

THE JUSTICE OF RESTITUTION

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A restitutive theory of justice is a rights-based approach to criminal sanctions that views a crime as an offense by one individual against the rights of another calling for forced reparations by the criminal to the victim. This is a sharp departure from the two predominant sanctioning theories—retribution and crime prevention. Rights-based analysts have criticized this approach for failing to include *mens rea*, or criminal intent into the calculation of sanctions, thereby ignoring the traditional distinction between crime and tort. Such a distinction is problematic, however, since punishment for an evil mind cannot be made compatible with a coherent individual rights framework. To do so would require the existence of a right to certain thoughts of others, a morally and theoretically objectionable position.

To understand the argument for a restitutive remedy for rights violations one must posit what a crime is: an unjust redistribution of entitlements by force that requires for its rectification a redistribution of entitlements by force if necessary from the offender to the victim. Certain common objections to such an approach are considered, including the difficulty of measuring damages, the impossibility of reparation and the problem of criminal attempts.

I

RESTITUTION TO VICTIMS OF CRIMES is a subject that has received increasing attention recently. Almost all treatments, however, have concerned how such a scheme might be implemented or how restitution has fared in other cultures and times.¹ What remains to be considered is the sort of justice theory that properly underlies such an approach and how this theory compares to more familiar formulations of criminal justice. In two recent articles, I have attempted to show that the principle that should animate any system of justice is a restitutive one.² Here I intend to expand upon the ground already covered by first considering the argument of two critics of a restitu-

1. See, generally, Stephen Schafer, *Compensation and Restitution to Victims of Crime*, 2d ed., enl. (Montclair, N.J.: Patterson Smith Publishing Corp., 1970); Joe Hudson and Burt Galaway, eds., *Considering the Victim: Readings in Restitution and Victim Compensation* (Springfield, Ill.: Charles C. Thomas, 1975); *ibid.*, *Restitution in Criminal Justice* (Lexington, Mass.: Lexington Books, 1977).

2. In "Restitution: A New Paradigm of Criminal Justice," *Ethics* 87, No. 4 (July, 1977), pp. 279-301, I argued that the existing paradigm of criminal justice—

tive theory. Examining their thoughtful attack will highlight much of what is at stake in the debate and the theoretical superiority of the restitutive approach. After that I will explore more fully what a restitutive theory of justice should look like and how one might deal with some criticisms likely to be made of it.

Before proceeding, it might be useful to review what is meant by restitutive justice: "Restitution refers to monies or services paid by the *offender* to the victim, whether directly to the victim or through intermediaries such as insurance companies."³ This is to be distinguished from compensation which "refers to monies paid by the *State* to the victim or . . . by the offender to the State."⁴ I have said that a restitutive theory of justice "views crime as an offense by one individual against the rights of another. The victim has suffered a loss. Justice consists of the culpable offender making good the loss he has caused. . . . His debt, therefore, is not to society; it is to the victim."⁵ Such a theory "recognizes rights in the victim and this is a principal source of its strength. The nature and limit of the victim's right to restitution at the same time defines the nature and limit of the criminal liability. In this way, the aggressive action of the criminal creates a *debt* to the victim."⁶ An implication of such an ap-

punishment—has failed (in the Kuhnian sense) to solve the problems it was in part responsible for creating; that the justifications traditionally offered—deterrence, disablement (or incapacitation), and reformation—are inadequately served by punishment and that, alone or in combination, they are an inappropriate and problematic justification for the deliberate, forcible infliction of suffering on a criminal offender. I also suggested that proportionality, rehabilitation, and victim compensation were attempts to salvage the punishment paradigm and, though they have ultimately been undercut by the paradigm itself, they point in the direction of a new paradigm—restitution. In "Assessing the Criminal: Restitution, Retribution and the Legal Process," *Assessing the Criminal*, eds. Randy E. Barnett and John Hagel III (Cambridge, Mass.: Ballinger Publishing Co., 1977), pp. 1-31, with John Hagel I outlined a restitutive theory albeit in a conclusory manner. The theory as formulated revolved around the distinction between moral rights and moral goals. Moral rights are those actions which may never be interfered with. The purpose of a system of justice is to rectify infringements of moral rights and nothing more. Crime prevention, whether by deterrence, disablement, reformation, or rehabilitation, is a highly desirable (moral) goal which may be well served by the course of justice but has no place in the calculation of sanctions for rights violations.

3. Laura Nader and Elaine Combs-Schilling, "Restitution in Cross-cultural Perspective," *Restitution in Criminal Justice*, p. 28. (Emphasis in original)

4. *Ibid.*, pp. 27-8. (Emphasis in original)

5. Barnett, *op. cit.*, pp. 287-8.

6. *Ibid.*, p. 291. (Emphasis in original)

proach is the collapse for most purposes of the traditional distinction between crime and tort with their merger into a single theory of corrective justice that looks to the conduct, broadly defined, of the parties to a case with a view toward enforcing individual rights while obtaining whatever incidental maximization of certain moral goals may be possible. It is on this unifying characteristic of restitutive justice that the two critics have focused.

In "Crime and Tort: Old Wine in Old Bottles,"⁷ Richard A. Epstein argues that the traditional distinction between tort law and criminal law can only be understood by examining the essential purposes of each institution. He concludes by drawing the following distinction: While the tort and criminal law both deal with volitional⁸ invasions of one individual's rights by another, here the similarity ends. The differences in the *prima facie* cases in each system and the remedies imposed can only be explained by their different functions. The purpose of the (civil) tort law is to compensate individuals who have been harmed by a rights invasion; the purpose of the criminal law is to punish individuals who have revealed a *mens rea* or bad intention to invade rights by an overt act which attempts (successfully or not) to carry out this intention. For Epstein, then, the function of the civil law is to restore the victim while the criminal law is based on "the view that the state should punish any person whose own conduct is worthy of moral condemnation,"⁹ regardless of whether a victim has been harmed. As he puts it, "the actual harm itself is immaterial to the criminal law."¹⁰ Epstein goes on to show how only this distinction can explain the differences between the civil and criminal systems.

It is interesting to note that Professor Epstein never considers the actual historical separation of the two systems. Though the question has yet to be settled, many have convincingly argued that it was the rise of the English monarchy and the King's desire for increased power (and a share of the reparations) that led to the fissure rather than any theoretical distinction.¹¹ The rationalization of the split

7. In *Assessing the Criminal*, pp. 231-57.

8. For a discussion of what he means by "volition," see his excellent "A Theory of Strict Liability," *Journal of Legal Studies* 2 (1973), pp. 166-8.

9. Epstein, "Crime and Tort," p. 248.

10. *Ibid.*

11. See Schafer; Richard E. Laster, "Criminal Restitution: A Survey of Its Past History and an Analysis of Its Present Usefulness," *University of Richmond Law Re-*

came centuries later. Such an observation, if true, does not, however, resolve the theoretical challenge. Even if Epstein's distinction between tort and crime is correct, as it may well be, it must still be justified and any attempt to do so will face at least two main difficulties, which at this point I shall merely list.

The first is that if the purpose of the criminal law is to punish only those who are worthy of moral condemnation, it is difficult to see why the bad intention must necessarily be linked to an (overt) act. Is it merely a practical problem (viz., that we can't read minds) that prevents punishing people's thoughts or is it a theoretical one? For on Epstein's view, "if the accused believes that property he is about to take belongs to another, it should make no difference in the application of the criminal law that by some fluke or confusion the property is unowned, that the accused happens to own it [!], that a gift was about to be made or that the owner has not communicated a subjective consent to allow the accused to use it."¹²

A second, somewhat related problem is whether and how a rights approach, within which Epstein works, gives the state (or anyone else) a right to punish offenders that would justify a separate system devoted to this end. Where does such a right come from and how does it relate to the rights enforced in Epstein's civil system? Though for Epstein the purpose of the criminal law is "moral condemnation" of the offender, it needs to be shown that *punishment* is a justifiable form of condemnation consistent with a theory of individual rights.

This discussion must be seen in its proper context. I do not mean to deny that some rights violators deserve to be "punished" as the term may be used—the deliberate infliction of *unpleasantness* for the purpose of moral condemnation. Neither do I criticize the distinctions made by retributivists as to who is deserving of punishment and who is not. Rather, my argument would be that utilitarian considerations

view 5 (1970), pp. 71-80; Bruce Jacobs, "The Concept of Restitution: An Historical Overview," in *Restitution in Criminal Justice*, pp. 45-62; for a general historical background, see Fredrick Pollack and Fredric William Maitland, *The History of English Law* (Cambridge: Cambridge University Press, 1898), p. 460; A.S. Diamond, *Primitive Law* (London: Longmans, Green and Co., 1935), pp. 148, 316, n.5; Heinrich Oppenheimer, *The Rationale of Punishment* (London: University of London Press, 1913), pp. 162-63, 173-74; Nader and Combs-Schilling, pp. 27-44; and William F. McDonald, "The Role of the Victim in America," *Assessing the Criminal*, pp. 295-298.

12. Epstein, *op. cit.*, p. 251.

are illegitimate to support such practices and that the retributive argument from desert is insufficient to justify the *forcible* imposition of suffering on an offender. The remaining alternative is nonviolent punishment—approbation, isolation, and even banishment,¹³ which though nonviolent may prove to be very harsh. As Joel Feinberg has suggested, a

. . . skeptic might readily concede that the reprobative symbolism of punishment is necessary to, and justified by, [its] . . . various derivative functions [of disavowal, nonacquiescence, vindication, and absolution]. Indeed, he may even add deterrence to the list, for condemnation is likely to make it clear, where it would not otherwise be so, that a penalty is not a mere price tag. Granting that point, however, this kind of skeptic would have us consider whether the ends that justify public condemnation of criminal conduct might not be achieved equally well by means of less painful symbolic machinery. . . . Isn't there a way to stigmatize without inflicting any further (pointless) pain to the body, to family, to creative capacity?

One can imagine an elaborate public ritual, exploiting the most trustworthy devices of religion and mystery, music and drama, to express in the most solemn way the community's condemnation of a criminal for his dastardly deed. Such a ritual might condemn so very emphatically that there could be no doubt of its genuineness, thus rendering symbolically superfluous any further hard physical treatment. Such a device would preserve the condemnatory function of punishment while dispensing with its usual physical media—incarceration and corporal mistreatment. . . . The problem of justifying punishment, when it takes this form, may really be that of justifying our particular symbols of infamy.¹⁴

Epstein does not consider such questions except for a single vague mention of retributive theory.¹⁵ His objective is simply to rationalize the traditional distinction between crime and tort, and while he arguably succeeds in this endeavor, this limited scope weakens his defense of that distinction. As a result, his criticism that a restitutive approach fails to take notice of the proper differences between crime and tort is severely undercut.

Fortunately we do not have to look to Epstein alone for a defense of his position, for Roger Pilon, operating within the same theoretical

13. More easily handled where common areas are privately owned, e.g., shopping centers. For a historical perspective, see Leonard P. Liggio, "The Transportation of Criminals: A Brief Political-Economic History," *Assessing the Criminal*, pp. 273-94.

14. Joel Feinberg, *Doing and Deserving* (Princeton: Princeton University Press, 1970), pp. 115-16.

15. *Ibid.*, p. 248.

framework, has dealt with precisely these issues in his excellent "Criminal Remedies: Restitution, Punishment, or Both?"¹⁶ He attempts to show how a rights-based theory of justice demands both civil sanctions (restitution) and criminal sanctions (punishments). His argument is based on the contention that a restitutive approach fails to capture "the whole of what is at issue in the criminal transaction." "To be sure," he says, ". . . criminal acts of the kind under consideration do involve harms to victims—hence our first concern ought to be to make victims whole again. But is that all they involve?"¹⁷ Pilon concludes, with Epstein, that what a criminal act involves (and therefore what the criminal law is justified in punishing) is the *mens rea* or bad intent of the offender. "For we punish some moral offense, some action that involves a guilty mind."¹⁸ In other words, ". . . the criminal act includes both the 'wrongs' of the tort act and the *morally* wrong aspect—the guilty mind."¹⁹

This formulation avoids, or seems to, the first question I raised above—why punish only the *mens rea* that is evidenced by an overt act apart from practical considerations? Here it appears that the intent is not being punished; rather the intent colors the act, somehow changing the act from a morally neutral one (perhaps justifying restitution) to a morally objectionable one justifying punishment. In this way the act and intention are apparently inextricably joined—theoretically inseparable. Now there is nothing particularly novel or unreasonable about such a construction and it might indeed answer the first question.²⁰ I do not agree with Pilon, however, that this formulation avoids the second problem, and it is to this I now turn.

The problem, put simply, is how punishment can be made comfortable within a context of individual rights, for Pilon, no less than Epstein (or I), wishes to focus "attention upon the parties directly involved, upon the rights violated and the obligations now owing."²¹ Pilon qualifiedly stays within what he terms the "state of nature" and assumes ". . . with Nozick . . . that no institutional rights (e.g., rights of the state) can be justified except as they are grounded first in indi-

16. Roger Pilon, "Criminal Remedies: Restitution, Punishment, or Both?", *Ethics*, 88, No. 4 (July, 1978), pp. 348-57.

17. *Ibid.*, p. 350.

18. *Ibid.*, p. 355.

19. *Ibid.* (Emphasis in original).

20. About this some doubt still remains. See also, e.g., Max Atkinson, "Justified and Deserved Punishments," *Mind* 78 (July, 1969), p. 364. There he contends that ". . . the requital of evil conduct would, if taken as the basis for punishing a type of conduct, justify official punishment of lying and other forms of immorality. . . ."

21. Pilon, p. 349.

viduals.”²² The right to punish must reside, therefore, in the parties to a crime, i.e., the victims. To this point Pilon is entirely within the individual rights context. But he must then ask how a right to punish comes to reside in the victim.

Pilon argues that by using “. . . the victim for his own ends, and against the victim’s will . . . the criminal alienated his own right against being similarly treated by the victim. . . . The original act thus creates a right in the victim (or his surrogate) to use the criminal as he himself was used.”²³ Intention is again the key, for an unintentional harm cannot justify an intentional harm in return, but only compensation (restitution). An intentional harm gives the victim a right to intentionally harm (punish) the criminal, for only in this way does the remedy “mirror” the offense. Pilon contends that a right to restitution is parasitic on a more fundamental right to a remedy which duplicates or, to use his phrase, reflects the criminal act as closely as possible. At this point a serious problem arises: Does such a general principle follow from a rights approach and is it even consistent with it? Such a proposition must be closely considered to see if it can do the work that Pilon intends for it.

To say that a victim’s remedy must mirror the wrong, Pilon must assert the following:

- (1) If A violates B’s rights, B’s remedy must mirror the nature of the rights violation.
- (2) If A acted unintentionally, B’s only remedy is restitution.
- (3) If A acted intentionally, B also has an additional right to punish A.
- (4) B may punish A, therefore, if and only if A had the requisite mental state (*mens rea*) at the time of the offense.
- (5) The existence of this mental state at the time of the act creates, therefore, in B a right that he would not possess were it not present.
- (6) Since a remedy must mirror the extent and nature of the rights violation, the existence of this mental state must violate an additional right in the victim, such that an additional remedy is justified.

The only right which could account for (6) would be a right to have others think a particular, i.e., nonaggressive, way (about you?). B, on

22. *Ibid.*, p. 352, note 7. See Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 6, 137-42. But see Jeffrie G. Murphy, “A Paradox In Locke’s Theory of Natural Rights,” *Dialogue* 9 (Summer, 1969), pp. 256-271, for the contrary (and I believe incorrect) view that *no one* in the state of nature properly may punish.

23. Pilon, p. 355-6.

this view, has a right to a certain mental state in A, such that he may punish A if this attitude is not maintained. B, therefore, has a right not to be harmed (giving rise to a remedy of restitution) and a further right not to have others, here A, intend to harm him (giving rise to a further right to punishment). Notice that I am not contending that Pilon must justify the punishment of bare intentions with no overt act.²⁴ Rather, even if it is assumed that for some reason the right to a peaceful mental state in others giving rise if violated to a right to punish can only arise in combination with a harmful act, this additional (though conditioned) right must still be supported. Put another way, Pilon and Epstein must show that the existence of an intent to violate a right (and not all morally objectionable intentions) has violated an additional right in the victim that the volitional, harmful act unaccompanied by such an intention does not.²⁵

Professor Epstein doesn't deal with this problem but Pilon does. In the case of an intentional crime: "The criminal," Pilon suggests, "has not simply harmed you. *He has affronted your dignity.*"²⁶ Now whatever else this might mean, here it can only mean that you have a right to dignity such that violations of it give you a right to some form of rectification (and, presumably self-defense as well). While conceding that ". . . dignity is a difficult idea to come to grips with,"²⁷ Pilon attempts to explain how such a right might exist. He says that rights are ". . . grounded in and derived from human dignity. A dignity rich enough to generate rights must surely figure in the remedy for violations of those rights."²⁸ But surely the second sentence does not follow easily from the first. For if it is true (as it may well be) that *rights flow from* dignity, this doesn't imply *a right to* dignity itself whatever this might mean. And if "dignity" is not a right, why should it "figure in the remedy" at all?

There is reason to believe that dignity is not and cannot be a right in the traditional sense. The sort of dignity which Pilon's formulation

24. Though this may be a consequence of his position. For the problems raised by such a proposal, see Herbert Morris, "Punishment for Thoughts," *The Monist* 48, No. 3 (July, 1965), pp. 342-76.

25. To illustrate what must be established consider the following: I swing a sword at you and cut you severely. Your rights have been violated—viz., the right to be free in your person or property from the unjustified use of force. Now add to this act the fact that I intended to harm you. Since the remedy of restitution entirely satisfies the first act (less the intention) that violated the right to be free from the unjustified use of force, the intentional act must violate an *additional* right, viz., the right to a particular (peaceful) mental state in others.

26. Pilon, p. 351-2. (Emphasis in original)

27. *Ibid.*, p. 352.

28. *Ibid.*

requires is the right to a certain attitude or opinion in the minds of *others* since he seeks to punish mental states. I suggest that Pilon has jumped from the proposition that "people who intend to harm others and do some act in furtherance of that intent (though the source of this proviso remains obscure) are morally worse people than those without this intention" to the proposition that "this moral difference invades additional rights generating thereby additional remedies." The latter does not follow from the former and the requisite connecting proposition—that evil intentions violate rights or that a person has a right to be free from others thinking harmful thoughts about them—is a troublesome position to contemplate much less defend.

Another approach would be to ask whether, assuming that a bad act coupled with a bad intent violates *more* rights than the volitional act alone, does the same act coupled with a noble purpose or intent violate *fewer* rights? It would seem that the thrust of a rights thesis is that persons have rights regardless of how others view them and if it is to be suggested that this precludes considering only good intentions and not bad, then such asymmetry must be explained.²⁹

Moreover, even if such a right could be posited and justified, this would not get Pilon as far as he would like, for the ultimate question at issue—should a remedy be restorative and reparative or should it be destructive of an equal right in the offender?—is not resolved by establishing that a right to dignity has been violated. The question remains why the harming of a victim gives him a right to equally harm the offender rather than some form of restitution, monetary or otherwise. In other words, if it is conceded, as Pilon does, that restitution is the appropriate remedy for all other rights violations including intangible ones, then why does violating a right to dignity bring about an entirely different *form* of remedy? This problem is not solved by making its resolution the victim's concern as Pilon suggests³⁰ since our enterprise is to determine the limit of victim discretion compatible with individual rights including the rights of the offender.

Those who seek to defend a dual system of justice—restitutive (civil) and punitive (criminal) must show that they both follow from a rights thesis or that one or both is justified on some other ground. If

29. Walter Kaufman has remarked that while many freely speculate about the proper proportionate punishment commensurate with desert, "[s]peculation about proportionate rewards, on the other hand, has remained a rather barren affair." (Walter Kaufman, "Retribution and the Ethics of Punishment," *Assessing the Criminal*, p. 228).

30. Pilon, p. 356.

one accepts the rights thesis, then both systems must be consistent with it. This, as I have tried to show, is a difficult task.

II

How might the argument for a restitutive remedy for rights violation be structured? First, it is necessary to posit what, after all, a rights violation is: an interference with the use of one's person or property provided that use is not itself harming others. While a theory of rights is required to specify those actions that are permissible and those that are not, when a right once specified is violated what has occurred is an appropriation by someone of the use of what belongs to another. Thus, if I force you out of your house, I have interfered with your use of your body, house and land. I am acting as though I own your body, house, and land though I do not. While I am acting as owner, your right to unobstructed use of what is yours gives you an absolute right to regain control of your property however necessary. This is self-defense. But once the incident is over, what then? Self-defense is inappropriate since there is nothing presently to defend against. A wrongful distribution has taken place and it is a *fait accompli*.

What must be done is to rectify that wrongful distribution somehow, however imperfectly this may be done. A redistribution of rights, then, must take place. The offender must give something to the victim, by force if necessary. That what was interfered with may have been intangible does not make it any less a "harm" or rights invasion. It is no less an unjust distribution. If an intangible can be sold, as we know it can, surely it can be stolen or destroyed as well. A theory of rights, therefore, involves a theory of just distribution of rights and a crime is a wrongful interference with that distribution; it is an unjustified redistribution which necessitates, if the victim desires,³¹ another redistribution to rectify.

To appreciate the sort of concrete remedies such an approach suggests (and precludes), consider the example of arson. A burns down B's house. What A has done is interfered with B's ownership of his house as though he, A, owned it. He has treated B's house in a manner inconsistent with B's rights to his house. A redistribution from A to B would involve the building of another house or, if B

31. If the victim does not desire a redistribution, then he has made a gift.

prefers, money payments sufficient to accomplish this. The act of burning down A's house (if A has one) redistributes nothing to B.³² Such a right would be inconsistent with A's legitimate right to *his* house. It is misleading and wrong to say that by burning B's house A has given up all rights to his own house. What A has incurred is an obligation to redistribute that which was unjustly taken—he must repair B's house and A has given up any rights which may be necessary to accomplish this task. Justice, then, on the rights thesis must be redistributive, not retributive:

[C]ompensation protects just distributions, and the rights they involve, by undoing, insofar as possible, actions that disturb such distributions. Put briefly, justice is a matter of people having those things that they deserve, are entitled to, or otherwise ought to have, and compensation serves justice by preventing and undoing actions that would prevent people from having these things.³³

A restitutive approach considers neither the desert or merit of the victim, nor the desert of the criminal. Rather, a restitutive theory is concerned with the *entitlements* disturbed by the criminal act and the entitlements to restitution consequently created in the victim. It is not that the victim deserves compensation on account of some quality he may possess, but that he is entitled to restitution on account of an injury he has received at the hands of a criminal.³⁴ Since a properly understood theory of restitution is not concerned with desert, it is neither impermissibly asymmetric nor inappropriately future-oriented.

It is important to note that a restitutive theory does not measure damages by what it would take to please the victim *now*. To do so would make the criminal act of minimal, if any, relevance. Instead, we would need to consider how outraged the victim is and just what it would take to appease his anger. Or, conversely, we might consider how indifferent the victim is and might ask whether he needs to be

32. It may be argued that a right "to burn down A's house" has been distributed to B, but this cannot be since this is not the right that A appropriated. A has stolen B's house and in the process destroyed it. What he has taken is the house; this, and nothing less, is what must be returned.

33. James W. Nickel, "Justice in Compensation," *William and Mary Law Review* 18 (Winter, 1976), p. 382. I would confine the discussion to entitlements.

34. For a discussion of the distinction, see Nozick; see also Feinberg, pp. 55-87. Feinberg speaks of "desert of reparation" as a polar (two party) form of desert (pp. 74-5), but there seems to be no reason why reparations might not also be thought of as an entitlement as he employs the distinction.

appeared at all.³⁵ The same trouble would attach to considering the victim's merit or desert.

Such an approach, apart from its obvious practical difficulties, seems to be inconsistent with the proper focus of justice. What the offender is liable for is not the mental attitude—vengeful or benign—of the victim, but the harmful consequences of his criminal act. Such consequences might include mental anguish, but this form of suffering is distinct from the desire (or lack of it) for harsh revenge. While the line dividing the two categories may be fine, it is a very real one nonetheless. Moreover, this last argument strengthens the case against retribution, for some, though not all, theories of retribution are based on the need to appease or satisfy the victim and therefore could only be incidental to a redistribution of rights.

With this notion of restitutive justice in mind, it should be illuminating to consider a few of the objections most often made of it.

A prominent criticism of a restitutive theory is that it is impossible to adequately measure the appropriate restitution for a crime. A retributivist would claim that this is a failing his theory successfully avoids. Thus a murder obviously calls for the death penalty and the loss of, say, an eye naturally calls for a loss of the criminal's eye. While this apparent symmetry is attractive, it is also deceiving. Commensurability, it may be shown, actually presents as great a problem for the retributivist as it does for the restitutive.

Let us say, to stay with the example of arson, that I deliberately burn down your house. We saw that a restitutive theory calls for me to rebuild the house or have it rebuilt or, in the alternative, any other form of restitution the parties might negotiate. A retributivist would have to say that you (only) have the right to burn down my house. But what if I don't have a house? Can you compel me to build one so that you can burn it down? But what if I don't care if you burn down the house I built? Or what if my house is worth less than yours; or I don't care about mine at all; or you didn't really like the house I burned down and it didn't bother you much, but burning down my house would really bother me? A retributivist who wants to match pain with pain would have considerable difficulty with each of these examples. And one who seeks to match act for act would have similar problems with the case, for example, of a blind man who puts out the eye of another. What is its moral equivalent?

35. The so called "poor criminal/rich victim," "rich criminal/poor victim" and "rich criminal/rich victim" dilemmas are species of this type of inappropriate concern with victim satisfaction. See, e.g., Pilon, p. 351.

This line of argument does not undermine the *theoretical* case for retribution, but only its claim to *practical* superiority.³⁶ The effort to match hurt for hurt or act for act is as fraught with difficulties as the measurement of damages. Even when personal injury is considered, retributive sanctions are not easy to locate. If you are raped, must you confine your retribution to a similar rape of the offender with similar damages? Do I have to perform it myself (difficult for a woman) or must I find someone who will do it?

To highlight the problems of a retributive approach is not to suggest that a restitutive theory does not present measurement difficulties of its own. But at least a restitutive standard concerns the subjective mental state of the parties far less than retribution and, where it does, it compensates for an already existing mental state (pain and suffering) and not a prediction of future satisfaction (to the victim) or hurt (to the criminal). Nor does it force the victim to devise a retaliation of equal and possibly horrific magnitude. Rather, where, for example, a woman has been raped, justice mandates that the criminal repair his acts by paying for hospital care, psychiatric counseling, and a cash award for suffering. If the victim didn't want anything from the rapist, she could, if she wished, have the cash value of her benefits assigned to a rape crisis unit. While any theory of justice will present some problems of measurement, it would seem that those facing a restitutive theory are far fewer and less extreme.

With this in mind, let me now consider what seems to be the main obstacle to accepting a restitutive view. How can money damages, in any sense, make up for a criminal act?³⁷ If restitution is a chimera, then there can be no restitutive theory of justice. In part this problem presents itself because of an overemphasis placed on money damages by proponents of a restitutive theory (myself included). The rights invasion does not immediately call for money damages, but for reparation: for the criminal to restore as best he can what was taken from or deprived the victim. Money damages may or may not be the most appropriate form of restitution. Personal services of some kind

36. This point is made by Jeffrie G. Murphy, "Three Mistakes About Retributivism," *Analysis* 31 (April, 1971), pp. 166-69: "[T]his objection as Hegel rightly sees, is superficial. Surely the principle *jus talionis*, though requiring likeness of punishment, does not require *exact* likeness in all respects. There is no reason *in principle* (though there are *practical difficulties* [my emphasis]) against trying to specify in a general way what the costs in life and labour of certain kinds of crime might be, and how the costs of punishment might be calculated, so that retribution could be understood as preventing criminal profit." (p. 168)

37. "The past is not a blackboard, the slate cannot be wiped clean, and what is done cannot be undone." (Kaufman, p. 230)

may be another. Perhaps a variety of acts could constitute restitution, provided they serve the legitimate end of restoring the victim and not (unless wholly incidentally) some other illegitimate end, such as punishment or crime prevention.

The objection that *nothing* can repair a criminal act must be answered on several levels. Insofar as it means that the event cannot be erased, the criticism is misplaced. For if this is the thrust, then on this ground a leaky roof cannot be repaired since the leak has already occurred and cannot be "unleaked." This is not how we normally think of repairing something. At another level it might be objected that some crimes are so heinous that they are beyond repair. To this comes the two-part reply that many or even most crimes do not fall into this category, and that because those that do cannot be *completely* repaired does not mean that they cannot be repaired *at all*. Surely some restitution is more just than none.³⁸

Finally, the criticism is nonunique, not because the alternatives—utilitarianism and retribution—cannot restore the victim since this is not their goal, but because neither theory can perfectly achieve *its* objectives, whether utilitarian or retributive. Does utilitarianism perfectly deter? Does retribution perfectly balance the score? An approach need not work perfectly to be justified.

The last objection I will consider is raised by both Epstein and John Hospers. Epstein contends that only a "punishment for bad intention" rationale for criminal law can explain punishment of unsuccessful attempts to commit a crime.³⁹ If this is correct, then the status of attempts is uncertain in a restitutive theory which views intention as irrelevant to the calculation of a just sanction. "If you don't penalize [unsuccessful] attempts," argues Hospers, "more attempts will be made, and more are likely to succeed. Besides, the man who attempts to kill you deserves a penalty; some would even say he deserves as great a penalty as if he had succeeded."⁴⁰

While I have examined this issue elsewhere,⁴¹ a brief discussion

38. It is curious that while the victim of a property crime is often conceded to be entitled to restitution, a victim of a more serious crime who suffers much more is usually excluded from a restitution scheme. It would seem, to the contrary, that a more serious injury entitles the victim to more extensive restitution not less.

39. Epstein, pp. 248-53.

40. John Hospers, "Retribution: The Ethics of Punishment," *Assessing the Criminal*, p. 205.

41. Randy E. Barnett, "Restitution: A New Paradigm of Criminal Justice," as it appears in *Assessing the Criminal*, pp. 375-78. Part of my argument there, which is tentatively offered, is that while intent is immaterial to the calculation of a just sanction, it may be material at other stages of inquiry, most notably in determining justified self-defense in a legal action by the aggressor against the victim who used force to ward off an attack.

here might serve to clarify the issues. The question of attempts is interesting for if we reject punishing criminal desert, then it would seem that a criminal who intends to commit a crime, but fails in his attempt, cannot be sanctioned. Retributive theory, however, itself does not satisfactorily deal with the problem of unsuccessful attempts. For if it is desert that we punish and not the effects of a criminal act (justifying, thereby, punishment where there are no effects), why are attempts punished less severely than the crime itself? Why, for example, is attempted murder considered less serious and punished less severely than murder when the desert is presumably the same?⁴²

The real question becomes, or is all along, whether an attempt is a crime. The rights theorist must ask whether an unsuccessful attempt to violate a right violates any right? Put this way, the question appears to answer itself in the negative. What the rights theorist must decide, then, is not whether an unsuccessful attempt is a crime—it isn't—but instead when an attempt becomes a *threat* such that it is subject to the prohibition on the use or threatened use of force. Unsuccessful attempts, therefore, may only be sanctionable if they are successful threats. Such an inquiry, as it concerns what constitutes a breach within a theory of rights and not how breaches are to be dealt with when they occur, is outside a theory of restitutive justice. Such a theory posits that *any* rights violation is a harm giving rise to a right in the victim to restitution. The *application* of this theory must await the outcome of the discussion, but the restitutive theory itself is in no way affected by that outcome:

. . . for until it is settled what conduct is to be legally denounced
and discouraged we have not settled from what we are to *deter*

42. This objection is raised by Gerald Dworkin and David Blumenfeld in "Punishment for Intentions," *Mind* 75 (1966), pp. 396-404, and again by H.L.A. Hart in "Intention and Punishment," *Oxford Review* 4 (February, 1967), pp. 5-22, reprinted in *Punishment and Responsibility*, pp. 111-35. The contention of both articles is that retributive *and* utilitarian theories cannot justify different treatment of attempts. Paul J. Dietl, however, in "On Punishing Attempts," *Mind* 79 (January, 1970), pp. 130-32, shows that utilitarian analysis can withstand such a criticism: "It is perfectly conceivable that a person might think that committing a crime was worth the risk of the penalty for success but not worth undertaking at all if, should he fail, he would still be punished." (p. 130) A similar attempt by John Marshall to defend retributive theory in "Punishment for Intentions," *Mind* 80 (October, 1971), pp. 597-8, meets with considerably less success: "To the question 'Why don't we punish X as severely as Y?' [where X has failed in his attempt and Y has succeeded] it is only to be expected that the retributivist *qua* retributivist will have no answer. He will say that, since X and Y *ex hypothesi* have the same moral worth, they deserve equal punishment, but this does not preclude his also saying on the basis of some general moral theory that there might be good reasons (non-retributive but not, therefore, non-moral reasons) for treating X differently than Y." (p. 598)

people, or who are to be considered *criminals* from whom we are to exact *retribution* [or restitution], or on whom we are to wreak *vengeance*, or whom we are to *reform*.⁴³

It should now be apparent that those who defend the forcible punishment of criminals beyond restitution are hard pressed to make such a program consistent with individual rights. The significance of such a difficulty is considerable for it means that the restitutive theory of justice or, at the very least, the rejection of punishment is not only consistent with an individual rights approach, it is required by it. And if this is true many will face an uncomfortable (and some an easy) choice between individual rights on the one hand and punishment on the other—a choice that is not currently thought to be necessary.

In this article I have attempted to outline the justice of the restitutive theory I have described elsewhere. To this end it was useful to examine criticisms made by others operating within much the same philosophical context as I. The arguments presented here do little, however, to answer the criticisms made by those who do not share a rights-based approach to criminal sanctions.⁴⁴ Such a worthwhile project must, regrettably, be left to future work.

43. Hart, *Punishment and Responsibility*, p. 8. My earlier discussion of attempts cited at note 41 may be deficient for failing to make this point clear.

44. See, e.g., Franklin G. Miller, "Restitution and Punishment: A Reply to Barnett," *Ethics* 88, No. 4 (July, 1977), pp. 358-60; Stanley S. Kleinberg, "Criminal Justice and Private Enterprise," *Ethics* 90 (January, 1980) app. 270-282; and Richard Dagger, "Restitution, Punishment, and Debts to Society," *Victims, Offenders and Alternative Sanctions*, eds. Joe Hudson and Burt Galaway (Lexington, Mass: Lexington Books, 1980), pp. 3-13.