improve themselves or better prepare for life after prison.¹¹⁵ Simply put, not only does incarceration fail to deter poor individuals from resorting to criminal activity, but in many cases, it pushes them towards it. Thus, once again, the issue of the poor offender is much less of a problem for the theory of pure restitution than it is for punishment.

3.9 Insufficient Deterrence Objection

The next objection against the theory of pure restitution arises from a worry that compensating victims for crimes will not be enough to deter potential offenders from committing those offenses. The example presented by Boonin to illustrate this objection is one of stealing a candy bar¹¹⁶: If someone steals a candy bar from a store (which has, say 19 more candy bars) and this person is caught, then not much harm has been done to the store owner except for the loss of the single candy bar. Thus, all that the candy-bar thief must do in order to restore the wellbeing of the store owner is either return the candy bar or pay the price that he would have paid had he purchased the candy bar. What this means is that, had the candy bar thief gotten away with the theft, he would have been one candy bar richer. However, if caught, then he will not be any worse off than he would have been prior to attempting to steal the candy bar. Thus, the objection maintains, potential offenders will have an incentive to commit crimes under the theory of pure restitution.

¹¹⁵ Vivar, Jose, “What Prison is Really Like”. TVO. Nov. 14, 2016. Web.

¹¹⁶ Boonin, 2008: 264

There are two ways to respond to this objection. The first is in the way Boonin does¹¹⁷ by arguing that the lower the chances of a crime being detected are, the higher the secondary harms will be, and thus, the more restitution the offender will have to pay. This is because, for instance, if stealing a candy bar is so easy, this will force the store owner to have to install a security system, knowing that it will likely happen again if he does not. Part of the cost of the security system may then be what the candy bar thief must compensate the store owner for if he is caught, and this is enough to deter the candy bar thief from attempting it in the first place. On the other hand, if the chances of getting away with a crime are extremely low, then the secondary harms will be less. An example Boonin uses is that of an individual breaking into someone's house and stealing their television set without being detected. Because it is so difficult to get away with this, if someone is, in fact, able to get away with it, it is unlikely that they will repeat the same offense or that others will attempt to do the same thing.

However, while Boonin's response appears quite compelling at first glance, I am not persuaded by the claim that crimes with a low success rate will always have different secondary harms from those with a high success rate. Imagine, for instance, that your neighbour, who has a great security system installed, was the one whose house was broken into and whose television set was stolen. If the offender was able to get away with this despite the difficulty of getting around the security system, you will likely feel the need to acquire a much better, more expensive security system than your neighbour or perhaps start a neighbourhood watch, etc. Thus, it is for this reason that I do not find Boonin's response to the objection to be satisfactory.

My alternative response¹¹⁸ to the insufficient deterrence objection is the following: Due to the fact that it is up to the victim to decide what the offender can do to make restitution, the

¹¹⁷ Boonin, 2008: 264-6

¹¹⁸ I provide a more detailed response in the next chapter.

detering factor for the offender will be not knowing what the victim will want in order to be compensated - which may include compensating them with a sum of money that will make the crime not worth committing (keep in mind that the victims cannot simply ask for an unrealistic amount of money as compensation. The victim will have to make a case for why they are asking for that amount of money and what the money will be used for - this will then have to be approved or renegotiated until a settlement can be made). Finally, for those offenders who prove to be a serious threat to society or who show themselves to be incapable of being deterred and continue to reoffend without any potential for rehabilitation, the state will resort to taking a further (though still non-punitive) measure that I will discuss at the end of this chapter.

3.10 Punishment as Backup

The final worry that arises when considering a system operating under the theory of pure restitution is the following: How can the state require offenders to compensate their victims without the threat of punishment? Consider the following example, for instance: someone steals a candy bar and is caught and required to give the candy bar back or pay the price of the candy bar or perhaps pay back the price of the candy bar plus more money to compensate for the store owner's newly developed sense of insecurity. However, the candy bar thief refuses to do any of these things - then what? Simply put: under a system of punishment, the state is able to, for instance, compel offenders to pay fees by threatening to punish them if they do not. For example, speeding tickets or parking tickets must be paid off before one is able to renew his license plate sticker, if too many tickets are given out for an expired license plate sticker, the owner's car is towed to an impound - these are all threats of punishment that ensure that individuals will pay off their tickets and renew their stickers. However, what can be done under the theory of pure restitution in these cases?

My response, put simply, is this: In such cases as those mentioned above, the threat of humane “punishment” (keep in mind that the only reason I am using the term punishment is to demonstrate that it is meant to be inconvenient enough to push offenders to fulfill their obligations) may be used as a last resort to compel offenders to comply with their duty to compensate their victims. By “humane”, I mean “punishments” that are inconvenient but not physically or mentally harmful - this may include, for instance, taking away an individual’s driver’s license or impounding their car, but may not include imprisoning them or torturing them or publicly shaming them. Once again, this would only be used as a last resort when an offender simply refuses to comply by the law. Keep in mind that the punishment is only used as a means to obtain compensation and is not done for the sake of harming the offender.

3.11 Dangerous Offenders

Finally, I mentioned earlier that I would be discussing a non-punitive measure to take with extremely dangerous offenders who prove to be incapable of being deterred and will likely continue to commit serious crimes such as rape, murder, arson, grand theft, battery, assault, etc. Once again, the reason I say “non-punitive” is because its purpose is not to harm the offenders, but simply to compensate the victims (primary and secondary) by restoring their sense of security. In such cases as those described above: (1) Every effort should be made to rehabilitate the offenders. The state should work on determining what factors led them to commit such crimes and work on finding a way to reintegrate them back into society as law-abiding citizens¹¹⁹. In doing so, we must treat them humanely and well (i.e. the way we treat everyone else), because they are, after all, human beings worthy of being treated with respect and dignity,

¹¹⁹ If drug addiction or sex addiction is the issue, for instance, then rehabilitation should be provided. If mental health is the problem, access to a psychiatrist should be provided, etc.

regardless of what their circumstances have led them to do. (2) We should only bring in incarceration as a very last resort (a back-up plan when everything else fails and they are a major risk to the rest of society). But even then, we should ensure that they are treated well and given as much freedom as possible. What I have in mind is something like a city of their own where they can take on jobs (where some of the money can be used to repay their victims), earn a degree, and even enjoy leisure time and entertainment.¹²⁰ Keep in mind that this is definitely not the one and only way that restitution can be paid in a humane manner, but what I have done here is simply provide a plausible example of how it *can* be carried out. We can restore victims' well-being by restoring their security, and this can be done without treating the offenders like sub-humans (locking them up and taking away their freedom, beating them for misbehaviour, shaming them, and neglecting to prepare them for life outside of prison).

¹²⁰ This city's residents will certainly have some limitations (such as increased security to maintain order, a ban on weapons and weapon-like objects, etc.) but its aim will be to allow for as much freedom as possible while securing the safety of the residents within that city as well as those outside of the city. Once a resident has proven to be capable of living with the rest of the law-abiding citizens outside of this city without being a danger to anyone (with the assessment of professionals), he will be released and provided with opportunities for further improvement and employment outside of this city.

Chapter 4

Punishment Vs. Pure Restitution

In the first chapter, I made clear the problem of punishment and suggested that if an alternative, less morally problematic solution was possible, and if that alternative solution was able to achieve the same benefits that an institution of punishment does (namely, deterrence of crime, restoration of victims' wellbeing, expression of disapproval of wrongful behaviour, and the securing of justice and order in society), then that alternative should be favoured over the practice of punishment. In the second chapter I made the problem of punishment even more clear by presenting further problems with some of its most popular defenses, thus pointing out the fact that the practice of punishment is not so easily justifiable. In the third chapter, I went on to present and promote an alternative, non-punitive, way of dealing with criminal activity - namely, through restitution - and provided justifications for this practice as well as responses to objections raised by its critics. The purpose of the third chapter was to show that there was no serious problem with the theory of restitution that could not be overcome. Thus far, however, I have not yet done what I set out to do at the start of this paper. That is, I have not yet come to demonstrate how or in what ways the theory of restitution can achieve the same benefits that a system of punishment can achieve. What's more, I have yet to show not only this, but also that restitution achieves further benefits that punishment is not capable of achieving, and that this is why restitution is a better alternative to punishment. This will be my task for this chapter.

4.1 Deterrence

One important feature of punishment is its deterrent factor. This deterrence is beneficial in two significant ways. The first is by protecting potential victims from immediate harm and the

second is by guaranteeing freedom for all members of a society by ensuring that those who attempt to hinder such freedom are, themselves, hindered. That punishment is a deterrent is an undeniable fact. Although some offenders will go through with their illegal activities regardless of the sort of threat of punishment that may be awaiting them (whether that threat is a fine¹²¹, imprisonment, or death), many are, in fact, deterred by the potential punishment they will have to endure for breaking a law. As Arthur Ripstein rightly notes, offenders usually have some incentive in breaking the law - they break the law in order to achieve some private end. Punishment, in turn, “provides an incentive to conform with law, which can compete with the criminal’s other incentives”.¹²² Once again, the threat of punishment is not a deterrent in *every* case, but it is a deterrent in many cases. Many drivers, for instance, refrain from driving too much over the speed limit not for fear of causing an accident, but rather for fear of being fined. If no fine (or threat of a fine) existed for exceeding the speed limit, many more drivers would, in fact, exceed the speed limit. The same is true of crimes like theft, battery¹²³, and sexual assault, to name only a few.

A question I must now turn to addressing is whether or not replacing punishment with restitution will allow for the same degree of deterrence. Before I can turn to discussing this point, it is important to make note of the fact that it is difficult to determine for certain how the theory of pure restitution would play out in practice, and especially with regard to its deterrent factor. It is also important, however, to make note of the fact that when imprisonment replaced the death penalty in Canada in 1976, there was also much uncertainty about its deterrent effect, only for

¹²¹ Some (such as Feinberg, for instance) argue that a fine is a “penalty” and not a “punishment”. However, due to the fact that it also meets the criteria for what I consider punishment to be (as stated in chapter 1), I will allow fines to be included in the category of punishment.

¹²² Ripstein, 2009: 319

¹²³ Consider, for instance, the fact that battery of women is quite common in countries where the act is not punishable.

the fact to be revealed later on (after the abolition of capital punishment) that the death penalty did not actually deter crime any more than imprisonment did¹²⁴. Thus, my discussion here will be strictly with regard to the theory of restitution that I have unpacked in chapter 3 and how I believe it will operate in practice, simply based on its non-punitive, yet incentivizing features.

I would like to begin by clarifying that on the theory of restitution, compensation will always be required from an offender after he has engaged in criminal activity, and although the intention is certainly not to harm the offender, this compensation that he must provide will likely not be something that the offender *wants* to do (and this will act as a deterrent in and of itself). Thus, a system operating under pure restitution will in no way be like the Hobbesian state of nature, where everyone is free to roam around doing whatever they please and violating the rights of whomever they please without having to face any consequences whatsoever for their actions. Individuals' rights and freedoms will still be protected under a system of pure restitution in much the same way that they would be under a system of punishment¹²⁵. The most significant difference between punishment and restitution, however, is that the consequences under the theory of restitution will not be *intended* to be painful or unpleasant. This, some may fear, may result in the consequences not being unpleasant at all - enough so that the offender may reoffend shortly after compensating his victim without a second thought. This is especially difficult to accept when dangerous offenders, such as rapists and murderers, have paid a small price for their

¹²⁴ I point this out for two reasons. The first is that it is a great demonstration of the fact that a stricter punishment does not necessarily imply a higher degree of deterrence. The second is to show that such matters cannot be determined for certain when the issue is being discussed only theoretically, and that a system of restitution would need to be put into practice before accurate claims about its degree of deterrence can be made.

¹²⁵ Individuals' rights are protected in two ways under a system of restitution: 1) The requirement of some payment or compensation from offenders demonstrates that the violation of others' rights is not permissible. 2) Victims are compensated for the harms suffered and efforts are made to restore their wellbeing as much as possible - this reassures victims of their rights and freedoms after such rights and freedoms have been violated.

crime and are ready to pay that same price again because their incentive to commit such crimes is higher than the incentive to comply with the law and refrain from doing so.

However, there are three points that I would like to make clear in response to this worry. The first is that the victim, in declaring what it would require for their wellbeing to be restored, will likely want to ensure that their own sense of security is restored, and for their sense of security to be returned to what it was prior to the offense, they will want to ensure that the offender does not reoffend. In order to lessen the chances of that offender reoffending, the victim will likely ask, as part of their compensation, for something that will make the crime not worth the price that the offender must pay for it. In other words, the very restoration of the victim's wellbeing will likely¹²⁶ require and ensure that the offender's crime does not pay. The second point I would like to make clear is that each victim will likely require something different from their offender, and there is no way to know what that compensation will be or if the crime will be worth having to pay that compensation. What this means is that an offender cannot determine, prior to committing an offense, that the crime will be worth the price of compensation because he will not know what this compensation will be. All that he will know is that there will certainly be *some* consequence or *some* compensation to pay. What's more, even if an offender reoffends and targets the same victim, the offender cannot be certain that the victim will want the same compensation. In fact, it is hardly likely that the same compensation will satisfy the victim because they will be aware of the fact that the offender may repeat the offense for the third time, thus lessening their sense of security significantly. As a result, they will likely want a different

¹²⁶ A critic may worry about cases in which the immediate victim is perhaps too forgiving and requires a compensation from the offender that does not necessarily outweigh the benefit of the crime. It is important to remember, however, that it is rarely ever the case that a crime will only have one victim. As I discussed in chapter 3, crimes (especially serious crimes) tend to generate secondary victims (i.e. decreasing a neighbourhood or a town's sense of security). Thus, even if in such outlier cases, the immediate victim does require much compensation from the offender, the secondary victims will. The overall cost for the offender, then, will more than likely outweigh the benefit of the crime.

compensation, one that does a better job of deterring the offender so that their sense of security can truly be restored. The final point I want to stress is that, as I have already discussed in the previous chapter, the extremely dangerous offenders as well as offenders who simply prove themselves to be incapable of being deterred and are at risk of reoffending, will be dealt with in a different way. Namely, on top of compensating the victims, they will be kept away from the rest of the law-abiding members of the community and moved to a city where they do not have the ability to leave, but still have a sense of freedom through the acquisition of jobs, education, entertainment, counselling, rehabilitation, etc. and where they are not abused, humiliated or disrespected.

This is simply to say that replacing punishment with restitution will not necessarily decrease the incentive to comply with the law. In fact, replacing punishment with restitution may even have a stronger deterrent effect when it comes to the issue of recidivism. Recall that a problem with punishment (in particular, incarceration) is its failure to prepare offenders for life outside of prison. In particular, prison fails to provide them with education or long-term solutions for any problems that they have which may be the cause behind their criminal activity. Due to prisons' failure to help (rather than only hurt) inmates, offenders become likely to reoffend when the same factors that caused them to commit crimes in the first place recur after their sentence is over. Consider, for instance, a drug dealer who is caught and sent to prison but is offered no help to acquire skills to land a job, and in fact, likely becomes even more unemployable with his criminal record. This individual, when released, may likely feel that he has little choice but to go back to dealing drugs in order to make a living. A non-punitive theory such as the theory of pure

restitution will not fail offenders in this same way, and thus, may even deter crime even further¹²⁷.

4.2 Victims' Wellbeing

The second main benefit that punishment is thought to achieve is the restoration of the wellbeing of victims. Punishment achieves this in several ways, one of which is by increasing the victims' sense of security by keeping their offenders away from them, so they are unable to be harmed by them again. Another way that victims' wellbeing is increased under a system of punishment follows from its ability to deter crime (as discussed above). Simply put, not only will a victim of crime not be harmed again by the same offender, but because punishment is something many potential offenders wish to avoid, the victim is more likely to be safe from other offenders, and thus, will have an even further increased sense of security. Another way that punishment restores the wellbeing of the victims is by providing them with a sense of justice and a reassurance from the state as well as the rest of their community that what happened to them (in particular, the violation of their rights) was not permissible and not something that will be tolerated. If one's rights are violated and the individual who violated those rights is not dealt with in any way or if the victim's loss is not acknowledged and they feel that their rights have been trampled upon and that they do not have the same freedom to exercise their rights as others do, then this has the potential to decrease the wellbeing of victims significantly, perhaps even

¹²⁷ Note that this will especially be a deterrent considering the significantly high rate of reoffenses. According to the National Institute of Justice, based on information acquired from 30 US states in 2005, 68% of prisoners were arrested for a new crime within three years of their release from prison, and 77% were arrested within five years. (Acquired from: <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4986>)

destroying their sense of self-worth. By punishing the offender, the victim will feel that their rights have been vindicated¹²⁸ and this will consequently help to restore their wellbeing.

The question now arises of whether replacing punishment with restitution will allow for the same increase in the wellbeing of victims after crime. The answer to this is perhaps not as straightforward as one might expect. It appears that one easy response I could provide is to argue that pure restitution would surely restore the wellbeing of victims, and that in fact, it would a much better job of restoring the wellbeing of victims than punishment given the fact that under the theory of restitution, victims are able to decide for themselves what they would like from the offender, and consequently, are able to decide for themselves what the restoration of their wellbeing would require. However, a critic may respond by pointing out that there is a difference between what the victim himself believes is best for the restoration of his own wellbeing and what the state believes is best. In other words, perhaps the victim may think that they know what they want in order for their wellbeing to be restored, but that this will not always necessarily be true, and perhaps, the critic may continue, the state knows what will best restore the victim's wellbeing better than the victim, himself, does. So, for instance, the victim may decide that all he wants from his offender is an apology and for his offender to seek rehab, but after the offender has been sentenced to do these things, the victim may still not feel satisfied (not to the extent that he would have been if the offender had been punished). Another problem, the critic may argue, is that the victims may want too harsh of a punishment and when they are told that it is not permissible, they may feel angry and resentful towards the state, which would, in turn, decrease their wellbeing.

These worries, of course, are not easy to respond to, particularly because I would have to go into a discussion of paternalism, which would stray very much from the topic at hand. The

¹²⁸ This is noted by Feinberg, 1965: 407-8

simplest way I can respond to the first problem (that the victim does not, in fact, know what is best for his own wellbeing) is by pointing out that regardless of whether or not the state knows what is best for the victim, one fact will remain true: the victim's having a say in what should be done will, in and of itself, improve his wellbeing. He will feel in control of the situation, and in control of his own rights and how he would like to vindicate them, not what others believe they are worth or how they should be vindicated. It is also important to keep in mind that there will be professionals (i.e. judges and lawyers) to notify the victim of his options.

I would respond to the second worry similarly by pointing out that the reason we tend to feel this way now is because we have become accustomed to a system where punishment represents repentance and, to some, justice. However, if restitution became the norm, we would become accustomed to a system where an offender simply provides his victim with what the victim wants. Thus, a lack of punishment will not be likely to anger a victim when restitution becomes a common way to deal with crime, and a common symbol for justice. It is also important to keep in mind that at least some victims will not be in favour of punishing their offenders - either because they would prefer that their offender do something else to restore their wellbeing or because they acknowledge that punishment is less effective than alternative ways of dealing with offenders - i.e. rehabilitation, education, counselling, etc. With that said, I stand by what I have been arguing throughout the previous chapters: punishment, in failing to provide victims with the ability to have a say in how crimes that have affected them should be dealt with, will always fail in its attempt to truly restore their wellbeing. This is, of course, not a problem for the theory of restitution. Thus, replacing punishment with restitution will not only achieve the same benefit of restoring the wellbeing of victims, but will, in fact, restore their wellbeing to a degree that a system of punishment is incapable of.

4.3 Expressive Function

The next benefit of punishment is its expressive function¹²⁹. This is a function of punishment that I have yet to discuss in detail. Punishment, it is argued, serves an important role in our system beyond merely consequential or retributive reasons. It serves to express something - to make a statement. It is, according to Feinberg, a “conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, either on the part of the punishing authority himself or of those in whose name the punishment is inflicted.”¹³⁰ Punishment in the form of certain hard treatments, he argues, “have become the conventional symbols of public reprobation”¹³¹ Simply put, Feinberg asserts that by punishing offenders, the law as well as the members of the community are expressing their disapproval of the offender’s actions. It is this sense of reprobation that makes a certain treatment a “punishment”, and it is this very aspect of punishment that also makes it much harder for offenders to bear. Feinberg argues, for instance, that “even floggings and imposed fastings do not constitute punishments where social conventions are such that they do not express public censure; and as [for example] therapeutic treatments simply rather than punishments, they are easier to take”.¹³² Moreover, this disapproval or condemnation, he suggests, does not always have to be accompanied by a need for vengeance - the hard treatment is simply symbolic of this disapproval (in the same way that champagne is symbolic of celebration or the colour black is

¹²⁹ The expressive aspect of punishment is noted by Feinberg, 1965; Hampton, 1992; Ripstein, 1999, 2009, among others.

¹³⁰ Feinberg, 1965: 400

¹³¹ Ibid., 402

¹³² Ibid., 419

symbolic of mourning)¹³³ An example Feinberg uses to show that punishment is not always about vengeance is that of laws against paramour killings.¹³⁴ He writes:

The demand for punishment in cases of this sort may instead represent the feeling that paramour killings deserve to be condemned, that the law in condoning, even approving of them, speaks for all citizens in expressing a wholly inappropriate attitude toward them. For, in effect, the law expresses the judgment of the people, in whose name it speaks, that the vindictive satisfaction in the mind of a cuckolded husband is a thing of greater value than the very life of his wife's lover¹³⁵

This is a similar (though less extreme) assertion as one made by Kant, in which he states that in failing to punish criminal acts, a society would actually be, in a sense, endorsing them and even participating in those acts. Kant, however, goes as far as to suggest that if a community on a deserted island were to disband, all the prisoners charged of murder on that island would need to be executed immediately, otherwise, the rest of the members of the community "might all be regarded as participators in the [unpunished] murder[s]."¹³⁶ Once again, while Kant's statement is quite a strong one, the point behind it is acknowledged by several others. Hampton, too, for example, suggests that when an offender knowingly violates the rights of another for his own personal profit, he is expressing disregard for the victim's rights. Punishment serves to correct this - it serves as a retraction of the offender's declaration. Without punishment, the offender's declaration would remain and be implicitly endorsed.

Punishment expresses more than just disapproval of the offender's actions. Ripstein argues that punishment is also a way for the law to express its supremacy and vindicate the

¹³³ Ibid., 402

¹³⁴ The killing of the lover of one's wife.

¹³⁵ Ibid., 406

¹³⁶ Kant, trans. W. Hastie, 1887: 198

victim's rights. With regard to the law's supremacy, he states that "in every case of a crime, the law has failed to create a system of equal freedom by constraining conduct. The punishment restores the supremacy of the law because it deprives the criminal's deed of its effect".¹³⁷ With regard to vindicating victims' rights, Ripstein states that when a crime has been committed, two sets of the victims' rights have been violated: rights against injury (i.e. suffering wrongful losses) and rights against insult. A violation of the victim's rights against insult results from an offender "treating [their] rights as tradeable...[thereby] add[ing] insult to injury". Thus, according to Ripstein, while compensation or payment of damages may make up for the victim's first set of rights, punishment is required in order to vindicate the victim's latter set of rights.¹³⁸ Thus, Ripstein concludes, "[crime] involves a denial of the victim's rights. To shift only the factual costs back to the criminal would leave the criminal's claim to subject the other's rights to his own will unchallenged, and so the victim's rights would be as the criminal claims them to be. Without punishment, the criminal would in some sense be right."¹³⁹

Discussed above are all different ways in which punishment has the benefit of being expressive. The question I must now address is whether or not restitution is capable of achieving that same expressive function. There are several points to address here: the symbolism of punishment as disapproval, the vindication of victims' rights, and the expression of the supremacy of the law. Recall that according to Feinberg, punishment is able to have the expressive role that it has because, over time, it has become a symbol for reprobation. In other words, incarceration is how the offender, the victim, the state, and society as a whole understand and convey reprobation. For Feinberg, this implies that non-punitive measures, such as

¹³⁷ Ripstein, 2009: 308

¹³⁸ Ripstein, 1999: 148

¹³⁹ Ripstein, 1999: 149

restitution alone, would not be able to convey this same sense of disapproval, and so the criminal act may mistakenly appear to be accepted or endorsed by the state.

However, it is important to keep in mind that symbols change (and have changed) throughout history. Flogging, branding, and hanging, for instance, were all at one point considered to be symbolic of reprobation in the same way that a prison sentence is symbolic of it now. This, however, does not mean that this symbol for reprobation cannot be changed so that it is conveyed by something else. In other words, there is no reason to think that we cannot come to convey disapproval of criminal acts by requiring the offender to compensate his victim for them. When a child takes a chocolate bar from another child, for instance, we require that the child give the chocolate bar back, and in having to give it back, children often understand that they did something wrong - that the reason they have to give the chocolate bar back is because it is not theirs to take or because taking others' things without permission is not permissible. Those who engage in criminal activity and violate the rights of others, similarly, will understand that by not being allowed to enjoy any benefit from the crime and in having to compensate their victims, that what they did was not permissible and not something that the state will accept or endorse.

The next point to consider is the vindication of victims' rights. The idea here is that punishment vindicates the rights of victims by conveying to the offender, to the victim, and to the rest of society that the victim's rights are not tradeable and should not be violated for the sake of the offender's private ends. Thus, Ripstein suggests that compensating victims for damages is not sufficient and that punishment is required for the restoration of their "rights against insult".

However, there are two problems with the idea of vindicating victims' rights by punishing offenders. The first is that it is not clear why punishment is the only way or even the best way to achieve this. It appears as though Ripstein is operating under the belief that without

punishing an offender, it would seem as though “the criminal [has] gotten away with the crime”¹⁴⁰ This, however, is certainly not the case. As I discussed earlier with regard to pure restitution’s deterrent factor, not punishing an offender does not equate to doing nothing about the crime. What’s more, under the theory of pure restitution, what will vindicate the victim’s rights is having the *right* to decide how he should be compensated. It is in having a say in how his own rights should be vindicated that the victim will come to truly exercise them, and in exercising them, they will come to be restored. It allows the victim to acknowledge that his rights are very much intact, and it is this very power to exercise his rights that will restore his rights against insult. The second problem is that it is not entirely clear how inflicting hard treatment on an offender will vindicate the rights of the victim. If you break my phone and buy me another one to replace it, there is no point in me breaking your phone to vindicate my “rights against insult”. It seems to be enough that you acknowledge that I have a right to not have my phone broken and that you compensate me for my broken phone and maybe buy me a new case and a screen protector to make up for upsetting me¹⁴¹. Breaking your phone, however, does not take back the fact that you believed that the satisfaction of breaking my phone was worth violating my rights. Thus, in short, I am not entirely sure that punishment is the only way, the best way, or even an effective way at all of vindicating the rights of victims.

The final point to discuss is pure restitution’s ability to express the supremacy of the law and uphold its name. Once again, however, refraining from punishing is not the same as refraining from acting at all. The state has the power to require the offender to compensate his

¹⁴⁰ Ripstein, 1999: 153

¹⁴¹ It is important to note that I do not deny that victims have a right against insult. On the theory of restitution, the victim may certainly ask for compensation that goes beyond the material loss he or she suffered (in order to make up for their rights against insult), but this compensation need not (and must not) include punishing the offender.

victims and to right his wrong¹⁴². In doing so and in having this power, the name of the law is kept intact and will remain respected. Thus, once again, it seems that punishment is not absolutely required to achieve this, and that pure restitution can achieve this same benefit.

4.4 Justice and Order

I would finally like to turn to the fourth main benefit that punishment achieves - that is, its promotion of justice and order in society. As Ripstein notes, “the principle of punishment is...a guarantee of freedom...[through] the hindering of hindrances to freedom”¹⁴³ This means that punishment allows members of a society to live freely, knowing that their rights will not be hindered, because those who attempt to hinder their rights will, themselves, be hindered. However, once again, there is no reason to think that punishment is the only way to achieve this or that restitution is incapable of doing so. I have already discussed in this chapter that restitution is capable of achieving deterrence, protecting victims (as well as potential victims) from offenses and reoffenses, expressing disapproval of criminal acts, and ensuring that this disapproval is acknowledged by the offender as well as society as a whole. It is these things that ultimately allow for order in society. As with allowing for justice, it is, once again, not clear that justice necessarily calls for punishment. Justice can very well be achieved under a system of restitution by requiring compensation for wrongful harms in order to restore things as much as possible so that the victim’s (or victims’) ¹⁴⁴ wellbeing is returned (as much as possible) to what it was prior to the offense and so that the offender is not allowed to benefit from the violation of others’ rights. Thus, once again, punishment is not necessary to achieve justice and order in society, for the same benefit can be achieved by a system of restitution.

¹⁴² A discussion of how the state can enforce restitution can be seen in chapter 3.

¹⁴³ Ripstein, 2009: 324

¹⁴⁴ I.e. secondary victims, as discussed in chapter 3.

4.5 Further Benefits to Restitution

At this point I hope to have established that restitution is capable of achieving the same benefits that punishment achieves.¹⁴⁵ However, simply achieving the same benefits as punishment is not enough to convince critics that pure restitution should replace punishment. After all, if you make a great tasting dish and I ask you to change up the ingredients because doing so will taste “just as good”, you will have no reason to do so. I must, instead, show that altering the ingredients will result in either a more delicious or healthier dish (or both) in order to convince you to change your recipe. Likewise, proponents of punishment will only truly consider the replacement of punishment with restitution if I can show that there are advantages to restitution that punishment lacks.

There are several advantages to restitution that I have already discussed through this thesis, but I feel it is nonetheless important to reiterate them. The first advantage, as noted in the first chapter, is that punishment and the purposeful infliction of hard treatment on another human being is at the very least morally questionable - especially if this infliction of pain is not absolutely necessary (which, as I hope to have demonstrated in this thesis, it is rarely, if ever, “necessary”). Pure restitution, on the other hand, is quite easy to accept, morally speaking, for it does not involve intentionally harming another human being. All that it requires is that what is damaged be mended and what is wrong be righted.

Another advantage to pure restitution¹⁴⁶ is that it attempts to help all those involved, without abandoning anyone, including the offender. Punishment seems to treat offenders as a lost cause, and when they are treated this way, many of them will feel that they have no choice but to

¹⁴⁵ It is important to keep in mind that this system will require adjustments once in place. The important point, however, is that it has the potential to achieve these benefits.

¹⁴⁶ My version of restitution, which is not incompatible with the rehabilitation of offenders.

become what the system deemed them to be. As I pointed out earlier, drug dealers, for instance, may resort to dealing drugs after the sentence for their first offense is over. This is because punishment (in particular, incarceration) makes little attempt to rehabilitate them, educate them, or provide them with opportunities to seek a different (law-abiding) life after their release. Pure restitution, on the other hand, avoids this mistake. It seeks to not only restore the wellbeing of victims, but to give those who violate the law a chance to become law-abiding and rights-respecting individuals. This, in turn, also results in a lower rate of recidivism.

Another advantage to pure restitution, as I have stressed quite a bit already, is its ability to give victims a say in how the crime should be dealt with and what it will take for their wellbeing to be restored. As I have previously argued, allowing victims to decide how they should be compensated is the only way to truly restore their wellbeing. This allows victims to feel that their rights are being exercised and their personal wellbeing matters to the state. While punishment focuses more on dealing with the offender, restitution accounts for the victim's wellbeing just as much.

I hope to have demonstrated three important things in this chapter. The first is that restitution, too, is capable of achieving the most important functions of punishment - namely, deterring crime, restoring the wellbeing of victims, expressing disapproval of wrongful actions, and allowing for justice and order in society. The second thing that I hope to have demonstrated is that restitution contains features that may, in fact, make it preferable to punishment. These features include: refraining from purposely inflicting pain on human beings (thus making restitution less morally questionable), refraining from abandoning or disregarding the wellbeing of anyone (including the offender), decreasing the rate of recidivism, and allowing the victims of crime to have a say in the restoration of their own wellbeing. Above all, however, I hope to have

demonstrated that punishment is certainly not the only way for the state to respond to criminal activity, and that there are other (perhaps better) alternatives to take into consideration – pure restitution is one such example.

Conclusion

There are two goals that I set out to achieve in this thesis. The first was to demonstrate that the practice of punishment is flawed, and the second was to show that the theory of pure restitution is a great alternative. I suggested in the first chapter that if a less morally questionable alternative proved to be capable of achieving the same benefits as punishment, then that alternative must be preferred over punishment. These benefits were: deterrence, the enhancement of the wellbeing of victims, the expression of disapproval of wrongful acts, and the achieving of justice and order in society.

While punishment has been argued to be able to achieve these benefits, I demonstrated in chapter 2 that punishment is problematic in several ways. In particular, I argued that not only do all the strongest defenses of punishment fail to be successful, but that punishment, as a practice, actually fails to restore the wellbeing of victims (despite what its proponents have suggested). Once again, this is due to its failure to allow victims to have a say in how they would like the crime to be dealt with and how they would like their wellbeing to be restored. Since victims' wellbeing must always be among the highest of priorities, and since punishment is not capable of truly accounting for it, it was made clear that any future attempts made to justify the practice of punishment would be unsuccessful.

In the third chapter, I introduced an alternative, non-punitive, way for the state to respond to crime: through pure restitution. I addressed the most common objections raised by the critics of the theory, namely: (1) That the theory is unable to account for the restoration of the wellbeing of secondary (non-immediate) victims. (2) It disregards the effect of crime on the state. (3) It is incapable of repairing irreparable harms (especially in cases of rape and murder). (4) It leads to the trivialization of crime. (5) It is incapable of accounting for cases of failed attempts at

wrongful behaviour as well as cases of non-harmful endangerment. (6) It is incapable of deterring the very rich as well as the very poor potential offenders from engaging in criminal activity. After responding to these objections, I concluded that there were no serious problems that the theory is not capable of overcoming, thus making it a plausible alternative to punishment.

In the fourth chapter, I made a final comparison between punishment and pure restitution, addressing once again the benefits of both. I argued that not only is pure restitution capable of achieving the same benefits as punishment, but that it is capable of achieving even further benefits. As such, I concluded that the version of pure restitution that I have presented in this thesis should be preferred over punishment.

My ultimate goal throughout this thesis, however, has been to point out the fact that punishment is not the state's only option when dealing with crime. My defense of pure restitution was simply a way to demonstrate that there is at least one other plausible, non-punitive, way to respond to crime, and that this, alone, should make the practice of punishment worth seriously reconsidering.

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