

ŁUKASZ DOMINIAK

IS THE ROTHBARDIAN THEORY OF PUNISHMENT
RETRIBUTIVE?*

INTRODUCTION

There seems to be some confusion in libertarian literature about classifying the theory of punishment put forward by Murray Rothbard. On the one hand, Rothbard himself called his theory retributive. As he pointed out, “punishment is an act of retribution after the crime has been committed” (ROTHBARD 2011, 381), or in another place: “it should be evident that our theory of proportional punishment—that people may be punished by losing their rights to the extent that they have invaded the rights of others—is frankly a *retributive* theory of punishment, a ‘tooth (or two teeth) for a tooth’ theory” (ROTHBARD 1998, 91). Also other authors either repeated those pronouncements (BLOCK 2019, 103; BLOCK 2009, 1; GORDON

Dr. habil. ŁUKASZ DOMINIAK is an Associate Professor at the Department of Social Philosophy, Institute of Philosophy, Faculty of Philosophy and Social Sciences, Nicolaus Copernicus University in Toruń, Poland and a Fellow of the Ludwig von Mises Institute, Auburn, Alabama, United States; correspondence address: ul. Fosa Staromiejska 1A, 89-100 Toruń, Poland; e-mail: lukasdominiak80@gmail.com; cogito1@umk.pl; ORCID: <https://orcid.org/0000-0001-6192-8468>.

* This research was funded in whole or in part by the National Science Centre, Poland, grant number 2020/39/B/HS5/00610. For the purpose of Open Access, the author has applied a CC-BY public copyright licence to any Author Accepted Manuscript (AAM) version arising from this submission.

The author would also like to express his gratitude to anonymous referees of the present paper for their very encouraging reviews as well as to the editors of this journal, especially to the Secretary of the Annals of Philosophy, Natalia Gondek, for their professionalism, efficiency and friendly readiness to help the author with many questions he had during the publication process.

Last but not least, the author would like to thank his dear friend and colleague, Professor Karl-Friedrich Israel from Saarland University in Saarbrücken, Germany and the Catholic University of the West in Angers, France for his, as always, perceptive comments and corrections.

2020) or developed their own “retributive/retaliatory, or *lex talionis*, theory of punishment.... largely consistent with the libertarian-based *lex talionis* approach by Murray Rothbard” (KINSELLA 1996, 52). Additionally, the fact that retributivism was embraced by Robert Nozick (NOZICK 1981, 363–97) seems to facilitate adopting it as the official libertarian theory of punishment and so interpreting the Rothbardian account along the same lines.

On the other hand, as pertinently pointed out by Stephan Kinsella (1996, 52), who builds his own estoppel account of punishment on the Rothbardian *lex talionis* approach, it was Randy Barnett and John Hagel (1977) who noticed that the Rothbardian theory of punishment “with its emphasis on the victim’s rights... is a significant and provocative departure from traditional retribution theory which, perhaps, merits a new label” (179). In another text, Barnett (1977, 288) in turn suggested that although Rothbard’s system of double payments is “closer to pure restitution than other proposals,” it should nonetheless be classified as “punitive restitution” due to the fact that “the ‘double damages’ concept preserves a punitive aspect.” Thus, instead of constituting a truly restitutive scheme, the Rothbardian theory, according to Barnett, “can be considered another attempt to salvage the old paradigm [of punishment]” (288).

Still, a different classification of the Rothbardian theory of punishment is suggested by Walter Block. Developing and applying the Rothbardian theory of punishment to the problem of unjust enrichment, Block (2009) rejects the idea that this account of punishment is “based upon consequentialism or retributivism” (104). As he points out, “it is predicated on neither one of these considerations. Rather, an attempt is made herein to deduce punishment theory from the basic elements of libertarianism: the non-aggression principle and private property rights” (104). This in turn suggests that the libertarian theory of punishment might be unique and not easily subsumable under traditional categories of deterrence, retribution or restitution. However, despite these appearances, in other place Roy Whitehead and Walter Block (2003) offer a much more traditional classification of the libertarian theory of punishment calling it compensatory. As they declare, “[l]et us first make clear that the libertarian theory of punishment is one of compensation for the victim” (243).

The present paper engages in this debate about the proper classification of the Rothbardian theory of punishment by arguing that despite Rothbard’s explicit pronouncements to the contrary, his theory of punishment is corrective rather than retributive. Following Barnett and Hagel’s suggestion that Rothbard’s emphasis on the victim’s rights might constitute a departure from retributivism and drawing on the detailed exposition of retributivism and the role of victims in punishment

offered by Michael S. Moore (1999, 65–89; 2010, 83–188), the present paper develops an argument that Rothbard’s insistence on vesting the victim with rights over punishment defeats the central requirement of retributive justice that criminals should be punished solely because they deserve it and only in a way that fits their respective deserts. At the same time, allowing the victim to decide what punishment should be within the limits set by forfeiture of the criminal’s rights justifies classifying the Rothbardian theory of punishment as an account of the best possible correction of injustice that was inflicted on the victim: where material restitution and compensation are either impossible or arbitrary, the victim herself should determine what brings her the biggest consolation. This in turn supports the conclusion, following Nozick’s distinction between retribution and revenge, that if inflicting suffering on the criminal is what satisfies the victim the most, its infliction is better classified as revenge than retribution. As pointed out by Moore in the context of a debate with George Fletcher (1999, 51–63) about the role of victims in determining punishment, a “move to victims turns the criminal law into an engine of victim vengeance rather than a realization of abstract justice” (MOORE 1999, 76).

The present paper proceeds in the following order. Section 2 briefly explains what retributivism is. Section 3 shows why the Rothbardian theory of punishment may seem retributive. Section 4 describes the role that the Rothbardian theory assigned for victims in determining punishment. Section 5 puts forward the proper argument of the present paper that the Rothbardian theory of punishment, notwithstanding appearances to the contrary, is not retributive and then it considers some possible objections to this argument. Section 6 continues the main argument and shows that the Rothbardian theory of punishment is really corrective rather than retributive. Instead of exacting punishment in accordance with desert, it allows victims to seek compensation in various forms, including taking revenge on their offenders. Section 7 concludes.

1. RETRIBUTIVISM REQUIRES THAT OFFENDERS ARE PUNISHED ONLY BECAUSE THEY DESERVE IT

Let me first clarify what the retributive theory of punishment is. I take the following passage from Immanuel Kant to be the locus classicus of hard retributivism:

But what is the mode and measure of Punishment which Public Justice takes as its Principle and Standard? It is just the Principle of Equality, by which the pointer of Scale of Justice is made to incline no more to the one side than the other. It may be rendered by saying that undeserved evil which any one commits on another is to be regarded as perpetrated on himself. Hence it may be said: ‘If you slander another, you slander yourself; if you steal from another, you steal from yourself; if you strike another, you strike yourself; if you kill another, you kill yourself.’ This is the Right of RETALIATION (*jus talionis*) and properly understood, it is the only Principle which in regulating a Public Court, as distinguished from mere private judgment, can definitely assign both the quality and the quantity of a just penalty. All other standards and wavering and uncertain....

Whoever has committed Murder must *die*.... and therefore there is no equality between the crime of Murder and the retaliation of it but what is judicially accomplished by the execution of the Criminal.... Even if a Civil Society resolved to dissolve itself with the consent of all its members—as might be supposed in the case of a People inhabiting an island resolving to separate and scatter themselves throughout the whole world—the last Murderer lying in the prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realize the desert of his deeds, and that bloodguiltiness may not remain upon the people; for otherwise they might all be regarded as participators in the murder as a public violation of Justice. (KANT 1887, 196–98)

In a nutshell, what retributivism postulates is that any one who inflicted undeserved evil on another ought to be punished in accordance with the principle of equality or retaliation (*lex talionis*)—even if society were to dissolve itself—simply because he deserves it, that is, simply because he intentionally inflicted undeserved evil on another which fact constitutes his desert basis.

This idea is further confirmed, even if partially modified, by other prominent authors. For example, Robert Nozick (1981) points out that while “the punishment deserved depends on the magnitude H of the wrongness of the act, and the person’s degree of responsibility r for the act, and is equal in magnitude to their product, $r \times H$,” retributivism is “[t]he view that people deserve punishment for their wrongful acts in accordance with $r \times H$, independently of the deterrent effect of such punishment” and that “the underlying rationale of retribution... [is] punishment inflicted as deserved for a past wrong” (363–66). Similarly, Herbert Hart (2008) identifies “the retributive principle” as the proposition “that wicked conduct injuring others itself calls for punishment... even if its infliction is not necessary in order to prevent repetition of that conduct” (234). Also Michael S. Moore (2010), from whom the title of the present section takes its form, points out that “retributivism is a very straightforward theory of punishment. We are justified in punishing because and only because offenders deserve it” (91). For

Moore as for Kant, retributive punishment is not only justified in a sense of giving us “a *right* to punish culpable offenders. It does this, making it not unfair to punish them, but retributivism justifies more than this. For a retributivist, the moral responsibility of an offender also gives society the *duty* to punish” (91). Still in other words: “Moral responsibility (‘desert’) in such a view is not only necessary for justified punishment, it is also sufficient” (91).

To summarize the above concise exposition of retributivism, one can say that retributivism is the view that all people who deserve it ought to be punished and that the only reason for which they ought to be punished is that they deserve it. In other words, that desert is both a necessary and a sufficient reason for punishing. Additionally, punishment that ought to come upon the offender should equal his desert, that is, the magnitude of the wrong he committed responsibly. Transposed into the libertarian framework of private property rights,¹ retributivism requires that all property rights violators are punished—only due to the fact that they committed violations of property rights and are responsible for these violations—and that they are punished equally to the degree of their responsibility for the committed property rights violations.

2. THE ROTHBARDIAN THEORY OF PUNISHMENT MAY INDEED SEEM RETRIBUTIVE

Prima facie, it may seem that Rothbard (1998) also subscribes to the retributive theory of punishment. First of all, in order to explain what retribution is, he approbatively quotes *Webster’s Dictionary* to the effect that retribution amounts to “the dispensing or receiving of reward or punishment according to the desserts [*sic!*] of the individual” (93). So understood retribution “remains as our only just and viable theory of punishment and equal treatment for equal crime is fundamental to such retributive punishment” (96). He believes it is “evident that our theory of proportional punishment—that people may be punished by losing their rights to the extent that they have invaded the rights of others—is frankly a *retributive* theory of punishment, a ‘tooth (or two teeth) for a tooth’ theory” (91). In

¹ Let us recall that at least for some libertarians “the traditional Lockean view—that all rights are essentially property rights—far from being merely a piece of bourgeois ideology, actually embodies an important conceptual truth” and so “all rights in a set of compossible rights may be regarded as property rights.” See Hillel STEINER (1994, 93–94). Jan Narveson puts it even more clearly: “it is plausible to construe *all* rights as property rights”; or Murray Rothbard: “the concept of ‘rights’ only makes sense as property rights.” See NARVESON (2001, 71) and ROTHBARD (1998, 113).

turn a retributive standard of *lex talionis* which he “advocated here” is “a criterion for punishment which truly meets our conceptions of justice” (92).

Additionally, one might be willing to conclude the retributive character of the Rothbardian theory from its insistence on proportionality in punishing criminals. As pointed out in the introduction, if transposed into the framework of libertarian property rights, retributivism requires that property rights violators are punished equally to their responsibility for property rights violations that they committed. It in turn implies (at least on the grounds of the forfeiture theory embraced by Rothbard) that property rights violators must have forfeited their rights proportionally to the magnitude of their wrongs. Otherwise punishing them equally to their responsibility for wrongs they committed would violate their unforfeited rights. In such a scenario any punishment would be an excessive and unjust punishment. It should therefore come as no surprise that Rothbard (1998) subscribes to a theory of proportional punishment. As he informs his readers: “We have advanced the view that the criminal loses his rights to *the extent* that he deprives another of his rights: the theory of proportionality” (85). “We must therefore fall back upon the view that the criterion must be: loss of rights by the criminal *to the same extent* as he has taken away” (88).

How this principle of proportionality might support the retributivist interpretation of the Rothbardian theory can be seen, for example, in the way Rothbard gauges the extent of criminals’ rights forfeiture. In the simplest case of theft, the amount stolen (\$15,000) should, according to Rothbard, be returned to the victim. However, this “simple restitution of the \$15,000 is scarcely sufficient to cover the crime (even if we add damages, costs, interests, etc.)” (88). Restitution or compensation is therefore only the first step on the way to justice. Moreover, it is a step pronouncedly distinct from punishing the thief, for returning the stolen money only marginally involves forfeiture of the criminal’s rights. After all, the thief did not acquire property rights to the amount stolen and so his losing the stolen money cannot constitute forfeiture of his ownership rights. There is therefore no wonder that for Rothbard “restitution, while the first consideration in punishment, can hardly serve as the complete and sufficient criterion” (88). It is actually necessary to take away the criminal’s rights, that is, seizing at least double the amount stolen.² As pointed out by Rothbard, “the criminal must pay *double* the extent of theft: once, for restitution of the amount stolen, and once again for loss of what he had deprived another” (88). Juxtaposed with Rothbard’s fierce

² For Rothbard, following Nozick, there should also be additional penalty for the victim’s fear: “So that for proportionate punishment to be levied we would also have to add *more than double*” (ROTHBARD 1998, 89).

rejection of deterrence and rehabilitation theories of punishment (92–96), this suggests retributivism.

3. THE ROTHBARDIAN THEORY GIVES VICTIMS RIGHTS TO DETERMINE PUNISHMENT

The Rothbardian theory of punishment assigns a special role to victims in determining punishment. On the one hand, due to its background political anarchism and methodological individualism, the Rothbardian theory of punishment identifies only two parties to any crime: an individual victim and a perpetrator. There is no room for state officials playing any role in fighting crimes, pressing charges, convicting criminals or sentencing. Neither is there any room for crimes against society or other abstract entities. The only victim is the individual whose rights were violated by the perpetrator. Accordingly, all powers to inflict punishment are originally held by the victim. Hence, if any security agency or judge enjoy any power over the process of punishing the criminal, they enjoy it only in virtue of delegation. As pointed out by Rothbard (1998):

In the libertarian society, there are, as we have said, only two parties to a dispute or action at law: the victim, or plaintiff, and the alleged criminal, or defendant.... In a libertarian world, there would be no crimes against an ill-defined 'society,' and therefore no such person as a 'district attorney' who decides on a charge and then presses those charges against an alleged criminal....

All rights of punishment derive from the victim's right of self-defense. In the libertarian, purely free-market society, however, the victim will generally find it more convenient to entrust the task to the police and court agencies. (85, 90)

On the other hand, due to its background in libertarianism which rejects the existence of any positive duties (unless incurred contractually or as a result of committed violations), that is, duties that require the duty-bearer to perform some action or service, the Rothbardian theory of punishment does not burden the victim with a duty to punish the criminal. Rather it vests the victim with a liberty-right³ to punish. After all, by committing a violation, the criminal forfeited only his claim-rights against being punished which correlated with the victim acquiring liberty-rights to punish the criminal up to the extent dictated by the proportionality principle. Neither the criminal nor anyone else acquired any new claim-rights

³ This probably simplifies the matter a bit. Besides Hohfeldian liberties, the victim would be vested with some second order positions, especially powers. But this fact seems irrelevant in the present context. For an exhaustive exposition of Hohfeldian relations see, for example, HOHFELD (1913, 16–59), KRAMER (2002, 7–111), STEINER (1994).

against the victim that the victim punish the criminal. Since only such new claim-rights would correlate with the victim's duty to punish, it follows that the victim did not incur a duty to punish the criminal.

This in turn implies, first of all, that according to the Rothbardian theory of punishment the victim may pick up any level of punishment within the limit set by the proportionality principle. As pointed out by Rothbard (1998), "the proportionate principle is a *maximum*, rather than a mandatory, punishment for the criminal.... [It] tells us *how much* punishment a plaintiff *may* exact.... But, in libertarian law, there would be no *compulsion* on the plaintiff, or his heirs, to exact this maximum penalty" (85). Moreover, the fact that the victim is not burdened with a duty to punish the criminal but only acquires a right to this effect implies that the victim may forgive the criminal entirely or allow him to pay instead of serving his sentence in prison. As put by Rothbard, if the victim "was opposed to punishment altogether, he could simply forgive the criminal, and that would be that. Or... the victim or his heir could allow the criminal to *buy his way out* of part or all of his punishment" (86). Hence, the role that Rothbard assigns for the victim in the process of determining punishment consists in the victim having a full control over it, provided that punishment stays within the maximum limit set by the proportionality principle. As he concisely summarizes this role himself:

The victim, then has the right to exact punishment up to the proportional amount as determined by the extent of the crime, but he is also free either to allow the aggressor to buy his way out of punishment, or to forgive the aggressor partially or altogether. The proportionate level of punishment sets the *right* of the victim, the permissible upper bound of punishment; but how much or whether the victim decides to *exercise* that right is up to him. (89)

4. THE ROTHBARDIAN THEORY OF PUNISHMENT IS NOT RETRIBUTIVE

Having set the stage for the proper argument of the present paper, I can now cut to the chase. Let me start with the thesis that the Rothbardian theory of punishment is not retributive (and leave the thesis that it is corrective for the next section). By now the reasoning supporting this proposition should be pretty straightforward:

- (1) Retributive theory of punishment requires that offenders are punished only because they deserve it.
- (2) The Rothbardian theory of punishment requires that offenders are punished also because their victims demand it.

- (3) Therefore, it is not the case that the Rothbardian theory of punishment requires that offenders are punished only because they deserve it.
- (4) Therefore, the Rothbardian theory of punishment is not retributive.

Or:

- (1) Retributive theory of punishment requires that all offenders are punished in accordance with their deserts.
- (2) The Rothbardian theory of punishment allows victims to forgive their offenders.
- (3) Therefore, the Rothbardian theory of punishment does not require that all offenders are punished in accordance with their deserts.
- (4) Therefore, the Rothbardian theory of punishment is not retributive.

As one can see, the principal problem with classifying the Rothbardian theory of punishment as retributive is that it vests victims with liberty-rights to punish offenders up to the maximum set by the proportionality principle. This fact allows for the possibility that punishment might not match desert which in turn runs against the crucial tenet of retributivism that offenders are punished in accordance with their respective deserts and only because they deserve it. For example, if an offender commits voluntary manslaughter, then punishment that he deserves equals—to use Nozick’s handy formula— $r \times H$, that is, the product of the degree of his culpability (in this case, intent to kill mitigated by the extreme emotional disturbance or heat of passion upon provocation; that is, the degree of culpability that would amount, if translated into Nozick’s formula, to a value lower than 1)⁴ and the magnitude of wrong caused by the offender’s act (in this case, death of a human being). However, if the victim’s heir exercised his punishment rights and partially forgave the offender, then punishment exacted on the offender would equal $r \times H - m$ (where m stands for the magnitude of mercy showed to the offender) whereas the magnitude of the offender’s desert would still amount to $r \times H$. Since $m > 0$, then $(r \times H - m) < (r \times H)$ which in turn means that

⁴ Incidentally, it seems that Rothbard supports strict liability as the proper standard of responsibility for the libertarian criminal law. This in turn means that for Rothbard the value of r in Nozick’s formula would always equal 1 and so desert would simply equal the magnitude of wrong (violation of rights) caused by the criminal’s act. Then in the case of voluntary manslaughter punishment deserved would amount to death penalty. On a different note, the fact that Rothbard seems to support strict liability speaks independently against the idea of classifying his position as retributive, for under strict liability the offender’s culpability does not count for punishment at all whereas retributivism requires culpability for desert. See ROTHBARD 2011, 367–418. On the strict liability standard in criminal law see MOORE 2018, 513–29. For a support of strict liability as a proper standard in torts see EPSTEIN (1980). For a libertarian criticism of Rothbard’s support of strict liability standard see HOPPE 2012, 327–36.

punishment exacted would be smaller than punishment deserved. Now for a retributive theory of punishment such a situation would be clearly unjust.⁵ Still even more unjust would be a scenario in which the victim's heir would forgive the offender entirely. For in such a case m would equal H and so the magnitude of exacted punishment would equal 0 whereas the degree of the offender's desert would stay at the same level of $r \times H$. Again, from the vantage point of retributive justice any such scheme would be glaringly unjust.⁶

Could the Rothbardian theory of punishment respond to this by claiming that what the offender really deserves is not punishment which equals $r \times H$ (or any other measure traditionally proposed by retributive theories) but whatever punishment the victim demands within the limit set by the proportionality principle (that is, punishment which according to Nozick's formula would equal $r \times H - m$)? Then one could say that the Rothbardian theory of punishment requires that all offenders are punished in accordance with their respective deserts and only because they deserve it, although it would define desert differently, that is, as $r \times H - m$. This in turn would allow one to conclude that the Rothbardian theory of punishment is after all retributive. There are at least three problems that beset this response (let us call it the *Victim's Demands Response*).

First of all, it seems problematic for conceptual reasons. For punishment to be deserved, it must match a desert basis. There is no desert without a desert basis. However, an offender's desert basis must be a fact or a property about the offender, not about other actors. As pointed out by Joel Feinberg (1970):

The facts which constitute the basis of a subject's desert must be facts about the subject. If a student deserves a high grade in a course, for example, his desert must be in virtue of some fact about *him*—his earlier performances, or his present abilities. Perhaps his teacher *ought* to give him a high grade because it will break his neurotic mother's heart if he does not; but this fact, though it can be a reason for the teacher's action, cannot be the basis of the student's desert. (59)

⁵ Of course, the Rothbardian theory of punishment could argue that from the point of view of libertarian first principles it is the retributive theory of punishment that is clearly unjust (and so that it should be rejected). However, such a move would also imply the truth of the proposition argued for in the present paper, namely that the Rothbardian theory of punishment is not retributive.

⁶ It seems that any such scheme would also be unjust from the point of view of distributive justice. After all, the same crimes or the same degrees of desert would be punished unequally across different criminals. In other words, under the Rothbardian scheme punishments would be distributed unequally amongst equally deserving criminals depending on contingent circumstances of their victims having different inclinations to show mercy. The present paper, following Moore, develops this argument below. See MOORE (1999, 77). On retributive justice involving elements of distributive justice see FLETCHER (1999, 58).

Similarly, the fact that the victim forgives the offender might be a good reason for abstaining from punishment (and apparently it is a sufficiently good reason for Rothbard) but it cannot be the basis for the offender's desert. Accordingly, although no punishment or less punishment can indeed be justified all things considered, it cannot be the deserved punishment. At any rate, Rothbardians themselves do not think that other people's demands can constitute a desert basis for the actor when it comes to deserving acquisition of ownership interests. In such a case they hold tightly to the idea that the actor's own agency involved in the process of labor-mixing or production is the sole basis for his deserved private property. They find totally unacceptable a suggestion that other people's needs or demands could dictate or even partially influence what a homesteader deserves as his rightful property. Why then should the actor's desert basis be something entirely different when it comes to punishing him for violations of property rights? We should rather expect a coherent notion of desert across various branches of the libertarian theory of justice.

Second of all, regardless of conceptual intricacies connected with the notion of desert basis, the *Victim's Demands Response* would run against our moral intuitions about what people really deserve. Suppose that the victim's heir does not demand any punishment for the victim's killer. Then under the interpretation that deserved punishment equals $r \times H - m$ we would have to conclude that the killer does not deserve any punishment, regardless of the fact that he intentionally killed an innocent person who after all was a self-owner protected by absolute property rights. That alone should strike us as extremely counterintuitive. But suppose further that the victim herself would have punished her killer at the maximum, had she had an opportunity to do so. Unfortunately, the victim neither had had this opportunity, nor an opportunity to pass her demands for maximum punishment to her heir. Accordingly, what the heir inherited from the deceased victim was only a right to punish her killer, not a duty to do so at the maximum. Being given this freedom, the heir decided to forgive the killer. Would anyone really believe that the killer received what he deserved? It is highly instructive to note that not even Rothbard (1998) himself believed so. As he pointed out:

A problem might arise in the case of murder—since a victim's heirs might prove less than diligent in pursuing the murderer, or be unduly inclined to let the murderer buy his way out of punishment. This problem could be taken care of simply by people stating in their wills what punishment they should like to inflict on their possible murderers. The believer in strict retribution, as well as the Tolstoyan opponent of all punishment, could then have their wishes precisely carried out. (86)

This of course implies that unless people stated in their wills that retributive punishment should be inflicted on their possible murderers, then punishment actually inflicted by less than diligent heirs would not be retributive, that is, would not be what their murderers objectively deserve.

But even if the victim forgave the killer at the last moment before he killed her, would that really affect one's intuitions about the killer's desert the way the *Victim's Demands Response* suggests? Or would it rather show that due to the exceptional moral worth of the person killed, the killer deserves even harsher punishment? Consider the following hypothetical from Michael S. Moore (1999) concerning Nicole Simpson:

In the O.J. trial, suppose a hitherto unknown tape suddenly surfaces. Here's what the tape records: that Nicole said during the attack that killed her, "O.J., I know that you think that I've done you wrong and I forgive you for this." Does that make any difference to what O.J. deserves with regard to killing Nicole Simpson? Or did he do a great wrong, culpably, to which victims' preferences, whether vengeful or forgiving, are simply irrelevant? Many would think that such a forgiving attitude, if relevant at all, would make what Simpson did even worse: his victim was such a good person, she could even forgive her killer at the time she is killed. (78)

One can also test one's moral intuitions about desert by confronting cases which raise equality considerations, that is, cases in which two or more perfectly analogous crimes happen. Sticking to the original scenario in which the offender committed voluntary manslaughter that went unpunished because the victim's heir forgave him, suppose that in another, perfectly analogous voluntary manslaughter case the heir of another victim happened to show no mercy to the offender who is therefore punished with death.⁷ Is it really plausible at all to claim that even though both offenders committed perfectly analogous crimes, the former deserves to go free whereas the latter deserves to be executed? Quite the contrary, what seems to be a much better explanation of our intuitions in this case is that although both offenders deserve exactly the same punishment, one of them was forgiven. Consider again a quote from MOORE (1999):

In a truly victim-oriented system, if a wrongdoer has the good luck to injure one of those New Testament types, instead of one of the Old Testament types, then that wrongdoer is going to receive less punishment—because he is always going to get the turn-your-other-cheek forgiveness response from his victim. That is not equality. The propensity of a victim to forgive her transgressor is irrelevant to retributive desert. Two offenders, one of whom injures a resentful victim and the other of whom injures a forgiving victim, seem equally deserving of punishment. (77)

⁷ Again, under Rothbard's strict liability standard r always equals 1 and so punishment deserved (provided no mercy is showed to the offender) equals H .

5. THE ROTHBARDIAN THEORY OF PUNISHMENT IS CORRECTIVE

The third reason for which the Rothbardian theory of punishment—whether modified by the *Victim's Demands Response* or not—should not be classified as retributive is that it is much better explained as a corrective theory. The basic idea is that instead of ensuring that all offenders get what they objectively deserve, the Rothbardian theory of punishment takes pains to assure that all victims (or their heirs) are subjectively made equal for the wrongs committed against them. The most obvious element of the Rothbardian theory that points in that direction is its emphasis on restitution to the victim. Rothbard (1998) even calls it “the idea of primacy for restitution to the victim” (87), and he sees it as an original contribution of his libertarianism that in the case of theft “the emphasis of restitution-punishment is diametrically opposite to the current practice of punishment [where] the government instead of forcing A to repay B..., forces B, the victim, to pay taxes to support the criminal in prison” (86–87). One can therefore clearly see that for Rothbard the main objective of punishment is to return to the victim what was taken away from her rather than to give back the criminal what he deserves.

However, restitution is only the first step on the way to corrective justice. As put by Rothbard himself, “restitution, while the first consideration in punishment, can hardly serve as the complete and sufficient criterion” (88). One more corrective element is needed: the victim’s right to get compensation for her additional costs, foregone interest and experienced fear. Thus, what the victim should receive over and above restitution are “damages, judicial and police costs, and interest foregone” (86). However, “even if we add damages, costs, interest..., we are still not finished with elaborating the extent of deprivation of rights involved in a crime” (88). Still, it is necessary to compensate for fear and uncertainty experienced by the victim. Crediting Nozick for this observation, Rothbard points out that in the case of theft “A had not simply stolen \$15,000 from B.... He had also put B into a state of fear.... So that for proportionate punishment to be levied we would also have to add more ... so as to compensate the victim for the uncertain and fearful aspects” (88–89) of the crime.

The problem with this corrective scheme is that it poorly applies to cases where “there is no theft of property” (88). For example, in the case of assault “there is obviously no way for the criminal to make restitution” (88). Similarly, any financial compensation would be entirely arbitrary as evidenced by “schedules for monetary recompense” set in “ancient forms of law” that “are clearly

wholly arbitrary, and bear no relation to the nature of the crime itself” (88). For this reason needed is some other mechanism than restitution or monetary compensation that would correct injustice inflicted on the victim. As pointed out by Rothbard, “we must therefore fall back upon the view that the criterion must be: loss of rights by the criminal *to the same extent* as he has taken away” (88).

This of course suggests that the criterion of rights forfeiture is needed only in order to overcome arbitrariness of monetary compensation or impossibility of restitution in cases where no theft of property is involved. It is not about punishing the offender in a sense of inflicting suffering that would go beyond what he must suffer as a matter of restitution or compensation. To the contrary, the criterion of rights forfeiture is needed exactly in order to create conditions for a possible correction of the wrongs done to the victim in a situation in which no straightforward restitution or nonarbitrary financial compensation is possible. That is why the extent to which the offender forfeits his rights is decidedly *not double* the extent to which he invades rights of the victim and that is why Walter Block’s criterion of “two teeth for a tooth” does not apply here. As pointed out by Rothbard, if “A has severely beaten B; B now has the right to beat up A as severely, or a bit more” (89)—this bit being due to the victim’s fear and uncertainty—not twice as severely. That is also why “[h]ere allowing the criminal to buy his way out of this punishment could indeed enter in, but only as a voluntary contract with the plaintiff” (89). For the point of the forfeiture criterion is to let the victim and her subjective preferences to decide what, within the limit of proportionality, would compensate her the best: taking revenge on the criminal by beating him in return, settling on a payment for a waiver of her right to do the beating or taking satisfaction in showing mercy to the evildoer. And this opportunity of the victim to decide for herself what is the best compensation for injustice does not change much in the case of theft where the standard of “two teeth for a tooth” applies. For one thing, the victim still has a right to forgive the offender. She may even absolve him from the duty to retribute the stolen property, not to mention all other payments. Equally well may she inflict on the offender what he inflicted on her, that is, she may take his property with the intent to permanently deprive him of its possession. Finally, she may also try to sell the offender her right to do all these things in exchange for him submitting to some corporal penalty if this is what she believes will compensate her the most.

Hence, no matter whether the crime in question involves theft of property or not, vesting the victim with rights over the criminal’s punishment turns the entire scheme into a corrective mechanism aiming at rectifying wrongs done to the victim rather than a retributive tool of giving back the criminal what he

deserves. If monetary recompense is what satisfies the victim best, then she is at liberty to strive for it, regardless of the nature of the crime. If however the only thing that can satisfy her is inflicting suffering on the criminal, then taking revenge becomes the currency in which compensation may be paid.⁸ Consider the following comment by Moore (1999, 66–67) concerning the way in which vesting victims with rights over punishment transforms retributive justice into corrective one:

Retributive justice is not the same as compensatory or corrective justice; it is distinct. That's why we're retributivists and not corrective justice theorists. Ten years ago the Bowling Green Center for Social Philosophy and Policy got together the leading retributivists of America for discussion. On the table for one of the discussions was Jeffrie Murphy, who was present. The issue was whether Jeffrie could keep his card in the club because he had taken what we called the "victim's turn." The victim's turn is taken when one holds that victims are the ones to determine whether an offender is punished, and to what extent. As Murphy recognized, this belief turned his system into an institutionalized form of revenge. For Murphy, victim preference determines whether (and to what extent) punishment should be suffered by an offender; desert of the offender only gives the state the right to punish, but it is the desire of the victim for vengeance that gives the state a reason to do what it has the right to do. Such victim determination of punishment is what Murphy recognized made him no longer a retributivist, and he put his card on the table.

Now it is important to note that it is exactly the fact that inflicting suffering on the criminal is not governed by what he deserves but rather by what the victim happens to desire that determines that what is actually being achieved under the Rothbardian scheme is vengeance rather than retribution. To see that even more clearly consider how the Rothbardian theory of punishment fits into the Nozick's (1981, 367) distinction between vengeance and retribution. The crucial point is that revenge "can be desired only by someone with a personal tie..., and it can be inflicted only by (the agent of) someone with a personal tie. Retribution, on the other hand, may be desired or inflicted by people without such a tie" (367). Moreover, "steps sometimes are taken to exclude the personal tie from intruding in a process of retribution and clouding the nature of what is happening by blurring the distinctness of retribution from revenge" (367). Now it should be obvious that such a personal tie is exactly what is required by the Rothbardian theory of punishment. Since for Rothbard "all rights of

⁸ Incidentally, the possibility that "the suffering of the wrongdoer [might] be required by the process of compensation to the victims, when only such suffering can compensate them or move them toward feeling as well off as if the wrong had not occurred" is admitted, for example, by Nozick (1981, 386).

punishment derive from the victim's right of self-defense" (1998, 90) only people who act as agents of the victim—besides, of course, the victim herself—can punish the criminal. This clearly suggests that the Rothbardian theory of punishment allows for taking revenge rather than achieving retribution.

Similarly, the fact that revenge does not have to be bound by the magnitude or similarity of harm inflicted by the offender whereas retribution closely follows general principles of desert supports the thesis that the Rothbardian theory of punishment does not strive for retribution. As pointed out by Nozick (1981):

Not only is the revenger not committed to revenging any similar act done to anyone; he is not committed to avenging all done to himself. Whether he seeks vengeance, or thinks it appropriate to do so, will depend upon how he feels at the time about the act of injury. Whereas the imposer of retribution, inflicting deserved punishment for a wrong, is committed to (the existence of some) general principles (*prima facie*) mandating punishment in other similar circumstances. (368)

All of this, of course, speaks strongly for classifying the Rothbardian theory of punishment as corrective rather than retributive. However, ultimately it is the idea of vesting victims with rights over punishment—what Moore calls the victim's turn—that justifies such a classification. As pointed out by Moore (1999):

If it were truly abstract justice at which punishment aimed, it shouldn't matter what the victim preferred, unless you think, again that victim preference is constitutive of justice; unless you think that justice is constituted by the right to make the accused suffer. Can such an engine of victim vengeance still be retributivism? It doesn't look retributive; it looks compensatory to the victims. Punishment in such a scheme turns on the victims deciding what they want, not on what justice demands. Everyone else who has taken the victim's turn concludes that they don't believe in retributive justice anymore; they believe that criminal justice systems should serve corrective justice. (76)

7. CONCLUSIONS

In the present paper we considered the question of whether the Rothbardian theory of punishment is retributive. Against Rothbard's explicit pronouncements, we argued that it is not. The main reason for which such a classification does not seem accurate is the role that Rothbard assigns to victims in determining punishment. For vesting victims with rights over punishment defeats the crucial requirement of retributive justice that offenders are punished solely because they deserve it and in accordance with their respective deserts. Instead of giving offenders what they objectively deserve, such a rights-based mechanism allows vic-

tims' subjective preferences to determine punishment, provided that it does not exceed the limit set by the principle of proportionality (spelled out in terms of forfeiture theory). At the same time, allowing victims' subjective preferences to determine the degree and kind of punishment ensures that corrective justice will be reached, for it lets the victims themselves to decide what corrects the wrongs they suffered the most. Qualifying this scheme by setting sentencing maxima or creating some bargaining room for offenders does not change the fact that the main mechanism described by the Rothbardian theory is corrective rather than retributive. Even where it allows for suffering being inflicted on the criminal, this infliction is better understood as vengeance exacted by the victim seeking compensation for her own pain than retribution being meted out in accordance with the criminal's moral desert.

REFERENCES

- BARNETT, Randy E., and John HAGEL. 1977. "Assessing the Criminal: Restitution, Retribution, and the Legal Process." In *Assessing the Criminal: Restitution, Retribution, and the Legal Process*, edited by Randy E. Barnett and John Hagel, 1–31. Cambridge: Ballinger Publishing.
- BARNETT, Randy E. 1977. "Restitution: A New Paradigm of Criminal Justice." *Ethics* 87 (4): 279–301.
- BLOCK, Walter E. 2009. "Libertarian Punishment Theory: Working for, and Donating to, the State." *Libertarian Papers* 17 (1): 1–31.
- BLOCK, Walter E. 2019. "Libertarian Punishment Theory and Unjust Enrichment." *Journal of Business Ethics* 154:103–8.
- WHITEHEAD, Roy, and Walter E. BLOCK. 2003. "Taking the Assets of Criminals to Compensate Victims of Violence: A Legal and Philosophical Approach." *Journal of Law in Society* 5 (1): 229–54.
- EPSTEIN, Richard A. 1980. *A Theory of Strict Liability. Toward a Reformulation of Tort Law*. San Francisco: Cato Institute.
- FEINBERG, Joel. 1970. *Doing and Deserving: Essays in the Theory of Responsibility*. Princeton: Princeton University Press.
- FLETCHER, George. 1999. "The Place of Victims in the Theory of Retribution." *Buffalo Criminal Law Review* 3 (1): 51–63.
- GORDON, David. 2020. "Rothbard and Double Restitution." *Mises Wire*, last modified September 4, 2020. https://mises.org/wire/rothbard-and-double-restitution?utmsource=Mises+Institute+Subscriptions&utm_campaign=ccce2acf8d-EMAIL_CAMPAIGN_9_21_2018_9_59_COPY_01&utm_medium=email&utm_term=0_8b52b2e1c0-ccce2acf8d-227976965.
- HART, Herbert L. A. 2008. *Punishment and Responsibility: Essays in the Philosophy of Law*. New York: Oxford University Press.
- HOPPE, Hans-Hermann. 2012. "Property, Causality, and Liability." In *The Great Fiction*, 327–36. Baltimore: Laissez Faire Books.

- HOHFELD, Wesley N. 1913. "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning." *Yale Law Journal* 23 (1): 16–59.
- KANT, Immanuel. 1887. *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right*. Translated by William Hastie. Edinburgh: T. & T. Clark.
- KINSELLA, Stephan N. 1996. "Punishment and Proportionality: The Estoppel Approach." *Journal of Libertarian Studies* 12 (1): 51–73.
- KRAMER, Matthew H. 2002. "Rights Without Trimmings." In Matthew H. KRAMER, Nigel E. SIMMONDS, and Hillel STEINER, *A Debate Over Rights: Philosophical Enquires*, 7–111. New York: Oxford University Press, 2002.
- MOORE, Michael S. 1999. "Victims and Retribution: A Reply to Professor Fletcher." *Buffalo Criminal Law Review* 3 (1): 65–89.
- MOORE, Michael S. 2010. *Placing Blame: A Theory of the Criminal Law*. New York: Oxford University Press.
- MOORE, Michael S. 2018. "The Strictness of Strict Liability." *Criminal Law and Philosophy* 12 (3): 513–29.
- NARVESON, Jan. 2001. *The Libertarian Idea*. Peterborough: Broadview Press.
- NOZICK, Robert. 1981. "Retributive Punishment." In *Philosophical Explanations*, 363–97. Cambridge, MA: Harvard University Press.
- ROTHBARD, Murray N. 1998. *The Ethics of Liberty*. New York: New York University Press.
- ROTHBARD, Murray N. 2011. "Law, Property, and Air Pollution." In *Economic Controversies*, 367–418. Auburn: Ludwig von Mises Institute.
- STEINER, Hillel. 1994. *An Essay on Rights*. Oxford: Blackwell Publishers.

IS THE ROTHBARDIAN THEORY OF PUNISHMENT RETRIBUTIVE?

S u m m a r y

Murray Rothbard claims that it is "evident that our theory of proportional punishment—that people may be punished by losing their rights to the extent that they have invaded the rights of others—is frankly a retributive theory of punishment, a 'tooth (or two teeth) for a tooth' theory." The present paper argues that it is not. The role that Rothbard assigns for victims in determining punishment justifies classifying his theory of punishment as corrective rather than retributive, for vesting victims with rights over punishment defeats the retributive justice requirement that criminals are punished solely because they deserve it and in accordance with their respective deserts. Instead of giving offenders what they objectively deserve, the Rothbardian theory of punishment allows victims to seek compensation in various forms, including revenge.

Keywords: libertarianism; punishment; retribution; restitution; compensation; Murray Rothbard

CZY ROTHBARDOWSKA TEORIA KARY JEST RETRYBUTYWNA?

S t r e s z c z e n i e

Murray Rothbard twierdzi, że „jest oczywistym, że nasza teoria proporcjonalnej kary—iż ludzie mogą być ukarani przez utratę swoich praw do poziomu, do którego sami pogwałcili prawa innych

—jest, szczerze mówiąc, retrybutywną teorią kary, teorią ‘zęb (lub dwa zęby) za zęb’”. Niniejszy artykuł argumentuje, że tak nie jest. Rola, jaką Rothbard przypisuje ofiarom w określaniu kary, uzasadnia zaklasyfikowanie jego teorii kary jako teorii korekcyjnej raczej niż retrybutywnej, ponieważ przyznanie ofiarom praw decydowania o karze podważa wymóg sprawiedliwości retrybutywnej, aby przestępcy byli karani wyłącznie dlatego, że na to zasługują i dokładnie w tej mierze, w jakiej na to zasługują. Zamiast dawać przestępcom to, na co obiektywnie zasługują, rothbardowska teoria kary pozwala ofiarom zamienić wymierzenie kary na uzyskanie odszkodowania lub zadośćuczynienia, również w formie zemsty.

Słowa kluczowe: libertarianizm; kara; retrybucja; restytucja; odszkodowanie; zadośćuczynienie; Murray Rothbard

Informacje o Autorze: Dr. hab. ŁUKASZ DOMINIĄK jest profesorem nadzwyczajnym w Zakładzie Filozofii Społecznej Instytutu Filozofii Wydziału Filozofii i Nauk Społecznych Uniwersytetu Mikołaja Kopernika w Toruniu oraz członkiem Instytutu Ludwiga von Misesa w Auburn, Alabama, Stany Zjednoczone; adres do korespondencji: ul. Fosa Staromiejska 1A, 89-100 Toruń, Polska; e-mail: lukasdominiak80@gmail.com; cogito1@umk.pl; ORCID: <https://orcid.org/0000-0001-6192-8468>.