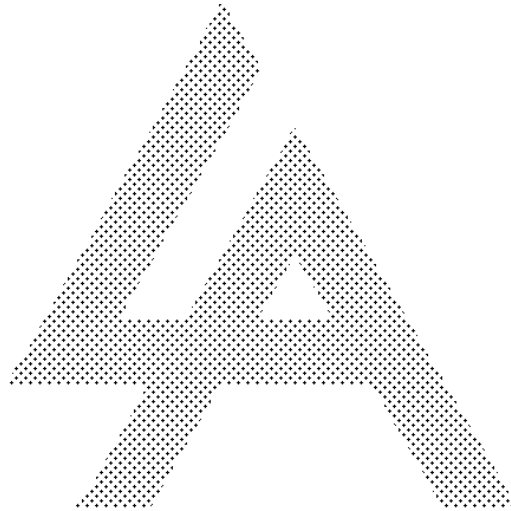


# RETRIBUTION VERSUS RESTITUTION



**MATTHEW O'KEEFFE**

If one broadly divides “the Left” and “the Right” between those who tend toward collectivism and the compulsory state and those who favour individualism and the free market, then it would be fair to say that support for retributive justice has been most strongly voiced from “the Right”. Many of my friends in the University Conservative Association talk about solutions to crime in terms of ever stiffer prison sentences, a reintroduction of the death sentence, bringing back the birch (a favorite), castration of rapists, etc.. What is alarming is that all of this is advocated in the name of “law and order” or “the rule of law”.

People who care about the rule of law should care about the degree to which violence has been institutionalised through the machinery of retributitional justice. Depending on where the criminal finds himself in the world, his particular crime may be punished by flogging, the loss of a hand or physical mutilation of some sort, imprisonment (for days, months, years) or the death sentence (whether by firing squad, lethal injection, electric chair, or hanging). Retributive justice has, in Walter Kaufman’s words, “allowed the sadistic imagination rather free rein”, if nothing else. Alternatively murderers and rapists in the West are more

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often than not released after a couple of years of “rehabilitation”.

## RETRIBUTION AND THE RULE OF LAW

The question as to whether such “solutions” to crime are sadistic or arbitrary obscures the more basic question as to whether they really are conducive to the rule of law. Obviously if retribution is too great the law will not be respected by either the criminal or law-abiding. In early nineteenth century London, crimes such as damaging Westminster Bridge and impersonating a Chelsea Pensioner were punishable by death - the law was regarded as a laughing-stock and rightly so. Furthermore, many criminals reasoned that they might as well be hanged for a sheep as for a lamb and an incentive thus existed for the rational criminal to commit greater rather than lesser crimes. This increase in criminality was matched by a decrease in apprehension; people were far less willing to “shop” their friends if they thought this would mean certain death. And the criminal himself was naturally far less likely to turn himself in, and, if caught, far less likely to plead guilty. The juries themselves often chose to acquit a criminal rather than condemn him to an unfair punishment for a petty offence. The very great severity of punishments - in particular the irreversibility of the death sentence - led juries to be very cautious about their verdicts. This is only an example of retribution at its most extreme but it is here that its flaws are most obvious. The message is simple; the greater the punishment (“deterrent?”), the greater the crimes actually committed, the smaller the number of apprehensions, and the smaller the number of convictions. And one can just as easily find these faults and others, such as the alarming tendency to recidivism, in more moderate punitive sanctions such as imprisonment. It is curious to consider that the policy of imprisonment has been to commit murderers and rapists to penal institutions where murder and rape are common practice. And when one considers that in prison first-time offenders are mixed with hardened career criminals, it is equally curious how anyone could describe prisons as “correctional institutions”. Sam Konkin’s description of them as “institutions of criminal higher learning” is far better.

## THE NATURE OF CRIME

So far I have concentrated on what is wrong with the practice of retributive justice. What, then, of the theory of punishment (“that which an offender is made to suffer because of his wrongdoing”)? The dictionary definition of the word best answers this question for a libertarian.

Once one establishes “wrongdoing” as the criterion for punishment, the need for a victim disappears entirely. It is quite easy to think of numerous activities

that a libertarian might regard as “wrong”, such as self-destructive drinking or drug-taking or gambling. But a libertarian would never wish to prohibit such things. The vast number of victimless activities which have in fact been criminalised is a result, I think, of loosely and mistakenly defining crime as wrongdoing rather than as damage. One does not have to be a libertarian to recognise that criminal acts are only a subset of “wrong” or “immoral” acts.

But can punishment be right even in cases where “wrongdoing” involves actual damage against person or property? Consider the following true story. A couple of months ago I was involved in a minor road accident. As is the case with any accident, it called merely for compensation, which was promptly paid by the other driver. But let us now suppose that the damage had been deliberate; the dent in my car would have been no larger, and my rights violated to no greater a degree, yet the driver would then have been liable to punishment. We arrive at the conclusion that what makes such a case a “criminal” rights violation (and an instance of “wrongdoing”), and what calls for retribution, is the aggressor’s intent, his desire to do damage. If you think as I do that the power to punish guilty thoughts and desires lies with God or conscience alone, this seems highly unsatisfactory. Yet these “Thought Police” powers are accorded to the forces of law and order nearly everywhere. Indeed it is intent alone which distinguishes “criminal” rights violations from “civil” rights violations, and intent alone which sanctions retribution in every case. Of course, the example of the car accident is perhaps too simplistic an attempt to eliminate the civil/criminal distinction; one may argue that certain crimes against the person must by their very nature be criminal. After all, it is impossible to rape or kidnap someone *accidentally*. This creates problems for those who wish to dethrone intentionality altogether. On the other hand, once one accepts that the offender be accountable under the law not only for his actions but also for certain moral attributes such as his wilfulness to commit those actions, it is hard to know where to stop. Not to be outdone, Stalin at the time of the Great Terror introduced Article 58 of his new criminal code whereby one could be punished simply for intent to sabotage the state. No actual sabotage was necessary for successful prosecution under Article 58. But this is only an example of retributive justice at its logical extreme.

One may even ask whether the process whereby “an offender is made to suffer” is a useful one. The practice of “an eye for an eye” may be “justice” in some crude sense, but it does nothing in the way of restoring binocular vision to the victim. In fact as most retributive schemes are financed through taxation, it is the victim and the rest of society who are made to suffer, forced to suffer not only the cost of crime but

also the cost of the criminal's punishment. Once crimes are thought of strictly as damages, the appropriate remedy for rights violations becomes clear: restitution. Randy Barnett's explanation of the difference between restitutive and retributive justice is the best I know:

A retributive view attempts to lower the criminal to the level at which the victim has been placed as a result of the crime. The restitutive view attempts to force the criminal to raise the victim to the level at which he or she was before the crime.

Those libertarians who worry about the "problem" of whether a stateless world would be libertarian or intolerant towards victimless activities are perhaps guilty of thinking in terms of a world governed with retributive justice. The restorative view does not allow for "victimless crime"; restitution requires that there be a victim to claim restitution, and physical damage for which the responsible make reparations. The idea of crime without victims is a peculiarity of the retributive view.

### THE VIRTUES OF RESTITUTION

The intuitive response against the restitutive view is that punishment ought to be employed in the case of certain crimes such as kidnap or murder for which reparations can never fully be made. I agree that no amount of money can make up for kidnapping or murder. But neither will subjecting the criminal to any amount of punishment make up for such crimes; restitution at least does *something* for the victim (or in the case of murder the victim's next-of-kin). And in fact people do place values on their lives - this is what the business of life insurance is all about. Another advantage of the restitutive system, then, is that it allows every individual to make a subjective choice in determining just how much a potential aggressor would have to pay for crimes such as murder or rape. If I took out an insurance policy valuing my life at over £1,000, then anyone foolish enough as to murder me would in all probability spend the rest of his life working off his debt to my insurance company. Other people might place different values on their lives. But no one - and certainly not the government - can make these evaluations for anyone else.

What of the accusation that restitutive justice is the free market philosophy taken to absurd limits? That it would leave the wealthy at liberty to "purchase" - by committing and then paying restoration for - whatever crimes they chose, with insignificant financial loss? If a thief convicted of stealing my car is forced to return my car and pay damages, it concerns me little whether the criminal is wealthy and can afford to make these payments with ease or not. (Most crimes are of such a petty nature - would the wealthy even engage in such crimes?) But it will be a matter of somewhat

greater concern to me if the criminal kidnaps or murders a relation and is then easily able to make payments for any damage done. It needs first to be restated that neither punishment nor repayment can undo this sort of damage. Our question should be, rather, how restitution will deter the rich from committing these crimes. One answer is that such crimes would be extraordinarily expensive, once damages *and* interest *and* the costs of apprehension and trial were included. But how, then, does it deter the extraordinarily rich? to the extent that "millionaire murderers" became a serious problem in society we could expect even higher life insurance policies. (Incidentally, it is not at all obvious how the economics of such insurance would work; presumably the higher a policy one took out on one's life, the lower the risk of being murdered and the cheaper the premium. So it's not obvious that the poor would be unable to afford effective insurance against such aggression.) To deter the extraordinarily rich, the cautious could insure their lives at prices even "millionaire murderers" would find hard to meet. And with or without insurance, there would be nothing to stop potential victims killing such murderers in self-defence. To the extent that post-harm solutions to crime (whether restitution or retribution) prove ineffective, individuals (or protection agencies) can always resort to pre-harm solutions such as dealing with the criminal in the act, on the spot. It is still possible, however, that in a very few cases the very wealthy would be able to get away with injustice. This surely poses grave problems for restoration theory, and leads us again at least to consider the possibility of some retribution for crimes against the person. It will not do to resort to the utilitarian argument that any such miscarriage of justice would be enormously offset by reductions in crime elsewhere (although this is exactly the argument used by advocates of the death sentence when countering the possibility of a miscarriage of justice).

There is another reason, and one which many libertarians may find more appealing, for preferring restitution to retribution. Those libertarians who advocate anarcho-capitalism are often asked questions such as: who, if anyone, will protect the rights of those too poor to afford protection in the stateless society? Retributivists have no answer to this question, unless they anticipate the emergence of "altruistic avengers" who, for no financial reward, will deal with those who commit crimes against the poor. Similarly the advocates of restitution are often asked how reparations are to be made in the cases where there is nobody to repay. If a hermit without friends or family is murdered, to whom should the murderer be forced to make restoration? The answers to both questions begin, again, with thinking of crimes as damages. The way my friend Robert Taylor explained it to me was thus: every time a crime is committed, damage is

done, and an entitlement to reparations created. In other words, every crime involves the creation of a property right, a right of restitution. If you steal my TV, I have that right. If a man's wife is run over and killed, he has that right. If our "hypothetical hermit" is murdered, on the other hand, it is not obvious who has the right to restitution; since a property right *has* been created, however, it seems reasonable that this right be open to "home-steading". In this case homesteading would obviously include tracking down the killer and staking a claim to damages, in much the same way as did the bounty hunters who proved so successful in the apprehension of criminals in the "Wild West". Indeed, if the bounty hunters of the future prove anything like as effective as their American predecessors, one would expect the rights of the poor to be indirectly yet zealously protected. Within the restitutorial system there is a clear financial incentive to bring to justice criminals who have harmed those with no means of demanding compensation. No such incentive exists within a retributorial system. A restitutorial system could mean far greater justice for the poor, against the claim that it would mean "justice for the rich". Of course the above scenario will only attract a certain type of libertarian; restitutorial justice could just as easily be administered by the existing court system. One does not have to be an anarchist to recognise the superiority of restitution over retribution in law enforcement.

### THE MECHANICS OF RESTITUTION

It is important to bear in mind that such a restitutorial system would be no more than an extension of the existing system of compensation with all its advantages and faults. Some criminals might be confined to debtors' institutions where they would work until restoration was complete. Others might wear electronic tags and be allowed to go about their business if this proved more conducive to repayment. Presumably the victim would set the conditions for repayment. It is not impossible that in cases where the criminal caused damage beyond any possible repayment, he would have to pay with his life. But death would only ever be a means of restitution for the victim. It is conceivable that the sale of television rights to the execution of notorious criminals could finance restitution in many cases (in nineteenth century America crowds queued to watch public executions). No doubt the greater the damage done the more notorious the criminal, and the more notorious the criminal the more could be raised in this way. Alternatively, convicted criminals could finance restitution by fighting to the death in televised gladiatorial combat or accepting roles in "snuff movies". Robert Burrage (*A Free Market in Human Organs*, Economic Notes No. 10, Libertarian Alliance) has even made the suggestion that after death, the criminal's body be reduced to

spare parts and sold on the market! Perhaps the space age will offer less barbaric options; it could well offer a whole range of high pay, high risk, menial occupations. Criminals could be sent to work in perilous, frontier condition places to repay the more sizeable restoration debts. A particularly attractive feature of this option would be that after a certain period away from earth, the effects of gravity on the body would be such that no criminal could ever live on earth again. Those sceptical should consider that a civilised country like Australia was colonised in a very similar way. These are but a few suggestions; nobody can know in advance exactly how a restitutorial system would work.

However restitution might work, we have every reason to believe that it would do so better than retribution. The reverse ought to be true of restitution, of everything that is true of retribution. Restitution creates no incentive for the criminal to commit ever greater crimes; the arsonist who causes £100,000 of damage knows that if caught he will have to pay a hundred times more than the thief convicted for £1,000. The greater the crime, the more the criminal is deterred. Restitution also places a price on the head of every criminal. This, I think, would slightly increase the probability of capture! The criminal himself has an incentive to turn himself in; the longer he delays, the more interest accumulates and the more apprehension costs mount. And restitution tends to more convictions; the criminal is more likely to plead guilty if he faces the prospect of trial costs, and victims are more likely to take part in prosecution if they can reap financial reward from it. The only reward available to victims in a retributorial court is revenge, and many are quite naturally reluctant to pursue their cases. And the time a convicted criminal spends working off a debt furnishes him with a marketable skill for future life. Recent studies by Nick Elliott for the Adam Smith Institute suggest that recidivism could almost be reduced to zero. Restitution should lessen the crimes committed, increase apprehensions, increase convictions, and lower recidivism.

Those who continue to find something appealing in the ideas of retributive justice should consider where they have led us. It was once pointed out to me that by legitimising "mental institutions" in the West, we have helped the Eastern Bloc maintain its own "psychiatric institutions". It should also be pointed out that by legitimising "correctional institutions" and the death sentence in parts of the free world, we have made it that much easier for our friends on the other side of the iron curtain to run their "labour camps" and murder their opponents in the name of "justice". It is time all who advocate the rule of law rejected this "justice", and time that the manifesto of "hanging and flogging" was left to the atavistic ideologies on "the Left".