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CRIMINAL REMEDIES: RESTITUTION, PUNISHMENT, OR BOTH?

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We came in out of the state of nature, so the story goes, in order better to protect ourselves. There is safety in numbers, we said, and justice too. Thus we gave up (in most cases) our Lockean rights to self-enforcement and asked the state to do it for us. Some would say we erred, and they have an impressive set of statistics on their side. For as crime continues at its present alarming rate, the ability of the state to protect us becomes ever more suspect. Indeed, upon viewing these figures one is tempted to follow some of these critics back to the state of nature, at least to some non-Hobbesian version. A few would add that we haven't far to go.

But it is not the state's ability alone that these critics question. There is also the rather more fundamental issue of just what the state's aim is in connection with the problem of crime. For it was not only the need for protection that brought us all together. (Some states indeed have devised means more than adequate to protect citizen from citizen, and I have in mind here more than is implied by the observation that where there is little to steal there will be little stealing.) There was also the matter of justice, which we sought no less to secure. What these critics are saying is that the state is failing not only in its protective function but in its charge to secure justice between individuals as well. Thus they point increasingly to the forgotten man in the criminal exchange—the victim—and remind us that it was in the name of his rights that we set up the state in the first place.

Nowhere, perhaps, have these points been drawn out more sharply than in a recent article in these pages by Randy E. Barnett, "Restitution: A New Paradigm of Criminal Justice."[1] Against a Kuhnian background, Barnett outlines the crisis in what he calls our old paradigm of criminal justice—punishment—and goes on to argue (largely, if only implicitly, along nonconsequentialist lines) that this crisis can be resolved by the adoption of a new paradigm—restitution. He calls for a fundamental shift

1. *Ethics* 87, no. 4 (July 1977): 279–301; subsequent page references are noted in the text; all quoted emphases are in the original.

in our view of criminal justice, away from punishing criminals, toward compensating victims. Crime should be seen, he argues, "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. . . . Where we once saw an offense against society, we now see an offense against an individual victim. . . . *The armed robber did not rob society; he robbed the victim*. His debt, therefore, is not to society; it is to the victim" (pp. 287–88). Quite rightly, I believe, Barnett eschews those proposals that would have the state compensate victims of crime; for the state, and the third parties who constitute it, did not commit the crime. The lines describing this new paradigm are thus drawn by the individual rights and obligations at issue: "Restitution 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" (p. 291). That debt is settled not through punishment at the hands of the state but through the criminal's compensating the victim. "No longer would the criminal deliberately be made to suffer for his mistake. Making good that mistake is all that would be required" (p. 289).

Much of Barnett's essay is concerned with practical suggestions toward implementing this new paradigm. While the difficulties in this connection are considerable, as a moment's reflection will suggest, they are perhaps less intractable than is ordinarily thought. My concern here, however, will be not with these but with the more theoretical aspects of Barnett's argument. In particular, I want first to question how thoroughgoing this "paradigm shift" in fact is. Second, I want to examine whether we can do away with punishment, as Barnett suggests—indeed, whether his proposal captures the whole of what is at issue in the criminal transaction. Finally, after setting forth a more complete account of that transaction, I will develop a brief argument in support of what I take to be the proper remedy for crime—restitution *and* punishment.

Now the first thing to be noticed about Barnett's thesis is that it does in fact shift the emphasis. By concentrating on the historical event at issue—the criminal transaction—Barnett focuses our attention upon the parties directly involved, upon the rights violated and the obligations now owing. There is much to be said for this shift of emphasis, for viewing crime as an offense not against the state but against another individual. (This may not be the whole story with crime, as I will mention at the end.) It does indeed seem odd that if I hit you with my automobile I am (prima facie, and in most states) required to make you whole again, whereas if I hit you with a club or with a bullet from my gun I go to jail, leaving you to fend for yourself. If I am required to return you to the prior status quo in the former case, then a fortiori I ought to be required to do so when I intentionally harm you.

The truth of the matter, of course, is that under our present system I am required to make you whole again in *both* cases. For in the latter case two

legal proceedings are possible: just as the state may initiate criminal proceedings to determine whether punishment is called for, so the victim may initiate civil proceedings against the criminal to recover his losses.[2] The above anomaly is owing to practical reasons alone: most criminals are judgment-proof, or certainly will be while in jail; hence it is usually pointless to initiate a civil suit.

What Barnett is calling for, then, is perhaps not as radical as he supposes. He is asking us to focus our attention upon the private relationship brought into being by the criminal act, provisions for the rectification of which we already have, however impracticable they may be in most cases. It is probably more correct, then, to view his essay as calling not for a new paradigm but for the refurbishing of an extant paradigm—our system of civil justice—by the implementation of the many practical suggestions he makes toward handling the judgment-proof problem.

I say "probably" because the issue thus far is one of emphasis only (as is often the case within a Kuhnian framework). What complicates the matter—and now we come to my second and the more important concern—is Barnett's call for the elimination of punishment. In view of this, Barnett is not asking us simply to shift our attention to the civil remedy; for all intents and purposes he is calling as well for the elimination of the criminal proceeding. (Whether he would determine the civil remedy through a civil or a criminal proceeding is never made clear.) Indeed, he explicitly rejects the *mens rea* element as material to determining sanctions (p. 300, n. 59). Moreover, he explicitly rejects the distinction between crime and tort, claiming that on his view the former collapses into the latter (p. 299). All of which raises the question, Why call restitution "a new paradigm of *criminal* justice"? We have here a paradigm of civil, not of criminal justice. For on Barnett's view it is incidental that a crime rather than a tort gives rise to the legal proceeding.

The more important question, however, concerns whether this reduction is justified. To be sure, Barnett has correctly shifted our focus, for 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? Are we really to treat, by way of remedy, my accidentally hitting you with my automobile and my intentionally hitting

2. Thus the purposes of the two proceedings are different: the criminal court concerns itself with punishment proper, the civil court with the private dispute between the parties and hence with the question of whether the criminal should compensate the victim. (I ignore the complication of punitive civil damages.) Each of these is a sanction, but the latter is not properly a punishment, however onerous it may be in the subjective view of the criminal (or tort-feasor). This is a frequently misunderstood distinction (see, e.g., Roger Pilon, "Justice and No-Fault Insurance," *Personalist* 57, no. 1 [Winter 1976]: 84–85). Barnett, e.g., when considering the justification of punishment, asks "whether the 'virtue of some punishment' justifies the *forceful* imposition of unpleasantness on a *rights violator* . . . " (p. 283). Civil sanctions, no less than criminal, ordinarily involve "the forceful imposition of unpleasantness."

you with a club as acts of the same kind? Is the *mens rea* element to be allowed *no* place in the calculation? Even if we include in the compensation due the victim all that Barnett believes we should—special damages, including the costs of apprehension, trial, and legal fees for both sides, and general damages, including pain and suffering (p. 298)[3]—there still remains a crucial element that these considerations do not touch. For thus far the compensation is identical with that ideally due the victim in a simple civil action.

Nowhere are these misgivings and this missing element brought out more sharply—if misleadingly, about which more in a moment—than in cases involving wealthy principals. Barnett considers and then elides but one of the variations, that of the wealthy criminal (p. 297). There is also the case of the wealthy victim and, perhaps of most interest, the case in which both the criminal and the victim are wealthy. However uncommon these three variations may be in the larger world of criminal activity (but perhaps they are not so uncommon), they are of interest because they bring clearly into focus the *mens rea* element omitted from Barnett's account, an element present in *all* criminal transactions but captured most poignantly here. What, really, does the wealthy criminal care about having to compensate his victim? Or the wealthy victim about receiving compensation? If a rich man rapes a rich woman, are we really to suppose that monetary damages will restore the status quo, will satisfy the claims of justice? A wealthy child molester will treat compensation simply as the price of pleasure! And what of the terrorist who murders, knowing that his wealthy backer will settle the account? The reduction of criminal wrongs to civil wrongs, in short, or at least the addressing of criminal wrongs with civil remedies, bespeaks an all too primitive view of what in fact is at issue in the matter of crime.

For all their heuristic value, however, we must not let examples such as these confuse the issue. It is not, as they may have suggested, that the requirement to compensate the victim does not make the criminal suffer if he is wealthy (as it seems to when he is not wealthy), for that would conflate the different purposes of punishment and compensation: thus, raising the compensation to fit the criminal will not only continue to miss the point but will produce this conflation as well.[4] Rather, it is simply that the civil remedy by itself is altogether inadequate in the case of criminal acts. For the element missing from the mere tort but present in the criminal act is the guilty mind. The criminal has not simply harmed you. *He has affronted your*

3. Notice that some of these particulars suggest that Barnett is working implicitly within an anarchic or state-of-nature framework, about which I will have more to say below.

4. Barnett correctly rejects this proposal, both on grounds of equal justice and because the function of compensation is restitution of the victim, not punishment of the criminal. There are also rather persuasive consequentialist grounds for not raising the compensation to fit the criminal, for compensation that leaves the victim better off tends to encourage fraud. Imagine the plight of wealthy men if the going rate for rape, after a certain threshold, were one-half a man's total worth: philandering would surely be by contract only!

dignity. He has *intentionally* used you, against your will, for his own ends. He cannot simply pay damages as though his action were accidental or unintentional. How would this right the wrong? Using even Barnett's criterion for determining the obligation now owing, how would compensation make the victim whole again? For compensation does not reach the whole of what is involved—it does not reach the *mens rea* element. There is simply no amount of money that will rectify certain kinds of wrongs.[5] The criminal act and the mere tort are of altogether different magnitudes; they are different categories of action, calling for different remedies. Indeed, the criminal act calls not only for compensation but for punishment as well.

It will of course be necessary to argue for this final claim, for there will always be those who do not see what should be intuitive. This brings me to my third and final consideration. Now I know that dignity is a difficult idea to come to grips with. It is offended differently in different people. I recognize also that there are even some who believe that modern science has taken us beyond dignity, if not freedom. I cannot think that Barnett believes this, however, for the rights that find so central a place in his account are themselves grounded in and derived from notions of human dignity.[6] A dignity rich enough to generate rights must surely figure in the remedy for violations of those rights.

In search of an appropriate remedy, then, is it possible to build upon the shift in focus that Barnett has brought about so that the relatively richer account of the criminal transaction set forth above may be accommodated? I believe it is, but it will require a closer look at the rights and obligations at issue. I will conclude with an argument for punishment not unlike the classical arguments of Kant, Hegel, and others. But unlike them I want to develop that argument through a tort remedy of the kind that Barnett has set forth, for with him I believe it important that we look first to compensating victims.

Before beginning, however, we need to be clear about the context within which the argument develops. Although Barnett speaks throughout about rights and obligations, he never makes explicit whether it is moral or legal rights and obligations that he has in mind; I shall assume, therefore, that he is speaking of the moral rights of the victim and the moral obligations of the criminal, both of which might be or become legal rights and obligations in some state. Intimately related to this ambiguity is the problem that arises from his never making clear whether this system of restitution is to operate within the context of our extant state or whether it

5. As Kant has put the point, "In the realm of ends everything has either a *price* or a *dignity*. Whatever has a price can be replaced by something else as its equivalent; on the other hand, whatever is above all price, and therefore admits of no equivalent, has a dignity" (*Foundations of the Metaphysics of Morals,* trans. L. W. Beck [Indianapolis: Bobbs-Merrill, 1959], p. 53).

6. For a derivation of those rights, built upon the moral foundations set forth in recent years by Alan Gewirth, see Roger Pilon, "A Theory of Rights: Toward Limited Government" (Ph. D. diss., University of Chicago, 1978), chap. 3.

is designed instead for some anarcho-capitalist state or state of nature; passing comments, together with certain citations, suggest the latter: he speaks, for example, of privately run employment agencies, which would facilitate criminal reparations (p. 289), of insurance companies apprehending criminals (p. 291), of enforcers (p. 300), and of enforcement agencies (p. 301). In order to build upon his argument, then, let me proceed from within this state-of-nature theory, setting aside both the practical and moral problems of enforcement in order better to be clear about what rights and obligations there are, which might be enforced whatever the arrangements for doing so.[7]

With this context in mind, then, we can return to the problem of an appropriate remedy.[8] The criminal act has created rights in the victim; in the criminal it has both alienated rights and created obligations correlative to the newly created rights of the victim. But just what are those newly created rights and obligations? In the case of simple torts, for example, why do we say that the victim has a right to be made whole again, the tort-feasor an obligation to bring that about? How, that is, do we establish the object or content of the right and hence the correlative obligation?

To answer these questions we have to distinguish first between the generic and specific issues they raise. The above-named right-object—"to be made whole again"—is stated in very general or generic terms, as is the correlative obligation-object—"to make the victim whole again." By this I mean that these rights and obligations—thus formulated—are characteristic of all tort remedies,[9] whatever particular or specific content these rights and obligations take on (which is of course a contingent matter that will vary from case to case). Underlying this generic remedy, as has long been recognized, is a principle of equality:[10] the court assumes a prior equality between the parties, a status quo that was disturbed (or so the victim attempts to show) by the act of the tort-feasor. A causal criterion thus serves to distinguish admissible from inadmissible losses.[11] The victim attempts to show the causal connection between the tort-feasor's act and his own losses:

7. Thus I am assuming, with Nozick (and probably with Barnett), that no institutional rights (e.g., rights of the state) can be justified except as they are grounded first in individuals; see Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 6.

8. The sketch that follows is developed more fully in my doctoral dissertation.

9. I am assuming a simple or ideal tort model and ignoring complications raised by such doctrines as comparative negligence.

10. See, e.g., Aristotle's discussion in the *Nicomachean Ethics* 5.4; and the relevant commentary of W. D. Ross, *Ethica Nicomachea* (Oxford: Oxford University Press, 1925), unpaginated.

11. I would thus argue that a strict and not a negligence standard of tort liability is morally justified. For a detailed treatment of this issue, see Richard A. Epstein, "Pleadings and Presumptions," *University of Chicago Law Review* 40 (1973): 556–82; "A Theory of Strict Liability," *Journal of Legal Studies* 2 (1973): 151–204; "Defenses and Subsequent Pleas in a System of Strict Liability," *Journal of Legal Studies* 3 (1974): 165–215; and "Intentional Harms," *Journal of Legal Studies* 4 (1975): 391–442.

all and only losses brought about by that act are admissible and hence enter into rights of recovery.

In its bare form, then, this tort remedy is ordinarily unobjectionable. At the least, and setting aside difficulties raised by de facto inequality of the parties, it has served for centuries as the framework for the common law of torts. Moreover, these rights and obligations and the implicit principle of equality can be shown to be justified in that they flow from even more general rights and obligations which in turn are derivable from fundamental moral principles.[12]

In order to answer the above questions adequately, however, we have to distinguish two further though closely related elements that underlie this generic remedy, elements that do raise difficulties: they are the means appropriate to carrying out the remedy, to rectifying the loss—that is, the form the tort-feasor's obligation is to take—and the criterion for assigning value to specific losses. Because it is often impossible practically to render an exact quid pro quo for losses to person or property, the form the tort-feasor's obligation usually takes is that of monetary damages. Thus the second element—the criterion of value for losses—though distinct, figures intimately in the form of the remedy. The questions these elements raise, however, are these: Can this form of remedy be justified, and if so, how are the losses, especially the less tangible ones, to be valued? I do not (nor do I know that anyone does) have an adequate answer to the second question. But I want to set forth a very brief answer to the first, after which I will extrapolate to the criminal act.

When we say that monetary damages will rectify a tort loss, we cannot reach that conclusion with an eye primarily or even at all to the losses themselves. For while this method would help us arrive at the value of the losses—though in a very rough way, especially in the case of general damages—it would do so only after we had settled upon the form of the remedy. That form of remedy must be determined instead with an eye toward the most relevant factor, namely, that which it is a remedy for—the wrongful *action*. The form of the remedy, that is, should reflect as much as possible—should be equal to—that which brings about the need for a remedy in the first place. Thus will the function of rectification be served.

Now torts are ordinarily accidental wrongdoings; they are unintentional actions. It would therefore be quite impossible, by way of equal remedy, to have the victim perform a similar action on the tort-feasor! Not only would this be a dubious "remedy," but the victim cannot perform the same action *deliberately,* for that would hardly be the same action. The original act is "wrongful," however, only in the sense that it causes wrongs or harms; ordinarily it is not a morally wrong act. These "wrongs" and hence the wrongful action too are rectified by undoing them. Given that

12. I have in mind Gewirth's Principle of Generic Consistency. See, e.g., Alan Gewirth, "The 'Is-Ought' Problem Resolved," *Proceedings and Addresses of the American Philosophical Association* 47 (1974): 34–61.

they often cannot be undone literally, the best we can do is "repair" them; and this we do by requiring the tort-feasor to provide the wherewithal for repair—monetary damages.

So much for the positive argument for this form of tort remedy. There is also a negative argument. Sanctions may be either positive or negative, that is, valued or disvalued by the person assigned them; in the case of negative sanctions, we usually think of them as falling roughly into two categories, compensation and punishment (proper). Would punishment be an appropriate form for the tort remedy to take? Ordinarily the answer is no. For we punish for some moral offense, some action that involves a guilty mind. In the case of torts there is usually no such element. Thus if the form of the remedy is to reflect as much as possible the action to be remedied, punishment is ordinarily uncalled for—indeed, tort wrongs usually create no rights in their victims to punish. If punishment is unjustified, then, that leaves only the other form of sanction—compensation.[13]

With this we can now return to the criminal act. Here we have a more complex situation, for the criminal act includes both the "wrongs" of the tort act and the *morally* wrong aspect—the guilty mind. Again, if the form a remedy takes is to reflect as much as possible the act that calls for remedy, then the criminal remedy should reflect the complexity of the criminal act: it should include both the monetary rectification of these harms, as in torts, as well as a further element aimed specifically at this moral wrong.

Once again, we look at the original act to determine what form this further element of the remedy should take. That act involved a violation of the victim's dignity; the criminal intentionally used the victim for his own ends, and against the victim's will. In so doing, the criminal alienated his own right against being similarly treated by the victim (or by anyone else acting on behalf of the victim), just as the tort-feasor alienates his right to that amount of his property necessary to right the wrongs he has caused.[14] Notice that here, the problem of reflecting in the form of the remedy the mental character of the original act does not arise as it does in torts, for here we have an intentional wrong, capable of being mirrored in the remedy. The original act thus creates a right in the victim (or his surrogate)

13. It would be theoretically neater if there were pure tort actions and pure criminal actions, but there are not. Hence the qualifications in this paragraph. In truth, tort actions—when negligent, grossly negligent, and reckless—seem to shade imperceptibly into criminal actions and thus may generate the right to punish in their victims, along the lines developed below. For the claim that harmful consequences were unintended becomes increasingly less plausible as actions become increasingly risky. Reckless behavior, that is, may exhibit the same disregard for the integrity of others as does criminal behavior. (Notice, however, that on a theory of strict liability, unlike one with a negligence standard, this question of intentions is in most cases irrelevant to determining civil liability. It enters, rather, when the question of punishment arises.)

14. See Locke's *Second Treatise on Government,* § 172, for alienation (or forfeiture); § 7, for the rights of surrogates.

to use the criminal as he himself was used.[15] Only so will the parties be treated as equals. For only so will the *character* of the original act be reflected in the remedy. Money damages simply do not do this. It is the *using* of one person by another—this affront to the victim's dignity or integrity—that must be captured in the criminal remedy. Thus the victim's treatment of the criminal is equal in character to the treatment he himself suffered. (Again, I leave open the question of what specifically constitutes equal treatment, just as I left open the criterion for measuring tort losses. These questions, especially the latter, involve a theory of value, which is beyond my present scope.)

It should be noticed how central the notion of equality is to this argument. In the case of torts the remedy (ideally) is exactly commensurate with the wrongful act. Similarly, in the case of crimes there are no elements in the remedy that are not found in the original act. Nor are there elements omitted from the remedy, as in Barnett's account.

Now it may be asked whether it is possible to include the element peculiar to the criminal act—the *mens rea* element and the corresponding affront to the dignity of the victim—in the account of damages such that it might be viewed as but one more, one additional compensable harm. This amounts to asking whether the form of the remedy—indeed, whether punishment—need always reflect the character of the original criminal act. A Kantian would undoubtedly say that it must, that the acceptance of money damages for an affront to dignity is impermissible. I should want to argue, however, that the decision as to what form the punishment takes—or indeed whether to punish at all—rests with the victim (or his surrogate).[16] For again, the criminal act, no less than the tort act, creates a right in the victim, though a much more extensive right than is the case with torts. When we have rights we have options. We may choose to exercise our rights or we may choose not to, but the choice is ours.[17] Just as the tort victim is not obligated to sue for damages—though he has a right to sue—so the criminal victim is not obligated to select any particular form of punishment or indeed to punish at all—though he has a right to (within the substantive constraints imposed by the original act, which again I leave open). The important point to note, then, is that the option rests with the victim—just as the original act was performed at the will of the criminal. If he wants to exchange an affront to his dignity for money damages, that is his business, for the right is his to exercise as he thinks best. Thus his use of

15. Hohfeld, in his more precise system, would perhaps call this a "power" with its correlative "no-right."

16. Because I am working here within the context of state-of-nature theory, I have not considered the question of whether the public has an interest in punishing the criminal, or even a right to do so. If there is such an interest—and I believe there is, though I will not argue for it here—then I will have to adjust the argument above when I move from state-of-nature to state theory; see Nozick, pp. 65 ff.

17. I ignore the case in which a right and an obligation refer to the same act, when what we have a right to do we are also obligated to do.

the criminal—more correctly, his *right* to use the criminal—is preserved, whatever form it takes (or even if he elects to let the criminal go unpunished).

In conclusion, then, I have attempted to show how restitution, while necessary, is not alone sufficient by way of remedy for criminal actions. I have sketched an argument aimed at showing that both restitution *and* punishment are justified, even in a state of nature. For both can be derived from the moral rights of individuals alone. In so arguing I have said nothing about the practical or theoretical difficulties involved in individuals' punishing (or seeking restitution from) other individuals, which strike me as immense. Nor have I discussed enforcement agencies, which raise substantial problems of their own. Nor have I said much, in developing this argument, about the functions of states—for example, about whether the need for punishment can be determined through a civil proceeding and hence whether punishment can be viewed as a civil sanction—or about remedies for statutory violations. I leave open whether purely regulatory laws are necessary (I believe some are); but if they are, there may be crimes with no victims, or with victims insufficiently affected on a particular occasion to bring charges. Here the "public interest" intrudes, raising fascinating problems as it does.[18] Each of these issues and more remain to be explored as part of a complete account of criminal remedies.

18. I am alluding here not to "victimless crimes," such as gambling or prostitution, but to those crimes that amount to violations of purely regulatory laws, e.g., driving rules. Whereas regulatory laws are often aimed at controlling noncontractual behavior that is risky and therefore potentially harmful to others, the same cannot be said for laws relating to victimless crimes. Now if Barnett does in fact wish to argue from some anarcho-capitalist state—where everything, including roads, is privately owned—then perhaps these violations could be treated as breaches of contract. But quite apart from the problems raised by there being no public domain (see, e.g., Nozick, p. 55, n. 1), unless Barnett wants to live in a world in which all actions are allowed, including actions very risky to others, provided only that compensation is paid if harm results, then there seems to be some room for purely regulatory rules; if there is, then there is a need for sanctions for violations of those rules, violations that need not directly involve victims.