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An American Philosophy of Punishment: Moral Permissibility, the Inferiorities of Punishment,
and a Case for Pure Restitution

By

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I. Introduction

At present in the United States, the American people are questioning many of the criminal justice institutions which have existed for as long as our relatively young nation. Are laws which prohibit the use of recreational drugs or (consensual) prostitution reasonable, let alone necessary, and if so, do these types of crimes merit prison sentences? Who is harmed by these actions, and if no harm is perpetrated, why do these actions require a response of retributive punishment? If no one is harmed, how can punishment claim proportionality to the offense? These questions, at face, seem to generate a fair amount of skepticism toward the backwards and unnecessary laws which are increasing in prevalence at an exponential rate; however, more paradigmatic questions arise from this discussion of flawed laws and regulations: what does punishment offer that other schemes of criminal justice cannot?

David Boonin's theory of pure restitution asserts that punishment is morally unjustifiable, and that if pure restitution is capable of replacing punishment there is no reason to keep it (punishment). From this, it can be inferred that, in Boonin's view, pure restitution is superior to punishment in the scope of its offerings, and can be morally justified. If we consider the victim of a thief- caught, tried, and convicted- pure restitution seems to gain even more traction: currently (in punishment), the victim is never made whole again- nor partially so; in pure restitution, the victim is made whole again- to the highest degree possible, by the offender's own bidding. The mere presence of a comprehensive alternative to punishment gives rise to questions which can no longer be avoided: when an offender harms a victim, is the victim second party to the state? In the body that follows, I will examine the offerings and moral justifiability of punishment and pure restitution, as well as the practicality of Boonin's pure restitution.

II. What is Punishment? Restitution?

How, exactly, can punishment be abolished, while preserving society's relatively predictable processes and functions? In a modern society- at the very least- there must be ramifications for acting against reasonable and just laws, else there remains no reason to respect their force or binding nature. While this assertion is hardly questionable, a deeper question must be raised: why does the fact that a person breaks a just and reasonable law make it morally permissible¹ for the state to treat him in such a way that would otherwise be impermissible?² Why is it okay for the state to treat one group of its citizens in a way that it would not treat another, appealing to nothing but the nature of the difference as justification for doing so? This sort of justification has been rejected by our government in various forms, including restrictions on same-sex marriage, as well as Jim Crow laws; although these distinctions are substantially different from punishing an individual for choosing to violate a law- the former are personal traits which cannot be chosen or changed (realistically)- does it necessarily change the result? I, personally, am inclined to think otherwise- whilst applying to law school, students attending less prestigious undergraduate institutions, maintaining equivalent LSAT scores and GPAs to more prestigious institution-attending counterparts are often treated unfavorably simply because of their choice of degree-granting institution. If these students are capable of demonstrating their academic merits (by having an LSAT score and GPA in line with or higher than applicants from more prestigious institutions), they should not be treated unfavorably *for the sole reason of* their choice of undergraduate institution.³ Therefore, it is reasonable to conclude that since using the nature of the difference between two groups as justification to treat one group differently from

¹ I acknowledge the other justifications for punishment- retributivism, deterrence, and others. The focus of this paper, however, is the morally involved aspects of punishment. Arguments may be advanced from retributivism, deterrence, etc., but these arguments must "bite the bullet" of moral unjustifiability.

² David Boonin, *The Problem of Punishment* (Cambridge: Cambridge University Press, 2008), 213.

³ Please admit me, Vanderbilt.

the other is demonstrably insufficient to warrant continuing doing so, there must be some other independent and morally justifiable argument to warrant punishment.

Before distinctions between punishment and restitution can be made, there are a number of terms whose specific meanings must be clarified. Given this will be a defense of Boonin's theory of pure restitution, it is only appropriate to remain loyal to his characterizations of "punishment" and "pure restitution". For the remainder of this paper, "punishment" (which will be understood as "legal punishment") and "pure restitution" will be used solely in the context discussed in the body immediately below. Boonin offers two nearly identical definitions of punishment, of which- for the sake of appeasing criticism- I have elected to use the weaker, which proceeds in the following manner:

*P's act a is a legal punishment of Q for offense o if and only if (1) P is a legally authorized official acting in his or her official capacity and (2) P does a because P believes (perhaps mistakenly) that Q has committed o and (3) P does a with the intent of harming Q (even if P fails to actually harm Q) and (4) P's doing of a expresses official disapproval of Q for having committed o.*⁴

Boonin's definition of punishment characterizes the harm it [punishment] is expected to cause as necessarily intentional, as opposed to foreseeable harm that is merely left uninterrupted. In formulating this, as well as the other possible definition for [legal] punishment, Boonin addresses a number of potential objections to the use of particular diction. Since Boonin's counterarguments to these objections are sufficient, the objections will not be addressed in the scope of this paper; my concerns rest solely upon the determination of whether Boonin's theory of pure restitution is a justifiable, superior, and practical alternative to punishment, in the context of the American criminal justice system.

⁴ Ibid., 25.

It is pertinent, now, to outline Boonin's theory of pure restitution. However, before doing so, it will be beneficial to characterize and distinguish "pure restitution" from "punitive restitution". Randy Barnett, whose paper, "Restitution: A New Paradigm of Criminal Justice" provided the foundation of Boonin's more robust theory, provides a straightforward distinction between the two types of restitution: "Punitive restitution is an attempt to gain the benefits of pure restitution... while retaining the perceived advantages of the paradigm of punishment."⁵ Where punitive restitution is restitution "*in addition to*" punishment, pure restitution is restitution itself and nothing more.⁶

We can therefore summarize the theory of pure restitution as follows: if an offender is responsible for having wrongfully harmed a victim, then (a) the state should compel the offender to restore the victim to the level of well-being that the victim rightfully enjoyed prior to the offense and (b) the state should not punish the offender.⁷

In Boonin's definition of the theory, the words 'harm', 'wrongfully', 'restore', and 'rightfully' are subject to further clarification- 'harm' is to be understood as making a victim worse off than they would have been, had the act not occurred; 'wrongfully', as prohibited by a just and reasonable law; 'restore', as in to the exact state enjoyed prior, (but where this is not possible, restoration to the level of well-being previously enjoyed will suffice); 'rightfully', as the victim's enjoyment was protected by a just and reasonable law.⁸ I have omitted 'responsible' from these terms which required further definition, as I intend to discuss it at greater length later in this paper. There is insight into a fair few things from these clarifications, including that pure restitution is not necessarily monetary, nor does it protect any individual's enjoyment of illegally acquired objects or benefits- the theory of pure restitution does not protect a car thief's

⁵ Randy Barnett, "Restitution: A New Paradigm of Criminal Justice," *Ethics* 87, no. 4 (1977): 490.

⁶ Barnett distinguishes between punitive and pure restitution; I am interested only in the characteristics of pure restitution.

⁷ Boonin, *The Problem of Punishment*, 224.

⁸ *Ibid.*, 221-4.

enjoyment of a car, which was acquired by stealing, if it came to be in the thief's possession through unlawful means (whether stolen directly, or acquired by exploiting other stolen goods). In the following sections, I will discuss the key differences between pure restitution and punishment as well as the most infamous objections to Boonin's pure restitution, before furthering an argument for restitution which stifles those common objections attempting to undermine pure restitution.

III. Key Differences of Punishment and Pure Restitution

While most of the differences between punishment and pure restitution are entirely apparent and of little consequence to discussion, some of the most core differences are those more subtly distinct. The most significant distinction to be made between the two is in their situation of harm- in punishment harm must be *intended*, whereas in pure restitution, where it may be supposed that harm is incompatible with the theory, harm is permissible because it is not *intended*. The goal of punishment is to make an offender suffer (harm) for violating a reasonable and just law. The goal is achieved through numerous methods, which may even include restitution; however, if in the course of extracting compensation for a victim – who rightfully enjoyed the status from which they were removed (made worse off) - wrongfully harmed by an offender, the state's goal does not include harming the offender, but simply returning the victim to the state they rightfully enjoyed before the offense. If the state does not *intend* to harm the offender, then it cannot be argued that the state- by causing harm to the offender, as a result of being compelled to make restitution- punishes the offender.

Another distinction between punishment and pure restitution is the entity "offended" by crimes- in punishment, when a crime is committed, that crime is against *the state*. The state, whether in the context of a town, city, county, or actual state is, at its core, society. When one

individual is robbed at gunpoint, on the paradigm of punishment, society as a whole is perpetrated upon. Contrarily, in the theory of pure restitution, when an offender commits a crime against an individual, the only ‘victim’- by default- is the individual whose well-being was wrongfully damaged, while other individuals harmed by the offender’s actions may be entitled to compensation. There are several objections stemming from the idea of “secondary victims”, which I will discuss in greater depth in the portion of this paper dedicated to objections; for now, however, I must digress.

One of the largest differences between punishment and pure restitution is not merely a theoretical problem, but an illustratable practical concern. I wish to draw attention to the massive inequality between what punishment and pure restitution are capable of offering their victims, illuminated by Murray Rothbard:

What happens nowadays is the following absurdity: A steals \$15,000 from B. The government tracks down, tries, and convicts A, all at the expense of B, as one of the numerous taxpayers... Then, the government, instead of forcing A to repay B or to work at forced labor until the debt is paid, forces B, the victim to pay taxes to support the criminal in prison for ten or twenty years’ time. [...]. The victim not only loses his money, but pays more money besides for the dubious thrill of catching, convicting, and then supporting the criminal; [...].⁹

In punishment, everyone is made worse off, no one is “bettered”- the *real* victim never sees a dime of compensation, nor is the offender made to reflect upon or address- in any meaningful way- those factors which led to their imprisonment. It is unlikely that the frequency of crime in society will reduce (and ultimately disappear) when those individuals committing crimes are incapable of overcoming the socioeconomic and political ramifications which cripple their economic opportunities to a degree so high that recidivism is unavoidable: the offender sits in a cell for a decade- after which it is impossible for him to find legitimate work capable of

⁹ Murray Rothbard qtd. in Kelse Moen, “A Choice in Criminal Law: Victims, Defendants, and the Option of Restitution.” *Cornell Journal of Law and Public Policy* 22, iss. 3 (2013): 5.

supporting himself, let alone a family (which many convicts have); so instead of learning valuable skills for reintegration to society (and the workforce that is unwilling to give him a job), he refines the skills of his craft, increasing the likelihood of his evasion in the future, since he'll be forced to resort to crime to make money. If the function of punishment is, in fact, to reduce the amount of crime in society- by separating the criminals from the innocents, paying a "debt" to society- it fails tremendously. Pure restitution can provide compensation to the victim, so as to return them (as close as is possible) to the condition they enjoyed previously, but may also benefit the offender by assessing and addressing the circumstances which led to criminal behavior in the first place. Because of the flexibility restitution enjoys, there are nearly endless possibilities of what 'form' compensation can take, so scenarios in which neither the victim's nor offender's situation is improved should seldom occur.

IV. The "Irreparable Harms" Objection

At first glance, there appears to be a number of objections this iteration of pure restitution cannot- if Boonin hopes it to replace punishment, as his theory suggests is possible- leave unanswered... nor offer sufficient responses to. Boonin addresses eleven of the most significant objections raised by critics in *The Problem of Punishment*, a number which has only grown larger; however, the most serious and potentially harmful objections are confined to a small collection of objections. Although I would prefer to address each of more than a dozen objections to the theory of pure restitution, I must narrow the scope of my discussion drastically- Boonin had a hundred pages to represent what I must in far fewer. For this reason, I will limit my discussion to the two objections with the greatest potential to damage the theory of pure restitution: the "irreparable harms" objection and the "third party victims" objection. I will begin with the "irreparable harms" objection.

The theory of pure restitution functions appropriately when it is possible to determine the cost of a harm- in most cases of theft or other like property crimes, this is an exceedingly simple task; precisely how the calculation is performed is irrelevant to this discussion. The critics of pure restitution, however, keenly point out the apparent problems crimes whose damages are not so easily repaired cause Boonin's theory. To many critics, the suggestion that pure restitution could claim to truly repair the damage caused by crimes against the person, like murder or rape, is unacceptable. This perceived inability of the offender to repair the damage their victim suffered seems to allude to the supposition that

if the harm cannot be repaired, then the state cannot do anything to the offender at all. An offender who causes reparable harm ... on this account, might face serious consequences for his offense, but an offender who causes irreparable harm... would face none at all. And thus, again, the critic maintains that punishment is necessary.¹⁰

The sentiments most apparent in this supposition seem to suggest that, as prescribed by the theory of pure restitution, in a case of rape or murder (or other irreparable harms), an offender would not face any consequences for their actions, and likewise, this lack of consequences is unacceptable (else, why would punishment be necessary?). The "irreparable harms" objection is confronted by two avenues- by rejecting the unacceptability of the lack (or apparent lack) of consequences, or by demonstrating the vulnerability of punishment to the same criticism.

Boonin's first response is most clear when framed analogously- consider a scenario in which there is a moral principle that states that "when a patient is dying, it is permissible to save her by transplanting an organ from a willing donor, but it is not permissible to save her by stealing an organ from an unwilling donor." In this situation, the absence of a willing donor does not invalidate the principle, but demonstrates that the principle has conditions that must be met in

¹⁰ Boonin, *The Problem of Punishment*, 235.

order to permissibly perform the procedure.¹¹ Phrased alternatively, the theory of pure restitution claims that the state *may* compel restitution (doing so is morally justifiable, where punishment is not), not that it is required to do so. If the extraction of restitution is morally justifiable, it does not follow that restitution is possible to extract, in all instances. This is not an implication that will be accepted lightly, but the unpopularity of its factuality does not necessarily make it false.

Suppose, however, that this response is insufficient in the eyes of critics of the theory; this second line of reasoning, by which the “irreparable harms” objection is disputed, proceeds by demonstrating that although- in some instances- the state is incapable of extracting restitution from offenders, the theory of pure restitution faces detriment no greater than the paradigm of punishment, therefore this is not reason enough to reject the theory. To illustrate how punishment would, in these circumstances, be vulnerable to the same pitfalls as pure restitution, Boonin offers another analogy:

Suppose, for example, that Larry is dying of cancer. He has only a few days to live, and the quality of his life is so poor that he is indifferent between dying now and dying in a few days. Larry maliciously and savagely kills several of his nurses. [...] ...it is impossible for the state to do anything to him that will make him significantly worse off than he already is. As a result, in this case it is not possible for the state to punish an offender.¹²

In these circumstances, it is clear that punishing Larry in any meaningful capacity is impossible; time constraints aside, there is simply nothing left for him to lose (that he isn't losing in the immediate future). By the same logic proposed by the critics of the theory of pure restitution, the cases in which the state would be incapable of imposing punishment upon an offender would provide sufficient justification to reject punishment. The “irreparable harms” objection seems thoroughly dismissible as a potential reason to reject the theory of pure restitution; it has been

¹¹ Ibid., 236.

¹² Ibid., 236.

demonstrated that despite the inability of the state, in some scenarios, to extract restitution (‘adequate’) from offenders, it does not follow logically, nor has it been demonstrated by critics, that this inability is unacceptable. Furthermore, even if the critical assumption is granted- that it is, in fact, unacceptable- punishment fares no better on the “necessity” framework, as it is equally incapable of wholly repairing irreparable harms. For this reason, the irreparable harms objection is not sufficient to reject the theory of pure restitution.

V. Intentions and the “Third Party Victims” Objection

At this point, I would like to shift my attention to an objection with many iterations- the “third party victims” objection- some of which are contrived from strange assumptions about intentions, what the theory of pure restitution implies, and moral permissibility; other versions display a greater depth of understanding. Before examining various versions of this objection, however, I would like to engage in a brief discussion about intentions and why they are significant.

While acting in the most trivial of scenarios, it is fairly debatable as to whether our intentions matter or not. Then again, past a certain threshold, our reasons for doing things, whether entangled with the rule of law or not, matter. Troublesome implications sprout from the notion that our reasons for doing things don’t matter. Consider the following scenario: an ambulance driver and Billy both run a red light; the former does so in order to escort an individual in need of immediate medical attention to the hospital as rapidly as possible- else the individual will die, whereas Billy is in a hurry to get to the toy store, to pick up a birthday gift. To claim that the ambulance driver is no more justified than Billy, to run the light, is asinine on every conceivable level. To suggest this is to suggest that ambulance drivers must let people die, serial murderers be considered no more culpable than someone ‘responsible’ for a workplace

accident, and other nonsensical claims. Although it is true that both are interrupting the order of society, the ambulance driver is doing so for reasons which we, as a society, deem important enough to make exception for, whereas Billy's actions undermine an "absolute value" of society in order to further a personal agenda (which is, I would argue, objectively of embarrassingly little consequence in comparison to the life of another human being). Certainly, it is a foreseeable possibility that the ambulance driver might cause harm to others by running the red light, but we would not suggest his actions were malicious, or that he ought to be held to the same degree of accountability as Billy; perhaps they would be accepted as an unfortunate by-product of a morally justifiable action. Supreme Court Justice, Oliver Wendell Holmes Jr., perfectly characterizes the critical nature of intentions: "even a dog distinguishes between being stumbled over and being kicked."¹³ This illustration is sufficient, I think, to suggest that- at the very least- intentions do matter.

With this conception of intentions in mind, I move to address the "third party victims" objection. One formulation of this objection hinges upon the assumption that extracting compensation from an offender usually causes harm to third parties. His objection to pure restitution proceeds, then, by arguing that [pure] restitution itself explicitly possesses a principle prohibiting the harm of non-offenders, and, by extension, that "the state should exact compensation from the criminal, and it would be wrong to exact compensation from the criminal," thereby contradicting and invalidating itself.¹⁴ The argument produced by Jesper Ryberg continues by rejecting the immediate response to this objection: that the distinction between intent and foresight is sufficient to save the theory. Claiming that harm to "third parties"

¹³ Oliver Wendell Holmes, "Early Forms of Liability." *The Common Law*. (1909).

¹⁴ Jesper Ryberg, "Restitutionism: A Self-Defeating Theory of Criminal Justice." *Social Theory and Practice* 38, no. 2. (Tallahassee: Florida State University, 2012), 289.

is merely a regrettable, yet foreseeable by-product, according to Ryberg, suggests that in any such case (of mere foreseeability) there exists no justification for extracting restitution. Ryberg goes as far to attribute the intentional/foreseeable distinction to the acts of the offender himself... incorrectly so. He argues that the offender could claim, in every case, that the harm caused to the victim was not intentional, but merely a foreseeable consequence, but this application is mistaken. In the presence of a just and reasonable law, the harmful acts caused by an offender upon a victim are not lessened/heightened by the offender's reasons for doing so (except in cases of accepted/rejected excuses), but their *culpability* may be aggravated or diminished in accordance with their intentions. This relationship is apparent by considering those people held responsible for workplace accidents: they are still accountable for the end result, but usually to a lesser degree than we would hold a murderer whose (intentional) actions resulted in a similar outcome. Boonin's iteration of pure restitution surely does not make mention to "third parties" or secondary victims, expressly, but must acknowledge that it clearly follows that *intentionally* inflicting harm to individuals- whether the offender or anyone else- is morally unjustifiable.

Ryberg relies on an unrepresentative interpretation of Boonin's definition for 'harm', which overlooks the fact that, when the state extracts restitution, the state is not, in doing so, subjecting itself to the first claim of the theory of pure restitution- (a)¹⁵, so long as the state does not break any just and reasonable laws in doing so. The state's extracting compensation from the offender (if it is determined to be morally justifiable to do so, in accordance with the reasoning discussed in the "irreparable harms" objection) is not congruent to an offender wrongfully harming a victim. In the same way that the ambulance driver is justified in running the red light where Billy was not, the state is justified in extracting restitution- possibly harming the offender

¹⁵ See pg. 5.

(as a foreseeable by-product, but not intentionally), where the offender was not (in the presence of a just and reasonable law) justified in harming the victim- intentionally or as a foreseeable by-product. By the same reasoning, then, “third parties” in close relation to the offender, who are ‘harmed’ by the state’s extraction of restitution, do not invoke the first claim of the theory of pure restitution- the state’s actions are morally justifiable, and neither “wrongful” nor a “harm”, since they (third party victims) are not ‘victim’ to the state’s ‘offense’; it is for this reason that the ambulance driver’s running a red light is not responded to in the same manner as Billy’s.

Scott Gallagher, another critic of the theory of pure restitution, recognizes that Ryberg’s conclusion- that neither harming victims, nor “third parties” can be justified- is a massive overstep. The state’s harming “third parties” cannot be categorically dismissed as “unjustifiable”, though Gallagher asserts that determining the justifiability of the infliction of harm on “third parties” must be decided on the merits of each individual case.¹⁶ Although I agree that Gallagher’s assertion is in the correct general vicinity, it seems to be framed in an unnecessarily restrictive manner- the merits for determining the justifiability/unjustifiability of an infliction of harm carry no increased, nor decreased weight if the justifiability is assumed and unjustifiability is considered by merits instead. This criticism, if it could be called that, is miniscule in its intended goal, compared to those against Ryberg. This small distinction would have meaningful implications in application, since the victim would receive the benefit of the doubt (which seems appropriate, considering this is an element of pure restitution), much in the same way the accused is- “innocent until proven guilty”- in the current criminal justice system. This shift of burden seems acceptable since the offender is not at risk of being treated in a way that would be impermissible for a non-offender: ‘innocent’ people are required to pay restitution regularly in

¹⁶ Scott Gallagher, “The Limits of Pure Restitution.” *Social Theory and Practice* 42, no. 1 (2016): 79.

society. Consequently, the assertion that pure restitution has been shown to be theoretically capable of implementation seems sufficiently justified.

VI. Theoretical Limitations of Restitution

Now that pure restitution has been demonstrated to be theoretically implementable, a critical question is raised: are there negative implications to said implementation of pure restitution? Surely- the proposed paradigm shift is not without flaws... so what are they? This is by no means a comprehensive list of all the practical flaws of restitution, but I believe these illustrations will provide sufficient insight as to the categorical nature of many of these limitations.

Many of the limitations of pure restitution manifest out of intentional actions which we consider morally repulsive, but with no clear person as their victim. For example, animal cruelty is widely condemned, and although cruelty toward an *owned* animal- by an external party- can be easily dealt with¹⁷, animal cruelty inflicted upon pet by its owner poses a much more difficult question. Furthermore, restitution seems incapable of responding to animal cruelty against wild/ownerless animals, although a case could be made that society- as a whole- is harmed by such reviled acts (though this requires further elaboration).

Yet another category of problematic scenarios arises when crimes against individuals are perpetrated by a government. There seems to be no way to compel a government to pay restitution, and even if there was, if tax dollars are spent on restitution, the government would

¹⁷ I am implying that the pet would simply be treated as any other case of destroying/damaging another person's property, though the nature of the animal as sentient and the disgust such an act might cause could be applied as aggravating factors toward the extent of the damage that be accountable for compensation.

not seem to be paying- the people would. It must be acknowledged that in most cases of *criminal* harms perpetrated against individuals (by the government), there is an individual or small group of individuals (or an organization) which specifically committed the harm; these individuals and organizations *do* have superiors/equals which could reasonably compel restitution.¹⁸

These illustrations are only a few of the sorts of limitations worthy of discussion, but in both cases-and, I assert, in most (if not all)- a sensible resolution is reachable. With these examples in mind, I ask: are these limitations so unacceptable that restitution must be outright rejected? I suggest not; considering all the benefits pure restitution enjoys over punishment and the moral impermissibility of punishment, the small amount of reasoning required to sufficiently respond to the objectionable behaviors discussed above returns a massive improvement.

VIII. Restitution Implemented

Considering the purpose of this discussion is to demonstrate not only the theoretical consistency of Boonin's theory of pure restitution, but also the practical applicability of restitution in the U.S., it will be prudent to consider a possible real-world implementation, which includes a potential for the creation of the highly lucrative industry- "crime insurance/tax". I will begin by laying out the features of such a society, and later discuss the benefits and potential pitfalls inherent in the iteration I consider.

If restitution replaced punishment as the national standard of criminal justice, all costs associated with the housing of prisoners could be eliminated, as the number of incarcerated persons would be significantly lower- the circumstances necessary to confine an individual on the paradigm of restitution are few, and the cost of any individual incarceration could be paid by

¹⁸ Whether personal capital or non-tax-related income from the organization as a whole/department.

said individual. Additionally, the costs associated with public defense might disappear or decrease significantly, as the reasoning for providing public counsel is tied to the potential loss of life or liberty; there is currently no right to counsel in civil suits (which are extraordinarily similar in outcome to those criminal cases in a paradigm of restitution) for this reason, and when the only potential consequence of crime is restitution, there seems to be little need for public counsel. Furthermore, there is the possibility for the creation of “crime insurance”, an *optional* service which consists in an independent entity (the agency) investigating the crime and filing the appropriate court complaint... potentially even litigating the case; in the event of a conviction, the agency could also pay their client (the victim) upfront and, having a vested interest in the offender paying, compel them to do so. Alternatively, those unable (or unwilling) to acquire crime insurance could be compelled to pay a “crime tax”, serving much the same purpose.

The most immediately apparent benefit which arises from the implementation above is the disappearance of the high costs associated with the imprisonment and care of inmates. The amount of money the U.S. spends in this area is astronomical- in 2016, the U.S. reported over \$80 billion in spending, annually, on corrections¹⁹; if these costs disappeared, said money could be reallocated to be used in more beneficial ways. Furthermore, since the only limitation inherent to the exaction of restitution is income, these convicts would be incentivized and motivated to find and keep well-paying jobs (assuming they do not already have one). Here, the money saved in prison housing might be reallocated to innovate in industry and create jobs, which would directly or indirectly (as a result of other people moving into those new positions, creating an opening at their previous job) create job opportunities for convicts.

¹⁹ U.S. Department of Education, “Report: Increases in Spending on Corrections Far Outpace Education.” (2016).

There are several objections which must be addressed in this example. First, the potential risk for abuse resulting from the lack of public defenders- money being involved, it would be an interest of the state (or insurance agency) to return guilty verdicts, correctly so or otherwise. Here, it would be beneficial for the litigant to be uninfluenced by their vested interest (if the state has been paid a “crime tax”, there should be independent arbitration, or vice-versa). Additionally, without public defenders, there is a concern that wrongful convictions would increase drastically. Although wrongful convictions are not a large problem for restitution- which is solely concerned with returning the victim to the state they rightfully enjoyed previously- it might be beneficial to reevaluate the criteria for burden of proof.

Perhaps the most damning objection, if left unanswered, is that potentially forwarded against the “crime tax”. Critics of the practical implementation of restitution will certainly formulate an objection in the same vein as the objection advanced by critics of the Affordable Care Act’s “individual mandate”²⁰: Congress cannot implement a tax for economic *inactivity*- Congress cannot tax individuals for choosing not to participate in an optional transaction (having insurance). Although this objection seems reasonable at face, it does not stand up to scrutiny. Very recently, the U.S. Supreme Court affirmed standing precedent, in *NFIB v. Sebelius* (2012), that Congress can impose taxes upon economic inactivity, that this tax need not be apportioned in accordance with state proportion (of payments) nor population²¹, and also that this tax need not even be characterized as a tax in order to be treated as one:

The payment is not so high that there is really no choice but to buy health insurance; the payment is not limited to willful violations, as penalties for unlawful acts often are; and the payment is collected solely by the IRS through the normal means of taxation. [...]. Neither the Affordable Care Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS. The Affordable

²⁰ National Federation of Independent Businesses v. Sebelius, 648 F.3d 1235 (2012).

²¹ Ibid.

Care Act describes the “shared responsibility payment” as a “penalty,” not a “tax.” [...]. In answering that constitutional question, this Court follows a functional approach, “disregarding the designation of the exaction, and viewing its substance and application.”²²

This is an appropriate example for several reasons- first and foremost, it is a real-world implementation of a tax upon an optional economic transaction (buying health insurance), within the same industry as the potential “crime tax”, but also leaves open for discussion the appropriate state apportionment for the distribution of these funds. Law enforcement in states with low rates of crime might receive a smaller amount of the tax collected than states/regions where crime is a more substantial issue, the specifics, however, are unimportant to this discussion.

Lastly, it will be beneficial to consider the current standards for “burden of proof.” Presently, criminal and civil suits employ independent standards which dictate, in part, which Constitutional rights are guaranteed to the respondent in court. Criminal courts implement a burden of proof known as “beyond reasonable doubt”, which is favorable to the accused insofar as allegations which may be reasonably doubted fail to result in convictions. This is the highest burden of proof, and is necessary in current criminal proceedings plainly because the accused stands to lose everything- potentially even his life. Civil courts implement a standard known as “preponderance of evidence”, which is indicative of a probabilistic- more likely than not- determination of guilt and culpability, in consideration of the evidence. With nothing but money potentially at stake in civil court, citizens do not enjoy the right to public counsel; the respondent does not face the possibility of imprisonment or execution, so it is acceptable that they might not receive adequate defense. Wealth and earning in America are already far from absolute- we are subject to taxes and fines, and restitution- whether civil or criminal- needn’t be any different. Considering there is less at stake in the paradigm of restitution, it would certainly be reasonable

²² Ibid, §4(a).

to lower the burden of proof accordingly. Paired together, the abolition of public defense and a lower burden of proof are indicative of no problem for the implementation of restitution, and perhaps illustrate yet another superiority of restitution, in its simplicity and fiscal responsibility, whilst achieving goals equivalent to those of the paradigm of punishment.

VII. The Crux of Restitution in Practice

I have demonstrated that Boonin's theory of pure restitution is theoretically sound and defended an instance of its implementation as practical. However, the replacement of punishment with restitution has not yet been demonstrated compatible with the supreme law of the land- the Constitution. If restitution is in conflict with the Constitution, it cannot be said to be practically implementable *presently*; I recognize that it is possible to amend the Constitution, though the infrequency with which it has been done, as a result of the difficulties involved in doing so, indicates the high unlikelihood of such an amendment. Consequently, if restitution cannot be demonstrated as presently compatible with the Constitution, my thesis should be rejected. I will begin by discussing Constitutional provisions and case-law relevant to the imposition of restitution, the categorization of restitution as non-punitive, as well as the method of calculation used to determine the appropriate amount of restitution in any given case.

The Fourteenth Amendment of the U.S Constitution states, plainly, that no state²³ shall "deprive any person of life, liberty, or property, without due process of law".²⁴ It is reasonably clear that these passages are not endorsements of, nor expressions alluding to an endorsement of, any particular paradigm of criminal justice. However, it is important to note that these passages are often cited as indicative of the permissibility of punishment. While it is certainly true that the

²³ The Fifth Amendment contains the same provision, as applicable to the federal government.

²⁴ U.S. Const. amend. XIV.

Fourteenth Amendment enumerates the condition necessary for an individual to be deprived of “life, liberty or property”, the deprivation itself is not necessary. Bluntly, there is no Constitutional obligation to deprive anyone of life, liberty, nor property. As obvious as this fact is, it levels the *Constitutional* permissibility of restitution with more traditional punishment. Although neither punishment nor restitution receives an endorsement of superiority from the Constitution, both are recognized as- at the very least- potentially legitimate.

As bland as the discussion of the Constitutionality of restitution has been thus far, its importance cannot be overstated- if restitution were incompatible with the Constitution, there would be no point in considering its applicability. The demonstrability that the transition from punishment to restitution would require no significant shifts in the function of the Constitution makes the paradigm of pure restitution far more practically appealing.

At this point, I will discuss the current situation of restitution in the American Criminal Justice System. The most recent legal precedent of relevance to this discussion comes from the U.S. Court of Appeals, Tenth Circuit in the case *United States v. Serawop* (2007): Redd Rock Serawop, an American Indian convicted of one count of voluntary manslaughter, challenged a court order to pay \$325,750- the calculated expected lifetime “lost-income” of the victim- in accordance with the “Mandatory Victims’ Restitution Act”²⁵, to the estate of said victim- Beyoncé Serawop (his three-month-old daughter).²⁶ In affirming the lower court’s decision requiring Serawop to pay the originally ordered restitution, the court referenced *U.S. v.*

²⁵ *Mandatory Victims’ Restitution Act*, U.S. Code 18 (1996), § 3663A.

²⁶ *United States v. Serawop*, 505 F.3d 1112 (2007).

Cienfuegos (2006), which asserted that “it would be illogical to assume that the ultimate death of a person who suffered bodily injury eliminates restitution for lost income”.²⁷

Although the decision in Serawop does not reference anything except lost income, it does cite the merit inherent to the method of calculating lost income:

the district court did not base its conclusions on sheer speculation and hypothesis; rather it relied on well-recognized industry standards and norms. “We have recognized that the determination of an appropriate restitution amount is an inexact science.” [...]. While calculations of future lost income must be based upon certain economic assumptions, the concepts and analysis involved are well-developed in federal law...²⁸

It seems entirely feasible to apply a similar method of calculation to more “*Booninian*” concepts of harms and losses (i.e. emotional/psychological harms). Furthermore, the Serawop decision seems to respond to a common and flippant practical objection to Boonin: “you cannot simply plug someone into a formula and determine the appropriate amount of restitution.” On the contrary, the Serawop decision indicates that this is *precisely* what we can (and should) do. This also highlights the lack of necessity for restitution to go to the victim whilst remaining legitimate, by drawing further from Cienfuegos: “it is plain that the statute allows a representative of the victim’s estate or another family member to assume the victim’s rights to collect restitution for future lost income”.²⁹ The possibility for family members, etc. to collect restitution for future lost income indicates no incompatibility with the collection of restitution of other varieties (i.e. psychological damage). Although restitution is not used as an alternative to punishment in the American Criminal Justice System, the judiciary has characterized the primary function of restitution as such, which bares strong resemblance to Boonin’s interpretation:³⁰

²⁷ United States v. Cienfuegos, 462 F.3d 1160, 1164 (2006). Qtd. in U.S. v. Serawop.

²⁸ United States v. Serawop, 505 F.3d 1112 (2007).

²⁹ Ibid. Qtd. in U.S. v. Serawop.

³⁰ See §II.

The principle of restitution is an integral part of virtually every formal system of criminal justice, of every culture and every time. It holds that, whatever else the sanctioning power of society does to punish its wrongdoers, it should also ensure that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well-being.³¹

In its final characterization, the Tenth Circuit- in *Serawop*- asserted that the “statutory focus” of the Mandatory Victims’ Restitution Act (MVRA) is “upon making victims whole”³², and furthermore, that restitution is not criminal punishment.³³

The Tenth Circuit’s conclusion, that restitution is not punitive (nor, by extension, punishment) hardly comes as a surprise. However, the likeness of the court’s reasoning to Boonin’s, including the near-identical statement of purpose (of restitution)- which is largely uninterested in the offender- is fairly reassuring of restitution’s potential utilization in the U.S. It is safe to conclude from this discussion of relevant case law and precedent, I think, that restitution is applicable as an alternative paradigm of criminal justice. Although it may still face many practical problems of implementation, restitution is already a cornerstone of American criminal justice, and will remain so no matter which paradigm of criminal justice the U.S. endorses.

IX. Conclusion

The United States’ Criminal Justice System does not need punishment; whether David Boonin’s formulation of pure restitution is the most appropriate alternative, I cannot say. Punishment’s reliance upon the nature of the difference between two groups as justification for treating one in a way that would be objectionable to treat the other has been assessed and used to attack the moral permissibility of punishment. However, I have demonstrated the offerings- to

³¹ *United States v. Serawop*, 505 F.3d 1112 (2007), §II C 2, para. 4.

³² *United States v. Coriaty*, 300 F.3d 244, 253 (2002). Qtd. in *U.S. v. Serawop*.

³³ *United States v. Visinaiz*, 428 F.3d 1300, 1316. Qtd. in *U.S. v. Serawop*.

both the victim and offender- of pure restitution to be superior to those of punishment, the offerings of which are non-existent for the victim and offender alike (in punishment). Those common objections to the theory of pure restitution, as the “irreparable harms” and “third party victims” objections, fail to defeat restitution on account of punishment’s failure to do any better³⁴ and a misrepresentation of a key concept respectively.³⁵ Additionally, I have illustrated the practical benefits and detriments of the implementation of restitution, the benefits of which heavily outweigh the costs. Furthermore, I have demonstrated restitution- as a paradigm of criminal justice- to be compatible with the U.S. Constitution by evaluating the relevant case-law precedent, as well as the court’s attitude toward restitution as an institution.

I recognize that there is a far greater scope of justifications for punishment as a paradigm of criminal punishment than those discussed in the confines of this paper. Arguments are readily advanceable by appealing to the retributivist theory of justice, or contrarily, focusing on deterrence (though evidence of deterrence as a result of the threat of (generally, capital) punishment in the American criminal justice system is largely inconclusive). However, regardless of the strength of any external justification of punishment, this paper’s examination of the moral implications is sufficient, I suggest, to assert that any such justification must willingly accept the moral impermissibility of punishment; as a result, advocates of punishment might no longer enjoy the ability to claim that punishment is “the right thing” or any similar notion.

As with many instances of change, the greatest weakness to the implementation of restitution is cultural fear of change. Still today, as more and more Americans recognize the seriousness of many problems inherent to punishment, attempts are made to *fix* punishment; I suggest, as apparent from the consideration of punishment in the body above, that punishment is

³⁴ See §IV. Punishment also fails to repair those harms which restitution cannot.

³⁵ See §V.

fundamentally unfixable. However, it is hopeful that a realization that the paradigm of criminal justice in America must change will be accompanied by a willingness to shift away from those values that punishment encompasses. It is not entirely clear that Boonin's pure restitution harbors the values instantiated by our growing skepticism of the current criminal justice paradigm, but it is undeniable that punishment does not, and accordingly, must be abandoned.

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