

Retribution and Restitution: A Synthesis

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In recent years a new and powerful critique of our current criminal justice system has been advanced by advocates of a totally new approach to criminal justice. These advocates challenge the current paradigm of criminal justice, which emphasizes punishment of the criminal, and support instead a radically different paradigm, which emphasizes compensation or restitution to the victim for losses suffered as a result of the crime.

The advocates of the new restitutionary approach point out many anomalies in the current system. Murray Rothbard writes:

We must note that the emphasis of restitution-punishment is diametrically opposite to the current practice of punishment. 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 victimized in this process. Then, the government, instead of forcing A to repay B or to work at forced labor until that debt is paid, forces B, the victim, to pay taxes to support the criminal in prison for ten or twenty years' time. Where in the world is the justice here? The victim not only loses his money, but pays more money besides for the dubious thrill of catching, convicting and then supporting the criminal; and the criminal is still enslaved, but not to the good purpose of recompensing his victim.¹

At the same time new trends are developing within the current paradigm of punishment itself. Traditionally there have been three distinct justifications for this punishment—deterrence, rehabilitation and retribution. Under the deterrence approach, punishment is justified because of its deterring effect on future crimes by the criminal or others. Under the rehabilitation doctrine, punishment is justified because it allows “experts” the opportunity to rehabilitate the criminal. The rehabilitators see themselves as prescribing treatment rather than inflicting punishment. Under the retribution view, punishment is justified as the moral and just desert of a criminal who wantonly transgresses against the right of his fellow men and fails to accept the immorality of his acts.

Generally, the popular and fashionable viewpoint has been that the deterrence doctrine and, even more fashionably, the rehabilitation doctrine are the correct and valid justifications for punishment, while retribution was thought of as primitive and barbaric. The justification on which pun-

ishment rests, of course, makes a crucial difference in the nature and type of that punishment. But in recent years, many have found deterrence and rehabilitation inadequate justifications for punishment, and retribution is once again becoming more widely accepted as not only a valid justification, but the sole justification for criminal punishment.

This paper will develop a philosophical justification for a system of justice which integrates elements of both restitution and retribution. This system will include mechanisms for requiring the criminal to compensate the victim for the losses suffered from the criminal act, while retaining a role for punishment of the criminal for his illegal behavior based on a retributive justification. This integration will make the achievement of restitution goals more feasible, while supplying some of the missing elements in the current theory of retribution and its justification. It will also eliminate the major shortcomings of a system which relies on restitution alone.

The Theory of Restitution

The most well-developed presentation of the theory of restitution is probably that presented by Barnett and Hagel.² This approach to criminal justice is soundly based on an explicit conception of individual rights. In their view, a crime has been committed only when "the rights of an individual, rights that each of us possess, have been violated in some way."³ These rights are defined by and based on "the fundamental right of all individuals to be free in their person and property from the initiated use of force by others."⁴

This focus on individual rights leads the restitutionary system to diverge from the current system in several important respects. First, crime is defined as any act which violates or threatens to violate the rights of one or more individuals rather than as any action that has been prohibited by statute (the latter being the standard definition under the prevailing positivist approach to crime). Second, it becomes clear that crimes are committed against individuals with resulting damage to those individuals, rather than against the state as under the current concept. Third, this insight leads to the conclusion that there are two parties to any criminal proceeding, the aggressor and the victim, rather than the aggressor and the state, as is currently the case in criminal law. Thus, Barnett and Hagel write:

A restitutionary theory of justice begins with the principle that there are two parties to any criminal action. They are not, as traditionally conceived, the state and the defendant(s), but are, rather, the victim and the defendant. The state, if it is to play any role, would be restricted to mediating the dispute and enforcing the judgment.⁵

These points lead to the fourth key point of the restitutionary theory: namely, that the prime purpose of a true criminal justice system is to force the criminal to compensate the victim for the damages caused by the crim-

inal act. This is because the criminal act, in this view, creates an imbalance between the parties since the criminal has infringed upon the rights of the victim. This imbalance must be corrected, therefore, by forcing the criminal to restitute the victim for the loss caused by this violation of rights. Thus, the initial focus on individual rights in the restitutionary theory leads directly to the conclusion that the prime function of the criminal justice system is to make restitution to the victim rather than punish the criminal.

Barnett and Hagel go on to state that "this act of reparation should be designed to put the victim or the victim's heirs in the position that they would have been in if the original criminal act had never occurred."⁶ A key implication of this theory is that once the victim has been restituted or compensated, no further sanctions should be imposed on the criminal. Thus the authors write,

An alternative approach would be to limit the range of sanctions available to the victim by declaring that the deliberate infliction of pain or suffering upon an offender will not be permitted as an end in itself and that only if the pain or suffering results from an attempt to enforce some other form of sanction will it be permitted. Under this alternative approach, only sanctions that were designed to provide constructive reparation to the victim, either in the form of money or services, would be permitted.⁷

In a separate article, Barnett even more explicitly expresses the position that once the victim has been compensated no further punishment would be inflicted on the criminal.⁸

A further characteristic of the restitutionary theory of criminal justice as opposed to the current approach is that the restitution paradigm is backward-looking or past-oriented while the punishment paradigm is forward-looking or future-oriented. The emphasis in restitution is to determine what has happened in the past and to make amends for it. The emphasis in most punishment theories is to prevent future crime by deterring, incapacitating or rehabilitating potential criminals. In a purely retributive theory of punishment, however, this is not so, for the emphasis under such a theory is to punish a criminal for past actions. Thus this theory is as past-oriented or backward-looking as is restitution.

Because of the focus on rights in the restitutionary theory, another characteristic of this approach is that none of the goals of crime prevention of the current punishment paradigm can be pursued through the criminal justice system except as incidental by-products of the pursuit of restitution. This is because the need for restitution arises from the violation of rights which constitute the crime. To sacrifice this restitutive goal for crime-prevention goals would, therefore, be to ignore the rights of the victim and to allow them to be infringed. But rights may not be infringed in the pursuit of others goals, for they constitute "moral side-constraints" within which we must pursue all our goals, including crime prevention. Thus, Barnett and

Hagel write:

While the goal of crime prevention is certainly a legitimate and important one for any social system, it is not, strictly speaking, an appropriate goal for the criminal justice system. . . . The purpose of a criminal justice system is to rectify the imbalance created by past violations of individual rights; it should not, and it cannot, seek to do more and still remain true to its fundamental purpose.⁹

The authors correctly note that to allow other goals such as crime prevention to creep into the criminal justice system would corrupt the past-oriented focus of the restitution paradigm with future-oriented goals.

Since the restitutionary theory does not permit the pursuit of any goals except restitution through the criminal justice system, it follows that third parties to a criminal proceeding, parties other than the criminal or the victim, do not have rights to be enforced in the proceeding. The purpose of the criminal proceeding is solely to provide restitution to the victim, and therefore it is only the victim who has the right to enforce his claim. Since the rights of third parties have not been infringed, they have no rights to be enforced. Thus Barnett and Hagel write:

Under the restitutionary theory outlined above, a criminal act does not vest any rights in third parties. A specific action is defined as criminal within the context of this theory only if it violates the right of one or more identifiable individuals to person and property. These individuals are the victims of the criminal act, and only the victims, by virtue of the past infringement of their rights, acquire the right to demand restitution from the criminal.

This is not to deny that criminal acts frequently have harmful effects upon other individuals besides the actual victims. All that is denied is that a harmful "effect," absent a specific infringement of rights, may vest rights in a third party.¹⁰

This leaves the right and power to impose sanctions solely in the hands of the victim. Under the restitution doctrine, he alone can decide whether to prosecute the criminal, and no one else has any right to pursue such prosecution in his name. This also is unlike the current system, where the decision and power to prosecute is solely at the discretion of the state and the victim has no say in the matter.

Finally, Barnett and Hagel note that restitutionary theory implies important rights for the criminal as well as the victim. With their basic focus on individual rights, the authors note that the criminal as well as the victim has rights which cannot be abridged. He can be punished only to an extent commensurate with the harm he has caused by his criminal act. Any further punishment or sanctions against him will violate his rights and will therefore be unjustifiable. As Barnett and Hagel write, "therefore, 'the criminal's right as a rational being' is the right to be protected from a sanction that goes beyond the nature and consequences of his acts. In short, the criminal's

rights pick up at the exact point that the victim's rights leave off."¹¹

While Barnett and Hagel have outlined a system of law fully consistent with a libertarian concept of rights and one rather appealing from that viewpoint, they have overlooked one significant fact as well as its implications for a proper system of criminal justice: that we already have a system of restitutionary penalties, namely, that defined by the tort doctrines of the civil law, as distinct from the criminal law. We will discuss the contours of this system below. As will become readily apparent this system is remarkably identical to the system that Barnett and Hagel advocate for the criminal law. The existence of this alternative and coexisting set of penalties has important and fundamental implications for the appropriate structure of the criminal justice system.

The System of Tort Law

A victim of virtually any *statutorily defined crime*, and certainly all violent and fraudulent crimes libertarians would consider true crimes, can sue the transgressor under the civil law of tort. If the suit is successful, the victim or plaintiff is then able to receive monetary compensation for all the damages caused by the defendant's infringement of his rights. The amount of these damages is determined by a jury in accordance with the legal rules prescribed by the court and based on the evidence presented by the victim to prove the amount of damages he has suffered or is likely to suffer in the future.

The goal of the damage awards granted in tort cases is to fully restitute the victim for his losses due to the wrong inflicted on him in violation of his rights. Thus, "compensation is the stated goal of courts in awarding damages for tortious injury, or for breach of a contract or promise. With torts, compensation most often takes the form of putting the plaintiff in the same financial position he was in prior to the tort."¹² This principle forms "a limiting force on jury verdicts and indicates that American ideas of justice begin by placing emphasis, not on retribution, but on compensation."¹³ Similarly,

the rule of damages for wrongful injury to, or the wrongful taking, detention or destruction of property, is no different than the general principle of damages applied in all tort cases. The injured party is entitled to such recovery as will compensate him fully for the losses which are the proximate result of the wrongful negligence or wrongful act or omission. Stated otherwise, the injured party is entitled to such sum as will restore him as nearly as possible to his former position and he may therefore recover the actual loss sustained.¹⁴

The law provides,

The fundamental principle of the law of damages being compensation for the injury sustained, the plaintiff in a civil action in damages cannot,

except in the cases in which punitive damages may be recovered, hold a defendant liable in damages for more than the actual loss which he has inflicted by his wrong. In other words, one injured by a tort is entitled to full and adequate compensation for such injury, but no more. His recovery is limited to a fair compensation and an indemnity for the injury suffered. The law will not put him in a better position than he would be in had the wrong not been done.¹⁵

Yet,

the plaintiff is not limited to the pecuniary losses which have occurred but may also recover damages for future losses which will—in the opinion of the trier of fact—result from the defendant's wrong. Further, compensatory damages are not necessarily restricted to the actual loss in time or money. They also include such as may be awarded for bodily pain and suffering, permanent disfigurement, disability or loss of health, injury to character and reputation and in most states, wounded feelings and mental anguish.¹⁶

Also "recovery may be had for future pain and suffering and for the reasonable value of medical services and impaired earning capacity to the extent that these injuries are reasonably certain to result in the future from the injury complained of."¹⁷

Thus the possible damages which may be recovered in both personal injury and property cases are comprehensive.

Recovery in a personal injury action may be had for all the natural and proximate consequences of the defendant's wrongful act or omission such as pain and suffering, including future pain and suffering, the reasonable value of loss of time and earning capacity including loss of profits, ill health or disability naturally resulting from the wrong or injury, subsequent aggravation of the injury proximately traceable to the original wrong and any other damage that can reasonably be said to have followed as the proximate consequence of the injury.

In determining the amount of damages to be allowed the jury may take into consideration the age, health, habits and the pursuits of the plaintiff, the sex of the party injured and the circumstances of peril and suffering undergone, together with the trade or profession of the plaintiff, the situation of the person injured and his ability or want of ability to pursue some lucrative employment, and such circumstances as the presence or absence of a cruel or wanton purpose or of personal malice, actual violence, and threatening or insulting language. Allowance may be made for permanent injuries, pain and suffering, injuries to health, and for loss or diminution of the plaintiff's earning capacity. The recovery may also include damages for any pecuniary loss sustained by reason of the injury, such as loss of time and consequent loss of earnings and expenses incurred in effecting a cure.¹⁸

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The jury should award a fair and reasonable compensation taking into account what the plaintiff's income would have been, how long it

would have lasted, and all the contingencies to which it was liable. As bearing on these matters, the nature and extent of the plaintiff's business, profession or employment, his skill and ability in his occupation or profession, the loss or diminution of his capacity to follow it, as a consequence of the injury, and the damage he has sustained by reason of such loss or diminution may be shown and taken into consideration. The plaintiff's position in life may be taken into consideration, and the jury may consider the possibility of future increases in income, based upon plaintiff's character, intelligence, ability and work record.¹⁹

In a tort action for transgression of property rights, "The property owner is generally entitled to recover compensation for discomfort, annoyance, personal inconvenience, and for any other consequential damages which necessarily arise from a wrongful act complained of and which are the proximate result thereof."²⁰

"The ordinary and basic measure of damages for injury to personal property is the difference between its market value immediately before and after the injury, or in the case of its destruction, its market value at the time of destruction."²¹ "A person may recover for expenses incurred in searching for, reclaiming, or replacing property wrongfully taken from him," and for other expenses incurred in responding reasonably to wrongful loss.²²

Thus, "the basic goal of the damage remedy in tort actions is to place the injured party in the same financial position he would have been in had there been no tort."²³

The rights of victims who are killed in criminal acts to sue for restitutionary damages pass to their heirs under wrongful death or survival statutes. The law under these provisions is varied and complex but the important point is that there does currently exist a legal mechanism for providing restitutionary damages for those who have been killed by criminal acts.

Thus, the civil system of tort law already provides the victim of a crime with the opportunity to obtain damage payments from the criminal to compensate him for the damages caused by the crime. This system provides for comprehensive damage payments both for crimes resulting in personal injury and for crimes resulting in injury to or loss of property. No doubt the precise substantive provisions of this system contain many inadequacies from a libertarian viewpoint. But these inadequacies can probably be eliminated by minor changes which do not require a radical restructuring of the entire system.

There is one practical shortcoming of this system which cannot be solved by mere tinkering and which severely cripples the adequacy of the entire system. This is that people who commit crimes are typically judgment-proof—they do not have the money to pay for the damages they have caused. As a result, the victim's right to sue the criminal is usually meaningless. This is especially true if the criminal has no assets to begin with and then is placed in jail, making it almost impossible for him to acquire assets. *This is a shortcoming of any system of restitution which contains no puni-*

tive elements and, therefore, no mechanisms for collecting damages beyond the typical civil suit and judgment for money against whatever assets the criminal happens to have accumulated. This chief shortcoming of the current system of restitution, however, can be solved by integrating the system with a system of retributive punishment, as we shall see.

It should be apparent that this tort system of the civil law faithfully conforms to all the principles discussed above which Barnett and Hagel have advanced for their restitutionary paradigm of criminal justice. The civil system of tort law is first of all based on an explicit concept of individual rights. These rights are defined by statute and by the common law. It is the transgression of these rights that gives rise to the tort and the right to recover damages.

The tort is defined as any act which violates the rights of one or more individuals and not just acts which are prohibited by statute. Rights under the tort system can be developed and enforced by the common law independent of statutory expression. The tort is seen as committed against an individual rather than against the state. There are two parties to any tort proceeding, the aggressor and the victim, rather than the aggressor and the state. The state is limited strictly to the role of mediating the dispute and enforcing the judgment.

The prime purpose of the tort proceeding is to force the transgressor to make restitution to the victim by compensating him for the damages caused by the criminal act. These reparations are designed to put the victim or the victim's heirs in the position that they would have been in had the criminal tortious act never occurred. Once the victim has been compensated, no further sanctions are to be imposed on the tortfeasor.

The tort law is backward-looking or past-oriented with the emphasis on determining what has happened in the past and making amends for it. Goals other than restitution cannot be pursued through the tort system if their pursuit means a sacrifice of the victim's right to restitution, since the law fundamentally demands that the tort victim be compensated by the tortfeasor for the damages caused by the tort. Also, third parties to the tort proceeding, parties other than the aggressor, do not have any rights to be enforced in the proceeding and are therefore not parties to it. This is true even though the tort may have harmful effects upon others than the victim.

Thus, in the tort system the right and power to impose sanctions, the decision of whether to prosecute, is solely held by the tort victim, and no one else, especially the state, has the right to prosecute the case in his name.

Finally the tort system recognizes the rights of the tortfeasor as well as the tort victim. The tortfeasor can be punished only to an extent commensurate with the harm he has caused by his tortious act. Any further punishment or sanctions against him will violate his rights and will therefore be unjustifiable.

Thus, what Barnett and Hagel have described is not a new paradigm for

the criminal justice system but the current paradigm for the current civil tort law system. Barnett and Hagel are not really advocating a new paradigm for the criminal justice system. They are advocating the abolition of the criminal justice system. All this bluff and bluster about new paradigms only serves to obscure the real issue.

Thus, no one denies that the victim of a crime or tort should be restituted for the damages caused by the transgressor and we already have a system to serve that purpose which is fully consistent with the principles espoused by Barnett and Hagel. No doubt this system can be improved in various ways from a libertarian viewpoint. But the important question is whether compensation for the victim is the only sanction that should be imposed on a criminal. Barnett and Hagel answer yes, and advocate the abolition of the criminal justice system. In doing so, however, they advance only arguments that the victim must receive restitution. They present no arguments which suggest why nothing more should happen to the criminal and therefore why the criminal justice system should be abolished. It is their confusion over whether they are advocating a new paradigm for an old system or the abolition of that system, and their failure to remember that we already have a civil tort law system which provides for restitution, that leads them to fail to make any arguments in support of their real position — the abolition of the criminal justice system. In the next section we shall examine the question of whether there are any valid functions to be served by a criminal justice system apart from a civil tort law system and whether the criminal should be subject to sanctions beyond that of restitution.

Let the Punishment Fit the Crime

Robert Nozick²⁴ has outlined a system of retributive punishment in a criminal justice system. Under Nozick's theory, R (the retributive punishment deserved) equals $r \times H$ (where H is a measure of the seriousness of the harm from the act, and r indicates the degree of responsibility for H). In a retributive system of punishment, $r \times H$ happens to the offender because of his wrongful act and is inflicted by other persons, whose intention is that the offender will know that $r \times H$ is happening to him because of the wrongness of his act and that he will realize that we want him to know it. All of these elements are necessary for a complete system of punishment.

Because retributivism is often disparaged as a primitive desire for revenge, it is interesting to note the differences between this retributive system and revenge. The first major difference is that retributive punishment is always exacted because the actor committed a moral wrong. But revenge is not necessarily exacted for the commission of a moral wrong. It may be exacted for the commission of any harm upon the avenger, even if the actor was perfectly justified in committing that harm. Thus, for example, an avenger may seek revenge on the members of a jury that sent him to jail for a crime he actually committed. The punishment he exacts on these members

will be revenge but it will not be retribution for they have committed no wrong in deciding correctly that he was guilty of a crime.

A second major difference is that revenge is usually exacted by the person harmed or someone close to the person harmed, while retribution is exacted by a disinterested third party. Thus, revenge is more likely to be disproportionate to the crime committed because the person carrying out the vengeful penalty has a strong self-interest in the harming of the original transgressor. In retribution, however, the dispassionate, impersonal application of the penalty helps to ensure its proportionality.

Thirdly, the retribution system described above sets an upper limit to the penalty that can be imposed on the criminal. This upper limit is $r \times H$. It is strictly proportional to the seriousness of the crime committed, with the more serious crimes receiving stiffer penalties. This is accomplished through the H element. The more serious the harm, the higher H will be and, therefore, the heavier the penalty will be. But in the case of revenge, there is no upper limit on the punishment exacted. The punishment is, therefore, again more likely to be out of proportion to the harm.

Finally, the emotional tone underlying the exacting of revenge is entirely different from that underlying retributive punishment. One who exacts revenge enjoys seeing the suffering and he exacts the penalty in anger. One who imposes a retributive penalty, however, does not do so in anger nor does he enjoy seeing suffering. Rather he enjoys seeing justice done.

This system of retribution thus describes a proportional system of penalties for various crimes, with the more serious crimes receiving more serious penalties. But is such a system desirable? Why should we have it in addition to a compensatory system of tort law?

Nozick argues that such a system of punishment is necessary as a moral statement of the wrongness of the criminal act. The retributive punishment sends a message to the criminal and society saying: "This is how wrong your (or the offender's) action was." The retributive punishment is thus an expression of the view that the criminal's act is not only wrong and harmful but also immoral. The criminal therefore deserves the punishment because he has committed an immoral and not merely a negligent act.

By focusing on the essential moral basis for retributive punishment, Nozick seems to have articulated the reason why most individuals have an intuitive feeling for retributive punishment. There is an essential, basic moral difference between the harm committed through negligence or breach of contract and the harm committed through an intentional invasion of another's rights, especially when that invasion is a violent commission of intentional harm upon the victim such as murder, rape, robbery, theft, etc. To say that the sanctions imposed for these two types of harm are to be no different, that mere restitution is satisfactory for both, is to ignore this difference in moral quality. It is to say that there is no essential difference between murder or rape, and breach of contract or a negligent mistake in

operating an automobile. One who negligently harms someone has committed a wrong and has caused damage for which he should pay, but he has not committed an immoral act and therefore does not deserve punishment. One who murders or violently attacks another has not only committed a wrong and caused damage for which he should pay; he has committed an immoral act for which he deserves punishment. Exacting this additional punishment is to make a statement that the act was immoral. It is to morally condemn the act as a violation of accepted standards of civilized human conduct.

Making a moral statement which condemns immoral, criminal acts has functional and operational significance and is not merely symbolic. To impose no retribution or punishment beyond restitution for immoral criminal acts is to allow these wrongs to be committed, so long as the violator compensates the victims. One who breaches a contract is allowed to do so as long as he pays the damage, and the same is true for one who commits a negligent tort. But do we want to allow murders and rapes to be committed so long as the criminal pays compensation to his victims? Is no further sanction called for in such a circumstance? If we impose no further sanctions, are we not in effect saying it is all right for the criminal to commit these acts so long as he compensates his victim? If it is not all right, then why are no further sanctions imposed?

The fact that a mere restitutionary system of punishment would allow individuals to be absolved of responsibility for their crimes simply through payment of the damages is the fatal moral and practical shortcoming of the restitutional framework. To a multimillionaire it may well be worthwhile to spend a million dollars to have someone eliminated. There may even be circumstances where a monetary profit can be made on murder.

If an extremely wealthy man suspected his wife would divorce him and get an enormous alimony settlement, he may be able to save money by killing her. This would be especially true because he could claim that *he* suffered no damage from the loss and, so, total damage would be lower. Similarly, he might be able to save money by killing a business competitor, a blackmailer, or a newspaper reporter. Or the individual may merely hate another so much that it will be worth the cost to kill. Individuals undergo great personal risks now to commit murder and other heinous crimes, so it is not unrealistic to expect that many will find murder worthwhile if the only sanction is restitution.

Similarly, a rich individual may find it monetarily beneficial and emotionally gratifying to kidnap the girl he loves who is about to marry another and to hold her captive, engaging in periodic rapes. This may be even cheaper in time and money than wining and dining her, showering her with presents, and keeping her in the style of a wealthy man's wife.

This problem does not arise only with wealthy individuals. Those of lesser means could engage in fund drives to raise the money necessary to

eliminate a hated individual. For example, someone may feel that Murray Rothbard, the editor of this journal, constitutes a dangerous threat to the future of America and should be eliminated. He may then start a fund drive for donations to the "Murder Murray" fund or maybe the "Save America" fund. If every Nazi, Communist and Keynesian donated ten dollars to the fund, they could surely raise enough to pay the damage from his elimination, or at least those damages which the courts are likely to assess. If one cannot imagine this being done to Rothbard, how about to the publisher of *Hustler* magazine, George Wallace, or Martin Luther King, Jr.?

Further, consider cases where the perpetrator of the crime would be the sole heir of a murder victim and therefore the recipient of any restitution paid. Suppose a man married an orphan with no known relatives and the couple had no children. If the husband murdered the wife he could, as the sole heir, be the beneficiary of whatever restitutionary payments he might have to make. Since third parties are to have no interest in the dispute, there would be no one to prosecute the husband and who could claim the restitutionary payment. Similarly, consider a couple with an only child. If they decide to eliminate the child by murder, they, as the child's heirs, would be the recipients of the restitutionary payment. Again there would be no one to prosecute them since third parties are to have no interest in the case.

Finally, if the only cost of theft or robbery is to return what was stolen if caught, does the robber or thief have anything to lose from following his life of crime? He may lose time from unsuccessful attempts but he could have lost the same time from unsuccessful business ventures as well. Even if we assume that he will have to bear the expenses of apprehension and litigation and damages for assault, embarrassment, etc., he could take actions to mitigate these by simply returning the property when caught, making any robbery cordial, and engaging in thievery rather than robbery.

It should be emphasized that this is not merely a practical problem but a moral problem as well. Practically, allowing murderers, rapists, robbers and thugs to get off with just the costs of restitution would have little deterrent effect and would probably lead to large increases in crime. But it also seems that it is immoral to allow people to commit murder, rape or other crimes in exchange for restitutionary payment to the victim or his heirs. Such a system of sanctions seems to demean and cheapen individual rights by failing to fully enforce and protect them. Is it truly illegal to commit a rape or murder if all the criminal need do is compensate for damages? Are murder and rape illegal only if restitution is not made? Suppose the murderer or rapist commits the crime and leaves a check on the kitchen table for the amount of restitution. Are we to say that individual rights have been enforced? Does the individual really have a right not to be murdered or raped? It seems that with a system that provides only for restitution the answer is no. Such a system does not enforce and protect individual rights, but instead allows individuals to violate those rights as long as they make pay-

ments of restitution later. This is a moral, as well as a practical problem.

In response to these problems Barnett makes a series of arguments which I feel can be described only as pathetically weak:

Critics of restitution fail to realize that this "cost" of crime will be quite high. In addition to compensation for pain and suffering, the criminal must pay for the cost of his apprehension, the cost of the trial, and the legal expenditures for *both* sides. This should make even an unscrupulous wealthy person think twice about committing a crime.²⁵

And after he thinks twice he is no less likely to do it. First, the additional expenses Barnett cites can all be mitigated by the criminal. He can merely turn himself in and pay the costs without paying the apprehension, trial and legal expenditures. Secondly, individuals undergo quite high risks to commit all sorts of crimes today. It is unlikely that these additional costs will discourage additional crime, especially among the wealthy or those who may take collections for a crime fund or those who would experience monetary benefits even from a compensated crime. Thirdly, whatever the costs, this still does not change the fact that a pure restitutionary system would allow crimes whenever the criminal finds it is worth the costs.

Barnett argues further: "*Equality of justice means equal treatment of victims*. It should not matter to the victim if his attacker was rich or poor. His plight is the same regardless."²⁶ But it would not be the same if the rich person had been prevented from committing the crime by the threat of a retributive penalty. It would not be the same to the victim if his rights had been enforced by a criminal justice system that would have prevented the crime. This argument does not deny that under the restitutionary system individuals would be allowed to buy crimes. It merely says that this is all right. But we have already discussed above why such a system would be immoral and unjust.

Finally Barnett argues,

In the final analysis, however, it is irrelevant to argue that more crimes may be committed if our proposal leaves the victim better off. It must be remembered that our goal is not the suppression of crime; it is doing justice to victims.²⁷

But doing justice to victims includes punishing the criminals under our retributive scheme, as well as restituting the victim. Furthermore, Barnett's scheme does not leave those victims better off who would not have been victims if a retributive criminal justice system had prevented the crime. Nor would it leave the other victims better off, for they can get restitution under the current system of law as described above.

If we may now conclude that punishment is justified on retributive grounds, what about the other two rationales for punishment—deterrence and rehabilitation? An analysis of these two alternatives leads to the conclusion that they are not adequate to justify punishment.

First, the deterrence theory does not adequately explain our current system of punishment. On deterrence grounds, we would be justified in punishing innocent persons as long as others thought they were guilty, because this punishment would serve to deter these others. But almost everyone believes that punishment should be exacted only against the guilty, which is consistent only with a retributive rationale. Similarly, when a criminal is sentenced to death and becomes badly ill or attempts suicide before the execution, we attempt to revive him before we kill him. This is consistent only with a retributive theory of punishment, for the retributive sentence requires that the criminal be killed because of his crime, not by illness or suicide.

Ultimately, the deterrence rationale violates human rights. If the individual is being punished as an example to deter others, then he and his rights are being sacrificed to pursue the goal of crime prevention. But individuals are not means to be used to achieve the ends of others; individuals may not be sacrificed to the pursuit of social goals. All goals must be pursued within the moral side-constraints provided by individual rights. Similarly, punishment for the purpose of deterring the criminal himself from future crime, either by incapacitating him or by teaching him a lesson by providing a disincentive, would be punishment for something the criminal has not yet done. Deterrence punishment of this sort is indistinguishable from preventive detention, which violates individual rights because it restricts the liberty of individuals who have done no wrong.

The rehabilitative rationale for punishment is even less appealing. When considering such a rationale one must ask from and to what the criminal is supposed to be rehabilitated. Apparently, a rehabilitative rationale assumes some underlying vision of a normal person and that a criminal deviates from this vision in a way that makes him sick. But there is no objective standard for a normal person, and therefore rehabilitative punishment will merely be an attempt to mold criminals to a form which matches the conception of a powerful elite concerning how all people should act and think. But one group of individuals, no matter how elite, has no right to impose their conception of a normal human being on others, even if those others have committed crimes.

Secondly, the rehabilitative rationale results in unfairness because the sentence based on such a rationale is totally unrelated to the past crime. Thus, a brutal but compliant murderer-rapist will be released quickly if he agrees to conform to the mold, whereas a defiant petty thief will stay in prison forever unless he gives in and becomes cured. This means that one group of individuals, the powerful elite, is keeping another group of individuals, the criminals, imprisoned merely because that other group does not conform to the elite's conception of a normal person. The sentence under such a rationale can extend well past that justifiable on retributive grounds. But again, an elite, no matter how powerful, has no right to violate the

rights of others merely because these others do not conform to the elite's conception of normalcy.

Restitution and Retribution: A Synthesis

We may conclude that punishment is justified on a retributive rationale but on no other, and that both restitutive and retributive punishment are necessary for a completely moral, just and efficient system of legal sanctions. Yet Barnett and Hagel reject retributive punishment as well as all other types. *It is hard to understand why they do so, however, since they provide no explicit arguments in rejection.* Instead they merely argue that restitution is necessary. But retributive punishment does not make restitution more difficult. In fact, in an integrated system it makes restitution easier, as we shall see.

One can only speculate on the underlying reasons for Barnett's and Hagel's rejection of punishment and the criminal justice system. One possible reason may be that they see retributive punishment and the criminal law as inherently a function of the state and that, believing the state to be immoral and illegitimate, they therefore see retributive punishment and the criminal law as extensions of the immoral and illegitimate institution of the state.

Yet if restitutive punishment does not require a state, then neither does retributive punishment. Given the other types of services which Barnett and Hagel believe can be performed in the free market, such as police, law, and the courts, retributive punishment should be possible with market institutions, as well. The only question is: is it desirable? The answer is yes.

In fact, retributive punishment can be worked into and integrated with an entirely private civil system of restitution. An example of this exists today in the provisions of tort law which allow for punitive damages. These provisions grant the victim an additional monetary judgment against the transgressor, above the restitutive or compensatory judgment. "Exemplary or punitive damages are generally defined or described as damages which are given as an *enhancement of compensatory damages because of the wanton, reckless, or oppressive character of the acts complained of.* Such damages go beyond the compensatory damages suffered in the case. They are allowed as a punishment to the defendant and a deterrent to others."²⁸

These damages are not given for all torts; they are available only for torts containing elements deserving of moral disapprobation or torts which are typically also crimes. They are not available for innocent torts such as negligence. Thus:

as a general rule, exemplary damages are recoverable in all actions based upon tortious acts which involve circumstances or ingredients of malice, fraud or insult or a wanton and reckless disregard of the plaintiff. Thus, where such circumstances or ingredients are properly established as a predicate for the reward of exemplary damages, such damages may be

recoverable in actions for personal injuries received in consequence of tortious acts, in actions for injuries to, or for the wrongful taking or destruction of property, and in actions to recover damages for the following: abuse of process, false arrest or imprisonment, fraud and deceit, alienation of affections, interference with employment, contract or business relations, libel or slander, malicious prosecution, nuisances, entreatment or abduction of a child, seduction, and wrongful acts in regard to the transmission or delivery of telegraphic messages.²⁹

.....

Exemplary damages if recoverable at all may be recovered only in cases where the wrongful act complained of is characterized by, or partakes of, some circumstances of aggravation, such as willfulness, wantonness, maliciousness, gross negligence or recklessness, outrageous conduct, indignity and contumely insult or fraud or gross fraud.³⁰

And further:

In the absence of statutory provisions, exemplary damages are recoverable only in cases involving ingredients of fraud, oppressive malice or insult or a wanton reckless disregard of another's right. It is the general rule that exemplary damages are not recoverable for mere negligence.³¹

These punitive damages seem to follow a rough system of proportionality analogous to a retributive criminal punishment. "The general doctrine is that the punitive damages awarded must bear some reasonable relation to the injury inflicted."³²

Other courts hold that the amount of exemplary damages must be reasonably proportionate to the actual damage sustained and will set aside the verdict as excessive or reduce the amount of the award if it is not reasonably proportionate. By this it is meant that the character and extent of the injury inflicted should in some degree be considered by the jury in measuring the punishment to be meted out to the defendant.³³

Similarly, a system of proportionate retributive punishment could be exacted as part of a private system of civil restitutionary penalties. One of the chief differences between the punitive damages awarded in the present tort system and those awarded in the system to be described below is that this punishment consists solely of pecuniary sanctions, while the retributive punishment described below will consist solely of imprisonment sanctions.

Another example of how retributive punishment can be worked into a wholly private civil system of restitution is provided, ironically enough, by antitrust law. In antitrust civil suits, the plaintiff receives not only restitutive damages, but treble this amount. This tripling is meant to impose a punishment on the violator. A private system exacting restitution penalties can impose retributive penalties in a similar fashion.

This antitrust example is interesting, however, not only because it shows that retribution can be accomplished in a private system. It is also instruc-

tive because it provides an example of an integrated system of penalties, for the transgressor is punished to a degree related proportionately to the restitution damages. The greater the damage the wrongdoer imposes, the greater the punishment.

Whether provided by a private, free-market system (à la Rothbard) or by the state through more traditional institutions, an integrated system of restitution and retribution penalties, analogous to the antitrust law and to a lesser extent the general tort law, has several extremely beneficial features and positive implications. We will describe such an integrated system, incorporating restitution and retributive punishment, which we have concluded are both necessary for a complete system of legal sanctions, before noting these features and implications in more detail.

In this integrated system, transgressions which constitute mere torts will be punished by the sanction D where D is the amount of monetary restitution necessary to compensate the victim for the loss caused by the tort. The amount of D will be determined by a jury in accordance with rules specified by the court. The overriding principle behind these rules will be to provide the victim with an amount of compensation which will make him as well off as if the tort had never been committed.

Transgressions which are crimes will be punished by $P = D + I(D)$. In this formula D is the restitutionary part of the punishment penalty formula and is again monetary compensation to the victim for the loss caused by the crime. The amount of the payment will be determined either by a jury in the criminal proceeding or in a separate tort proceeding brought by the victim.

$I(D)$, the retributive portion of the punishment, is the length of imprisonment in days and is a function of the amount of restitution to be exacted (the greater the restitution, the longer the prison term). This is analogous to the punitive system in antitrust law where the punitive damages are a function of the amount of restitutive damages—a straight 200%, or $P(D) = 200\% \times D$, where $P(D)$ equals punitive damages. The only difference here is that the punitive damages or retributive punishment is a prison term rather than monetary damages. Thus, the severity of the retributive punishment would be based on the seriousness of the crime, where seriousness is measured by the degree of damages in the restitution award.

Note the similarity between the retributive punishment defined in this system and the retributive punishment defined by Nozick. As discussed in an earlier section, under Nozick's system, the retributive punishment R equals $r \times H$ where H is a measure of the seriousness of the harm of the act and r indicates the person's degree of responsibility for the act. Thus both definitions attempt to define the retributive punishment by the degree of seriousness of the harm caused by the crime. The only difference is that Nozick does not advance a method for measuring the seriousness of the harm caused by the crime, whereas the definition advanced here suggests that this seriousness be measured by the amount of the restitution award

through a formula which translates this amount of damages into a prison term measured in days. We have yet to present this formula, but a suggestion will be advanced below. It would seem, however, that the amount of the restitution award would be a particularly good place to start in measuring the seriousness of the harm caused by the crime, since this amount is the jury's estimate of the amount of damage caused by the crime.

Nozick's definition of retributive punishment is so similar to the definition advanced here, in fact, that we will take the liberty of incorporating it. Thus, $I(D) = r \times H(D)$, where $H(D)$ represents the formula which translates the amount of the restitution award into the length of the prison term.

Admittedly, this formula is difficult to specify but we can offer a suggestion. $H(D)$ can be imprisonment for the number of days it would take the criminal to pay off the restitution debt he owed, plus all other expenses of the criminal justice process, at an assumed wage he might earn during that period of imprisonment and without taking into account any of his assets which he could use to pay off that debt. The assumed wage would have to be the same for everybody, or else prison terms would be shorter for some who had committed the same crime with the same degree of seriousness as others. The prisoner could be allowed out of prison to work assuming sufficient precautions were made to prevent escape, but he would have to return to prison after work. Alternatively, he could work inside the prison.

This would provide us with a system of calibration for punishment for various crimes. It would tell us, for example, how much longer a person should have to serve for a robbery with a certain amount of damages than for a rape with a certain amount of damages. It would also provide us with a system for determining the absolute amounts or lengths of such sentences.

This system seems to work well for the determination of the calibration of punishments for various crimes or the relative sentences for various crimes. Whatever the assumed wage, a crime which caused twice as much damage as another would result in a prison term twice as long. This would provide us with a proportional system of punishment, the retributive ideal, directly related to the seriousness of each crime. This would seem to be an ideal way to specify the calibration of relative sentences.

The determination of the absolute amounts or lengths of these sentences, however, does seem to be arbitrary, for it depends solely on the assumed wage. Why should the length of prison terms, which are supposed to be statements of moral condemnation for various acts, depend on the wage a prisoner could earn during his imprisonment? Furthermore, over time, as wages rose these prison terms would fall. The absolute length of these sentences could be varied while leaving the system of calibrations intact by adjusting the formula. Instead of requiring the prison terms to be 100% of the number of days required to pay back the debt, it could be 75% or 125%, depending on how long one wanted the sentences to come out. But the relative lengths of the sentences would remain intact regardless of

the percentage. Those who had committed crimes twice as damaging would serve sentences twice as long. Thus, we have devised a system to define the proportionality of the punishment for various crimes, which seems valuable in itself. What remains is to define the absolute amounts of these punishments.

Admittedly I can think of no special formula which would compel one to decree a certain absolute prison term for each crime. However, since we have a system to define the relative scale of punishment for various crimes, we need only find a rationale that would require us to anchor that scale at a certain point. For example, if we could agree that one who commits first degree murder should serve a sentence roughly equivalent to life imprisonment, we could set the percentage in the formula at the figure that would yield this sentence for the typical first degree murder. All other crimes would then have their absolute sentence lengths set by the system of calibration as defined by the now complete formula.

Failing that, we can only say that the percentage in the formula should be varied until the lengths of sentences were in general deemed reasonable. This shortcoming neither would nor should prevent the practical application of this system. Most people have a rough idea of the amount of punishment that is deserved for various crimes. The fact that we cannot specify this amount with mathematical precision should not surprise or discourage us. The lengths of these prison terms are supposed to represent moral statements and morality does not lend itself easily to numerical expression. We were able to specify the calibration or relative length of these sentences with precision only because our notions of morality lead us to the conclusion that proportionality is just—that one who commits a crime causing twice the harm should bear twice the punishment. But there is no similar principle that would lead us to specify the absolute lengths of these sentences. Nevertheless, our conceptions of morality do lead us to rough judgments or estimates of the amounts of punishment deserved for various crimes, and in the real world that is all that is necessary. We do not lack opinions or ideas concerning the appropriate lengths of deserved prison terms; we are not totally at a loss in judging what is just. We lack only a precise mathematical formula. But in the real world such a formula is not necessary, it is only elegant. I do not believe, therefore, that a failure to specify precisely the absolute amounts of these prison terms is a serious shortcoming. It is sufficient to rely on rough moral judgments. This is especially true considering that we have developed a precise system of proportionality. The alternatives to this system lack even that.

Despite the drawbacks of this method of specifying the prison terms, it has apparently been suggested before. Barnett writes,

"Since rehabilitation was admitted to the aims of penal law two centuries ago, the number of penological aims has remained virtually constant. Restitution is waiting to come in." Given this view, restitution

should merely be added to the paradigm of punishment. Stephen Schafer outlines the proposal: "[Punitive] restitution, like punishment, must always be the subject of judicial consideration. Without exception it must be carried out by personal performance by the wrong-doer, and should even then be equally burdensome and just for all criminals, irrespective of their means, whether they be millionaires or labourers."

There are many ways by which such a goal might be reached. The offender might be forced to compensate the victim by his own work, either in prison or out. If it came out of his pocket or from the sale of his property this would compensate the victim, but it would not be sufficiently unpleasant for the offender. Another proposal would be that the fines be proportionate to the earning power of the criminal. Thus, "A poor man would pay in days of work, a rich man by an equal number of days' income or salary." Herbert Spencer made a similar proposal in his excellent "Prison-Ethics," which is well worth examining.³⁴

The crucial element in this entire system is D, the amount of damages. The determination of this amount would be left to the jury in accordance with rules prescribed by the court, much like the rules described above for the current system of tort law. The goal of this determination would be to return to the victim an amount of restitution that would fully compensate him for the losses caused by the criminal act. The jury would be allowed to consider all the factors which they are allowed to consider under current tort law, as described above.

The determination of the amount of restitution for murder would be determined in the same way. There already is a well-developed body of law providing for restitution for loss of life in the realm of torts, especially in the application of wrongful death or survival statutes. This body of law applies to intentional, criminally committed, wrongful deaths, but it has undoubtedly been much more developed in regard to negligent torts resulting in death. The courts today must regularly place a price on life lost due to wrongful negligence, and there is a complex and well-developed body of law which instructs the jury on how to determine this price. Among other things, the jury is to take into account the lost earning capacity of the deceased. It also takes into account the loss imposed on the victim's family and others due to his death.

So far in this discussion the death penalty would seem to have no role in this system, but there is a way in which it may still be useful. If a criminal already had a life sentence in prison and committed yet another murder against a prisoner or a guard or anyone else, the death penalty might be exacted. Without a death penalty, there would be nothing to stop a criminal with huge debts and a life sentence from engaging in indiscriminate killing and if the criminal displayed an attitude which indicated that he may well murder again, this situation would be plainly intolerable. Ultimately, however, this death penalty would be justified only on retributive, not deterrence, grounds. The execution of such a criminal would be justified as

retribution for the past murder, even though execution has the strongest of all deterrent effects on the criminal.

The existence of r in the formula allows us to lessen the retributive penalty without changing the restitutive penalty, when the defendant should *not* bear the full responsibility for the acts which led to the crime. This r would be between 0 and 1 and represents the degree of responsibility the actor had when he committed the crime. The more responsibility he had, the more he would suffer from the retributive penalty. This r could also be adjusted to provide for different penalties for different degrees of moral culpability. For example, second degree murder, as opposed to first degree murder, could reduce r , and manslaughter could reduce r even further. Regardless of any adjustments made through r , however, the transgressor would still have to compensate the victim. Otherwise, the victim's interests and rights might be sacrificed by a focus solely on the moral quality of the defendant's act to the exclusion of its effects on the victim.

Attempted crimes would still be illegal and the law of attempts would still apply. In such cases D by itself still would be zero and therefore no restitutionary penalty would result. But the D in the retributive portion of the penalty can represent the amount of damage that would have been caused if the attempt had been successful. This practice would retain the virtue of punishment of the criminal for his evil, immoral intent, which is the purpose of the retributive punishment, even though no restitution would be made.

This system would seem to require an additional adjustment for crimes of stolen money or property. If an individual robbed a bank and stole \$10 million and was caught with the stolen money, the restitutive damage D would be \$10 million plus. This would obviously result in life imprisonment even if the criminal had the stolen money on hand to compensate the victim for most of the damage. To eliminate this unfairness, in crimes of stolen money or property the D in the retributive portion of the punishment, but not in the restitutive portion, would be reduced by the amount of the stolen property returned to the victim. The robber would be responsible for full restitution and some additional punishment due to the other types of harm the robber may have caused such as assault, embarrassment, mental anguish, etc., as well as punishment for the amount of stolen goods or money the criminal had dissipated or spent. But this adjustment would prevent those who commit such crimes from being punished as harshly or more harshly than are those who commit other, more violent crimes.

The retributive punishment as described would take the form solely of imprisonment because that is the traditional and widely accepted, current form of punishment. It also seems to be the most flexible because it can be the most easily varied to fit different crimes and provide a proportional structure of punishment. One alternative would be to exact the punishment in the form of monetary damages, but this would have the disadvantage,

discussed earlier, of allowing those who are able and willing to commit crimes and simply buy their way off. Another alternative is a strict system of *lex talionis* as advocated by Murray Rothbard.³⁵ Under this system the criminal would receive as punishment exactly what he did to the victim. If he robbed the victim, he would have to not only give the money back in restitution but be robbed himself for an equal amount in addition. Similarly, if he murdered the victim he would be murdered, or if he beat the victim he would be beaten. I have rejected this system in favor of the imprisonment alternative because there are too many instances where it is not clear how to do back to the criminal what he did to the victim, as for example in rape cases or attempt cases or where multiple killings had been committed. Also, the imprisonment system seems more flexible in allowing the punishment to vary to match differing circumstances and degrees of damage in each case. Finally, many would probably feel that doing back to the criminal exactly what was done to the victim would in many cases be too cruel.

A key characteristic of the system described here is that everyone, rich or poor, would suffer the same retributive punishment for a crime of equal magnitude or damage, for even those who have the assets to pay the restitution debt would be imprisoned for the number of days that they would have to work to pay back this debt at the assumed wage. By excluding the assets of all and assuming the same wage for everyone, and by focusing on the seriousness and the amount of damages caused by the crime, the same retributive punishment would be applied regardless of assets or earning capacity. The advantage would be that individuals would not be allowed to buy their way out of prison terms. Since the punishment is imposed on the criminal because of the moral quality of his act, the amount of assets or earning power he has should be irrelevant; those whose acts have the same moral quality should suffer the same prison sentence.

A final important characteristic of this system is that no penalties would be exacted for victimless crimes since no damages would be caused by the violation of such laws; therefore D would equal zero, as would $P = D + I(D)$.

This theoretical system can be carried into practical effect as follows. Upon the commission of a crime, the victim would have the option of bringing a tort proceeding or a criminal proceeding. If he brings a tort proceeding he has to prove all the elements of the tort, including damages (D) by a preponderance of the evidence standard. He is entitled in this proceeding only to the restitutionary element of the sanctions (D). After the tort proceeding, he can bring a criminal suit in which he must prove all elements of the crime beyond a reasonable doubt, but he can rely on the damages (D) determined in the tort proceeding. If he prevails here, he will be entitled to exact $I(D)$ upon the defendant, which would allow the victim to place the criminal in jail and receive the proceeds of his forced labor there to pay for the restitution. A criminal suit will be especially valuable if the criminal is otherwise judgment-proof. It will also be valuable to the victim if he merely

wants to see justice done and the criminal get the punishment he deserves.

Alternatively the victim can bring a single criminal suit without a tort suit. In this case, the victim will get the rights to *D* if he establishes his case by a preponderance of the evidence and the rights to *I(D)* if he establishes his case beyond a reasonable doubt. The jury in this case will also decide the amount of damages (*D*) by a tort standard.

The convicted criminal would be liable to pay the amount of the restitution award and all costs incidental to his apprehension, including the costs of trial and legal counsel for both sides. The criminal will also be required to pay for the costs of his incarceration. The criminal should remain liable for the total amount of these debts for life or until they are repaid. They should not be negated by any bankruptcy or statute of limitations. Thus, if this total debt is not repaid when the criminal is released from prison, he will still be liable for the remainder and his wages or other income may be garnished to pay it back.

A key question is whether the criminal could earn enough in prison to pay back all his debts. For monetary crimes, this should be feasible if the criminal has the stolen assets to return to the victim. For crimes of physical violence, this may not be so. In order to make the system more feasible, all money that the criminal earns in prison should be sent to the victim first, and only after the victim is paid off would the prison start to collect for the cost of imprisonment. If the criminal is released before he can pay off all of his debts, he will remain subject to them for life or until they are paid off.

Thus, we have described an integrated system containing both restitutionary and retributive punishment elements. One of the major mistakes of Barnett and Hagel is the assumption throughout their paper that one must choose between either restitution or punishment. Barnett writes:

The real test of public sympathies would be to see which sanction people would choose: incarceration of the criminal for a given number of years, or the criminal's being compelled to make restitution to the victim. While the public's choice is not clearly predictable, neither can it be assumed that it would reject restitution. There is some evidence to the contrary.³⁶

But the correct answer is not to choose either restitution or retribution but to choose both. These two forms of punishment are perfectly compatible, as we have seen, and in many ways they complement each other.

The position taken here is basically the same as the position of Rothbard, who also advocates a combined restitution-retribution approach:

The first point is that the emphasis in punishment must be, not on paying one's debt to "society," whatever that may mean, but in paying one's "debt" to the victim. Certainly, the initial part of that debt is restitution. . . .

... While it is the first consideration in punishment, restitution can hardly serve as the complete and sufficient criterion. . . .

... The victim [also] has the right to exact punishment up to the

proportional amount as determined by the extent of the crime.³⁷

In fact, the only difference between the approach advocated here and the approach advanced by Rothbard is that the retributive punishment in Rothbard's scheme is defined by a strict *lex talionis* whereby the victim has the right to do to the criminal exactly what the criminal did to the victim. In my scheme, by contrast, this system of *lex talionis* is replaced by the retributive punishment defined by I(D) as described above.

The approach advocated in this paper is also very similar to the approach advanced by Hospers.³⁸ Hospers also advocates a retributive punishment scheme whereby each criminal is punished according to his "moral desert." His rationale for a system of retributive punishment is much like that discussed in the present essay.

Our system also maintains the distinction between tort and criminal law as advanced by Epstein.³⁹ Under the tort law the individual can get only restitution damages in money. Under the criminal law, the criminal can be punished and imprisoned for his act as well as forced to pay restitution. It should be clear that both the tort and criminal sanctions described by Epstein are based on a violation of individual rights. It is the same violation of the rights of the victim by the transgressor that gives rise to both the tort and criminal sanctions in our system. Epstein writes:

At this point I want to elaborate the argument in order to press the point one step further, by urging that criminal and tort law can only be understood by recognizing that both vindicate precisely the same set of individual interests. . . . The crimes of assault and battery, rape and the like are all concerned with the inviolability of the person and contemplate, via different substantive theories, invasions of exactly the same interest as that protected by the tort law. Likewise, the crimes of arson and many forms of larceny, robbery and the like are all concerned with external things that are also protected by the tort law.⁴⁰

And further:

The common features of tort and criminal law also can be approached from the point of view of the defendant's conduct that invades (or threatens to invade) that interest. . . . In order to establish any nexus between plaintiff's harm and defendant's conduct, it is universally necessary, as a minimal condition, to point to some individual conduct on the part of the person charged with the wrongdoing. The types of conduct subject to further investigation under both branches of law are two: (1) actions; and (2) the failure to act, but only in situations where there is a duty to act.⁴¹

This conduct must be volitional and violative of individual rights.

Yet the essential difference between tort and criminal law, which is retained in our system, is that the criminal law is used to prohibit those acts which are worthy of moral condemnation and which therefore should be punished, i.e., those acts which it is not all right to commit *even* when the

actor compensates his victim. This essential distinction was also noted by Epstein:

Briefly put, the position must be that the intention to harm is immaterial (to the *prima facie* case) in the tort law, whereas the actual harm itself is immaterial to the criminal law. Common acts, such as street muggings, may well be actionable as torts and punishable as crimes. Yet that fact should not obscure the essential point that the grounds for punishment and the grounds for liability are never the same. The act itself may be a unitary phenomenon, but the description under which it is judged in the two systems do and should diverge.⁴²

Thus the crucial question in a criminal case is the intent of the criminal (which shows the degree of moral condemnation necessary), whereas the crucial question in the tort case is the damage caused (which shows the amount of restitution which must be made). Thus, Epstein writes that "the criminal law is based on the view that the state should punish any person whose own conduct is worthy of moral condemnation." He argues that the criminal law is "born of the view that we should distinguish between accidental and deliberate harm."⁴³

Another way to note the distinction between the tort law and the criminal law is to note that the tort law gives the victim what he deserves and the criminal law gives the criminal what he deserves. Thus, both are essential to a complete system of justice.

It should be noted also that while our system contains elements of both restitution and retribution it is fully consistent with all of the important principles advanced by Barnett and Hagel in describing their restitutive paradigm of justice. It is firmly based on a concept of individual rights with the violation of those rights as the prerequisite for valid tort and criminal proceedings. Crimes would be defined as acts which violate individual rights, although they would be expressed in statutes to give notice to ordinary citizens, who are not philosophers. Crime in this system would be seen as committed against individuals, with resulting damage to those individuals, rather than as committed against the state. There would be two parties to criminal proceedings, the aggressor and the victim. The major focus of the criminal proceeding would be to compensate the victim by granting him restitution damages and granting the criminal the punishment he deserves. The restitution damages would seek to make the victim as well off as if the crime had never been committed.

Our system would be backward-looking or past-oriented, for its purpose would be to bring restitution to the victim for the loss caused by the criminal act and to punish the criminal for his immoral actions. Crime prevention goals of the current system of criminal justice could not be pursued through the system described here, except as incidental byproducts, because to do so would violate the rights of either the victim or the criminal. Third parties also would not have any rights to be enforced in the criminal proceeding.

Furthermore, in the system advanced here, the criminal would have the right to not have any further sanctions imposed on him beyond the restitution and proportional retributive penalties we have described.

Thus, the system we have described is fully consistent with the principles which have been advanced by Barnett and Hagel. Yet it has none of the shortcomings which Barnett and Hagel ascribe to purely punitive systems, as we shall see. In fact, with the combined elements of restitution and retribution, this system not only solves most of the major problems of restitution as pointed out by its critics, but also solves most of the major problems of retribution as posed by its detractors.

One of the chief criticisms which Barnett and Hagel advance against a system of retributive punishment, is that often no sanctions are imposed on a criminal, even though he has committed great damage, because of his lack of responsibility for his actions. Since a retributive system punishes for moral iniquity rather than for damage caused, and since an individual is not worthy of moral condemnation if not responsible for his actions, an individual who commits a crime without responsibility for his actions will go unpunished under a strictly retributive theory of punishment even if his actions cause great harm. In our system this responsibility factor is represented by the letter r in the formula for $I(D)$, which equals $r \times H(D)$. When responsibility is low or non-existent, r will be zero or close to zero, and the retributive punishment will therefore be low or nonexistent, even though the harm caused by the act may be great.

Thus, Barnett and Hagel write:

By focusing attention too heavily on the moral worth of the criminal offender, the theory is led to reject the imposition of sanctions upon individuals who had violated the rights of others but who, for a variety of reasons, might not be considered deserving of sanctions. Such a retributive approach is inconsistent with the concept of justice that requires the rectification of all past violations of rights.⁴⁴

The authors write further:

Another consequence of a theory of justice that focuses on the moral attributes of those accused of crimes is the need to probe the psyche to determine the extent of "badness" present. This often leads to the paradoxical result that those persons who commit the most heinous crimes may escape punishment entirely.⁴⁵

While this is a valid criticism of a solely retributive system, it is not a valid criticism of our combined system of restitution and retribution. When r is zero it is true that the retributive punishment would be zero, but the criminal would still be liable for the restitutive penalty D . He would thus still have to pay for the damage he caused to the victim by his acts. This is the entire penalty Barnett and Hagel would exact anyway, since they do not believe in punishment under any circumstances. While the retributive penalty

would be 0, this would be the just penalty since the criminal has no responsibility for his act and therefore deserves no condemnation or punishment. Thus justice would be done to the victim through the restitutive penalty; and justice would be done to the criminal through a retributive penalty proportionate to his degree of responsibility.

Another criticism made of the retributive system by Barnett and Hagel is that, "by departing from a theory of criminal justice that is based upon a relationship between two parties, such an approach ignores the rights of the victim entirely and the victim is reduced to the relatively marginal role of witness."⁴⁶ Again, this criticism does not apply to our combined system of restitution and retribution. First, this system does not depart from a theory of criminal justice based on a relationship between two parties. Secondly, the rights of the victim are not ignored. The victim has the full rights to restitution which Barnett and Hagel would grant. In fact, it is they who are denying the victim his rights, because the victim is prevented from exacting the retributive penalty in the enforcement of his rights against the criminal action, a penalty which he should have the right to impose and which the criminal deserves.

Barnett offers some additional criticisms of his own:

A system of punishment, furthermore, offers no incentive for the victim to involve himself in the criminal justice process other than to satisfy his feelings of duty or revenge. The victim stands to gain little if at all by the conviction and punishment of the person who caused his loss.⁴⁷

But again this is not true of the combined system of restitution and retribution. The victim has the same incentive to bring a tort action for restitution in our system as he does in Barnett's system. Furthermore, the victim has an incentive to bring the criminal proceeding so that the criminal, who is likely to be judgment-proof, can be put in jail and forced to work to pay back the debt.

Barnett also argues that in a retributive system "there is no rational connection between a term of imprisonment and the harm caused the victim"⁴⁸ and that "there is no objective standard by which punishments can be proportioned to fit the crime. Punishment is incommensurate with crime."⁴⁹ But by integrating the restitutive penalty and the retributive penalties, we have devised a rational connection between the punishment and the crime and an objective standard by which to determine proportional punishment. In the formula presented above, we have a method by which the retributive penalties can be based on the harm the criminal has caused.

Finally, Barnett argues that because of the punitive sanctions in a retributive system, the criminal justice system is burdened with procedural safeguards to ensure that the innocent are not punished. This tends to make the criminal justice system slow and arduous and delays the exaction of justice, Barnett contends. But this is not true of our combined system because the

restitutive penalty can be received in a separate, non-criminal tort proceeding which is not burdened with criminal procedures. The retributive portion of the system would be exacted through a criminal proceeding which would entail the usual criminal procedures and thus ensure that the innocent are not punished. But the restitutive penalty is all that Barnett would exact anyway.

While our combined restitution-retribution system of punishment is not vulnerable to any of the criticisms which Barnett and Hagel level at purely retributive systems, it is also not vulnerable to any of the criticisms validly leveled at a solely restitutive system.

The chief shortcoming of a solely restitutive system is that, as we have seen, it would allow individuals to commit crimes as long as they had the means and desire to pay the costs of doing so. The shortcoming of such an approach is not merely that it will fail to deter large amounts of crime, but also that it fails to enforce the rights of individuals to be free from crime, thus denying and demeaning individual rights. Furthermore, it seems unfair to allow some individuals to commit crimes which should be prohibited to all, merely because these individuals have the means to pay for the damages. One cannot earn the right to commit a crime through productive effort or voluntary exchange (unless the exchange is the granting of such a right by the victim beforehand), and therefore individuals should not be allowed to buy crimes by merely compensating an unwilling victim after the fact.

Our combined system would avoid this shortcoming. While restituting the victim, it would also punish the criminal regardless of whether he had the assets to make restitution, and thus it would not allow him to get away with the crime by merely making such payment.

Another important shortcoming of most solely restitutive systems, such as the current tort law, is that most criminals are judgment-proof: they do not have the money to pay for the damage that they cause. Even if the victim gets a judgment in court, he will not receive restitution because there are no assets out of which the judgment can be paid. Barnett and Hagel seek to remedy this by imprisoning or confining the judgment-proof criminal who could not be trusted to work to pay back the debt on his own, and forcing him to work to pay back the debt. Thus, Barnett writes, "If it is found that the criminal is not trustworthy, or that he is unable to gain employment, he would be confined to an employment project."⁵⁰ But how can this imprisonment or confinement be justified? How, for example, can we justify putting someone in jail just because they owe us a debt for breach of contract? How can we justify imprisonment as a means of gaining payment of a debt through forced labor? The only way that the debt owed for a crime can be distinguished from other debts, so that repayment of this debt can be extracted under forced imprisonment, is to focus on the moral quality of the underlying criminal act. This cannot be accomplished in the solely restitutive system advocated by Barnett and Hagel because that sys-

tem focuses only on damages caused by the criminal act and not on criminal intent. But by focusing on this underlying moral quality, we can justify imprisonment and forced labor as punishment on retributive grounds, using the proceeds of this labor toward restitution for the victim. Thus, a solely restitutive system cannot justify forced imprisonment, for any attempt at such a justification necessarily entails elements of punishment and retribution. A solely restitutive system, therefore, remains vulnerable to the problem of the judgment-proof criminal. The combined restitution-retribution system we have advocated, however, can justify the forced imprisonment alternative and thus eliminates this problem.

Hospers advances another criticism against the solely restitutive approach. He argues that under restitution those who cause a certain amount of damage innocently and unintentionally will face the same penalty as those who cause it deliberately with an evil intent. He argues that this is unfair because the one who committed the act with an evil intent should be punished more harshly. Under restitution one who accidentally kills another will face the same penalty as one who engages in first degree murder. Hospers argues:

But this seems to me a rather discomfiting consequence of the theory, for the two offenders' *deserts* are not the same. Whether the offender did it deliberately does not enter into a consideration of his desert. There is a difference between murder and manslaughter, and everyone agrees that murder should be more harshly punished. But the damage done may be exactly the same; and when death is involved, the victim is equally dead both ways. On the restitution theory, should not the amount of restitution be equal? I find this disturbing because no consideration is given to the offender's desert.⁵¹

While this is a valid criticism of the solely restitutive system advanced by Barnett and Hagel, it is not a valid criticism of the combined system we have advanced. Under this system, an unintentional offender would be subject only to the restitutive penalty D. The malicious offender would be subject to this plus the retributive punishment I(D).

Another criticism has been advanced against the solely restitutive system by both Epstein and Hospers. They correctly note that under a restitutive system no punishment would be exacted for an unsuccessful attempt, because there would be no damages. Yet the criminal had the same evil criminal intent which deserves punishment as the one whose attempt is successful. Why should mere luck in deflecting the intended harm prevent the criminal from being punished? In our combined system, as we have discussed, the unsuccessful criminal would also have no restitutive damage D to pay. But he would have a retributive punishment I(D), where D is the amount of damages that would have occurred if he had been successful. This would not only have the desirable result of punishing unsuccessful attempts for the underlying immoral intent, it would also mean that those

who had made successful attempts would suffer a higher penalty, $D + I(D)$, than those who had made unsuccessful attempts, who would suffer only $I(D)$. This would seem to comport with the modern approach to unsuccessful attempts, in punishing them with less severity than those which are successful. The difference in the degree of punishment also seems to be highly rational. The successful offender is punished by an additional amount equivalent to the additional damage he caused.

A final problem with the restitutive system advanced by Barnett and Hagel is that they display considerable confusion over the appropriate standard of proof in criminal cases. First, they suggest a preponderance of the evidence standard as in current tort cases. But this would allow the accused criminal to be convicted and burdened with the dishonorable criminal label on much less evidence than is currently required. This seems unacceptable in itself, but it is even more so when one recalls that Barnett and Hagel advocate imprisoning or confining the convicted criminal under certain circumstances. Perhaps with awareness of these problems, they would suggest a beyond-a-reasonable-doubt standard as an alternative. But ironically, this would make the achievement of restitution even more difficult than under current law, where the victim only has to prove his case by a preponderance of the evidence in a tort suit.

These problems are again solved by our integrated system. The restitution penalty can be awarded upon proof by a preponderance of the evidence in a tort suit. Yet retributive punishment would not be imposed until the victim had proved his case beyond a reasonable doubt in a criminal proceeding.

Beside solving the many shortcomings of the solely restitutive approach, our combined, integrated system solves the major defect in a solely retributive approach. The major criticism of the retributive theory of punishment, as well as all other theories of punishment, is that the retributive theory does not tell us how much to punish the victim to make up for the crime he committed. But our integrated system provides a solution to this problem, as we have discussed. The retributive punishment would be specified by $I(D) = r \times H(D)$ where D is the amount of damages that the criminal caused and $I(D)$ is a prison sentence. Thus, the degree of damages caused by the criminal and the seriousness of the crime would determine the length of his prison sentence and the severity of his retributive punishment. This method would provide a strictly proportional system of punishment fully consistent with the retributive ideal and would seem to be the ideal basis on which to specify the degree of retributive punishment for each crime. Each individual would be punished according to the degree of his wrong by the most sensible measure available, namely the degree of damages he caused. This system, however, leaves deterrence and rehabilitation theories still without any definition of the penalties they would impose.

Thus, it seems that with our combined, integrated system of restitution and retribution penalties, we provide an example of a situation where the

whole can be greater than the sum of the parts. By putting restitution and retribution theories together in an integrated system, we provide important elements missing in the philosophical justifications for each. We also solve important shortcomings of each separately and make restitution more feasible. Thus, instead of choosing between restitution and retribution as some would try to force us to do, it seems that the correct answer is to choose both.

NOTES

1. Murray N. Rothbard, "Punishment and Proportionality," in Randy E. Barnett and John Hagel III, eds., *Assessing the Criminal: Restitution, Retribution, and the Legal Process* (Cambridge, Mass.: Ballinger Publishing Co., 1977), p. 261.
2. Randy E. Barnett and John Hagel III, "Assessing the Criminal: Restitution, Retribution, and the Legal Process," in Barnett and Hagel, *Assessing the Criminal*, pp. 1-31.
3. *Ibid.*, p. 10.
4. *Ibid.*, p. 11.
5. *Ibid.*, p. 26.
6. *Ibid.*, p. 27.
7. *Ibid.*, p. 11.
8. Barnett, "Restitution: A New Paradigm of Criminal Justice," in Barnett and Hagel, *Assessing the Criminal*, pp. 349-83.
9. Barnett and Hagel, "Assessing the Criminal," pp. 17-19.
10. *Ibid.*, p. 15.
11. *Ibid.*, p. 13.
12. *U.S. v. Halatrally* (CA 10 Utah) 257F. 2d 920, 22 Am Jur 2d sect. 12, p. 28.
13. 22 Am Jur 2d sect. 12, p. 26.
14. 22 Am Jur 2d sect. 131, p. 189.
15. 22 Am Jur 2d sect. 13, p. 29.
16. 22 Am Jur 2d sect. 11, p. 27.
17. 22 Am Jur 2d sect. 27, p. 49.
18. 22 Am Jur 2d sect. 85, p. 122.
19. 22 Am Jur 2d sect. 92, p. 134.
20. 22 Am Jur 2d sect. 131, p. 189.
21. 22 Am Jur 2d sect. 146, p. 214.
22. 22 Am Jur 2d sect. 162, p. 237.
23. 22 Am Jur 2d sect. 162, p. 231.
24. An exploratory discussion of these issues was presented by Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 59-63. Nozick elaborated on this theory in more detail in his class discussions at Harvard Law School in January-June 1979.
25. Barnett, "Restitution," p. 379.
26. *Ibid.*, p. 380.
27. *Ibid.*, p. 373.
28. 22 Am Jur 2d sect. 236, p. 321.
29. 22 Am Jur 2d sect. 243, p. 334.
30. *Ibid.*
31. 22 Am Jur 2d sect. 257, p. 343.
32. 22 Am Jur 2d sect. 264, p. 358.
33. 22 Am Jur 2d sect. 265, p. 359.
34. Barnett, "Restitution," pp. 363-64, quoting from Stephen Schafer, *Compensation and Restitution to Victims of Crime*, 2nd ed. (Montclair, N.J.: Patterson Smith Publishing, 1970), 127.
35. Rothbard, "Punishment and Proportionality," pp. 259-70.
36. Barnett, "Restitution," p. 372.

37. Rothbard, "Punishment and Proportionality," pp. 260-63.
38. John Hospers, "Retribution: The Ethics of Punishment," in Barnett and Hagel, *Assessing the Criminal*, pp. 181-210.
39. Richard A. Epstein, "Crime and Tort: Old Wine in Old Bottles," in Barnett and Hagel, *Assessing the Criminal*, pp. 231-57.
40. *Ibid.*, pp. 238-39.
41. *Ibid.*, pp. 239-40.
42. *Ibid.*, p. 248.
43. *Ibid.*
44. Barnett and Hagel, "Assessing the Criminal," p. 24.
45. *Ibid.*, p. 8.
46. *Ibid.*, p. 24.
47. Barnett, "Restitution," p. 360.
48. *Ibid.*, p. 359.
49. *Ibid.*, p. 361.
50. *Ibid.*, p. 365.
51. Hospers, "Retribution," pp. 204-205.