

Restitution and Reconciliation

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I. Introduction. The debt/atonement model of punishment seeks to reconcile the criminal with his direct victim, as well as the larger community, through restorative mechanisms of restitution and atonement.¹ As a result, it has certain advantages over better known rivals.² Unlike retribution, reform and deterrence, the approach does some good, first and foremost, for the victim of the crime. But it can also benefit the victimizer and indirectly victimized members of the larger community. Competing theories usually profit but one of the three. They also fail to do as well in removing the tension between justice and mercy. Yet even when mercy is not an option, retribution, reform and deterrence can dictate punishments that are intuitively excessive. But the problem isn't just that of excess. At others times, it seems they will endorse inappropriately lenient responses to crime.

I will argue that a properly construed debt/atonement approach, despite its stress on punishment taking the form of restitution, can handle three common objections that it is incapable of providing appropriate punishments. The first is that it cannot justify punishing murder for the dead cannot be compensated. Even if this turns out to be true, surprisingly, it bestows no relative advantage upon rival accounts for if the dead cannot be benefited, then they cannot be *harmed*, and thus punishing killers who did not harm those they killed will be difficult for any theory to justify. The second objection is that it cannot accommodate our practice of punishing failed attempts where there appears to be no harm when the target didn't even know the attempt transpired. Ironically, it turns out that *only* the advocated approach can justify our practice of punishing failed attempts less severely than successes. The third objection is that the theory sometimes advocates making criminals suffer in order to satisfy the vindictive desires of their victims. I'll

argue that so harming criminals is a defensible way to extract the debt payment they owe their victims. However, I'll conclude that if it were wrong to ever intentionally harm criminals, it would still be necessary to excuse the practice given the failure of the most plausible alternative to the institution of punishment: a system of restitution that repudiates intentionally harming lawbreakers.

II. *Why Punish?* The most common response is that the criminal *deserves* it. But what good does it do to make him suffer? Well, perhaps it satisfies the public's sense of justice. But that just pushes back the question to what good does justice deliver when giving the criminal what he deserves? It can't be an *intrinsic* good if it isn't good in the first place. The retributivist seems to cut off explanation prematurely. Rival theories like deterrence do some good for society as a whole, while reform can do the criminal some good. Yet the immediate victim benefits little. Of course, it might be claimed that improving the lot of the victim is a civil matter. However the line between torts and crimes is not set in stone.³ I will argue that there are good reasons to treat restitution as a form of punishment, although there will be (rare) situations in which it can replace punishment, understanding the latter to necessarily involve intentionally harming the criminal.⁴

The debt/atonement theory places a priority upon aiding the direct victim, so the debt payment is more important than the debtor's atonement. But the approach aims to restore the criminal and victim to their status as equal citizens where they were before (or should have been.)⁵ The victim is brought as close as he can to his appropriate status through some form of restitution. In fact, the criminal's contrition and belated recognition of his victim's worth can play a role in the latter's restoration. And a remorseful criminal,

who accepts his debt payment and the accompanying suffering as a form of penance will both be able to alleviate his guilt and prove to himself and others that he has learned his lesson and thus ought to be restored to society as an equal.⁶

Alas, it will often happen that the criminal is not contrite and there will be times when the victimizer can't render restitution. In the former, the criminal can still provide restitution. In the latter, the wrongdoer can still atone. In situations where neither can be appropriately provided, that no more sinks the debt/atonement theory than the occasional failure to maximize crime prevention scuttles the deterrence approach, or the inability to make a particular criminal virtuous wrecks reform, or the impossibility to give a very elderly criminal the decades in jail that he deserves torpedoes the rationale for retribution. All theories, on some applications, will fall short of their own ideal.⁷ The degree of the failure, the frequency at which it occurs, and how poorly the theory accords with broader moral principles will be far more decisive in evaluating the approach.

III. *Justice and Mercy:* One of the broader principles is mercy. There is considerable tension between justice and mercy. If justice is a virtue, and mercy means not bestowing justice, then it would seem that mercy is a vice. Such an unwelcome conclusion usually assumes as a premise a retributivist account of justice where the criminal deserves a certain level of punishment, and anything less is a miscarriage of justice. Or if the premise is replaced with one that claims the rationale for punishment is to reform criminals, mercifully releasing them prior to rehabilitation would not undermine justice. And if the purpose of punishment is taken to be deterrence, then it seems the possibility of mercy will reduce the deterrent effect. However, if punitive justice is determined by what restitution requires, then the forgiving victim (or her

judicial/executive representative) is free to mercifully accept less compensation as a means to restoration and reconciliation than that typically demanded by the law. She can claim the apologetic and remorseful criminal owes her nothing else, his debt either paid or forgiven, and can thus be restored to society as an equal. Justice as restitution allows both x amount of compensation and x minus n compensation. Justice doesn't demand either. It depends upon what the victim requires to be restored and reconciled to the release of the criminal. Perhaps this involves his moral worth recognized, peace of mind regained, and material wealth recovered. What brings about the first two may legitimately vary with the behavior of the criminal and the character of the victim, while the material debt can be forgiven without rendering the reconciliation corrupt. So the higher restitution might be the norm enacted in law but mercifully accepting the lower is not incompatible with justice. Therefore mercy in a restitutionist account is not internally at odds with justice. There is no need to invoke a value external to justice in order to trump considerations of justice.

IV. *Inappropriate Punishment:* The principles governing restitution in the debt/atonement model not only fail to provide an internal obstacle to merciful early release but they don't demand sentences of inappropriate lengths as do reform, deterrence and even retribution. These problems have been well rehearsed in the literature so I will be brief and thus able to spend more time highlighting the appeal of restitution and dispelling misconceptions about the approach.

Deterrence could be obtained by punishing innocents or through excessive punishments of the guilty. On the other hand, consideration of deterrence could sanction responses that are too lenient. Deterrence might be obtained by faking someone's

punishment. In other cases it might not be possible to deter certain crimes or perhaps punishment of the much admired will inspire copycat crimes or other lawbreaking. Nevertheless, our intuitions are that punishment is still warranted even if there is no deterrent value in doing so. The debt/atonement approach captures our belief that the victimizer should compensate the victim and undergo a change of attitude - and often have this brought about by his own suffering. Such suffering may satisfy the victim as it teaches the criminal how he felt, symbolically defeating the criminal and thus vindicating the victim's worth.

The most likely problem for reform is that it will require excessive punishments. Imagine someone whose crimes are minor but due to a character flaw can't be easily reformed. Society shouldn't keep say a small-time thief in jail for decades because he is likely to shoplift again. The debt theory can make better sense of our intuitions here than reform. Reform entails atonement and restitution but the converse isn't the case. It is not that restitution and atonement take up where reform leaves off as Garvey suggests.⁸ Someone could be genuinely remorseful, penitent and willing to make restitution, nonetheless, he is so disposed to commit such crimes again. This may be because of weakness of the will or some other character defect or just the ineffectiveness of prison as a setting for moral improvement. However, from perspective of the debt/atonement theory, if the criminal has paid his debt and genuinely atoned, then he ought to be released. The debt/atonement theory demands remorse and restitution, not sainthood.

Retribution will also punish inappropriately. This is most obvious in the case of Morris-style retribution which aims to offset illicit gains of those criminals who don't restrain themselves as law abiding citizens do.⁹ But the lawful may have felt no

compulsion to rape or murder and thus don't resent the free riding of such criminals. Or the difficulty people have restraining themselves from one crime (tax cheating) as opposed to another (raping geriatrics) may not be correlated with the degree of harm of the respective crimes. The natural response is to defend a form of retribution where the greater the intended harm, the greater the deserved punishment. However, this account still will have a problem with punishing those who are contrite and forgiven by their victims. It intuitively seems they ought to be punished less but the harm they caused or intended is just as much. There are also some just and reasonable laws that are violated without wrongdoing on the part of the lawbreaker. The classic case is when a life is saved at the expense of someone else's property. Surely the lawbreaker doesn't *deserve* to suffer but is merely required to render restitution, any harm in doing so being foreseeable but unintended. There is also the concern that retributivist desert falsely assumes the criminal was free to do otherwise than he did. However the absence of such libertarian free will is not an obstacle to maintaining that those who intentionally harm others ought to atone and render restitution.

V. Failed Attempts: A common complaint directed at restitution based accounts of punishment is that they can't account for our intuitions concerning penalizing failed criminal attempts.¹⁰ Let me first remind readers that the theory advocated here is a debt *and* atonement approach so someone could initiate a wrongful attempt and warrant punishment, even if there is no harm that needs to be offset by restitution. The criminal still needs to atone and punishment could provide the place and time for atonement. Of course, society can't force someone to atone, for its components of remorse, apology and penance must be freely undertaken to be just that.¹¹ But society can, given the proper

account of forfeiture of some rights, place the criminal in a setting that makes atonement more likely.

That said, I would still argue that there is harm in failed attempts. There is obviously a harm where an attempt leaves the target petrified, sleepless, and in therapy. But what about when the intended victim doesn't even know the failed attempt has transpired? Why punish such a criminal? The advocate of moral education will insist that the criminal needs to be reformed. The retributivist will stress that the criminal is evil for he intended harm and thus deserves punishment. The deterrence theorist has his own argument for punishing mere attempts even though no one aims to fail, and that is the knowledge that one won't be punished if one's attempt fails will likely increase criminal endeavors for it lowers their probable costs.¹²

David Boonin claims that a restitutionist can account for punishing failed attempts of which the intended target is ignorant on the grounds that such attempts raise the probability that he will be victimized.¹³ One is harmed if put in an objectively more threatening situation, even if one is unaware of it. This may often be true but it isn't necessary so, and we will want to punish in scenarios where it is not. It is even possible to imagine a case where the attempted crime not only fails to increase the probability of harm, but actually produces an *overall decrease* in its likelihood. This hypothetical would involve a known criminal under constant surveillance. Wherever he went, more law enforcement and associated public health and safety agents (paramedics, firemen etc.) would be found than otherwise. Thus if he attempts to commit a crime against you, he will fail because there are so many law enforcement agents blanketing the area. Even if it is illegitimate to claim the criminal's *inevitable* failure, nevertheless, we can still

plausibly claim his attempt makes you safer overall although the risk of harm from him increases an infinitesimal amount. The reason you are better off overall is that a consequence of the presence of so many public safety agents protecting you from the known criminal is that they will then also render you safer from other sources of harm. For example, any other criminal in the vicinity who views you as an easy mark will have his chances of success dampened by the many agents already in the area protecting you from the attempt by the criminal under surveillance. Or if you were to be struck by a reckless driver, fall on a slippery sidewalk, or suffer a heart attack, you would receive quicker and better care than you would in the absence of the person who engaged in a failed criminal attempt. Thus your targeting in the failed attempt increases your overall safety. You are better off as a result of his intention to criminally prey upon you. Yet intuitively, such an unsuccessful criminal still ought to be punished.

What those who deny that the restitutionist can handle attempts have in common is a failure to appreciate non-experiential harms. It may indeed be true that there aren't posthumous non-experiential harms but there had better be non-experiential harms for the existent. It is hard to make sense of harm if it is due to only its experiential impact. For instance, the reason that infidelity is upsetting is that it is bad to be so betrayed. The harm is there before the recognition of it. There would be nothing to be indignant about if there was not first a non-experiential harm.

The intended victim ignorant of his being criminally targeted has still been treated in an undignified manner. He was not thought to have sufficient value to make him immune to such an attempt. So there is an offense, an indignity that he suffers. When he finds out that he has been targeted he is justified in being outraged because the criminal's

assumptions degraded him. He could rightly demand amends be made for the contempt expressed. He might not only want an apology but need proof of the victim's remorse, such as that given by a willingness to accept the hardship of punishment. And he might be vindictive as well, wishing to hurt the criminal whose contempt for him removed any obstacles to his being mistreated. So if there are non-experiential harms, then there can be a reason to demand punishment in the form of restitution for the failed attempt.

The debt/atonement account provides a better justification than its rivals of our practice of punishing failed attempts less severely than successes. The criminal whose attempt fails due to just luck needs to be reformed as much as the criminal who succeeds. If reform involves some hardship to sensitize the criminal, the same degree would be called for in punishing the perpetrator of the unsuccessful attempt as the successful crime. The retributivist is likely to claim that the person whose attempt failed is just as deserving of punishment as the successful criminal for they aimed at the same harm. And we have noted that even though no one attempts to fail in a criminal endeavor - rather everyone attempts to succeed - there is still a deterrence-based reason to punish attempts for the criminal will be more likely to make an attempt if failure is not costly. There may even seem to be deterrent-based reasons to punish attempts more severely than successes to give the perpetrator an incentive not to try again. The second attempt would seem to require a punishment more severe than even that for a success which, obviously, failed to deter.

David Lewis claims that there isn't a need to punish second attempts more severely than successes, just second attempts more severely than first attempts. But his overall theory will actually justify punishing attempts more severely than any successes.¹⁴

He describes a penal system that is a lottery in which the citizenry allow the chance-drawing of straws to determine which attempts are to be punished. Or if all criminal attempts are to be punished, which are to be punished more severely. He insists that given the equal chances, the lottery 'does, in some sense, punish all attempts alike, regardless of success.'¹⁵ Lewis claims that our penal practices are justified if such a penal lottery would be. 'If not, not.'¹⁶ The two systems are allegedly equivalent for instead of drawing straws, what our society actually does is allow the luck distinguishing successful from unsuccessful crimes to determine the distribution and severity of punishments. Real events thus stand in for drawing straws.

Lewis is wrong to assert that our system of punishment is justified only if such a lottery is. While our system of punishment is more or less acceptable, a lottery is not. Suppose the lottery worked by always punishing failed murder attempts more severely than successes, where instead of drawing the short straw for the shorter punishment, we used successful crimes as the stand in for short straws. Let us assume that in such a system there would be no loss in deterrence and that individuals who attempt crimes, successfully or not, are equally in need of reform or retribution since they are equally evil. Still, most people would be unsatisfied with this system since individuals who do much greater harm would be punished much less severely than those who bring about much less harm. It appears that we are willing to tolerate a lottery only if chance brings more misfortune, or at least as much, to individuals who have actually killed our loved ones than individuals who try to kill them or others but fail. But if we are ready to accept a full-fledged lottery, we have to be willing to allow luck to punish failures more than

criminal successes. Accepting the legitimacy of such a lottery means accepting the legitimacy of all its possible outcomes.

While most of theories of punishment suggest that attempts should not be punished less severely than successes, most people believe that punishments for successes should be greater than attempts.¹⁷ If punishment is punitive restitution, as maintained by the debt/atonement theory, then it is possible that the public's intuitions can be justified as well as explained. The targeted has suffered more harm if the crime succeeds, thus there needs to be more restitution. There was the disdain expressed by the attempt *and* the loss due to the success. To see that luck doesn't invalidate differences in restitution, consider two vandals who, by chance, do different amounts of damage. People generally don't find there to be anything intuitively wrong with making one vandal pay more compensation than the other because the artworks he deliberately disfigured turned out, unbeknownst to him, to be more valuable art than that destroyed by the other wrongdoer. So if punishment and restitution are not distinct, but the former involves the latter, then it is unsurprising that successes will be punished more severely than (failed) attempts. Thus it seems that the restitutionist can not only account for punishing attempts, but can do so in a way more in accordance with our intuitions and practices than rival theories.

VI. *Restitution and Murder:* At first glance, restitutionists have an obvious problem with murder. Public Reason will not permit a policy to be based upon theistic claims that the deceased still exist or the crime was an offense against God to whom the criminal must make amends. So working with only assumptions that the secular will find reasonable, it might seem difficult to imagine how the deceased can be compensated and

restored to their pre-crime state of well-being. Since our intuitions and practices reflect a belief that murder is one of the worst crimes and deserving of punishment, restitution would seem to fail woefully here as a form of punishment or replacement for punishment. I think this line of thought, embraced by so many authors, is a bit hasty.¹⁸ Moreover, even if it is correct, restitution is not the only response that will be in trouble because the victim no longer exists – retribution, deterrence and reform will likely fare no better.

It is commonly held that the deceased have interests that can be fulfilled or thwarted posthumously even if death brings about the nonexistence of the subjects of those interests. For example, it is thought that the deceased may have an interest in their property being distributed in a certain way, in their projects being fulfilled, their value acknowledged, their reputations vindicated, their achievements recognized, and the flourishing of their surviving relatives etc. Now if this is true, it would seem the deceased can be compensated somewhat for their wrongful deaths. The crucial point is that it is difficult to claim that death is an evil or harm to the deceased for it frustrates their interests without also claiming that the deceased have interests that can be satisfied to their benefit which could amount to restitution. Of course, the deceased can't be restored to the level of *experiential* well-being they possessed when alive since they can't be restored to life, but they may still have interests that can be promoted if not fulfilled. Some of these interests could be satisfied in a manner that could be described as restitution. The deceased may have an interest in their murderer suffering even if they can't savor the experience, or in their murderer compensating their surviving relatives, or furthering some project of theirs through financial contributions or labor. The victim may even have a posthumous interest in their murderer being brought to recognize their worth,

to make an expression of that and demonstrate remorse. So unless there is a compelling argument that restitution requires the recipient to experience the compensation, restitution is compatible with punishing murder.

If it is instead maintained that benefits to the deceased is a category mistake for being benefited involves states and only existing subjects can be in beneficial states, then the same reasoning would entail that the deceased couldn't be in harmful or deprived states. That is, their being dead couldn't be a harm to them. If that is so, then it is not just restitutionists offering their alternative to the existing system of punishment that will find themselves in philosophical hot water when dealing with murder. The leading theory of punishment, retribution, and the runners up in popularity, reform and deterrence, will all share in any embarrassment that restitution suffers.

The retributivist punishes because the criminal *deserves* punishment. Punishment is deserved because the criminal wrongfully and intentionally caused or attempted to cause harm. But if the murderer didn't cause the murdered any harm, then why does he deserve punishment? Surely, a satisfactory answer is not going to be that he caused the survivors grief or made his fellow citizens anxious. The restitutionist could easily make a parallel move and claim that the restitution be directed to the people made sadder or more insecure. It won't work to say the criminal deserves punishment because he had evil intentions even if he didn't do any harm. It is hard to flesh out what could be evil about an intention that if successfully carried out is not harmful. Or at least, it isn't easy to see why the immorality of intending what is wrongly thought to be a harm deserves a great harm in response. And if it is merely the intention or the morally flawed character behind

the attempt that warrants punishment, then the typical difference in severity of punishment between successful murder and attempted murder will not be justified.

If death is not a harm to the dead, the remaining rationale for deterrence is likely to be preventing certain unwelcome feelings in the still living. But the feelings of some survivors will be unreasonable if based upon beliefs that the dead are harmed or that the living will be harmed by their own deaths. And their *reasonable* lament for losing their cherished companions will still fail to provide a rationale for punishing those who kill people (hermits, loners, orphans etc.) whom will not be missed.

Advocates of reform believe that the criminal should be punished in order to improve his character. But if the murderer didn't harm the deceased, then it isn't clear what is wrong with his character. Well, it might be thought that his character is flawed because he *attempted* to harm the deceased, he was just oblivious of the Epicurean-style argument that death can't be a harm. But then it seems that reform of character isn't really called for, just some additional knowledge. It is probably true that those willing to murder are also willing to do many other bad things like inflict pain. But that correlation is only contingent and seems to be committing society to reforming people for what they *might* have done rather than did do. Moreover, if that thin reed is all that reform can offer to justify punishing murderers, then it seems like not much of an advantage over the restitution advocated by the debt/atonement account.

So it appears that the problem of restitution for the murdered has parallel manifestations plaguing retribution, deterrence and reform. As a result, there is no relative advantage gained by restitutionists' main rivals, and thus restitution can't be undermined if its competitors are in the same leaky boat.

VII. *Restitution and Revenge*: It is frequently declared that the victim has a debt to society.¹⁹ Retributivists rarely do justice to such talks which seems more at home in the restitutionist framework. However, a problem for debt/atonement approach is that it often seems that the criminal is too poor, uneducated and unskilled to make restitution. But restitution fails less often, and to a lesser degree, than might be expected despite the impoverishment and lack of restitution-making skills typical of many criminals. This is, in part, because restitution can involve vindictive satisfaction as a debt payment. Victims can ‘get even’ with the person whose denial of their value made possible the initial transgression. They can receive psychic compensation when the criminal realizes his punishment is undertaken for their sake and at their urging. The victim may be pleased that the suffering criminal is made to feel bad, forced by such suffering to acknowledge the significance of his pain and anger, as well as the esteem in which he is held by the supportive society that carries out the punishment for him. So it isn’t just that the criminal’s well-being will be lowered, but the victim’s well-being is raised in response as the tables are turned on his tormentor.

It is important to distinguish revenge for the sake of restitution from sheer sadistic revenge where the goal is not getting *even*, nor accompanied by a recognition that the criminal should be restored to society as a citizen with equal rights and duties after having paid his debt.²⁰ Furthermore, where there is a punitive role for revenge, the suffering it can endorse is restricted by norms determined by both the degree of the initial harm and deontological constraints that protect the criminal’s dignity.

The taking of revenge can even satisfy the criminal that is contrite. If a criminal feels guilty, he might be angry at himself for what he did, just as the victim and the rest

of the society will be angry at him.²¹ Such a criminal may want to lash out at and make himself suffer. The penance gives expression to this self-directed anger. The contrite might be especially willing to suffer if doing so makes his victim feel better. He may want his victim to get his vindictive fill. The macho version of this attitude can be found displayed by the cowboy in the Hollywood Western allowing a party he wronged to punch him in return. There is something egalitarian and restorative about taking and accepting such revenge.

Philip Montague and Dennis Klimchuk claim that the vindictive account of restitution isn't applicable to murders for the victim, even assuming his possession of posthumous interests, is not alive to *relish* the suffering of the criminal.²² Vindictiveness seems to involve enjoying the misery of one's victimizer. However, I harbor some doubts that *enjoying* revenge is essential to it. Consider first what seems to be a case of the living taking revenge. A person sets a trap to retaliate for some earlier wound. Even if he is later unaware that the trap has been sprung and his enemy injured, it seems correct to describe him as having taken revenge. It may be that sufficient for vindictiveness is the person desires those who wronged him to suffer for he believes their doing so will improve his own well-being. If well-being can be enhanced by interest satisfaction, then provided there are posthumous interests, there can be a posthumous increase in well-being and hence posthumous revenge. It doesn't strike my ears as wrong to hear that the dead can take revenge from beyond the grave. For example, if we change the previous case slightly to where a person makes use of a booby-trap device triggered by his death that painfully injures or kills his murderer, it again seems appropriate to speak of his taking revenge.²³

So it might not be incorrect to speak of the dead receiving vindictive satisfaction even if they can't experience it.

However, no restitution, vindictive or otherwise, may be required if the criminal is contrite and the victim(s) forgiving. Even in the case of murder, one can imagine a slow death that allows, however unlikely, the victim and criminal to reconcile. Someone may maintain the forgiving victim is 'a deep problem' for the debt/atonement theory.²⁴ I don't find it an embarrassment for the approach that punishment may sometimes not be needed. The ideal served by the debt/atonement account is restoration and reconciliation and this can be met, on rare occasions, without punishment.

It is worth keeping in mind, especially in the vast majority of egregious crimes, that there are usually indirect victims in the greater community, the large numbers of which make it less likely that they will all be forgiving. That will ensure few quick releases of the criminal and the resulting loss of deterrence power - the latter being a welcome but unintended side effect. Members of the direct victim's community may also be victimized by being made to feel less safe, burdened with the costs of the criminal justice system, or insulted through the criminal's disregard of the victim's value, a value that they too possess in virtue of sharing properties with the victim. Although the latter is most evident in how hate crimes offend others in the group of the victim, a similar vicarious offense can occur when it is just someone's dignity or humanity that is ignored in crimes that don't involve targeting members of historically maltreated groups. Therefore, a forgiving or deceased victim need not mean that the criminal goes free. The vindictive feelings of the larger, indirectly victimized community will see to it that he suffers. Moreover, compensation to the larger society need not be vindictive, it could just

involve the peace of mind gained by knowing a predator is forced to keep his distance or in payments to increase security.

A related misconception is to think that a forgiving victim automatically means less punishment. The victimizer need not always compensate each victim separately, the total compensation increasing with the number of victims. The same punishment or debt can simultaneously benefit the criminal's direct and indirect victims. So even if the direct victim is without vindictive feelings, the large number of indirect victims may mean the same amount of suffering as a debt payment as would be the case if the direct victim sought revenge. The harm inflicted upon the criminal need not rise or fall depending upon the number of unforgiving victims. Since the same burden inflicted upon the criminal can do 'double duty', compensating different people, there'll be many cases where even the direct victim's forgiveness won't mean any less punishment.²⁵

The idea of legitimizing vindictive feelings will be anathema to many. Revenge will be seen as pointless, or even disruptive to the practice of reform, retribution and deterrence. Perhaps the distinction which I have made between sadistic vindictiveness on the one hand, and egalitarian and judicial vindictiveness on the other, will make it somewhat easier to accept. The place allotted for revenge allows the satisfaction given to a victim from the suffering of the criminal to be considered a debt payment. Such a non-financial payment will likely be needed when the victimizer is either very poor or very rich; otherwise their contempt for their victims would have little impact on their own well-being, one being unable to make financial restitution, the other unfazed by it.

The role I envision for revenge may also seem more palatable when compared to that played by the desire to make the criminal suffer in the retributivist scheme. My

contention is that if it is not objectionable, or not very problematic in the retributivist framework, then there is even less reason to find it so in the restitutionist account. The retributivist *believes* the criminal ought to suffer and so *desires* that he suffer. This is not a thirst for revenge since the retributivist need not delight in the prospect of the victim suffering, even though he desires it, nor aim to have his well-being increased by the decrease in the criminal's. It would be a mistake to conflate retribution and revenge, even though the vindictive will *very* often disguise their real motivation with high-minded sounding calls for retributive justice. The paradigm case of non-vindictive retribution would be when parents regretfully turn in their own lawbreaking son to the police so that justice can be done. The parents take no delight in their grown child's suffering, but nevertheless, recognize that he deserves to suffer. Their wishing they didn't have to bring their own son to justice does not mean they lack a conditional desire that he suffer. The vindictive on the other hand, not only desire someone to suffer, but relish the prospect, believing their well-being will be raised as a consequence of the other's misery.

Since retributivists and vindictive restitutionists both desire others to suffer, the former have little grounds for criticizing the latter. In fact, the desire for the criminal's suffering seems pointless in the retributivist framework and thus more suspect. Retributivists desire suffering but not so it betters the criminal or satisfies his victim. As Bradley says in his endorsement of retributive suffering: 'The destruction of the wrong, whatever be the consequence, and even if there is not consequence at all, is still a good in itself.'²⁶ The vindictive restitutionist claims the suffering can play a restorative role for the victim, increasing his well-being and enabling him to later reconcile with his victim after the debt is paid. Moreover, such suffering can even assuage the guilt of the

victimizer who is angry with himself, who wants to compensate his victim, and whose acceptance of his debt and penance proves his worthiness to be returned to society. So the restitutionist bestows upon the criminal's suffering a purpose that the retributivist does not, one that benefits the victim, and ideally the criminal.

The effects of vindictive restitution support my claim that restitution should replace retribution as the model for punishment. However, Klimchuk makes the interesting claim that restitution, vindictive or not, cannot replace retribution for it presupposes its notions of desert and proportionality.²⁷ He argues that restitution will need to be guided by retributivist norms to be appropriate. The fear is that restitution-governed punishment could be inappropriately lenient in the absence of vindictiveness or excessive where such feelings are intense and unabated. One can indeed imagine victims who are not satisfied with virtually any amount of suffering others have undergone. We can also imagine hypersensitive people for whom what would be a minor slight to others is devastating to them and thus the required payment for full restoration would be immense. But none of this follows from the principles of the debt/atonement approach. The law frequently works with norms of what a reasonable person should do and feel. For example, the neurotically hypersensitive plaintiff won't be entitled to receive more in a defamation case. Likewise, the sadistic or the hypersensitive won't be entitled to more restitution, whether in the form of their victim's suffering or otherwise. The guiding norm for the debt/atonement approach is what it would take to restore the reasonable person who was so wronged. So it is a mistake to claim that the debt/atonement theory lacks the resources to 'measure objectively' loss and compensation.²⁸ The theory is not committed to the wrongdoer's punishment being determined by the victim's assessment of

misconduct. Restitution need not reflect the vices or character flaws of the victims. So no wild variations need to be tolerated, and no appeal made to a *deserved* punishment other than in the nonretributive sense of what level of compensation the victim deserves in order to be restored.

This is true even in the case in which the victim's forgiveness is corrupt. Forgiveness is not genuine when the victim just wants to forget the crime or has such low self esteem that she thinks there was little wrong done to her. It is not, as Klimchuk believes, that retributivist norms must be appealed to in order to reject any early release of the criminal or to make sense of our outrage at the lack of punishment. The problem is really that there hasn't been any restitution and reconciliation. The criminal has not atoned and the victim has not been compensated and had her worth recognized. Of course, society can't force the victim to recognize her value or desire compensation, however, it can refuse to facilitate her degradation. Thus it can reject the release of the unrepentant criminal whose contempt for the victim is unabated. The victim thus is (perhaps unwillingly) provided with the compensation of being protected from such a predator and her well-being somewhat restored. Her well-being has an objective component. This phenomenon is illustrated by the case of the domestic violence in which the repeatedly abused refuses to press charges or do much to protect her dignity. If the abuser is released he is likely to prey again upon his victim or someone else who shares her properties that he disregarded earlier. It may be paternalistic, but she is made objectively better off by his prolonged incarceration. And keep in mind it is the shared properties that make the offended members of the larger community indirect victims of the earlier crime. So they are unlikely to forgive prematurely.

VIII. *Restitution without Punishment.* David Boonin ends his recent book on the problem of punishment by arguing for replacing punishment with restitution.²⁹ Following Barnett, he calls this ‘pure restitution’ in order to distinguish it from an account like mine that considers restitution to be punishment. Boonin argues that since all theories of punishment advocate intentionally harming the criminal, none of them can be justified. He believes that people have rights, such as to their property, and so a right that their wealth be restored if illicitly taken. But Boonin insists that no one has a right that bad people suffer.³⁰ He claims that restitution is only for what one was *rightfully* entitled. The satisfaction of vindictive feelings is not something a crime victim has a legitimate claim to even if the criminal caused such feelings to arise.

To argue that Boonin is wrong about harm would involve mostly restating the claims that I have made above and adding a little about forfeiture of rights. So I would rather end the paper arguing that even if intending to harm criminals can’t be justified, punishment has to be excused for society can’t do without it. And if the debt/atonement theory is superior to rival accounts of punishment, then it is the system that should be tolerated even if it can’t be justified.

Boonin is aware that many readers will claim that society can’t function without punishment. He writes: ‘Punishment, on this understanding, is necessary, either as a condition for the existence of a social order at all or as a condition for the kind of social order that makes possible just relationships among its members.’³¹ So Boonin considers the possibility that even if punishment cannot be justified, it might have to be excused out of ‘an appeal to necessity.’ His response is that this won’t be the case for pure restitution can ensure a just social order. Pure restitution can involve far more than garnished wages

and seized assets. It can include even incarceration, monitoring devices, house arrest, restraining orders, compulsory counseling and preventive detentions. These are not punishments when undertaken without the intention of harming the criminal, instead implemented for the purpose of providing restitution to his victims. Boonin is well aware that criminals will suffer harm in a system of pure restitution, but argues that this is morally acceptable for the harms are merely foreseen rather than intended.

However, I very much doubt the mandated fines, preventive detentions, restraining orders and the like can work without the threat of intentional harm and so harm-induced restitution will be as morally suspect as imposing punitive harm. If a person has been placed under a restraining order, house arrest or compelled to work off a debt incurred, the threat of harm will be needed to make him fulfill his obligations. If not facing the subsequent harm of incarceration, he otherwise will likely ignore his bill and violate his travel restrictions. And to ensure that the criminal works in prison to pay off his debts, he will have to be threatened with the harm of solitary confinement or the loss of some other prison 'privileges.' Moreover, the criminal will likely repeatedly try to flee any holding center if not for the threat of harm that keeps him there. It is not just guards armed with tasers, nightsticks, guns and trained to apply painful pressure by hand, but the electric fence, barbed wire and snarling dogs that represent an intention to harm the criminal, to inflict pain in order to prevent flight. A society without some of these measures is likely not to be a minimally safe and just one. Thus it seems that the pure restitution approach will fail to meet the necessity condition.

Boonin can't maintain of the above harms that they are unintended side effects rather than deliberately imposed. To borrow Anscombe's phrase, that would amount to

double talk about double effect. To claim that barbed wire or solitary confinement is not intended to harm the criminal but merely induce payment of restitution is like claiming in the famous case imagined by Philippa Foot that intentionally blowing up the fat man stuck in the cave's exit doesn't involve the intention to kill him.³² If one knows that death consists of the loss of a certain bodily integration and that the explosive device will rip a person apart, then intending the latter when one knows that it necessitates the former, is also intending the former. The metaphysical impossibility of intending one without the other is not relevantly different from the impossibility of claiming to intentionally order a glass of water but not a glass of H₂O when one knows they are necessarily the same. Likewise, the connection between barbed wire, solitary confinement and pain is too tight (probably lawful necessity), and too well-known, for it to be claimed that such measures are not intended to harm, merely intended to bring about restitution.

Nor will it help Boonin to appeal to the counterfactual that if officials could obtain the restitution without the threat of harm, they would, while the advocates of punishment don't want a substitute for inflicting harm upon the criminal. This is like saying someone who killed his victim for money didn't do so intentionally for if he could have obtained the money without killing, then he would have. The harm is still intended despite the wish that a harmless alternative was available.

So the only difference between the harm that law enforcement will provide in order for Boonin-style restitution to occur and the harm in my debt/atonement account is that in the former it is intended as a means to subsequently obtaining restitution, while in the latter it is intended to be a part of the restitution. Therefore we see that Boonin's restitutionist scheme will require intentional harm and he thus will join the punitive

restitutionist in the same boat taking on water.³³ But those who view the debt payment as a punishment will see the water pouring in not as harmful leakage but as needed to cool the engines to ensure the proper operation of the ship of state.

¹ Restitution can occur without atonement but it can also be a component of atonement.

² I have argued this previously in my (1999) 'Restitution and Revenge', *Journal of Philosophy*, 79-94, and (2000) 'Punishing Failed Attempts Less Severely than Successes' *Journal of Value Inquiry*, 34, 479-489.

³ S. Garvey (1998-1999) 'Punishment as Atonement', *UCLA Law Review*, 46, 1801-58.

⁴ For an account that punishment necessarily involves intended, see D. Boonin (2008) *The Problem of Punishment* (New York: Cambridge University Press) 12-21.

⁵ 'The should have been' is added for perhaps the victim suffered misfortune or mistreatment prior to the crime and so it would be inappropriate to merely restore him to his pre-crime status.

⁶ More needs to be said to provide a full justification of punishment. For instance: why are certain wrongs punished and not others? How do we make sense of wrongdoers forfeiting rights? Why does the state have a monopoly on punishment? But answers to these questions will not be distinctive to the debt/atonement approach and need not concern us here.

⁷ Boonin 236-7.

⁸ Garvey 1849.

⁹ H. Morris (1968) 'Persons and Punishments', *The Monist*, 24, 477-501. For a more extended critique see Hershenov (1999) 82-83 and Boonin 119-14.

¹⁰ R. Dagger (1999) 'Restitution: Pure or Punitive' *Criminal Justice Ethics*, 10:2, 33-34.

F. Miller (1978) 'Restitution and Punishment: A Reply to Barnett', *Ethics*, 88:4, 359 and

D. Klimchuk (2001) 'Retribution, Restitution and Revenge', *Law and Philosophy*, 20, 92.

¹¹ See Garvey for an illuminating account of secular punitive atonement involving remorse, apology and penance.

¹² Hershenov (2000) 81-82.

¹³ Boonin 251-53.

¹⁴ D. Lewis (1989) 'The Punishment that Leaves Something to Chance', *Philosophy and Public Affairs*, 18:1, 58.

¹⁵ Lewis 58.

¹⁶ Lewis 62.

¹⁷ P. Robinson and J. Darley (1995) *Justice, Liability and Blame: Community Views and the Criminal Law* 206.

¹⁸ Klimchuk. 96-98. P. Montague (2002) 'Recent Approaches to Justifying Punishment', *Philosophia*, 5. Even Boonin claims that the 'murdered cannot be even partially restored to well being' 240. But he argues that their debt can be transferred, though it apparently does them no good.

¹⁹ Hershenov (1999) 80-81.

²⁰ Hershenov (1999) 90.

²¹ Garvey provides an intriguing discussion of the guilty identifying with their victim, being angry at themselves, and consequently willing to suffer a penance. (1999)1823.

²² Montague 5. Klimchuk 97.

²³ It may also be that prior to their death they relished the knowledge that the person who harmed them would suffer. So the intention to harm someone might have provided some vindictive pleasure ante-mortem even though the harm would occur posthumously

²⁴ Klimchuk 97-98.

²⁵ Of course, there will be scenarios where this is not the case for the indirect victims are few or the harms they incur are insubstantial.

²⁶ H. M. Bradley (1935) *Ethical Studies* (New York: Oxford University Press) 27-28.

²⁷ Klimchuk 98-101.

²⁸ Klimchuk 99.

²⁹ Boonin 213-275.

³⁰ Boonin 271-273

³¹ Boonin 2.

³² P. Foot (1978) *Virtues and Vices and Other Essays in Moral Philosophy* (Los Angeles: University of California Press) 21-22.

³³ Boonin could claim a system of intentional harm for the sake of restitution is preferable to intentional harm for the sake of punishment. But given that suffering in the form of punishment can enhance restitution and facilitate atonement, it would seem preferable to excuse punishment.