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Some Prospects of Libertarian Punishment Theory: Rejoinder to Blasco and Marcos

Walter E. Block

Loyola University
6363 St. Charles Avenue,
Box 15, Miller Hall 318
New Orleans LA 70118, USA

e-mail: wblock@loyno.edu
https://orcid.org/0000-0003-2215-4791

Abstract:
Libertarian punishment theory was initially articulated by Murray N. Rothbard and Walter E. Block. It was broken down into four separate stages. To a great degree, this theory was accepted by Eduardo Blasco and Davie Marcos. However, they maintain it is in need of some slight adjustments and improvements, mainly dealing with the interest rate. The present paper claims their suggestion while valid, is unnecessary, since this theory already incorporates that element, at least implicitly.
Keywords: capture costs; scaring; interest rate; compensation; libertarianism; punishment; law; use of force; violence.

1. Introduction

There is a valuable review written by Eduardo Blasco and David Marcos [1] about libertarian punishment theories. These authors announce that "the aim of (their) paper is to review the current literature on libertarian punishment theories, contribute to Murray N. Rothbard and Walter E. Block's [2];, [3]; [4]; [5]; [6]; [7]; [8]; [10]; [14] theory, and determine what represents a limit to this theory that future work will have to solve, and a limitation that is inherent to any libertarian punishment theory" [1, p. 83]. One main "limit" that they see concerns the failure of this theory to incorporate the interest rate, and time preference. My overall reaction is that the theory is fine as is, and that while, to be sure, it does not mention interest payments, this is implicit and thus already incorporated.

First, what is this Rothbard, Block theory? It is an attempt to set the limits on what may be imposed upon the criminal who has violated his rights. Let us exemplify this as follows: Posit that *B* has stolen a car from *A* and has now been captured by the forces of law and order, whoever they are.[1] The short-hand version of this theory is that *A* may now impose upon *B* two teeth for a tooth, costs of capture, and scare him. The first "tooth" is that *B* must hand back that automobile which he stole from

A. If he has destroyed it in the interim, he must give *A* his own vehicle, assuming that the two of them are of equal value. The second "tooth" is that what *B* did to *A* must now be done to him, *B*. Since *B* relieved *A* of a car, the same must be done to *B*. That is, *B* must give *A* his own automobile, or an equivalent monetary value.[2] The third element of legitimate punishment for *B*, that miscreant, concerns costs of capture. If, immediately upon taking *A*'s car *B* returned it to him, and/or drove to the police station reporting his own crime against *A*, then there would be no such charges laid against him. However, if it took five years and the efforts of 10 men to find him, *B* is in hock for that amount, also. Fourth is scaring. When *B* imposed upon *A* in that manner, he scared him. We must now do the same to *B*. How do we do that? Sneak up behind *B* and yell "Boo" at him? Not at all. Rather, we impose upon him the obligation to play Russian Roulette with himself, where the number of empty chambers, and bullets, and the part of *B*'s body that the gun must be aimed at, depends upon just how much fright *B* originally imposed upon *A*.

In Section 2 of this paper we take to task, and, also, congratulate, Blasco and Marcos for their contribution.

2. Criticism of Blasco and Marcos

In Section 2 of their paper, "Justifications for Punishment" our authors [1, p. 84] hold forth as follows:

> Punishment, or non-initiatory coercion use, can be justified as deterrence, rehabilitation, utilitarian, defensive, restitution, and retribution. The deterrent justification of force prescribes to punish evildoers so as to set an example to the rest. Deterrence is not deontologist, because it uses people, in this case, criminals, as a means to achieve an end, not as ends in themselves. This is perverse and immoral. We punish an individual because the victim deserves justice. Rothbard cites the example that under the deterrence theory it is justified to punish an innocent man if that dissuades future offenders to commit a crime.

I fail to see why using people as a means, rather than as an end in themselves, would occasion any libertarian opposition such as that offered by Blasco and Marcos. I just purchased a pair of shoes. I was polite to the salesman, as is my wont. But, true confession, I used him as a means toward my end of being well shod. I did not befriend him. I did not ask about his family, or in any other way treat him as an end, deserving of my attention. His life, his goals were the furthest thing from my mind. Sad to say, I usually behave even worse to clerks at supermarkets, newspaper stands. I am not impolite to them, but I am not polite, either. Rather, intent upon my own ends, not theirs, I coldly make these purchases. At worst, I am not honorable. But I am hardly behaving in a manner incompatible with libertarianism, the focus of the debate I am now having with Blasco and Marcos. Remember, this philosophy is concerned with one thing and one thing only: the proper use of violence. Since I am never violent in making purchases of this sort, I do not offend any libertarian law.

In Section 3 of their paper, "Libertarian Theories of Punishment" these two scholars do a splendid job of summarizing the four-part libertarian theory of punishment outlined above. I would only add that the scaring aspect of this proposal obviates the object that a very rich man could get away with crime, because he could afford to pay off his victim. Not so fast. If he is compelled to undertake Russian Roulette to an important part of his body,[3] that will make him reconsider his choice to embrace criminality. Also, since the victim may allow the criminal to eschew this part of the punishment, the wealthy person may well come out of this very impoverished.

In Section 4 of their otherwise splendid essay "Our Addition to the Libertarian Theory of Punishment" they come to the nub of their criticism of the Rothbard-Block perspective on this matter. Blasco and Marcos [1, p. 86] state as follows:

> Walter Block says his theory 'is a four-part penalty, consisting of two 'teeth,' costs of capture, and the imposition of terrifying the evildoer. But that is it! There is no more. Any other penalty would be adventitious, arbitrary, capricious, over and above the call of justice.
>
> We, however, do think the wrongdoers should bear another cost to make the punishment fairer. That is a percentage of the first tooth's value from the moment the victim's property rights were violated until the rest of the punishment was completed equal to the interest rate of the currency used by the victim or a penalty equal to the percentage increase in its market price – whichever is higher…

But this interest rate payment is implicit in all cases. Typically, whenever there is a time gap between loss due to theft and recompense, the interest rate is taken into account. It does no harm on Blasco and Marcos' part to make this explicit, as do these authors; but this already applies in virtually all cases. Thus, it pertains, at least implicitly, in the Blockian four stage punishment theory also. This problem plagues all examples of making compensation; there is simply no need to make it explicit in cases of libertarian punishment theory. What is the evidence for this claim? According to Prejudgment [12] "the successful party is usually entitled to have interest added to the money awarded by the court." This practice is very widespread. It applies not only in the United States, but in many other countries. Also, not only to governmental courts, but, even, to private arbitrators. For more on this see [10, 11, 13]

These authors [1, p. 87] have one more arrow in their quiver in criticism of the theory now under consideration:

> … if the first tooth's market value has increased, the wrongdoer should pay a penalty equal to percentage increase of the first tooth's market price as a compensation because this is a signal that other actors in the market value it more and the victim did not enjoy his good when he would have done so even more or had the opportunity to transfer its property title for other property and obtain more benefit.

No, there should be no extra penalty extracted from the criminal just because the price of the stolen good rose. The malefactor robbed or damaged the victim's property at time t_1, when the good was worth \$100 for example. It is now worth \$150 at time t_2, when the compensation is made. the wrongdoer owes only \$100, not \$150.[4] In order to see this more clearly, posit that the market value of the good *fell* to \$75. Then, according to these scholars' views, the criminal would only owe the latter, lower, amount. But this is clearly unjust to the owner.

While we are nit picking on the four elements of punishment, here are a few more nits to pick. First, there is a difficulty about market value. *A* ruins *B*'s computer. The first tooth would be to give to *A B*'s similar computer. But suppose the latter has no such device. We move smoothly to saying the *B* must pay the market cost of that item, which we can posit is \$100. But there are difficulties here. Perhaps *A* had sentimental value for his computer. Even if *B* had to one to give to him, it would not be the same. Ditto for purchasing a new one. In addition, when *A* purchased his initial computer for \$100, how much did he value it at? You can bet your boots that this figure was more than \$100. If it was exactly that amount, *A* would have been indifferent between it and the purchase price and would have made no such purchase. He never would have bestirred himself to buy that machine. It was, obviously worth more to him. By how much? By his consumers' surplus: the profit he made, at least ex ante, from the purchase. So, the first tooth, and the second one too, are in need of modification, a la Blasco and Marco's contribution? Not a bit of it. This problem plagues all examples of making compensation; there is simply no need to make it explicit in cases of libertarian punishment theory. When analyzing this perspective, there is simply no need to bring in extraneous considerations.

Second, Russian Roulette to the head means that the death penalty might be imposed, rarely to be sure, for stealing one stick of bubble gum. A much better solution would be to aim the gun at lesser parts of the body for such minor infractions: perhaps at the small toe or the tip of the pinky or the ear lobe. That will still lead to criminals sitting up and taking notice, but seems more congruent with our basic intuition about justice.

In Section 5 of their essay, "The Case for Arbitration" our authors place emphasis on this means of adjudication.

Arbitration is all well and good. If there are competing defense agencies under anarcho capitalism, as opposed to government institutions where supreme courts render final judgements, this is even more important. And, Blasco and Marcos are insightful in mentioning this aspect of criminal law. However, it is always possible to query: the arbitrator or government court made thus and such a determination: but was it just? The four-stage punishment theory criticized by Blasco and Marcos as insufficient is one such litmus test against which all such findings may be measured.

3. Conclusion

Blasco and Marcos conclude their paper in Section 6 "A Limit and a Limitation." They so on a note that is rare for authors, and should be emulated by all of us: they acknowledge a weakness in their own theory. That is, it cannot be completely and definitively deduced from basic premises the exact punishment that should be meted out to wrong-doers, nor, precisely who they are.

They [1, p. 87] make this point clear with this statement:

> … any libertarian punishment theory needs to provide a limit to whom can be held liable for their crimes. We intuitively know we cannot punish a newborn for ruining your favorite shirt, the case is unclear with a ten-year-old, and we would undoubtedly punish a guilty thirty-year-old. We are against a continuum problem.

I diverge from these authors on this matter. There is no necessity to invoke the continuum issue [2], important as it is in many legal issues facing libertarians.[5] All three should owe the same amount, whatever it is, in the just society. The newborn's parents or guardians must pay. This applies, as well, to those in charge of bringing up the ten-year-old. As for the thirty-year-old, he of course is on his own. Children are a problem for all political philosophies. It is no shortcoming of libertarian punishment theory that it cannot fully wrestle to the ground this challenge

They [1, p. 88] conclude with one more complication: "If *A* cuts *B*'s hand, how can we calculate its value to *B*? And how can we make *A* pay for the second tooth to *B*? By cutting *A*'s hand, maybe? If *B* is a renowned pianist, should we cut *A*'s whole arm?"

Yes, yes, well said; this is a pithy pianist example. But these sorts of problems afflict *all* punishment theories. It is again improper to single out the libertarian four stage solution on these grounds. There is nothing wrong with adding complications to this theory, of course; and these authors do that superlatively. But why do it under the heading of criticizing the theory when these are extraneous to that theory?

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Notes

1. From a pure libertarian perspective that would be competing defense agencies; from a limited government point of view that would be the state apparatus.
2. This amounts to exactly 2.0 "teeth"; not 1.9 or 2.1 teeth.
3. Not his earlobe or tip of his pinky
4. Plus an interest payment; Blasco and Marcos are entirely correct in this claim of theirs
5. For example, what should be the proper statutory rape age? How close and in what context must the fist approach the nose before the owner of the latter is entitled to use defensive violence against the owner of the former? [1]