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Restitution, Punishment, and Debts to Society

Richard Dagger

Of the many developments in the area of criminal justice over the last twenty years or so, the rediscovery of the victim may well be the most heartening. This rediscovery has produced both a new field of study, victimology, and a number of interesting programs and proposals that aim to redress the injuries suffered by the victims of crime. To this point, however, the rediscovery of the victim has not worked a fundamental transformation of our system of criminal justice. The question I wish to address here is whether it should do so.

This question is prompted largely by Randy Barnett's provocative essay, "Restitution: A New Paradigm of Criminal Justice."¹ In that essay, Barnett proposes that we abandon our current paradigm of criminal justice, "the paradigm of punishment," and replace it with one that takes restitution to victims, rather than punishment of criminals, as its central goal. On this view, crime is "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."² As Barnett sees it, then, we serve justice not by punishing offenders, but by requiring them to make restitution to their victims.

While the basic idea is familiar, there are at least two respects in which Barnett's proposal differs from—and is more radical than—most other schemes involving restitution. First, unlike such advocates of punitive restitution as Stephen Schafer, Barnett does not wish to use restitution either as a supplement to or as a form of punishment. Restitution will carry no punitive intent whatever in his scheme, which he calls "pure restitution," and it will completely supplant punishment.³ Barnett also differs from Schafer and most others when he argues that the criminal owes no debt to society. "Where we once saw an offense against society," he remarks, "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."⁴ If the offender can make good the losses of his victim(s) as soon as his guilt is determined and damages are assessed, then he should be allowed to do so. And that, according to Barnett, should be the end of the matter.

What Barnett is urging, in short, is a radical departure from the theory of restitution as well as a radical transformation of our system of criminal justice. Neither of these moves is warranted. In what follows, I shall argue that restitution is quite properly regarded as a form of punishment and that criminals do indeed incur debts to society when they commit their crimes; which is to say that I shall defend the claims of *punitive* against those of *pure* restitution.

I shall also have something to say, by way of a conclusion, about the forms punitive restitution might take.

Crimes and Victims

Do criminals owe a debt to society? This question is not easily answered, for how we answer it depends in large part on how we answer more fundamental questions about the nature of crime, society, and justice. We may begin, nevertheless, with some relatively straightforward considerations that strongly suggest that criminals do indeed owe a debt to society.

Consider first those cases that the advocates of pure restitution enlist in support of their position. No one doubts that in such crimes as murder, rape, and robbery there is, as Barnett says, "an offense by one individual against the rights of another." But is this all there is to it? Even in these cases, the person who suffers the direct attack or loss is seldom, if ever, the sole victim of the crime. If my neighbor's house is burgled, for instance, I am also likely to suffer the effects of the crime, whether it be through the cost of fitting my house with better locks or through anxiety and loss of sleep. In these ways, and in others, criminal offenses make indirect victims of most of us.

To complicate matters further, we must also recognize that indirect victims often cannot trace the harm done them to any particular offense or offender. This point may best be made by noting, with Alan Wertheimer, that crime imposes three distinct kinds of costs on its indirect victims.⁵ There are, first, the *avoidance costs* that are incurred by anyone who takes steps to minimize his chances of becoming the direct victim of crime. Installing locks and burglar alarms, avoiding unsafe areas, and paying for police protection, whether private or public, all fall into this category. Indirect victims may also have to pay *insurance costs*—costs that increase as the rate of crime in an area increases. And, finally, "as crime gives rise to fear, apprehension, insecurity, and social divisiveness," indirect victims are forced to bear the *attitudinal costs* of crime.⁶ All these costs are familiar, perhaps too familiar, and I suspect that we would have to search long and hard to find someone in our society who has never paid any of them. It is clear, moreover, that none of these costs need be linked to specific criminal acts. The mere fact that the crime rate in my vicinity is mounting may be sufficient in itself to impose higher insurance costs on me, regardless of my own luck in escaping the deeds of criminals; and my discovery of this fact is likely to lead to increased attitudinal and avoidance costs.

What this suggests, then, is that in one sense criminals do indeed owe a debt to society. For if criminals are indebted to their victims, and if their victims include all those who suffer as a result of criminal activity, directly and indirectly, then we may reasonably conclude that criminals are in the debt of a great many people whom it is impossible to identify with any precision. And this is to say that they owe a debt to society.

This conclusion is also supported by another set of considerations relating to a second sort of crime: crimes without specific victims. The most obvious cases of this sort are the so-called victimless crimes, such as prostitution, gambling, and trade in pornography. Because there is considerable controversy about whether these really are, or ought to be, crimes, I shall refer here only to other noncontroversial instances of crimes without specific victims. These may be classified as crimes of attempt, endangerment, and unfairness.

One of the paradoxes of our criminal law is that an attempt to commit a crime is itself a crime.⁷ We could dissolve the paradox by making such attempts legal, of course, but I doubt that many would favor this course of action. Yet if we persist in regarding unsuccessful attempts to inflict criminal injury as crimes, can we then hold to the view that for every crime there is (at least) one specific, identifiable victim? If there are crimes without victims, in other words, mustn't the crime be against society? And if this is true, then mustn't the criminal's debt be to society?

Barnett responds to this challenge in the following fashion. He claims, first, that "most unsuccessful attempts worthy of sanction" would still count as crimes in a system of pure restitution because most of these attempts result in some actual harm to somebody. For example, someone who botches an attempt at murder is likely to commit assault and battery in the process, and the culprit should be held responsible for the harm he actually inflicts rather than for what he intended to do. If no physical harm is suffered or no property right is violated as a consequence of the attempt, then it is nearly always possible to discover another kind of actual harm, "such as the creation of fear on the part of the intended victim or bystanders," to charge against the offender. All that remains are those attempts that are both unsuccessful and undiscovered; and because no one is harmed in these cases, Barnett maintains that there should be no criminal liability.⁸

Despite its obvious ingenuity, this response is unsatisfactory on at least two grounds. The first of these is that Barnett takes the position that the discovery of an unsuccessful attempt at crime, and not the attempt itself, is what makes the attempt criminal. This is plainly unacceptable. To see this, we need only imagine two unsuccessful attempts at murder that are identical in every respect but one: the first attempt is discovered while the second is not. Were we to accept Barnett's account, we would find ourselves committed to the view that only the first of these attempts is a crime—and this is absurd. We should also note, secondly, that Barnett is forced to cast his net wide in order to find victims of unsuccessful criminal attempts. Yet when he does this, as he does when he counts frightened bystanders as victims, he provides no reason for not opening his net further still to include everyone adversely affected by crime as a victim. Surely one need not be a witness or a bystander to suffer in some way from even unsuccessfully attempted crimes; successful or not, these attempts bring about avoidance and attitudinal costs. Once we open the net wide, however, we are led quickly to the same conclusion we reached with

regard to crimes that involve specific victims: criminals are indebted to a great many people who suffer indirectly as a result of their deeds. And in the case of crimes of attempt, this leads again to the further conclusion that criminals owe a debt to society.

With crimes of endangerment, as with crimes of attempt, there is no apparent victim. In crimes of endangerment, moreover, there is not even an intended victim. Here I have in mind such offenses as driving while intoxicated, carrying a concealed weapon, and exploding fireworks without a permit.⁹ None of these activities is necessarily harmful, although each poses an indeterminate threat of harm. We still regard them as crimes, though, and we do not want the police to wait until a drunken driver smashes into a car or runs down a pedestrian before they arrest him. After all, the law is supposed to prevent harm from being done as well as to punish those who do it. But if the drunken driver has the good fortune to injure no one, then does he owe a debt to anyone? The answer here, I suggest, is that his debt is to no particular person(s) but to society in general. For those who drive while intoxicated endanger all of us, either directly (through damage to our persons and property) or indirectly (through avoidance, insurance, and attitudinal costs). Only those who fail to take account of these crimes can deny that criminals owe a debt to society.

The last subcategory of crimes without specific victims is that in which one person illegally and unfairly takes advantage of the cooperation of others. Examples here include evading taxes, dodging the draft (when there is one to dodge), using more than one's fair share of water or fuel when these commodities are being rationed, and littering public areas. In virtually all instances, these crimes of unfairness harm no identifiable person. If I were somehow to deprive the government of the portion of my income it claims in taxes, for instance, I doubt that anyone could reasonably contend that I had harmed him personally. What I pay in taxes is insignificant from a national point of view, if not from mine, and no government program will suffer for want of my tax support. Yet we consider tax evasion a crime. To understand fully why it is a crime will require the investigation into the nature of crime, society, and justice mentioned earlier. For the moment, we may simply say that tax evasion is a crime, *ceteris paribus*, because the man who cheats on his taxes is (1) taking unfair advantage of those who bear their share of the tax burden and (2) engaging in conduct that, if allowed to spread, may bring ruin to the society. In crimes of unfairness, then, the victim again is society itself.

Thus in every case we reach the same conclusion: criminals do indeed owe a debt to society. This is true, furthermore, regardless of whether they owe a debt to the specific victims of their crimes, for every crime is in some way a crime against society. It may even be said that all crimes are crimes of unfairness. This claim, odd as it may seem, follows the concept of society that underlies the rule of law—the concept of society as a cooperative venture secured by coercion.¹⁰

To define society in this way is to draw attention to the fact that the individual members of society enjoy a number of benefits that are available only because of the cooperation of their fellows. The social order enables us to work together for common purposes and to pursue in peace our private interests. But we can do these things only when others, through their cooperation, help to maintain the order. This has two important implications. The first is that rules become necessary, for without them we cannot know what the required acts of cooperation are. That is, we need to know how we are to cooperate, and rules provide this guidance. The second implication is that those who enjoy the benefits of society owe their own cooperation to the other members of society. Because the cooperation of others makes these benefits available to me, fairness demands that I help provide these benefits for them by cooperating in turn. Unless there are extenuating circumstances, I owe it to the others to obey the rules; if I fail to do so, I unfairly take advantage of them.

The problem, of course, is that people do not always act fairly, especially when they may profit from unfair actions. When the numbers of those who act unfairly is sufficiently large, moreover, the social order itself is threatened. To defend ourselves against this threat, we rely on the institution of punishment to provide a guarantee that “those who would voluntarily obey shall not be sacrificed to those who would not.”¹¹ Which is to say that social cooperation is secured by coercion.

When criminals seek to enjoy the benefits of the social order without bearing its burdens—such as compliance with the law—they take advantage of all the law-abiding members of society. This is why all crimes are crimes against society; this is also why we are justified, *ceteris paribus*, in punishing those who break the law. Once we recognize this, however, we must also recognize that restitution to the particular victim(s) of a crime will not restore the balance between benefits and burdens that justice requires. We must therefore go beyond pure restitution to punishment. If restitution has a significant part to play in a legal system, it is because restitution can serve as a form of punishment—a form that is in some ways superior to more common punitive measures.

Restitution and Punishment

Although philosophers disagree considerably as to when, why, and whether we should punish, there is nonetheless a general agreement as to what punishment is. In keeping with this widely accepted definition, the standard case of punishment involves the following five elements.

1. It must involve pain or other consequences normally considered unpleasant.
2. It must be for an offense against legal rules.

3. It must be of an actual or supposed offender for his offense.
4. It must be intentionally administered by human beings other than the offender.
5. It must be imposed and administered by an authority constituted by a legal system against which the offense is committed.¹²

Nothing in this definition excludes restitution. Only the first of the five elements presents any problem at all, and whether it does so depends on the nature and extent of the restitution we demand from the offender. It might be argued, in other words, that wrongdoers will find restitution neither painful nor unpleasant if they are simply forced to return or repay what they have taken. To avoid this problem, we can do one or more of three things. First, we can exact more from the offender than he actually took. This assumes that some rough scale of damages can be developed. There are no doubt difficulties involved developing such a scale, but all forms of punishment face this particular problem. It seems reasonable to assume, anyway, that a thief who is made to pay two hundred dollars to the person from whom he stole one hundred dollars is likely to regard this as an unpleasant consequence of his theft. Second, we can force offenders to make restitution in ways that they might ordinarily regard as unpleasant, such as laboring for their victims. Something of this sort is sometimes suggested as a way of exacting restitution from wealthy people who might otherwise look upon monetary restitution as the price of their criminal pleasures.¹³ Or, third, we might simply use restitution as a supplement to other forms of punishment that are clearly painful. No matter which tactic we adopt, though, it is evident that restitution can be made painful—and this is all we need to show that it fits the definition of punishment.

The case for restitution as a form of punishment becomes even stronger when we examine the purposes commonly attributed to punishment. Here we may distinguish four aims, all of which restitution may help to achieve. With *retribution*, the key idea is that punishment is due to the wrongdoer because it is the only way in which the scales of justice may be set right. Any means that will accomplish this will satisfy the demands of retribution, and restitution may well be one of these means. Certainly the victims of crime may think of restitution as their due, and justice demands that we give everyone his due.¹⁴

A second aim of punishment is to express society's disapproval or condemnation of certain deeds—what Joel Feinberg calls the *expressive function* of punishment.¹⁵ Here, too, restitution may serve the purpose, especially if it is accompanied by publicity. Disapproval can be expressed in a number of ways—ostracism, imprisonment, and flogging among them—and how punishment is inflicted matters less in this case than that it is inflicted. For restitution to express social condemnation, all that is necessary is that both the offender and other members of society recognize that restitution is required only of those who take unfair advantage of others by breaking the law.

Another widely acknowledged purpose of punishment is the *reformation* of the criminal. Here the case for restitution is perhaps strongest. That is partly because the traditional modes of punishment seem rather limited in their capacity to reform. Imprisonment, for instance, may give the wrongdoer ample time to reflect on the wrong he has done, but it may also leave him more bitter, more violent, and more expert at crime than before. In contrast, as a number of commentators have emphasized, restitution is especially attractive in this respect because it requires the criminal to take steps toward his own reform. In Stephen Schafer's words, restitution "is something an offender does, not something done for him or to him, and as it requires effort on his part, it may be especially useful in strengthening his feelings of responsibility."¹⁶

Few writers on the subject now regard *deterrence* as the sole aim of punishment, but virtually everyone includes it as an aim. We pursue this aim by establishing penalties for those who commit crimes, with the penalties being harsh enough—and the prospect of their being imposed clear enough—to outweigh the potential gains from criminal activity. That, at least, is the intent. Here again the precise form of the punishment does not matter; what counts is its severity and certainty, and there is no reason to expect that the prospect of enforced restitution, if severe and certain enough, will be any less effective as a deterrent than the prospect of imprisonment.¹⁷

In all four of these cases, in sum, there is reason to believe that restitution may help to accomplish what we expect punishment to accomplish. From this, we may safely conclude that restitution can indeed be a form of punishment. What I should now like to show is that it is in some ways more promising than other forms. To see why this is so, we must look at restitution from the points of view of the offender, the victim, and society.

Proponents of restitutionary schemes sometimes find it difficult to decide whose interests restitution is supposed to serve, the victim's or the offender's. The proper answer, I believe, is that it should serve both of them and society as well. Requiring the offender to make restitution to the victim is normally of greater benefit to the victim than the mere confinement of the offender because it promises compensation for injuries suffered and opportunities lost. The wrongdoer, on the other hand, should benefit from the new or renewed self-respect that comes with knowing that he has done what he can to right his wrongs. At least this will happen if restitution actually has the reformatory powers its advocates claim it has—and there is some evidence that it does.¹⁸

From both these points of view, then, restitution seems more promising than imprisonment. From the perspective of society, restitution is an especially attractive way of exacting the criminal's debt to society. I say this for the following reasons. If a scheme of punitive restitution is successful in its deterrent and reformatory aims, it will reduce crime, and this reduction will clearly benefit society, which must bear much of the cost of crime. Under a system of restitution, some of these costs would be borne by the criminal and others

would decrease as the crime rate falls—which it should do if restitution leads to the reformation of some offenders. Because it is impossible to specify exactly who will benefit from the reduction of the costs associated with crime, we may say that society as a whole will share this benefit.

Society may also gain from a successful restitutionary program in other, more positive ways. If, for instance, we require offenders to make restitution not to individuals but to society itself, then society will receive a positive service while it punishes those who have broken the law. This usually involves some sort of community service, such as ordering someone guilty of littering a public area to clean that area on weekends. And regardless of whether the criminal makes restitution directly to his victims or through community service, society stands to gain from his reformation. For whenever a wrongdoer is habilitated or rehabilitated, society (re)gains a useful member—someone who is willing to bear a fair share of the burdens of social cooperation in return for a fair share of its rewards.

Thus, restitution appears to serve the interests of all parties—victim, offender, and society. It promises to serve them better, furthermore, than does our current practice, which combines confinement of offenders with attempts at their rehabilitation. The reason it holds more promise, quite simply, is that restitution is likely to promote the expressive and deterrent aims of punishment as effectively as other methods and even more likely than they are to accomplish retribution and reformation. When this can be said, we have ample justification for incorporating restitution into our punitive schemes.

Punitive Restitution: Some Recommendations

Let me return now to my original question: should the rediscovery of the victim work a fundamental transformation of our system of criminal justice? My answer is that a transformation is desirable, but not a fundamental one. We should indeed make the most of restitutionary programs, but we should use them to improve, and not to replace, our present system of punishment. But this leads to a final question: how can we best do this?

On the grounds set out in this paper, I think we may expect restitutionary programs to meet the needs of victims, offenders, and society best when they involve either direct restitution to victims or community service of some sort. I say this because these approaches offer the most promise of reforming the wrongdoer and correcting the imbalance of benefits and burdens in society.

What I mean by direct restitution is any sort of program that requires the offender to make restitution directly to his victim. This may be done in a number of ways, including monetary settlements and the provision of services to the victim, but it should involve some contact between offender and victim, if only for the purposes of establishing the terms of restitution. The outstanding

virtue of direct restitution is that it forces the offender to acknowledge that he has injured another person and is bound, as a responsible person himself, to do what he can to make amends. To put the point in Kantian terms, we may say that this is the best way to teach criminals that other individuals are not merely means to their ends, but ends in themselves. This respect for persons should be reinforced, moreover, as the offender comes to see that he can do something to repair the wrong he has done. In this way, the offender should learn respect for himself as well as respect for others.

Direct restitution will only work, however, when there is some person or persons we can identify as the criminal's victim(s). When we cannot do this, as we cannot with many crimes of attempt and most crimes of endangerment and unfairness, we must turn to another mode of restitution—community service. Indeed, in keeping with the view that all crimes are in some way crimes against society, we may even wish to require all criminals, including those who can make direct restitution to their victims, to perform some community service.

The leading virtue of community service is that it helps offenders understand that they are members of a cooperative venture with responsibilities to the other members. This lesson can best be taught, I believe, when the work required is related to the offense, as in the earlier example of the litterer. When this is not possible, we should see to it that the wrongdoer has a choice of tasks and that these tasks enhance the life of the community in perceptible ways.¹⁹ Through this work, the offender may gain respect for others and an appreciation of the cooperative nature of society while he simultaneously discharges his debt to society.

These are both promising approaches to restitution, and we can expect some success when we employ them. Unfortunately, we may not be able to employ them as often as we might wish. These approaches may not be suitable in many cases because we simply cannot trust the offender involved to make an honest effort at restitution or to refrain from committing more crimes while enrolled in a restitutionary program. There will also be occasions when the victim will be unwilling to participate. And as long as we are not prepared to demand that the victim of an assault meet his assailant to devise a restitutionary agreement or that a public-service agency welcome someone with a record of criminal violence into its employ, we can only hope to use restitution as a supplement to other modes of punishment.

An even more difficult problem is that restitution can be exacted only when the wrongdoer has been caught and convicted—a relatively rare occurrence these days. This problem is not peculiar to restitution, to be sure, but it does imply that restitution is not necessarily the best way to serve the interests of victims of crime. As others have pointed out, a state-supported compensation program has the advantage of supplying aid to victims even when those who made them victims have not been apprehended or convicted.²⁰ Unless the arrest and conviction rates improve considerably, then we must admit that,

from the victim's point of view, certain compensation may be preferable to uncertain restitution.

Nonetheless, when all the difficulties are taken into account, restitution remains a worthwhile goal. No other approach promises to meet the needs of all parties—victim, offender, and society—as well as it does. If it needs to be supplemented by a compensatory program, then so be it. But we should recognize that restitution provides a way to compensate the greatest victim of crime: society itself. And though we may not be able to employ punitive restitution as often as we would like, that is no reason not to employ it as often as we can.

Notes

1. Randy Barnett, "Restitution: A New Paradigm of Criminal Justice," in *Assessing the Criminal*, eds. Randy Barnett and John Hagel (Cambridge, Mass.: Ballinger Publishing Co., 1977), pp. 349-383. A shorter version of Barnett's essay appeared under the same title in *Ethics* 87 (July 1977), pp. 279-301.

2. *Ibid.*, p. 363. For similar views, see Murray Rothbard, "Punishment and Proportionality," in *Assessing the Criminal*, Barnett and Hagel, pp. 259-270.

3. For the distinction between *punitive* and *pure* restitution, see Barnett, "Restitution," pp. 363-364.

4. *Ibid.*, p. 363.

5. Alan Wertheimer, "Victimless Crimes," *Ethics* 87 (July 1977), pp. 311-312.

6. *Ibid.*, p. 312.

7. For an illuminating analysis of crimes of attempt, see Lawrence Becker, "Criminal Attempt and the Theory of the Law of Crimes," *Philosophy and Public Affairs* 3 (Spring 1974), pp. 262-294. For another argument against Barnett about criminal attempts, see Franklin Miller, "Restitution and Punishment: A Reply to Barnett," *Ethics* 88 (July 1978), p. 359.

8. The quotations in this paragraph are from Barnett, "Restitution," p. 376.

9. Again, see Miller, "Restitution and Punishment," pp. 359-360, and Wertheimer, "Victimless Crimes," pp. 306-307.

10. Space limitations required that the argument of the remainder of this section be abbreviated. I hope to present a fuller exposition in a paper on "Debts to Society."

11. H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), p. 193.

12. The definition is from H.L.A. Hart, "Prolegomenon to the Principles of Punishment," in *Punishment and Responsibility*, ed. H.L.A. Hart (Oxford: Oxford University Press, 1968), pp. 4-5. For similar definitions, see Antony Flew, "The Justification of Punishment," *Philosophy* 29 (1954), pp. 293-294, and S.I. Benn, "An Approach to the Problems of Punishment," *Philosophy* 33 (October 1958), pp. 325-341.

13. See, for example, Roger Pilon, "Criminal Remedies: Restitution, Punishment, or Both?," *Ethics* 88 (July 1978), p. 351.

14. See Patrick McAnany, "Restitution as Idea and Practice: The Retributive Process," in *Offender Restitution in Theory and Action*, eds. Burt Galaway and Joe Hudson (Lexington, Mass.: Lexington Books, D.C. Heath, 1978), pp. 15-31, for a fuller discussion of the relationship between restitution and retribution.

15. Joel Feinberg, "The Expressive Function of Punishment," in *Doing and Deserving*, ed. Joel Feinberg (Princeton: Princeton University Press, 1970), pp. 95-118.

16. Stephen Schafer, *Compensation and Restitution to Victims of Crime* (Montclair, N.J.: Patterson Smith, 1970), p. 125.

17. On the deterrent possibilities of various restitutionary schemes, see Charles Tittle, "Restitution and Deterrence: An Evaluation of Compatibility," in Galaway and Hudson, *Offender Restitution in Theory and Action*, pp. 33-58.

18. See, for example, Burt Galaway, "Restitution as an Integrative Punishment," in Barnett and Hagel, *Assessing the Criminal*, pp. 331-347.

19. For interesting accounts of community-service programs, see John Harding, "Community-Service Restitution by Offenders," in *Restitution in Criminal Justice*, eds. Joe Hudson and Burt Gallaway (Lexington, Mass.: Lexington Books, D.C. Heath, 1977), pp. 101-130, and the following essays in Galaway and Hudson, *Offender Restitution in Theory and Practice*: Dennis Challeen and James Heinlen, "The Win-Onus Restitution Program"; Robert Keldgord, "Community Restitution Comes to Arizona"; and Anthony Macri, "Off Days Sentencing Program."

20. See, *inter alia*, John Stookey, "The Victim's Perspective on American Criminal Justice," in Hudson and Galaway, *Restitution in Criminal Justice*, pp. 19-25. I have benefited considerably from Professor Stookey's valuable suggestions.