

**Nulla Libertarian Poena Sine NAP:
Reexamination of Libertarian Theories of Punishment**

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Abstract:

Libertarianism deals with what the law should be. In this article, we focus on what the appropriate law to punish criminals should be in a libertarian society; that is, one that respects the Non-Aggression Principle and property rights. We examine various theories of punishment and explain why some are incompatible with libertarianism. We contribute to the latest libertarian theory of punishment suggesting the necessity to take time preference into consideration. We conclude stating a limit and a limitation to libertarian punishment theories.

Keywords: Libertarianism, punishment, law, use of force, violence.

1. Introduction

The aim of this paper is to review the current literature on libertarian punishment theories, contribute to Rothbard and Block's 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. Our work is predicated on the praxeological insight that men always act employing goods or means to achieve their most valued ends. As these means are always scarce, conflict amongst men arises to control them. Therefore, we must ask ourselves how we are permitted to act in a world where you cannot not act, and resources are scarce. Libertarianism is a system of what the law ought to be, and it is the only system capable to provide a moral solution to our question [28].

Libertarian ethics are guided by the Non-Aggression Principle (NAP). The NAP prohibits the non-consensual initiation or threat of coercion against somebody else's private property [5, p.

30], [7], [8], [28]. Libertarianism allows for multiple theories of punishment provided that these theories respect the NAP and property rights based on Lockean homesteading principles [5, pp. 30-35], [7], [19], [21], [27, pp. 96-107], [28, pp. 45-50]. In order for a punishment to be libertarian it must be proportional. Anything else will be considered initiation of violence and the victim-turned-criminal will be committing an injustice, and thus the criminal-turned-victim will be able to punish him.

A libertarian punishment theory establishes the limits to what is the maximum use of defensive or retaliatory force that the victim of aggression may use in response to the initiator of violence [28, p. 85], [3, p. 103 n. 1]. It is the victim's decision to punish the wrongdoer up to the extent that the various theories of punishment permit [13, p. 156]. It is also legit for the victim to forgive the offender. Olson states: "[the individual] has the right to bring about justice when any of his above rights have been violated [...] the right to bring about justice does not reside in a court: it rests fully and irrevocable with the victim" [25]. Victims can rely on private defense agencies, arbitrators and any other individual or entity to aid themselves in the pursuit of justice. The State and public defense agencies are necessarily coercive, and thus non-libertarian.

Libertarian theories of punishment should not be confused with theories of liability. Theories of punishment deal with the legitimate force the victim can exert over the criminal once it is incontrovertibly liable and guilty for the victim's harm. For a libertarian theory of liability, we recommend Hoppe and Reinach's, which argues that to establish fault, intent, and causation must both be elements of the crime [11], [26].

First, we review several justifications for punishment. Second, we list the different punishment theories compatible with libertarianism. Subsequently, we suggest an addition to Rothbard and Block's theory. Fourth, we ponder on the role of arbitration. And we conclude stating a limit and a limitation to libertarian punishment theories.

2. Justifications for Punishment

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 [28, 93]. Long concludes that this is justified, no by itself, but jointly with the retributive justification [22].

Rehabilitative justice or curative punishment aims at punishing people to refine the criminal's character. This is to abolish Justice and substitute it for mercy. As C.S. Lewis said [20]: "Of all tyrannies a tyranny sincerely exercised for the good of its victims may be the most oppressive (...) Those who torment us for our own good will torment us without end for they do so with the approval of their own conscience."

Utilitarian theories of punishment attempt to decide the right punishment by achieving the largest degree of happiness or maximizing wealth by calculating the most efficient use of force [9], [10], [29, pp. 322-325]. To the latter, Kinsella provides a concise and clear rebuttal [15, p. 20]:

Wealth maximization is not the goal of law; rather, the goal is justice—giving each man his due. Even if overall wealth is increased due to IP laws, it does not follow that this allegedly desirable result justifies the unethical violation of some individuals' rights to use their own property as they see fit.

There are also many points to criticize for those seeking happiness maximization. Utilitarians defend punishments if generates a greater good [29, pp. 322-325]. Similar to the deterrent justification, utilitarian theories of punishment also justify using force against one individual; in this

case, if that translates into greater happiness to the rest. Luna describing Randy Barnett's position, a utilitarian, says [1, pp. 184-191], [24, p. 272]

Barnett does allow for preventative detention for those who present a credible threat of future rights violations, although he claims that this is based on an extended version of self-defense rather than punishment. But whatever the label-punishment, defense of property rights, or maybe some hybrid we could call 'propertyment' – the result is the same, incapacitation of the offender, a traditional objective of utilitarian punishment.

Law has to worry about actions, not about future possible scenarios or thoughts. Moreover, who decides what constitutes a "credible threat"? Being punished before initiating any violence goes against any possible moral justification. Those conducting the calculus to decide whom to punish will also possess an incommensurate power over the rest, which will mean that these people will to all intents and purposes run that society. And what happens if you are potentially dangerous according to a credible-threat analysis, but find legitimate ways to exert your violence? What if you decide to practice sports where both parties consent to the use of violence? Utilitarians will be thrilled to punish these people just because they may be statically more likely to commit a crime even before providing them with a chance to their own lives.

Defensive punishment theory, along with restitutive and retributive theories respect the NAP. These justifications along with pacifism – not a punishment theory – are explained below.

3. Libertarian Theories of Punishment

In this section, we will review four possible theories of to what extent you can use force legitimately in a libertarian society [23]. First, the pacifist theory, which argues you can never employ force, even for self-defense. This theory undermines property rights as you reveal a preference over having your rights violated than not [23]. This is a legitimate option for anyone to embrace. Nonetheless, if this principle is adopted as law, it will cause the eradication of private property.

Second, the defensive theory of coercion. This theory states that you can solely exercise force to restrain an attack but for retribution or retaliation. The problem with this theory is that if the criminal succeeds and damages your property regardless of whether you defend it from the attack, you cannot request restitution for your lost right. This means you only have a temporary right to property until that property is damaged or taken from you. This is undesirable as it is unjust you cannot own the property you acquired the title of or homestead as long as you wish. The defensive justification allows defensive force to reject initiatory and retaliatory force. The following two accept retaliatory coercion.

The restitutive theory of punishment is our third theory. This theory contends that you can exercise force to protect your property and to demand restitution for your right, but any punishment other than the restoration of the lost property is unjustified [22], [23]. Your original right is to your property, to nothing else. Therefore, you are entitled to use violence if needed to restore your initial condition. Any other use of force is considered an initiation of force and violates the NAP. The main critique of this view is that when your property is damaged you lose more than the right you formerly had. You also pay the costs to capture the criminal and possible fees to ensure justice, such as hiring an arbitrator to settle the conflict. You, too, suffer from a frightening situation. Imagine that A enters B's house to steal a chair, and B wakes up and finds A in his house. A's intentions are unbeknownst to B, who sees a trespasser in his house and fears for his life. Moreover, A loses the right over his property to the extent that he inflicted damage to yours, and you can rightfully request that forfeited property of his.

Last, the retributive justice theory. Retribution justifies proportional force on two grounds: The victim has suffered more than just to the extent that his right was damaged and should be compensated for that; and the criminal has lost his right to property to the same extent that he

violated someone else's. Rothbard introduced the libertarian retributive theory in his book *The Ethics of Liberty* and Block has advanced it throughout several articles over the years [2]-[4], [6], [8], [28, pp. 85-96]. According to this theory, the maximum amount of force justified to punish crime is summarized in the following formula: Two teeth for a tooth, plus the costs of conducting the punishment and scaring the wrongdoer. The first tooth of the punishment equals restitution for my damaged property – i.e. restitution. The damage for the second tooth is substantiated in the fact that by damaging my property, you reveal you do not value your right to the same extent of your property as you think it is legitimate to use force against it. If A breaks B's computer, A shows that property rights over a computer have no value to him and therefore B is entitled to a new computer and to A's, or some property of the same value. The case is more complicated in non-restitutive crimes, but the same logic applies: B can exercise force against A to obtain compensation for the harm B suffered and coerce A in a similar way or request a compensation equal to that damaged.

Kinsella has developed a comprehensive justification for the retribution of the second tooth, the estoppel approach [14, pp. 612-630], [16], [17, pp. 316-318], [18]. Estoppel means 'not permitted to deny,' and so if A violates B's rights and B tries to exercise a similar force against A, if A opposes it, A will be estopped – i.e. A is not permitted to deny my punishment. Objecting to B's coercion when A initiated the attack means that A entered a dialogical contradiction, and thus A's claim that B's coercion is wrong is false. Therefore, B is able to punish A for a second tooth.

This principle proves more complicated with non-restitutive crimes such as rape. Block ponders that a solution to rape could be raping the wrongdoer with a "wooden broom handle, and with splinters if it was an aggravated rape" [3, p. 105]. Another alternative would be to hire people willing to rape and do so on behalf of the victim. Same with people willing to execute murderers hired by the victim's heirs. If there were such a job as an rapists' rapist or assassins' assassin fewer people would rape or kill innocent people as those with the worst impulses would see their needs legitimately satisfied. The second tooth or estoppel approach does not mean you have to suffer the consequences of your law-breaking, but you lose your right to have your right preserved.

The third and fourth stages of this libertarian punishment theory are "[the compensation to] the victim for the time and the cost of obtaining justice and for the mental anguish caused by the crime" [25]. It is unjustified to demand the victim to be responsible for any costs he paid to recover his initial position. That is why a libertarian punishment theory has to allow the use of violence to recover the expenses incurred during the punishment process [2, p. 434], [6, p. 129]. If the case is decided via arbitration, the convicted party will conceivably have to pay for the arbitrators' salaries. The rights' violator will also have to reimburse the cost of scaring the victim. Block proposes that "[the criminal] would be forced to play Russian roulette, with the number of bullets and chambers proportional to just how badly he frightened the victim" [3, p. 104].

We posit that out of the four theories explained in this section, the retributive punishment theory is the closest one to a libertarian punishment theory, and thus we shall call it the Libertarian Theory of Punishment for now. That said, in the subsequent section we propose a minor addition to it to improve it slightly.

4. Our Addition to the Libertarian Theory of Punishment

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" [3, p. 104]. 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. When we talk about the first tooth, we do not mean the price of the whole good, only the damaged part.

We posit that a libertarian punishment ought to include this additional cost because man by consuming goods when he has a preference for having more of a valued good demonstrates that he

values more present goods more than later ones [12, p. 319]. If not, man “would invariably choose those production processes which yielded the largest output per input” and never consume any goods, only save [12, p. 319]. This translated to a high time preference for the same good. Therefore, offenders should recompensate their victims for neglecting the opportunity to enjoy their property when they valued it the most.

This penalty should be seen as a compensation for the time lost using two of the best ways, albeit imperfect, to measure value increase over time. For example, 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. Conversely, if the interest rate of the victim’s currency is devalued or the first tooth’s market price has decreased, then the criminal has to pay the price before the aggression, as the victim lost the chance to use his property as he would have done had the criminal not damaged the good.

This penalty is more complicated to calculate for non-material damage compensation, but an alternative could be to pay the price of insuring yourself against that crime at the time of the wrongdoing or the current insurance price, whichever is higher.

5. The Case for Arbitration

As we have said, conflicts arise over scarce resources. These involve two or more parties. These parties may hold opposing views on how the dispute ought to be resolved. It is typical to either agree on one arbitrator or that each party chooses one, and then the appointed arbitrators decide on a third one (or nth in case there are more than two parties) during current arbitration settlements. Imagine A stole sixty chickens from B. A and B follow different moral systems; A is a utilitarian atheist and B is a pacifist. B wants A to work for him as he avoids inflicting physical damage on someone else. But A has made an economic analysis and calculates that the libertarian punishment is less restrictive than working as many hours as B requests. They reach no agreement. One way to resolve this dispute is for them to agree on arbitration and let the arbitrators decide a satisfactory decision for both parties.

Arbitration allows parties to conciliate their divergent perspectives and achieve a consensus. It, too, enables people involved in conflicts to resolve them according to their own moral principles or theories of justice distinct to restitution or retribution. Furthermore, arbitrated conflicts will have witnesses and probably their own enforcement mechanism to deal with non-complying aggressors, and make sure the victim does not overreach justice by its own hand [25].

6. Conclusion: A Limit and a Limitation

In this last section, we present two restraints that current libertarian theories of punishment, including ours, face: a limit and a limitation. First, 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. We could set a minimum age limit or test to determine when people can be punished. Setting a specific age remains an arbitrary choice that defies reason and serves as a shortcut to ignore thinking about a more legitimate alternative. Should we seek to be true praxeologists, our solution ought to be predicated on human action, and as libertarians, on property rights and voluntary action. Therefore, we should start by deciding when human beings become self-owners, and thus have responsibilities. Rothbard posits that a human acquires full rights “when he demonstrates that he has them in nature – in sort, when he leaves or ‘runs away’ from home” [28, p. 103]. Another solution is to entrust this decision to the market. Private defense agencies will have incentives to ask for a low standard threshold from other agencies but set a high one for their clients’ children, which could set a market equilibrium of

what the proper answer is. Nonetheless, should children be punished before they attain full rights? Conceivably, we should punish them gradually according to the severity and age of the child. We would, however, fall into a continuum problem again; where do we set the threshold and why? Another question is whether we should punish their parents instead, or as well. Parents – or whoever homesteads the child – are, after all, trustee-owners of their children [28, p. 100]. Arbitrators will also be able to solve this problem on a case-by-case basis taking into consideration the duty of care applied by the guardians.

Second, a limitation to any praxeological libertarian punishment theory: we cannot make interpersonal comparisons of utility and have to in order to apply proportional punishments. The interest of the violated right to retribute and the costs of finding and judging the evildoer are given by the market. The second tooth and the price for scaring the victim, however, will be dissimilar for the criminal and the victim [13, p. 160]. If A steals \$100 from B, it is clear what our first and second tooth should be: B's \$100 (not necessarily the same cash) and A's lost right to \$100 of his. We need to make interpersonal comparisons of utility to decide the retribution except for theft of cash or an unopened good. 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? We can make certain estimations by looking at how much it would cost a renowned pianist like B to insure his hand, but this valuation would be far from perfect. The same issue arises with the price paid for scaring B, maybe A is a masochist happy to play the Russian roulette. This limitation supposes that other and our libertarian theories of punishment are imperfect, although as just as humanely possible.

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