

Libertarianism Allows Retributive Restitution (Which is Optimally Detering)

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The following essay responds to a draft article¹ that criticises the theory of libertarian restitution in “Libertarian Rectification: Restitution, Retribution, and the Risk-Multiplier” (LR).² The article was freely available to internet search engines. Hence, it seems fair and useful to reply to these very welcome objective criticisms. It is not intellectually relevant that its author might subsequently and subjectively have thought better of them, possibly as a result of the earlier version of this reply. Generally, the article misconstrues the position on retribution in LR. Eventually, it makes apparent qualifications to its own position such that there does not seem to be any clear theoretical difference between the two on the central disputed issue. LR’s position is to explain and defend only the non-normative theory of libertarian restitution: full restoration or compensation to the damaged (initiatedly imposed on) party. But it is argued that this can include a retributive aspect if that is what the victim prefers. Moreover, such restitution will tend to act as a deterrent that maximises both overall interpersonal liberty (theorised as no initiated imposed costs) and human welfare (theorised as preference satisfaction).

Having discussed its own views on the issues in question, the article states, “Some Libertarians seem to think that not only is Libertarianism compatible with retribution, but that it actually requires it. I turn to a recent essay by J. C. Lester”. But LR argues only that a retributive form of restitution is *compatible* with libertarianism. It does not argue that libertarianism “requires it”: a victim could, and probably usually would, opt for only financial or commodity-equivalent restitution. The article rightly paraphrases the LR position that restricting restitution to monetary damages “would inadequately reflect the crucial distinction between being mistakenly and being knowingly imposed on”. It agrees that the distinction is real but then confusedly asks, “Why should it give rise to a distinction between restitution and retribution?” Of course, LR does not assert any such “distinction”. It says that retribution can be allowable as a kind of restitution. For instance, “it is surely a form of restitution ... that the victim comes to own an equally-valued claim to the criminal’s person or goods” (endnote 16).

The article cites two of the reasons LR gives for the supposed “distinction”. But it does not mention or answer the question LR has in endnote 8: “Let me put it another way: on what libertarian basis could he complain, if we take a similar action against someone to that which he initially imposed on us?” For instance, suppose a man at a party makes an innocuous remark that a woman somehow misconstrues and takes offence at. In an act of anger, the woman pours her drink over the man’s head and then stands back. There is clearly no further threat from her for him to defend himself from. But he then simply chooses to pour his own drink over her head. Does the article imply that they were both—and equally—unlibertarian, and now they still both owe each other restitution? Other things being equal, these tit-for-tat actions seem to more or less cancel each other out: they are quits. More precisely, it looks more plausible to say that the initial drink-pourer is unlibertarian, while the responder is merely taking his restitution retributively.

The article states that, “there is nothing in principle about restitution that requires that damages be monetary”. And LR does not say that it does. It explicitly denies it with the very idea of retributive restitution; but other forms of non-monetary restitution are also clearly possible. The article continues that, “the thought behind Lester’s claim, that inflicting suffering on your attacker truly compensates for being attacked, betrays what can only be regarded as a thoroughly disheartening view of human nature”. LR does not assert or imply that this “truly compensates”. It is, rather, that if this is what the victim prefers, then that is clearly what he regards as the best form of compensation (or, perhaps, the least bad form: for he would probably prefer that there had been no initiated imposition in the first place, and—as the article and LR both agree—some crimes cannot be fully compensated for). And it is completely irrelevant to the objective libertarian theory that this might appear to some people to be a “disheartening

¹ Ellin, Joseph. 2002. “Restitution not Retributive: A Mini-paper”. Originally online: 216.239.39.100/search?q=cache:IZi3D41CLvMC:uregina.ca/~elliotta/doc/csivr.doc+%22restitution+not+retributive%22+ellin&hl=en&ie=UTF-8

² Lester, J. C. *Journal of Value Inquiry* 34 (2/3): 287-297 (2000). But also to be found in Lester, J. C. *Escape from Leviathan: Libertarianism Without Justificationism* (Buckingham: The University of Buckingham Press, [2000] 2012); pp. 110-121.

view of human nature”. The article continues that, “Morally, it is far superior to accept money damages than to demand physical retribution. As is so often the case, greed is a great humanizing influence”. Morality is simply not relevant to what libertarian theory objectively entails, which is what LR is trying to determine. But, as a moral aside here, it is not clear that retribution is always morally inferior or that monetary damages need reflect “greed”. Giving tit for tat might be more moral: the imposer might better be taught a moral, or at least prudential, lesson that way. And preferring to take the money might be only personally prudent, rather than “greed”.

We are told that “Lester seems to have an unusual idea of retribution if he thinks it entails or is defined as (he gives no definition) infliction of personal harm”. However, it could also be against someone’s property rather than his person (or body). That important clarification aside, is this really “an unusual idea of retribution”? It seems fairly standard as the main meaning in dictionaries. And LR does say what it means by “retribution” in various places, such as “with libertarian retribution the criminal creates a claim against himself to treatment as severe as he imposed on his victim”. The article then says, “The idea of retribution is to treat criminals according to their deserts”. That is not the idea as usually understood: ‘retribution’ mainly means some sort of punishment inflicted on someone, whether on his property or his person (but there is also a broader and less used ‘repayment’ sense). The article appears to have slipped into confusing one standard view of the more general idea of justice (as treating people “according to their deserts”) with the different and more specific concept of retribution. It asserts that, “if Lester wants to allow victims to inflict injury on their attackers, there is no reason (yet) to regard this as retributive, rather than merely brutal”. If other people are allowed to inflict an equivalent act against you after you initiatedly imposed on them, then that is clearly “retributive” by any normal usage. That it is only ‘equivalent’ makes it unlikely to be any more “brutal” than what was first initiatedly imposed. The article has some implicitly modern ‘liberal’ or ‘progressive’ bias: all bleeding heart about the immediate effects on the criminals, and no bloody brains about the long-term consequences for their victims.

Of affronts to dignity as an aspect of crime, the article says, “nothing would follow about how affronts to dignity ought to be compensated; no reason is given why these require any special form of compensation”. Possible affronts to dignity are often a part of any foreseeable initiated imposition. They allow for retributive restitution for the same reason that any such impositions do. Whatever we initiatedly impose on others, we thereby give those others an equivalent claim to responsively impose on us if they wish. The article continues, “or if they do, why it should take the form of infliction of physical harm on the attacker”. LR does not say this, although the article repeatedly asserts that it does. The indignity-imposition aspect of a crime only allows for an equivalent reactive indignity-imposition, if that is preferred to financial compensation. The article then asserts, “And the same is true of fear, or any other psychological malaise a criminal might inflict. All can be compensated by money damages”. But what if the victim prefers compensation by way of inflicting equality of treatment? What *libertarian* principle stops this? Why should we take seriously the article’s own anti-retributive preferences? In any case, LR explicitly says that taking the damages in money (or commodity equivalents) is always allowable, if that is what the victim prefers. Therefore, it is completely mistaken to claim that LR asserts that “money damages ... just aren’t the right kind of thing to use to compensate affronts to dignity”.

The article agrees with LR’s view that (as it paraphrases) “any penalty can be looked at [as] a cost that some inflictors might be willing to pay”. It then says, “imposing physical retaliation instead of monetary damages might restrict the number of one-sided purchasers, but does not resolve the theoretical problem”. There is no libertarian “theoretical problem” that any penalty can conceptually be viewed as a kind of cost (or price). But the article allows the forced purchase of initiated impositions without any risk of reciprocal treatment (which treatment it even admits “might restrict the number of one-sided purchasers”); and for no libertarian reason. Taking that position is the only libertarian “theoretical problem” here.

It is true that LR “suggests that insofar as restitution allows one-sided purchase, restitution is actually incompatible with Libertarianism”: if I could not have my restitution in terms of similar claims against you, then I am not being allowed full libertarian restitution. This is not a “blow ... to restitutionism” but a “blow” to anti-retributive restitutionism. It is, again, confused for the article to say that “one-sided purchase is possible on any theory of response to crime”. For a restriction to monetary restitution is literally to allow a forced purchase: I am exceedingly rich and I hate your guts; I will put out your eye and then pay you full financial damages for your loss and still laugh at your plight and

think the money well spent. But allowing retributive restitution is nothing like a forced purchase: you now have the option of removing my eye or of demanding a sum of money not to do this act, which may vastly exceed what the court judges to be full financial restitution to you (because a very wealthy man would probably be able and willing to pay far more to keep both of his eyes). Allowing criminal ‘forced purchases’ is unlibertarian and also consequentially bad. It is a very foolish error to assert that “An eye for an eye makes the whole world blind” (dubiously attributed to M. K. Gandhi, *inter alios*). If an eye for an eye is allowed, then that would empower the very poorest of victims and would thereby normally prevent any eye from being taken in the first place. An eye for an eye keeps the whole world sighted.

According to the article, the victim who is financially compensated is “fully compensated. In theory, this means the victim is indifferent as between being deliberately infringed on and compensated, and not being infringed on at all”. But this is assuming what has to be explained: that such financial compensation *can* be adequate (or even the best that can be done). In realistic practice, this means that a victim will have to put up with whatever some court decides amounts to being “fully compensated”. If he would have preferred, some degree of, the retributive restitution to which he has a claim under libertarian theory, then he has *not* been fully compensated (or even as well as can be done). People sometimes say that they don’t care about the money; they want some perpetrator to suffer some appropriately bad ‘payback’ (instead, the worst that a heinous criminal will often ‘suffer’ is something that usually looks more like a life of leisure under ‘house arrest’, but with free board and lodging, until his eventual release).

But then, after all this, the article produces this complete surprise: “Victims who do not think they are sufficiently compensated by money might be given the option of imposing physical harm on the criminal”. What?! This is, apparently, more or less LR’s position. Hence, it is no longer clear that there is a, significant, disagreement in theory. The article continues that the problem is “that there is no acceptable measure for determining inter-personal comparability of physical inflictions (notoriously, even death does not hold the same terror for everyone)”. But if ‘an eye for an eye’ is the correct physical libertarian principle, then this problem need not arise. And if an equal amount of inflicted disutility is the correct psychological libertarian principle, then this is only a similar problem to trying to assess how much a person suffered from some act and so how much monetary restitution is due. In both latter cases we have to resort to some ‘reasonable man’ assessment. Imperfect perhaps, but not hopelessly problematic and completely arbitrary. However, it is not immediately clear whether libertarian retributive restitution ultimately implies the physical or the psychological approach, or the victim’s choice of which one. (Eleutheric-conjectural libertarianism³ remains a relatively new theory with only one proponent to work out the implications.)

Libertarian restitution, including retributive restitution, should be optimally deterring as regards protecting both liberty and welfare: in short, because internalising (initiatedly imposed) externalities is both libertarian in itself and generally economically efficient. The article has not attempted to argue that it is not optimally deterring. It has merely assumed it and ignored LR’s arguments to the contrary. Neither is it any longer clear why retributive restitution is not allowable under the article’s preferred system. Hence, it is incomprehensible that the article concludes that it has explained how “libertarian restitution cannot accommodate either deterrent or retributive concerns”.

All of the issues the article raises have now been dealt with. Perhaps, though, it would be useful briefly to restate the main argument on retributive restitution. Under the theory of liberty in LR, libertarianism proscribes initiated imposed costs. With foreseeable initiated impositions you treat someone’s person or external property as though it were your own. Some rectification is needed if we are to return to the, assumed, libertarian *status quo ante* (or as near to it as possible). A monetary payment might suffice if that is what the victim prefers. But what if the victim prefers an equivalent imposition to be inflicted on the perpetrator’s property or person? That is not an initiated imposition. It is an equivalent responsive imposition. We do impose on the perpetrator if we interfere with his money or property, but we do not *initiate* an imposition unless we go beyond full restitution. We do impose on the perpetrator if we interfere with his body, but we do not *initiate* an imposition unless we go beyond full restitution. There is no theoretical libertarian explanation for making an absolute distinction

³ See Lester, J. C., 2022. “Eleutheric-Conjectural Libertarianism: a Concise Philosophical Explanation”, PhilPapers: <https://philpapers.org/rec/INDNLA>.

between someone's external property and his body. The idea that we can never, unnecessarily, responsibly impose on a criminal himself (we must, if possible, avoid harming a single hair on the head of a brutal serial murderer) is a form of modern 'liberal' bias that has no basis in libertarian theory.⁴

(October 2002; revised January 2022.)

⁴ There has been no discussion here of the risk-multiplier theory of libertarian restitution, and in what way that might also apply to retributive restitution; for that would add far too many complications and controversies.