

THE IRRELEVANCE OF RESPONSIBILITY

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I. RESPONSIBILITY NOT THE CONCERN OF LAW

Responsibility is often thought of as primarily a *legal* concept. Even when it is *moral* responsibility that is at issue, it is assumed that it is above all in moralities based on law-centered patterns and models that responsibility takes center stage, so that responsibility is a legal concept at its core, and is applicable to the realm of private morality only by extension and analogy.¹

As a genetic claim about the historical origins of the concept, this account may well be true.² What I wish to suggest, however, is that, regardless of how our concepts may have originated, judgments of responsibility are most properly at home in the realm of private morality, and are out of place in the legal sphere.

By “responsibility” I mean, of course, more than mere *causal* responsibility, in the sense invoked when we say that the acid was *responsible* for the corrosion of the metal, or that an asteroid was *responsible* for the extinction of the dinosaurs. Judgments of *causation* are, of course, essential to the working of any legal system. But there is a narrower sense of responsibility, having to do with positive considerations of knowledge and control, as well as normative considerations of praiseworthiness, blameworthiness, and obligation; and it is responsibility in this sense that I maintain is *legally* irrelevant.

Let me quickly qualify this “legal irrelevance of responsibility” in two ways. First, I am using the phrase “legal” here in a fairly narrow sense as well. There is a broad sense in which any organized system for adjudicating disputes and securing compliance counts as a *legal* system, even if judicial decisions are enforced only by voluntary, nonviolent means such

¹ “It was in *this* sphere then, the sphere of legal obligations, that the moral conceptual world of ‘guilt,’ ‘conscience,’ ‘duty,’ ‘sacredness of duty’ had its origin. . . .” Friedrich Nietzsche, *On the Genealogy of Morals*, trans. Walter Kaufmann and R. J. Hollingdale (New York: Vintage Books, 1989), 65.

² It does not necessarily follow, however, that a particular moral code’s emphasis on responsibility will be proportional to the extent to which that moral code follows a legal model. Ancient Jewish literature (e.g., the Torah) famously embraces a more law-centered conception of morality than does ancient Greek literature, which is more virtue-centered; yet the concept of moral responsibility plays at least as central a role in the latter as in the former, if not more so; think of Agamemnon’s and Oedipus’s disavowals of responsibility (in Homer’s *Iliad* and Sophocles’ *Oedipus at Colonus*, respectively), or the examination of the conditions of voluntary wrongdoing in Gorgias’s *Encomium of Helen*, Plato’s Socratic dialogues, and Aristotle’s *Ethics*.

as boycotts and other forms of social pressure. The late medieval system of commercial law known as the Law Merchant was of this character.³ I certainly do not maintain that considerations of responsibility are necessarily out of place in every institution that could be described as a legal system in this broad sense. My concern is with legal institutions in the narrower sense of institutions authorized to use *force* to back up their legal judgments. (The nation-state is the most familiar example of this sort of institution, though not the only one.)⁴ The limits of legal relevance, in my sense, are set by the limits on the legitimate use of force; that is, because I am here concerned only with law that is backed up by force, considerations of responsibility can be legally relevant only to the extent (if any) that the presence or absence of responsibility makes a difference to whether the use of force is justified or not.

The second qualification I wish to make is that it is only *for the most part* that considerations of responsibility are legally irrelevant, on my view. Hence, this discussion might more accurately (if less dramatically) be titled "The *Legal Near-Irrelevance* of Responsibility." But the respects in which responsibility turns out to be legally relevant after all are, I shall argue, largely peripheral, and certainly outside the primary context in which responsibility has traditionally been considered paradigmatically relevant.

II. A NORMATIVE LIMITATION ON THE USE OF FORCE

My argument will appeal to the following normative principle:

- (1) Every person has the right not to be treated as a mere means to the ends of others.

I conceive this right as what I have elsewhere called a BC-right.⁵ That is to say, this right is analyzable into two components: a *duty* of everyone to treat the rights-holder in a certain way (the B component), and a *liberty* of

³ For the Law Merchant, see Leon E. Trakman, *The Law Merchant: The Evolution of Commercial Law* (Littleton: Fred B. Rothman, 1983); Bruce L. Benson, "The Spontaneous Evolution of Commercial Law," *Southern Economic Journal* 55 (January 1989): 644-61; W. Mitchell, *Essay on the Early History of the Law Merchant* (New York: Burt Franklin, 1904); Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983); and William C. Wooldridge, *Uncle Sam, the Monopoly Man* (New Rochelle: Arlington House, 1970).

⁴ For other examples, see Bruce L. Benson, *The Enterprise of Law: Justice without the State* (San Francisco: Pacific Research Institute, 1990); Tom W. Bell, "Polycentric Law," *Humane Studies Review* 7, no. 1 (1991-92); and Albert S. Loan, "Institutional Bases of the Spontaneous Order: Surety and Assurance," *Humane Studies Review* 7, no. 1 (1991-92).

⁵ Roderick T. Long, "Abortion, Abandonment, and Positive Rights: The Limits of Compulsory Altruism," *Social Philosophy and Policy* 10, no. 1 (Winter 1993): 166-91. The right under discussion here is explicated somewhat more rigorously there.

the rights-holder (or the rights-holder's agent)⁶ to use force to ensure that such treatment is indeed accorded (the C component).⁷

If this right is to be coherent and universal, the exercise of the liberty-component must not violate the duty-component; so when Anita forces Juanita to refrain from treating Anita as a mere means, Anita's doing so must not count as an instance of Anita's treating *Juanita* as a mere means. If *every* use of force against another person were impermissible (as some pacifists maintain), then there could be no such thing as a *right* to be free from such forcible imposition, since the permissibility of a resort to force (if not on the part of the rights-holder, then on that of her agent, e.g., the state) is part of what it means for people to have *legal* rights—the sort of rights with which we are presently concerned.⁸

What precisely does principle (1) give us a right to? What conduct on the part of others is it permissible for us (or our agents) to enforce? I have argued elsewhere⁹ that the most plausible specification of the principle expressed in (1) is:

- (2) Every person has the right not to have her *boundaries violated*, and also not to have her *boundaries invaded* unless such invasion is necessary to end some wrongful boundary-invasion of hers, and such invasion is also not disproportionate to the seriousness of her boundary-invasion.

where the terms emphasized above are defined as follows:

- (3) S's action lies within O's boundary if and only if S's action involves using O as a means (whether mere or nonmere) to the ends of others.¹⁰
- (4) S *crosses* O's boundary if and only if S performs an action within O's boundary.

⁶ I leave open the question of the extent, if any, to which rights-holders should be required to renounce the personal exercise of this liberty in favor of delegation to a particular agent, the state.

⁷ I have elsewhere distinguished an A component as well: the moral permissibility of exercising one's right. This is distinct from the moral permissibility of enforcing respect for one's right. It would be legitimate to defend one's right to promulgate Nazi ideology, for example, yet not legitimate to exercise the right one is defending.

⁸ Bear in mind that we are still operating with the narrow conception of "legal" here. Claims not legitimately enforceable might nevertheless count as "legal rights" under a system of voluntary law like the Law Merchant.

⁹ Long, "Abortion," 170–76.

¹⁰ Note that one can be used as a means without being used as a *mere* means; it is only the latter that constitutes a rights-violation. Some such distinction is necessary, if the prohibition on using people as mere means is not to forbid most human interactions. Crossing someone's boundary counts as using that person as a means, but one uses someone as a *mere* means just in case one's boundary-crossing transgresses principle (2). For more discussion, see *ibid.*

- (5) *S invades O's boundary* if and only if *S crosses O's boundary without O's consent.*
- (6) *S violates O's boundary* if and only if (a) *S invades O's boundary* and (b) *invading O's boundary (in that way) is not necessary to end any boundary-invasion on O's part.*

Notice that none of these definitions turns on whether the act in question is intentional. If I trespass on your boundary, the fact that I did not mean to do it does not make my action any less a trespass. Not all use is voluntary use. For example, a plant does not intentionally use water and soil, but it uses them nonetheless. Likewise, if I step on your face I am using your face as a support for my feet, even if I stepped on your face inadvertently (or was pushed).

Since I have previously defended the derivation of (2) from (1), I will not recapitulate that argument here. I did not then defend (1) itself, however;¹¹ and while I shall not undertake a full defense of (1) here, it is worth saying *something* in its defense, since the principle is hardly uncontroversial.

Although (1) may seem like a paradigmatically deontological principle, I think it receives its strongest support from Aristotle's ethics of virtue (though Aristotle himself did not draw such a conclusion). On an Aristotelian virtue-ethical account, right action is action that expresses the attitudes and dispositions appropriate to a flourishing human life,¹² where the latter is conceived as a life that gives primacy to the exercise of distinctively human capacities. A life aiming primarily at sensual pleasure, or at mere survival, is rejected as subhuman, since it focuses on capacities that humans share with the lower animals, rather than being organized around the exercise of distinctively human traits.¹³ But superhuman lives are ruled out as well. Aristotle does urge us to strive for as godlike an existence as possible,¹⁴ but he makes clear that our human nature places constraints on this goal,¹⁵ and that actually becoming a god would not be a benefit for a human.¹⁶ Hence, the best life for a human being is one that navigates between the extremes of subhuman and superhuman:

Man is a naturally political animal; and he who is without a polis by nature (and not through chance) is either base or superhuman. . . . He

¹¹ I previously wrote only that "I shall not argue for the truth of (1), but I take it to be a plausible moral principle . . ." ("Abortion," 166 n. 2).

¹² An action need not actually be performed from virtue in order to express virtue, i.e., in order to be the kind of action that someone with the virtuous attitude would perform. For discussion, see Rosalind Hursthouse, "Virtue Theory and Abortion," *Philosophy and Public Affairs* 20 (Summer 1991): 223–46.

¹³ Aristotle, *Nicomachean Ethics* (hereafter *NE*), 1097b25–1098a4.

¹⁴ *NE*, 1177b26–1178a4.

¹⁵ *NE*, 1178b5–7, 1178b33–1179a1.

¹⁶ *NE*, 1159a6–12.

who is unable to share [in a political community], or who through self-sufficiency has no need to, is no part of the polis—thus, either a beast or a god.¹⁷

The Aristotelian virtues, too, can be seen as a mean between the subhuman vice of overvaluing, and the superhuman vice of undervaluing, our vulnerable embodiedness. To err on the side of the beasts is to be excessively concerned with our animal nature, our physical desires and physical security; this is the error of the common people, whom Aristotle regards as all too prone to take pleasure and material advantage as their primary goals, and to neglect the possibility of higher values that may require us to sacrifice comfort or even continued existence. To err on the side of the gods, by contrast, is to treat human beings as disembodied intellects for whom the animal nature is irrelevant; this is the error of philosophers like Socrates who see knowledge and virtue as sufficient for happiness, and dismiss external goods as unnecessary, aiming for a transcendent self-sufficiency that is not an option for embodied beings like us.

For he who flees and fears everything, and endures nothing, becomes a coward; and he who fears nothing whatever and approaches everything becomes rash. And likewise he who indulges in every pleasure and holds back from none is undisciplined, while he who flees them all, as boors do, is an insensible sort.¹⁸

Sober-mindedness and indiscipline are concerned with those pleasures that other animals also share in, which thus appear slavish and bestial. . . . Indiscipline seems to be justly reviled, since it belongs to us not as humans but as animals. . . . Those who fall short with regard to pleasures and take less enjoyment than they ought do not often arise; such insensibility is not human.¹⁹

[Aristotle] used to say that some people are as stingy as if they were going to live forever, while others are as profligate as if they were going to perish the next day.²⁰

In short, one set of vices places too much value, and the other too little, on the animal side of human nature.

How, then, can it be shown that principle (1) expresses an attitude appropriate to someone who is virtuous in Aristotle's sense? That is, how can it be shown that (1) is the truly *human* attitude, that it neither falls short of, nor exceeds, what can properly be demanded of our humanity?

¹⁷ Aristotle, *Politics*, 1253a1–5, 27–33 (translation mine).

¹⁸ *NE*, 1104a20–25 (translation mine).

¹⁹ *NE*, 1118a23–1119a7 (translation mine).

²⁰ Diogenes Laertius, *Lives and Opinions of Eminent Philosophers*, VI.20 (translation mine). The point, once again, is that people who fall short of virtue place either too much or too little value on their own vulnerable embodiedness.

Consider what Aristotle says about the political nature of human beings:

Now that man is more of a political animal than the bee and every other gregarious animal is clear. For nature, as we say, makes nothing in vain, and among the animals only man has *logos* [reason, speech]. So while mere voice is an indication of pain or pleasure, and hence is found in other animals (for their nature reaches as far as this: having the perception of pain and pleasure, and indicating these to one another), *logos* is for revealing the advantageous and the disadvantageous, and so also the right and the wrong. For this is peculiar to man, as opposed to the other animals: to be the sole possessor of the perception of good and evil, of right and wrong, and the others. And a community of these makes a household and a polis.²¹

In other words, Aristotle identifies the distinctively human capacity for reason and speech as the basis of our being naturally political animals, for it enables us to pursue our goals through *discussion* with one another. Moreover, Aristotle famously regards *logos*, reason or speech, as the essential trait around which a flourishing human life must be organized.²² This, it seems, is why Aristotle regards it as an essential component of a truly human life to deal with others *politically*, i.e., through reason and discourse—i.e., as conversation partners.²³ But such an ideal creates a strong presumption against the use of force, and in favor of relying on persuasion as far as possible. Aristotle indeed affirms that it is unjust to rule by force rather than persuasion, insisting that statesmen should be as dependent on the consent of their subjects as doctors and pilots are on the consent of their patients and passengers respectively.²⁴ I think, however, that Aristotle's insight points in the direction of a more radical critique of force than he is likely to have recognized. To deal with others by force is to act in a subhuman manner, like a beast of prey; we live a more human life (and therefore, in Aristotelian terms, a better life) to the extent that our relations with other people embody reason and persuasion rather than coercion.²⁵ Therefore, the need to avoid the bestial type of vice gives the virtuous agent reason to accept an obligation to respect other people as ends in themselves, rather than to treat them as mere means to her own

²¹ Aristotle, *Politics*, 1253a7–28 (translation mine).

²² *NE*, 1097b20–1098a18, 1168b29–1169a6.

²³ For a fuller presentation of this argument, see Roderick T. Long, "Aristotle's Conception of Freedom," *Review of Metaphysics* 49 (June 1996): 781–84.

²⁴ Aristotle, *Politics*, 1324b23–34.

²⁵ Cf. Lysias on the founders of Athenian democracy: "They believed that it was the way of wild beasts to be forcibly ruled by one another, but that the proper way for men was to define justice by law, to convince by reason, and to serve both by their actions . . ." (quoted in Kathleen Freeman, ed., *The Murder of Herodes, and Other Trials from the Athenian Law Courts* [Indianapolis: Hackett Publishing, 1991], 236). Both Aristotle and Lysias are thinking primarily of the choice of persuasion over force in the management of collective affairs, but the same principle seems to me to apply in the case of one-on-one interactions as well. (Cf. John Locke, *Second Treatise of Government*, II, 4–6.)

ends. If this high-level human end places a constraint on the pursuit of lower-level, animal ends, so be it.

This, however, gives us only the B-component of principle (1)—the prohibition on using the rights-holder as a mere means. This, by itself, does not entail the C-component—the permissibility of the rights-holder’s (or her agent’s) compelling others to comply with this prohibition. I suggest that what legitimates the C-component is the need to avoid the corresponding godlike type of vice, the pure pacifist position that requires the virtuous agent to cling to cooperation even when the other party abandons cooperation and resorts to aggression. The saintlike commitment to turn the other cheek accords less respect to one’s own material needs than they deserve. Principle (1) can thus be seen as striking an appropriate balance—a Golden Mean—between subhuman aggression and superhuman pacifism.

But how does this principle affect the legal relevance of responsibility?

III. TWO KINDS OF RESPONSIBILITY

The law is ordinarily expected to take cognizance of two kinds of responsibility. The first kind is *retrospective* responsibility, as when a person is held responsible or accountable for actions she has committed. In particular, the institution of *punishment* is supposed to aim at inflicting penalties only on those who have *responsibly* committed some sort of wrong or offense.²⁶ Wrongs committed through (nonculpable) ignorance, such as not knowing the gun was loaded, are regarded as having at least a strong claim to immunity from punishment, as are wrongs committed by external compulsion (for example, my injuring you because someone else forcibly shoved me into your path, tripping you) or by loss of ordinary mental control (as when an offender is judged “not guilty by reason of insanity”). In all these cases, the inflicting of legal punishment is held to be conditional on the defendant’s responsibility for an action that has been committed. I call this kind of responsibility “retrospective” because it is backward-looking; it concerns an agent’s relation to an event that has actually occurred (and so lies in the past).

This is the most familiar kind of responsibility, but we also use the term “responsibility” to describe an agent’s relation to an action that has not yet occurred, one which the agent is able to perform, and may or may not perform; this is the kind of responsibility I call *prospective* responsibility. When someone says, “It is your responsibility to keep the cistern filled,” it is this forward-looking kind of responsibility that is being invoked. This sort of responsibility seems to be a combination of authority and obligation; in the present example, having the responsibility to keep the cistern filled involves both having the *authority* to fill it (though not necessarily

²⁶ Even in cases of actions committed through negligence, the application of legal sanctions presupposes that the agent is responsible for being negligent.

the authority to enlist—much less conscript—others' aid in filling it) and being *obligated* to fill it.

These two kinds of responsibility—retrospective and prospective—are linked, in that the wrongs we can be held retrospectively responsible for are precisely those that it was our prospective responsibility to avoid. Prospective responsibility, too, is thought to be the proper province of law; part of the job of legal institutions is to require people to meet their responsibilities.

My contention, however, is that neither retrospective nor prospective responsibility is a proper concern of the law.²⁷

IV. RETROSPECTIVE RESPONSIBILITY AND THE LAW

Retrospective responsibility is thought to be crucial to legal judgment, primarily because the defendant's responsibility, or lack thereof, for committing an offense is thought to determine whether, and to what extent, it is permissible to inflict legal sanction or punishment. In other words, the standard view is that there are harms we may inflict on a responsible wrongdoer that we may not inflict on a nonresponsible wrongdoer.

This is the view I wish to challenge. My claim is not that the responsible and the nonresponsible must be accorded precisely the same treatment in every respect; the responsible wrongdoer may properly be the object of moral outrage and condemnation, of social ostracism, and so forth. What I do claim is that there is no use of *force* that is permissible against responsible wrongdoers but not against nonresponsible ones.

Let us first consider, then, what we are justified in doing to a nonresponsible wrongdoer; and then we shall see what more, if anything, may be inflicted on a wrongdoer who is responsible.

Consider two possible cases. In the first case, a nonresponsible wrongdoer commits a boundary-invasion; e.g., Erika, under hypnosis, stabs someone with a butcher-knife. In the second case, a nonresponsible wrongdoer commits no such boundary-invasion; e.g., Helga, under hypnosis, passes out Nazi leaflets on the street. In the latter case, although Helga is doing something wrong (I presume that promoting Nazism is wrong),

²⁷ My thoughts on this subject have been influenced by Randy E. Barnett, "Restitution: A New Paradigm of Criminal Justice," in Randy E. Barnett and John Hagel, eds., *Assessing the Criminal: Restitution, Retribution, and the Legal Process* (Philadelphia: Ballinger, 1977); Randy E. Barnett, "Pursuing Justice in a Free Society: Part One—Power versus Liberty," *Criminal Justice Ethics* 4, no. 2 (Summer/Fall 1985): 50-72; Randy E. Barnett, *The Structure of Liberty: Justice and the Rule of Law* (Oxford: Clarendon Press, 1998); Richard A. Epstein, *A Theory of Strict Liability: Toward a Reformulation of Tort Law* (San Francisco: Cato Institute, 1980); Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage Books, 1979); Walter Kaufmann, *Without Guilt and Justice* (New York: Dell Publishing, 1973); Thomas Szasz, *Ideology and Insanity: Essays on the Psychiatric Dehumanization of Man* (Garden City: Doubleday, 1970); and Benson, *Enterprise of Law*. None of these authors should be associated with the precise views I defend here; the conclusions I defend are closest to those of Barnett, but my case for those conclusions comes from a significantly less consequentialist perspective than does his.

one cannot, in turn, inflict harm on her without violating her boundary and thus offending against principle (2).²⁸ Let us focus, then, on the first case, that of Erika, the nonresponsible boundary-invader. And suppose that Erika's boundary-invasion is wrongful; that is, either it is an outright boundary-violation and thus counteracts no aggression (she just stabs someone out of the blue) or else it is a boundary-invasion out of proportion to whatever aggression it counteracts (she stabs someone who stepped on her toe). What measures can permissibly be taken against her?

First, one may take defensive action against Erika, to repel or expel her from her victim's boundary. The fact that she is not responsible for her wrongful boundary-invasion does not alter the fact that she has committed it, and the C-component of the right specified in principle (2) licenses the use of defensive force against her. If it were wrong to use force against innocent threats, it is hard to see how the use of force could become legitimate simply by the addition of wicked thoughts to the minds of these threats; for we surely do not enjoy rightful jurisdiction over the contents of other people's minds.²⁹

Second, one may restrain or imprison her if she poses a continuing threat to other people's boundaries. Why is this so? Suppose that I deliberately aim a rifle at your head and place my finger on the trigger. Are you permitted to take action against me in self-defense? I might claim that you are not; after all, I could say, I have not violated your boundary *yet*, and thus any violent response on your part would go beyond what is licensed by principle (2). But surely it is more plausible to say that by threatening you with my rifle I have already treated you as a mere means, someone who can be legitimately subjected to my ends. Thus, I have already violated your boundary, and you may respond with force.

But now suppose that my aiming the rifle at you is not deliberate; an uncontrollable epileptic seizure has caused me to jerk the rifle around to face you, and the next spasm is likely to cause my finger to depress the trigger. *My lack of responsibility does not cause my action to cease being a boundary-violation.* Thus, you still need not wait until I actually pull the trigger before using force in response. The broader moral is that if a person's pattern of behavior poses a sufficient threat to others, that person may justly be restrained³⁰ before she has taken any overt action against those others, regardless of whether she is responsible for her actions.

Third, one may force the nonresponsible wrongdoer to pay restitution to her victim. Here is the argument. If Anita breaks into Juanita's house,

²⁸ Notice that this principle rules out victimless-crime laws as impermissible. (Or at least, it rules out the *enforcement* of such laws.) I regard this as an advantage rather than a defect of my view.

²⁹ Cf. Long, "Abortion," 188 n. 46.

³⁰ By whom? Once again, I leave open the question of whether, and under what conditions, this right may be exercised by the victim (or third parties) or must be delegated to a particular institution.

Anita is illegitimately within Juanita's boundary and may properly be expelled. But suppose Anita leaves with Juanita's stereo. Since the stereo is Juanita's property, Anita is still within Juanita's boundary (and thus liable to justified coercion) until she exits Juanita's boundary by returning the stereo.³¹ But suppose instead that Anita destroys the stereo; then she remains within Juanita's boundary until she replaces the stereo with a new one of equal value (or the closest equivalent possible under the circumstances). Moreover, she must also compensate Juanita for the period of time during which Juanita was deprived of the use of the stereo, since that lost time was, as it were, something belonging to Juanita but destroyed by Anita, and so Anita remains within Juanita's boundary until she gives it (or its equivalent) back. More broadly, Anita should be legally required to make good any harms she inflicts on others in violation of principle (2).

Note that in none of these cases does it matter whether Anita was responsible for her actions. If she entered Juanita's premises by accident, or was blown through the window by a tornado, she cannot use that fact as an excuse for not leaving now that she is able to do so. Likewise, if Anita took (or destroyed) Juanita's stereo inadvertently, her lack of responsibility for her action does not void Juanita's claim to compensation.

Now in some cases (e.g., homicide, permanent injury, or the destruction of irreplaceable heirlooms) it may be impossible to make full compensation. Since "ought" implies "can," full compensation is therefore not obligatory. But partial compensation is certainly possible, and so may legitimately be required.

It might be argued that since one remains in one's victim's boundary until compensation is paid, if one commits a crime³² for which full compensation is inherently impossible, one remains in one's victim's boundary forever and thus may be subjected to coercion indefinitely, in effect becoming the slave of the victim (or, in the case of homicide, of the victim's family). This inference would be mistaken, however. Coercion of the perpetrator is justified by principle (2) only so long as it is needed in order to expel the perpetrator from the victim's boundary. If *no* amount of coercion will suffice to expel the perpetrator from the victim's boundary,

³¹ I take it that a person's property consists in objects whose relation to that person is such that one cannot use the objects as means without thereby using the person as a means. This might be because the products of our labor are an extension of ourselves (a proposition dear to the hearts of both Lockean defenders of capitalism and Marxist theorists of alienated labor), or because, as Robert Nozick argues (*Anarchy, State, and Utopia* [New York: Basic Books, 1974], 169-70), my seizing the products of your labor is tantamount to forcing you to labor for me. If the stereo is the product of Juanita's labor (either directly, because she built it, or indirectly, because she bought it with money she earned), then Anita's appropriation of the stereo counts as an indirect appropriation of Juanita herself, and thus as a boundary-invasion.

³² Or if one commits a tort—but one implication of the theory developed here is that the crime/tort distinction may be untenable. For a critique of that distinction, see Benson, *Enterprise of Law*; Barnett, "Restitution"; and Barnett, *Structure of Liberty*. The crime/tort distinction is the exception, not the rule, in legal history.

a policy of indefinitely prolonged coercion makes no contribution to such expulsion and so fails to conform to principle (2).

How much should be required in the way of partial compensation? What principle can be invoked to set an upper limit, even approximately, on the amount of restitution that can be mandated? Consider the clause in (2) that specifies that one's response to a rights-violation should not be disproportionate to the seriousness of that violation. (For example, although one has a right not to have one's foot stepped on, one does not have the right to use deadly force in order to prevent someone from stepping on one's foot—even if in the circumstances only deadly force would prevent the act.) The burdens imposed on the perpetrator by the restitution requirement, then, cannot be so onerous as to be out of proportion to the seriousness of the offense. For example, if a billionaire's million-dollar vase is broken by a fellow billionaire, the second billionaire may be required to pay full restitution to the first; but if the vase is broken by an indigent laborer, a million-dollar debt constitutes a greater burden (a lifetime of debt)—a burden which, in this case, is arguably out of proportion to the seriousness of the offense—and thus the amount of damages that can be demanded of the offender is far less.³³

We can apply this principle to the problem of uncompensable wrongs: If we think of partial compensation for an uncompensable crime as *full* compensation for *part* of the crime, then compensation ceases to be mandatory as soon as its burdens become disproportionate to the seriousness (not of the entire crime but) of the portion of the crime for which the victim is being compensated. While this does not offer a clear-cut guide to judges, it does place some weight on the perpetrator's side to counterbalance the victim's demand for indefinite restitution in the case of wrongs that are not fully compensable. (I do not mean to suggest that it is possible in every case to *identify* by description a distinct compensable component of an uncompensable wrong. But it is possible for analytic purposes to regard the seriousness of a crime as being composed of portions, each of lesser seriousness, without needing to identify a particular aspect of the wrong action itself that corresponds to the degree of seriousness of each portion.)

I have argued that an innocent aggressor may be subjected to various sorts of permissible coercion, including defensive force, imprisonment, and compulsory restitution. If we define punishment simply as *imposing a cost on a person in response to the person's having committed an offense*, then it is sometimes permissible to punish the innocent—since defensive force,

³³ It might be objected that this solution violates the liberal principle of equality before the law. But demanding a million dollars from a billionaire and demanding a million dollars from a pauper do not strike me as cases of equal treatment. In any case, liberal jurisprudence has traditionally recognized the concept of bankruptcy, i.e., a limitation on the claims creditors can make on someone whose resources have been exhausted; and tailoring damages to a defendant's ability to pay seems to me an application of the same principle.

imprisonment, and compulsory restitution all count as costs imposed on the innocent aggressor in response to her aggression. In none of these cases, however, is it essential to the treatment in question that it be *felt* as a cost by the perpetrator, i.e., that it be unpleasant to the perpetrator. Disutility for the perpetrator is a foreseen, but not intended, result of the enforcement of rights.³⁴ Hence, it is importantly different from the kind of punishment with which we are most familiar (let us call it punishment-as-suffering) in which the disutility experienced by the victim is the main goal of punishment—whether on *retributive* grounds (the wrongdoer deserves to suffer), *deterrence* grounds (inflicting suffering on wrongdoers will discourage other wrongdoers from imitating them), or even *rehabilitative* grounds (discipline and hardship will make the perpetrator a better person). It is generally conceded that punishment-as-suffering is morally inappropriate when inflicted on wrongdoers who are not responsible. But does punishment-as-suffering become legitimate when the wrongdoer is responsible for her actions?

I claim that it does not. The only difference between the responsible and the nonresponsible wrongdoer is the presence of malicious thoughts in the former. But malicious thoughts by themselves are not boundary-invasions and do not fall within the jurisdiction of the law *except insofar as they make a difference to external behavior*. Accordingly, the presence of malicious thoughts cannot justify any *additional* coercive treatment beyond what is already justified without them:

A restitutive theory of justice varies the level of reparations according to how serious a rights violation has occurred. . . . In contrast, a retributive theory requires that the sanction must be varied according to this factor and also according to how “bad” the offender is who committed the act. . . . This means that the criminal is liable not only for what he did but for *what he was thinking* while he did it. . . . [P]unishments for the mental state of the criminal—whether intention or motivation—can be justified within a rights theory only if one posits that someone has a right to a particular mental state or the particular thoughts of others. . . . [T]o extract more than what it takes to rectify the rights violation he inflicted is to violate the criminal’s rights.³⁵

³⁴ This claim needs to be qualified somewhat. In the exercise of defensive force, I may keep striking you because I know my blows cause you disutility and I hope they will accordingly motivate you to desist; or if I imprison you I may set up a device to give you electric shocks if you attempt to climb the prison walls, once again hoping that the disutility caused by the shocks will motivate you to stop trying to escape. In such cases the disutility is intended, not merely foreseen. In both cases, however, your discomfort is a means of controlling you, not an end at which the controlling process is aimed. For example, I cause you disutility in order to keep you imprisoned; I do not imprison you in order to cause you disutility.

³⁵ Barnett, “Pursuing Justice,” 65–66.

As for deterrence, the difference between defensive force and deterrent force is that deterrent force inflicts disutility on the perpetrator not in order to affect the *perpetrator's* behavior but in order to affect *other* people's behavior. Deterrent force thus fails to satisfy the conditions laid down by principle (2).

Rehabilitative force is more like defensive force in that the focus is on affecting the perpetrator's behavior, but unlike defensive force, rehabilitative force typically goes beyond what is needed to protect any victims' boundaries and thus once more violates (2). It might be thought that rehabilitative punishment is consistent with (2) because it involves using the perpetrator as a means to her *own* ends rather than to the ends of others.

One way of responding to this defense of paternalism is to claim (a) that people's interests are constituted entirely by their preferences, and (b) that there is no reliable way to identify people's preferences beyond seeing how they are expressed in actual choices. Hence, it would be impossible to promote someone's good by coercively interfering with his or her choices, because whatever people choose for themselves is automatically good for them. This subjectivist argument is not the line of response I shall take, for I do not believe that either (a) or (b) is true. Instead, I shall appeal to objective features of human flourishing.

First, on an Aristotelian conception, liberty is an essential component of the human good,³⁶ so that while freedom of choice may not be *sufficient* for a flourishing life, it is nonetheless *necessary* for it.³⁷ Hence, paternalistic interference does not in fact advance the welfare of its recipient, and so is, in reality, a subjection of the recipient to the paternalist's own goals—a clear violation of (2). Second, paternalism also interferes with the well-being of the paternalist herself, since by forcing her preferences

³⁶ Long, "Aristotle's Conception of Freedom," 787–92. Aristotle himself did not take the value of liberty to rule out coercive paternalism, because he thought that the requirements of liberty (*eleutheria*) were satisfied by allowing consent to a political framework, even when very little freedom of choice (*exousia*) was permitted *within* that framework (*ibid.*, 792–98). For a criticism of this view, see Roderick T. Long, "Immanent Liberalism: The Politics of Mutual Consent," *Social Philosophy and Policy* 12, no. 2 (Summer 1995): 1–31.

³⁷ On the Aristotelian view, self-directed activity is crucial to *eudaimonia* (human flourishing). As Jennifer Whiting observes:

A heart which, owing to some deficiency in its natural capacities, cannot beat on its own but is made to beat by means of a pacemaker is not a healthy heart. For it, the heart, is not strictly performing its function. Similarly a man who, owing to some deficiency in his natural capacities, cannot manage his own life but is managed by means of another's deliberating and ordering him is not *eudaimôn*—not even if he possesses the same goods and engages in the same first order activities as does a *eudaimôn* man. . . . Aristotle's general identification of what it is to be human with rational agency is not altogether implausible—at least not to those of us who would prefer to trust our hearts to pacemakers than our deliberations and the pursuit of our ends to another, no matter how benevolent and wise he happens to be.

Jennifer Whiting, "Aristotle's Function Argument: A Defense," *Ancient Philosophy* 8, no. 1 (Spring 1988): 43–46.

on others, she is dealing with those others by coercion rather than cooperation, and thus is living a less human life.

As for retributive punishment, it is an even clearer violation of (2), since punishment is a boundary-invasion,³⁸ and boundary-invasions can be justified only as a means of stopping prior boundary-invasions, not simply to inflict suffering. But if the wrongdoer's responsibility or lack of it makes no difference to what the legal system may permissibly inflict on her, then whether or not one is retrospectively responsible for the wrongs one has done is indeed *legally* irrelevant.

It might seem that considerations of responsibility are legally relevant after all, because they affect our predictions of a malfeasant's future behavior, and thus our judgment as to what sort of restraint it may be appropriate to impose. If, of my own free will, I kill a stranger just for fun, then in addition to the legitimacy of exacting from me (partial) restitution for the victim's family, it is permissible to lock me up, not out of retribution but because I pose a continuing danger to other people. Yet on the other hand, if I kill someone because I nonculpably skid on unexpected ice and hit the victim with my car, then while (on my theory) I still owe compensation, the fact that my killing of the victim was caused by an accident rather than by my free choice means that I do *not* pose a continuing danger to others and so should not be incarcerated.

In fact, however, responsibility itself is irrelevant to the difference between the two cases. What really matters is the likelihood of future offenses. A criminally insane offender may justly be imprisoned, despite her lack of responsibility, because her condition constitutes an ongoing threat to others;³⁹ and, on the other hand, those who pose no further danger to

³⁸ At least, the sorts of legal punishments we are concerned with are boundary-invasions, since they involve forcible impositions of various kinds. Peaceful, private sanctions like boycotts, ostracism, and the like can be punishments of a sort, but are not boundary-invasions, and thus may be imposed for retributive, deterrence, or rehabilitative reasons without violating principle (2).

³⁹ It might be objected that my position, since it denies any legal jurisdiction over people's mental states, cannot countenance treating wrongdoers as "ongoing threats," since such a judgment makes reference to the wrongdoers' mental states. But my position is that any causes predisposing people to violate others' rights may be considered as grounds for restraining such people, be those causes mental states or epileptic seizures. It is not the fact of the mental state itself, but its tendency to issue in action, that brings it within the law's purview.

"The liberal conception of justice prohibits not only the unjustified use of force against another, but the unjustified *threat* of force as well. . . . It is the right of self-defense that permits persons to use force to repel a threat of wrongful harm before the harm occurs" (Barnett, *Structure of Liberty*, 185).

If I point a gun at your head and start to play Russian roulette, you do not have to wait till a shot is fired before taking defensive action. To impose on others a sufficiently high risk of boundary-invasion is itself a boundary-invasion. Hence, preventive restraint can be justified. Needless to say, given the potential for mistake and abuse, the scope for preventive restraint should be narrow. As Barnett writes, "I would limit the use of preventive detention to those persons who have communicated a threat to others by their *past criminal behavior*. . . . I would wager that the odds of a crime being committed by someone who has already committed a crime greatly exceed the odds of a crime being committed by one who has never committed a crime" (*ibid.*, 213).

others should not be imprisoned even if they are retrospectively responsible for their crimes.⁴⁰ It is not the responsibility as such that is relevant.

Retributivists will resist the idea that evil motives should not be taken into account in the legal treatment of criminals. After all, we all recognize the importance of motives and other inner states in our judgment and treatment of other people generally; why shouldn't we take them into account in legal contexts as well? My answer is that legal contexts involve an element that is ordinarily absent from everyday interactions, namely *force*. The imperative to treat other people as conversation partners rather than as objects of manipulation creates an extremely strong presumption against the use of force. The need to resort to force to defend one's rights when an aggressor's actions render peaceful coexistence impossible is sufficiently weighty to overcome the presumption; but using *more* force than is necessary to protect one's boundaries is harder to justify, and the presence of malicious intentions in the malefactor's head does not seem

⁴⁰ My position entails that an offender like Karla Faye Tucker Browne (an axe murderer who was executed in Texas in 1998) should not have been kept in prison, let alone executed, since (to all appearances) she had become rehabilitated, and so neither imprisonment nor execution could pass the test of principle (2). More controversially, it entails that a participant in genocide like Adolf Eichmann should not have been imprisoned or executed, because despite an apparent *lack* of rehabilitation, he still posed no ongoing danger to others. Browne and Eichmann would still owe compensation to the families of their victims, however.

The notion of compensation in the case of Eichmann in particular may seem ludicrous. First, even those who accept the notion of partial compensation to the families of homicide victims may wonder how an individual of average means could make any substantial compensation to the survivors of the *millions* of victims to whose deaths Eichmann contributed. Second, even if Eichmann were the richest man on Earth, it may seem grossly insulting to the victims of so great an evil as the Holocaust to ask them to accept payment in lieu of the perpetrator's punishment.

But consider: Even on the retributive theory, there is no punishment for Eichmann that would not be ludicrously inadequate to his crime. We cannot execute Eichmann six million times. And even if such a sentence were physically possible, we could not carry it out without becoming monsters ourselves.

For that matter, as a purely pragmatic point, we must recognize that if there were no legal provision for punishing Eichmann, that would not mean that he could live in happy impunity. Someone like Eichmann, once his identity and location became known, would almost certainly be the victim of private revenge; and the perpetrator of that revenge, if unlikely to kill anyone else, would also have to be released. As Sade wryly suggests:

Let us never impose any other penalty upon the murderer than the one he may risk from the vengeance of the friends and family of him he has killed. "I grant you pardon," said Louis XV to Charolais who, to divert himself, had just killed a man; "but I also pardon whoever will kill you."

Donatien-Alphonse-François de Sade, "Yet Another Effort, Frenchmen, If You Would Become Republicans," in *The Marquis de Sade: The Complete Justine, Philosophy in the Bedroom, and Other Writings*, ed. and trans. Richard Seaver and Austryn Wainhouse (New York: Grove Press, 1966), 296–339.

To some it may seem paradoxical that, after being so highly critical (too critical, many will think) of public retribution, I should offer private retribution as in some instances a salutary corrective. Let me clarify. I am not recommending retribution, either public or private. (I do think private retribution is often more *excusable* than public retribution, but that does not make it just.) My point is simply that, given human nature as it is, the threat of private retribution would be a genuine one under the system I advocate, and that some of the consequences of this fact are not unwelcome (as a deterrent, for example).

a weighty enough consideration to warrant a further suspension of the presumption against force. This is not to say that other forms of punishment, not involving force—e.g., ostracism and the like—might not be morally justified. Certainly we ought to treat responsible wrongdoers differently from nonresponsible ones, in all sorts of ways (some of which may be quite effective as deterrents, incidentally). What I deny is that the greater demerit of responsible wrongdoers is grounds for relaxing the very stringent presumption against the use of force.⁴¹

Rejecting the legal relevance of retrospective responsibility involves rejecting the time-honored legal standard of *mens rea* ("accountable mind"), which makes the imposition of criminal penalties depend on showing that the lawbreaker acted with intent. Dispensing with *mens rea* will strike many, particularly those of retributivist persuasion, as grossly counter-intuitive.⁴² Roger Pilon offers a retributivist defense of *mens rea*:

Are we really to treat, by way of remedy, my accidentally hitting you with my automobile and my intentionally hitting you with a club as acts of the same kind? Is the *mens rea* element to be allowed *no* place in the calculation? Even if we include in the compensation due the

⁴¹ A still weaker case for retribution, in my view, is the idea that punishment is needed to send a "message." "The act of punishment constitutes symbolic condemnation of the offender for his offense. As such it serves to uphold and enforce collective moral norms violated by the criminal." See Franklin G. Miller, "Restitution and Punishment: A Reply to Barnett," *Ethics* 88, no. 4 (July 1978): 359. I find the notion of *symbolic* or *expressive* violence a rather disturbing one. In any case, the need to express symbolic condemnation is hardly weighty enough to overcome the presumption against force, given the numerous other methods available for expressing symbolic condemnation.

⁴² It should be noted, however, that our own legal system's commitment to *mens rea* is not unambiguous:

Frequently, in the modern era, the Anglo-American criminal law has imposed liability without requiring the showing of a *mens rea* or guilty mind. . . . Criminal statutes are frequently silent on what sort of *mens rea*, if any, must be shown. . . . Although Sir William Blackstone, writing in the 18th century, asserted that the *mens rea* is an indispensable element of a crime, developments that have occurred largely since that time have created a considerable body of penal offenses in which no intent or other mental state need be shown. Absence of the *mens rea* requirement characterizes a few offenses like statutory rape, in which knowledge that the girl is below the age of consent is not necessary to liability, and bigamy, which in most jurisdictions may be committed even though the parties believe in complete good faith that they are free to marry. For the most part, however, absolute liability has been created by statutes defining offenses to which only slight or moderate penalties are attached. These offenses, sometimes called "public-welfare offenses," are most frequently concerned with economic regulation or with protection of the public health and safety. . . . The maxim *ignorantia facti excusat* ("ignorance of fact excuses") represents one aspect of the *mens rea* doctrine. . . . On the other hand, the Anglo-American law recognizes the maxim *ignorantia legis neminem excusat* ("ignorance of the law excuses no one"). . . . The doctrine that mistakes of law do not excuse seems reasonably supportable when the offense involves conduct which would be recognized as dangerous and immoral by any responsible adult. The matter is much less clear, however, when the case is one of a statutory offense prohibiting conduct that is not obviously dangerous or immoral.

Francis A. Allen, "Criminal Law," in *Encyclopedia Britannica*, vol. 6 (Chicago: William Benton, 1970), 765.

victim . . . special damage, including the costs of apprehension, trial, and legal fees for both sides, and general damages, including pain and suffering . . . there still remains a crucial element that these considerations do not touch. For thus far the compensation is identical with that ideally due the victim in a simple civil action. . . . The reduction of criminal wrongs to civil wrongs . . . or at least the addressing of criminal wrongs with civil penalties, bespeaks an all too primitive view of what in fact is at issue in the matter of crime. . . . For the element missing from the mere tort but present in the criminal act is the guilty mind. The criminal has not simply harmed you. *He has affronted your dignity.* He has *intentionally* used you, against your will, for his own ends. He cannot simply pay damages as though his action were accidental or unintentional. How would this right the wrong? . . . [H]ow would compensation make the victim whole again? For compensation does not reach the whole of what is involved—it does not reach the *mens rea* element. There is simply no amount of money that will rectify certain wrongs.⁴³

It is quite true that restitution cannot always make the victim whole.⁴⁴ But punishing the perpetrator cannot make the victim whole either. Restitution at least goes some way toward making the victim whole, while punishment does nothing of the sort.

Pilon suggests that retributive punishment does satisfy the intent behind the requirement of making the victim whole, for it restores equality between the two parties:

The original act . . . creates a right in the victim (or his surrogate) to use the criminal as he himself was used. Only so will the parties be treated as equals. For only so will the *character* of the original act be reflected in the remedy. Money damages simply do not do this. It is the *using* of one person by another—this affront to the victim's dignity or integrity—that must be captured in the criminal remedy. Thus the victim's treatment of the criminal is equal in character to the treatment he himself suffered.⁴⁵

I have two problems with this argument. First, in the case of restitution the intent is to restore equality by *making the victim better off at the expense of the perpetrator*. Retribution merely makes the perpetrator worse off without improving the prospects of the victim (unless the victim's lot is

⁴³ Roger Pilon, "Criminal Remedies: Restitution, Punishment, or Both?" *Ethics* 88, no. 4 (July 1978): 350–52.

⁴⁴ I would disagree, however, with Pilon's contention that in the case of intentional injury, no amount of restitution could make the victim whole. If Bill Gates were to empty a bucket of Jell-O over my head, and then sign over to me half his fortune by way of restitution, I would regard myself as more than adequately compensated for his action. (Bill Gates, if you're reading this, please take note.)

⁴⁵ Pilon, "Criminal Remedies," 355–56.

supposed to be improved simply by the experience of retributive satisfaction with the perpetrator's punishment). In any case, the point of restitution is not to restore "equality" but to end the perpetrator's ongoing invasion of his victim's boundary.

Second, the notion that the remedy must have the same character as the original offense (and so must be a harmful using of the criminal, as opposed to mere financial compensation) has unsettling implications. For it was a crucial aspect of the original offense that it was *unjust* and *excessive*; that is precisely what is horrendous about it. So must not the remedy too, if it is to share the character of the offense, be unjust and excessive? The logic of retribution points in the direction, not of an eye for an eye (for how could an eye justly taken be any match for an eye unjustly taken?), but of two eyes for an eye, or a life for an eye.⁴⁶

Pilon insists that because "the criminal intentionally used the victim for his own ends, and against the victim's will . . . the criminal alienated his own right against being similarly treated by the victim (or by anyone else acting on behalf of the victim)."⁴⁷ But remember that the criminal's right against being ill treated is grounded in the duty of others to live a life of rational cooperation, and that this duty, in turn, is part of living a truly human life. Thus, it is not in the criminal's power to alienate this right; it consists in facts about other people's good that he cannot alter by any action of his own.

Advocates of a deterrence theory of punishment will offer somewhat different objections. From the point of view of deterrence, the difference between responsible and nonresponsible wrongdoers is that the behavior of the former (but not of the latter) is responsive to incentives, and therefore it makes sense to apply legal sanctions to the former but not to the latter. The fact remains, however, that the prospect of having to pay restitution certainly will have some deterrent effect, even if such deterrence is not the justificatory ground of the restitution policy.

It may be true that a greater degree of deterrence could be achieved through a policy of punishment that goes beyond mere restitution. But such a policy has a high moral cost, once we take into account the fact that such punishment will be inflicted by fallible human beings. As Barnett points out:

[A]ny gains obtained by increasing sanctions beyond what is required to compensate victims will inevitably increase the suffering of those innocent persons who have been wrongfully accused of

⁴⁶ One is reminded of the character Asineth in the novel *Hart's Hope*, a victim of terrible injustice who takes a nevertheless excessive revenge. When told that vengeance is justified only "if you avenge yourself on those who harmed you [and not, say, their loved ones], and only if your vengeance is equal to the wrong done" (two conditions she is violating), Asineth responds, "I was unjustly treated, and unless my vengeance is monstrously unjust I won't be satisfied." Orson Scott Card, *Hart's Hope* (New York: Tor Books, 1983), 43-44.

⁴⁷ Pilon, "Criminal Remedies," 355.

crimes. . . . Every increase in the *level* of punishment to enhance deterrence of the guilty increases the harm inflicted upon the wrongfully accused. That is, once we assume—as we must if we want to be realistic—the inevitability of enforcement error, a *rule* requiring punishment in addition to full compensation comes at the direct expense of the innocent. In sum, absent perfect information, a strategy of punitive deterrence requires that some people who are wrongfully accused be sacrificed to deter more crime.⁴⁸

Of course, my claim is that punishment-as-suffering is unjust even when the person being punished is guilty. All can agree, however, that it is unjust when the person being punished is innocent; and as long as punishment institutions are in the hands of human beings and not of angels, there seems to be no way to gain the benefit of greater deterrence through increased punishment without paying the cost of greater suffering for the innocent.

My case against punishment-as-suffering is not a consequentialist one. However, I do not take the view that pragmatic objections can be dismissed out of hand. If a virtue-based or rights-based position were to lead to horrendous consequences when put into practice—if, for example, restricting punishment to restitution were to lower deterrence so far as to unleash a torrent of crime that only a more robust practice of punishment could restrain—that would be, to my mind, a strong argument against it. Social consequences are not the foundation of my position, but they are not irrelevant to it either.⁴⁹ Once again, however, I do not see that the threat of mandatory restitution (and, in the case of criminals who pose serious ongoing threats, preventive restraint) is a negligible deterrent. One must also keep in mind that the more severe a penalty is, the more reluctant a jury may be to impose it; thus, increases in severity may be at least partly offset by decreases in certainty.⁵⁰

⁴⁸ Barnett, *Structure of Liberty*, 205, 228.

⁴⁹ One of the concerns of virtue is the public welfare; and one component of the public welfare is the adherence to virtue. Thus, to my mind, neither the requirements of virtue nor the requirements of public welfare can be defined in complete independence of one another. To be sure, each has *some* independently definable content; but a full specification of both will be a matter of coherence and mutual adjustment. The requirements of virtue put some constraint on what can be regarded as genuinely in the public interest; but the reverse is also true.

⁵⁰ Barnett (in *Structure of Liberty*, 234) offers additional reasons for regarding the restitution system as an adequate deterrent:

Full compensation includes compensation for the costs of detection, apprehension, and prosecution. . . . In such a case it is likely that the subjective cost of making restitution will often exceed the subjective benefit gained from the crime. . . . Pure restitution can also increase the certainty of sanctions and their proximity to the offense. Restitution increases incentives for victims to report offenses and to cooperate with law-enforcement authorities. . . . Moreover, since the cost of making restitution increases as time passes [because enforcement costs continue to accumulate], even offenders will have an incentive to avoid prolonging the proceedings.

Let me consider a few other pragmatic objections to the implementation of a policy of pure restitution. A system in which wrongdoers pay money damages might seem to benefit the rich over the poor. I have argued above that justice can countenance demanding lower money damages of the pauper than of the billionaire, but there may still remain the concern that since the wealthy face a lower marginal utility of money, even the higher damages they pay may be an inadequate incentive to refrain from crime.

This objection is short-sighted, however, for it looks no farther than the point at which the rich malefactor gives restitution to the poor. The interesting question is: What happens next?

[W]hat about wealthy criminals who could easily make restitution and go free? . . . [Some] worry that the wealthy will have little incentive to refrain from committing crimes in a system of pure restitution. . . . [This objection overlooks] the potential for reprisals that wealthy offenders, above all others, would have to fear in a system of restitution. For the amount previously paid in restitution could, if the victim or the victim's friends and family so wished, be used to make complete restitution for the commission of a like offense against the wealthy offender. While this may not seem an entirely attractive aspect of a system of restitution, it would nevertheless serve as a potential deterrent to wealthy offenders. Indeed, it might well provide a more effective deterrent than the likelihood that our current system will catch, successfully prosecute, and punish a wealthy offender. . . .⁵¹

I would add that to the extent that it *is* a successful deterrent, the threat of victim reprisal would generally not need to be implemented, thus mitigating its "unattractive aspect."⁵²

⁵¹ Barnett, *Structure of Liberty*, 181-83.

⁵² I may seem to have solved one problem only to create another. Doesn't my position, by licensing this kind of private retaliation, open the door to a reemergence of the bloodfeud? I don't think so. First, my position does not *license* such retaliation; it remains a crime (or tort) against which the victim can legitimately defend himself. And second, Europe's actual experience with restitution-based systems suggests that the prospect of collecting compensation tends to tame the bloodfeud:

[T]he fact that they would have to give up the restitution they had received as reparations would cause victims to consider long and hard whether they really want a reprisal. . . . I suggest that a less retributivist state of mind would likely result from a system in which victims and their families had to choose between accepting complete restitution or arranging for a reprisal as compared with a system in which government-authored punishment is the victim's only option. That the right of restitution—or composition—largely supplanted the blood feud in medieval Europe tends to support this suggestion. (Barnett, *Structure of Liberty*, 183-84)

Cf. David Friedman, "Private Creation and Enforcement of Law: A Historical Case," *Journal of Legal Studies* 8 (March 1979): 399-415; and Benson, *Enterprise of Law*.

Restitution, when it is awarded, goes to the victim—or, in the case of murder, to the victim's heirs. But what happens in cases where there are no heirs? Can friendless orphans be killed with impunity?

I suggest that this problem can be handled by making the right to restitution transferable, like any other property. In the restitution-based system of medieval Iceland, a victim of modest means could sell his claim to compensation (or part of it) to a wealthier and more powerful individual who was in a better position to extract compensation.⁵³ (This is perhaps not so different from hiring a lawyer on a contingency fee.) My proposed system would incorporate the idea of claims to restitution as transferable property, but with the additional feature that such claims would survive their possessor's death and, in the absence of specific heirs, become *abandoned property available for homesteading*. That is, the first person to claim the abandoned right by initiating a suit against the killer (thus mixing his labor with the right, as it were) would become entitled to compensation; and this would create the needed incentive for prosecuting murderers even when the victim dies without heirs.

Franklin Miller puts forward four problem cases for advocates of a restitution-based legal system. First, he asks, in the case of cruelty to animals, "to whom should restitution be paid?"⁵⁴ Well, it depends. Deciding the question of animal rights lies beyond the scope of my present project. But either animals have rights or they do not.⁵⁵ If they do, then compensation should be made to the animals. (Suit would presumably be brought by someone acting on behalf of the mistreated animal's interests; in this respect, animals would enjoy a legal status similar to that of young children. The recipient of the compensation might be a fund to provide care to the animal. If the animal is no longer alive, compensation might go to a homesteader, as in the case of friendless orphans.) If they do not have rights, then compensation should be made to the animals' owners; if the animals are rightless and unowned (or owned only by the person inflicting the cruelty), then no compensation is owed to anyone, and the act, while morally repellent, is perfectly legal. This admittedly leaves no room for the position, held by many, that animals have no rights but nonetheless deserve legal protection; but if animals indeed have no rights, then cruelty to animals is a victimless crime, and punishing victimless crimes

⁵³ Jesse L. Byock, *Medieval Iceland: Society, Sagas, and Power* (Berkeley: University of California Press, 1988).

⁵⁴ Miller, "Restitution and Punishment," 359.

⁵⁵ Does the presumption against force and in favor of persuasion extend to our relations with animals? I am inclined to answer along the following lines: In the case of animals with whom some cooperation is possible, where the choice between cooperation and compulsion is accordingly a meaningful one, there is a sense, albeit an attenuated one, in which animals count as conversation partners, and this probably licenses the extension to them of some rights, consistent with the limitations on their capacity that justify certain forms of paternalism. The extent of such rights may depend on the degree of cooperation and communication that is possible. Animals for whom very little along these lines is possible may accordingly be lacking in rights entirely (though this is consistent with our having other—non-rights-based, and therefore nonenforceable—moral obligations toward them).

is a clear case of a boundary-violation (i.e., a trespass on one rights-holder that is not a response to that rights-holder's trespass on another rights-holder) and thus runs afoul of the prohibition on using conversation partners as mere means.

Miller's second problem case is that of harm to public institutions. "The rights of private persons are not necessarily violated by instances of such conduct,"⁵⁶ so who is entitled to bring suit? Here I suggest that harms to large, dispersed groups could be handled by class-action suits. We have a precedent in ancient Athenian law, which, while not exclusively restitution-based, did treat crimes as torts to the extent that all legal actions against lawbreakers were initiated and conducted by individuals rather than public prosecutors. The closest Athens came to a crime/tort distinction was the difference between bringing a lawsuit on one's own behalf, to rectify a private wrong, and bringing a lawsuit on behalf of the wider public of which one is a member, to rectify a wrong affecting the community as a whole.⁵⁷ If possible, compensation should be paid to all the members of the affected group. When this is not practicable (if, for example, the group's members cannot be easily identified), their right to compensation can be regarded as an abandoned right that has been homesteaded by the person bringing suit.⁵⁸ A class-action suit could also be brought to ensure preventive detention, if warranted.

Miller's third problem case is that of attempts:

Attempted crimes may not cause any harm to particular individuals. For example, a terrorist is apprehended planting a bomb in the men's room of an office building. Whose individual rights has the terrorist violated? Restitution to the owner of the building merely for trespass would be far out of proportion to the gravity of the act.⁵⁹

But this case too could be handled by a class-action suit. Endangering the public at large is a violation of the rights of those persons so endangered,

⁵⁶ Miller, "Restitution and Punishment," 359.

⁵⁷ The distinction in ancient Athens between private and public suits was closer to that between ordinary and class-action lawsuits than between civil and criminal cases:

To begin with, there was no public prosecutor. The State took no cognizance of any crimes, not even murder, unless committed against itself: that is to say, the State did not prosecute for offences now commonly regarded as committed against the community, but only for offences against the actual administration, such as treason or cheating the public treasury. Until Solon's day, prosecution was allowed only to the person injured or his next of kin; under Solon's reforms, any citizen who wished could bring an indictment against another. . . . Any Athenian citizen could bring a public action; but a private action had to be brought by the person directly interested, or . . . by his or her legal guardian. (Freeman, *Murder of Herodes*, 19–25)

⁵⁸ The homesteader who receives this compensation could, in turn, be the object of a class-action suit if it transpires that a feasible way of identifying and compensating the group was available but ignored. (A court might also explore the possibility of there being ways to compensate a group without identifying its members.)

⁵⁹ Miller, "Restitution and Punishment," 359.

even if no actual injury results. Once again, unless some practicable way of compensating the public can be found, compensation would go to the person homesteading the “abandoned” right to compensation by bringing suit. The same reply can be given to Miller’s fourth case, that of reckless driving that endangers the public. (Similarly, if I subject you to a game of Russian roulette I am violating your rights.) Hence, I cannot agree with his conclusion that “[i]f we do not wish to give up such crimes, then we cannot accept a paradigm of pure restitution.”⁶⁰ In short, none of the pragmatic objections to a purely restitution-based system seem to me serious enough to justify overturning the moral case against punishment-as-suffering that is mandated by the principle of respect for persons.

V. PROSPECTIVE RESPONSIBILITY AND THE LAW

I have thus far discussed the role of retrospective responsibility in a legal system. What about prospective responsibility? We often hear laments over the decline of personal responsibility, conjoined with calls for governmental action. For example, on the left, it is sometimes said that economic advancement for the poor is the responsibility of those more fortunate, who accordingly should be legally required, or at least encouraged, to donate their time and money to helping those who are less well-off—while on the right, it is sometimes said that economic self-advancement is, on the contrary, primarily the responsibility of the poor themselves, and hence that government welfare programs should be curtailed or eliminated. What are we to make of such claims?

Well, let us take the two specific claims I mentioned—that the welfare of the poor is the responsibility of the more affluent, and that the welfare of the poor is their own responsibility—and see what implications either, if true, might have for legal policy.

Suppose that the poor are (prospectively) responsible for their own economic welfare. Since this responsibility is a prospective one, it entails both the *authority* and the *obligation* of the poor to be self-dependent. Insofar as the poor have the authority to be self-dependent,⁶¹ they are entitled to legal protection of the authority; but this is presumably because one could not interfere with that authority without violating principle (2). But what of the obligation—is it enforceable?

When this claim is invoked by opponents of welfare policies, it seems as though they are saying that the government should make sure that poor people meet this responsibility, rather than being allowed to escape it by getting government handouts. In fact, however, this cannot be what is meant; for those who make this claim do not, in fact, favor enforcing this responsibility. For example, if a poor person is denied public assis-

⁶⁰ *Ibid.*, 360.

⁶¹ As I am using the term “authority,” one can have the authority to do X *without* necessarily having the authority not to do X.

tance, but finds private charities willing to subsidize her instead, opponents of welfare programs will not generally call for the state to *forbid* her to accept this private assistance. They may believe that it would be *better* for her to shoulder her own burdens rather than becoming dependent on charity, so they do believe that her welfare is her own prospective responsibility, morally speaking; but they clearly do not regard this responsibility as properly enforceable, or else they would be seeking to outlaw private welfare programs, not just public ones.

If pressed to explain the difference, they will probably point to the fact that contributions to private charity are voluntary, while public welfare programs are funded by compulsory taxation—so their real objection is to treating the taxpayers as mere means to the ends of the welfare recipients, a reason that has nothing to do with welfare recipients' alleged prospective responsibility for their own welfare.

My point is this: When opponents of welfare programs advocate changes in the law to make poor people "responsible" for their own welfare, it may *sound* as though they are committed to the position that prospective responsibility is legally relevant. As I have tried to show, however, a closer examination of their position shows it to carry no such commitment.

Consider now the contrary proposition, that the economic welfare of the poor is the responsibility of the rich(er). Should this obligation to the poor be legally enforceable? This depends on the grounds of the obligation. Suppose the argument is simply that the rich have a duty of compassion to the poor. If the rich then refrain from fulfilling that duty, they may be behaving reprehensibly, and may accordingly be subject to moral condemnation and various sorts of noncoercive social sanctions; but by merely failing to help the poor they have not invaded the poor's boundaries, and thus may not be coerced consistently with principle (2). As I have argued elsewhere,⁶² positive rights are inconsistent with (2) *unless* those positive rights can be plausibly interpreted as necessary for the implementation of the more basic negative right not to be treated as a mere means.

If, instead, the case for the obligation is that the more affluent owe their position to their *exploitation* of the poor, then their status constitutes a wrongful invasion of the poor's boundaries, and principle (2) thus licenses compulsory restitution to the poor. In that case, the responsibility to help the poor is enforceable, but only because it is a special case of (2); the poor's positive right to assistance is derivative from and parasitic on the negative right not to be exploited.⁶³ Certainly the responsibility to respect people's boundaries is enforceable; that is just what (2) says.

Yet even here, it is not precisely *as* a responsibility that this responsibility is enforceable. Suppose Scrooge owes his wealth to unjust exploi-

⁶² Long, "Abortion."

⁶³ For the purposes of the present discussion, I do not (thank goodness!) have to determine what precisely exploitation consists in or whether every case of exploitation constitutes a violation of principle (2).

tation of Cratchit, so that he owes Cratchit compensation. Yet suppose further that Scrooge is currently senile or in a coma, and is unable to understand or act on this obligation. In that case, compensating Cratchit is not Scrooge's prospective *responsibility*, strictly speaking; for our prospective responsibilities are the things we can be held retrospectively responsible for failing to do, and Scrooge is not a responsible agent. He may now bear the retrospective responsibility for not compensating Cratchit *earlier*, when he was still a responsible agent; but he has no *prospective* responsibility now (for he will have no retrospective responsibility tomorrow for his failure to act today). Yet Scrooge's lack of prospective responsibility toward Cratchit does not mean that a court cannot legitimately demand a transfer to Cratchit of some of Scrooge's assets; if Cratchit is legally entitled to restitution from Scrooge, Scrooge's mental state is irrelevant. Prospective responsibility is simply not the law's concern.

VI. EXCEPTIONS

I have said that both retrospective and prospective responsibility lie outside the legitimate scope of the law. There are a few cases, however, in which it does seem to me that legal institutions should take cognizance of issues of moral responsibility. None of these exceptions, however, seriously affects the central point of my argument.

The first exception derives from principle (2)'s provision that one's response to a wrongful boundary-invasion must not be disproportionate to the seriousness of the invasion. This proportionality requirement places a restriction on what we may do in defense of our rights. I cannot blow you away with my bazooka even if that is the only way to prevent you from planting an unwanted kiss on my cheek; nor, if you swallow my diamond ring, is it permissible for me to rip your stomach open (thus killing you) in order to retrieve it.⁶⁴ But although principle (2) licenses the use of appropriate force against innocent threats,⁶⁵ such use of force does seem a more serious matter, morally, than a like use of force against threats who are not innocent; that is, the case for using force against

⁶⁴ The proportionality requirement does not mean that a defender must never inflict a greater injury than that threatened by the aggressor, however:

It might be objected that killing can never be a proportionate response to any threat short of death. But our concern is with proportionality in moral seriousness, not proportionality in physical effect; to claim that a defensive killing can be morally proportionate only to a threat of death is to assume, between aggressive force and defensive force, a moral symmetry difficult to square with [principle (2)]. (Long, "Abortion," 187)

⁶⁵ And arguably against innocent shields as well. (For the distinction between innocent threats and innocent shields, see Nozick, *Anarchy, State, and Utopia*, 34-35.) If I strap a baby to my chest and then go after you with a machete, so that you cannot defend yourself without injuring or killing the baby, it seems to me that in invading your boundary I have brought the baby into your boundary, and you are in your rights to respond; the invader of the baby's boundary is not you but myself.

innocent threats, though it can often be made, will always be *more difficult* to make, all else being equal, than the case for using force against a noninnocent threat. The use of force is an evil, and there is always a presumption against resort to it, though this presumption can often be defeated; force against the innocent is (again, all else being equal) a greater evil than force against the noninnocent, and thus the presumption that must be overcome is greater.⁶⁶ It is likely, then, that there will be cases in which it is the aggressor's responsibility or lack of it that makes the difference between a defensive response's being legitimate or illegitimate, and in such cases responsibility does become legally relevant.

The second exception is that there are arguably cases in which whether an action is a boundary-invasion or not depends on whether the agent is responsible or not.⁶⁷ Suppose that Caesar is fleeing from the murderous Brutus, only to find his path of escape blocked by Cassius. If Cassius is deliberately cutting off Caesar's only way out, then he is an accomplice in Brutus's attack; his blocking the exit is something that is coordinated with the attack and helping it succeed, and thus is a boundary-invasion.⁶⁸

But now suppose Cassius is no part of the assassination plot, but simply happens to be passing through the door when Caesar reaches it, causing Caesar to pause long enough for Brutus to reach him. Physically this situation may appear indistinguishable from the first; but Cassius's innocence, and the lack of coordination between his actions and those of Brutus, seem to make his act no longer a boundary-invasion. After all, he had every right to walk through the door when he did. In this case, then, responsibility becomes legally relevant, because the presence or absence of responsibility changes the nature of the act.⁶⁹ (Note, however, that this exception does not affect the vast majority of cases in which an action can be determined to be or not be a boundary-invasion irrespective of the agent's mental states.)

The third exception is that persons who (temporarily or permanently) lack the capacity for responsible choice (e.g., young children, comatose patients, and the mentally ill) are treated differently in the law, in that other people are allowed to make decisions for them. How is this provision to be squared with my earlier rejection of paternalism?

⁶⁶ Likewise, I am inclined to think, for the same reason, that the case for force against innocent shields faces even *greater* obstacles than the case for force against innocent threats, and thus has an even more stringent presumption to overcome. Most instances of "collateral damage" in warfare do not, in my judgment, come anywhere near to passing such a test.

⁶⁷ The following type of example was suggested to me by David Boonin-Vail.

⁶⁸ Whether it is also a boundary-violation will depend on whether Brutus and Cassius are right in regarding Caesar as an intolerable threat to Roman freedom.

⁶⁹ Even so, we may wonder whether it is indeed Cassius's responsibility, rather than the coordination of his action with Brutus's, that is doing the real work. Suppose Cassius had walked through the door innocently, but did so because Brutus had asked him to come through at a particular time (without telling him why); or suppose Cassius had been insane, and so had participated in the assassination plot intentionally, but not responsibly. In these cases the coordination with Brutus seems enough to change the significance of Cassius's act, despite the absence of responsibility.

I would suggest that what licenses paternalistic treatment of children is not the mere fact that children *benefit* from such treatment (for foolish adults might benefit from paternalistic treatment as well). Rather, the crucial point is that children lack the *capacity* to govern their lives by reason (while foolish adults may possess that capacity even if they do not exercise it). Just as we are justified in making medical decisions for comatose patients if we have good grounds for thinking they *would* consent to certain kinds of treatment if they were in possession of their faculties (so that, rather than overriding their will, we act as *agents* for them because they cannot currently express their will), so too we may legitimately act as agents for persons whose capacities for rational decision-making are not completely blocked (as they are in a comatose patient) but simply *diminished*, through intoxication, mental illness, or, in the case of children, incomplete maturation. A child's guardian is his *agent*, treating the child as the child would want (so far as can be determined) to be treated if his capacities were undiminished.⁷⁰ Thus, what justifies paternalism is not benefit but counterfactual consent.⁷¹

Hence, one may make decisions for another person *if* that person's capacity for responsible choice is impaired. Since a person's right to act as an agent depends on the absence of responsibility in the principal, responsibility is relevant to the legal question of what rights a person has.

The fourth exception involves contractual obligation. Contract law might seem an utter contradiction to my thesis, for entering into a contract seems to involve taking on a legally enforceable prospective responsibility, which is impossible if, as I claim, prospective responsibility is not the concern of the law. But I think this objection confuses moral responsibility with legal obligation. Suppose I give you twenty dollars, on the condition that you mow my lawn (and you accept it on that understanding). I have transferred my title to the twenty dollars conditionally; that is, the money is yours only on the condition that you mow my lawn. If the condition fails to be met, title to the money reverts to me, and you are within my boundary until you vacate it by returning the money (plus damages for the inconvenience you have caused me). Thus, we have a case for contract

⁷⁰ The standard of counterfactual consent will presumably overlap considerably with the standard of the child's welfare, but the two will diverge, especially as the child grows older. Diminished capacity is, after all, a matter of degree, and as the child matures, the case for regarding his *expressed* will as an accurate reflection of his counterfactual will grows steadily stronger.

⁷¹ Cf. Roderick T. Long, "Beyond Patriarchy: A Libertarian Model of the Family," *Formulations* 4, no. 3 (Spring 1997), 29. This account provides an explanation for why guardianship rights (specifically, the right to make decisions about what happens to the child) and guardianship duties (specifically, the duty to care for the child's welfare) come bundled together as they do. It is because we are justified in acting as a person's agent (and thus substituting our judgment for his) *only when* the decisions we make are those to which the person would (so far as we can determine) consent if unimpaired.

enforcement that makes no reference to responsibility, but only to the fact of a boundary-invasion.⁷²

Where responsibility does become relevant, however, is in determining the *competence* of agents to enter into contracts in the first place. If my rational capacities are diminished, so that I, as it were, am unqualified to act as my own agent, then I am not competent to transfer over to you my title to the twenty dollars in the first place. Thus, a court, in determining whether a boundary-invasion has taken place, will have to take account of whether the transfer of title was successful, which will, in turn, sometimes depend on establishing whether one (or both) of the parties involved is a responsible agent. This is then a variant of my second example, in that while the law is concerned with boundary-invasions rather than with the mental states of the persons involved, there are occasional cases in which the mental states make a difference to whether something is a boundary-invasion or not.

I have listed four kinds of cases in which the law may legitimately concern itself with questions of responsibility; no doubt there are more. The legal irrelevance of responsibility is thus not complete. Nevertheless, the kinds of examples I have given are fairly peripheral to the central cases where responsibility has traditionally been thought to be the concern of law. Hence, these exceptions do not seriously affect my main thesis.

VII. CONCLUSION

The determination of responsibility is widely regarded as one of the central tasks of any legal system. But the life appropriate to a rational, political animal is one that involves renouncing the use of force except in response to the aggressive force of others. Hence, the presence or absence of responsibility on the part of the wrongdoer makes no difference to the degree of force that may legitimately be used in response to her; no more force may be used against a responsible aggressor than against a nonresponsible one, since only aggression licenses retaliatory force, and the responsible aggressor commits no greater amount of aggression than the nonresponsible one. If my argument is correct, then all legal practices imposing greater costs on responsible wrongdoers than on nonresponsible ones stand condemned as unjust.

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⁷² For an argument that enforcing the contract should mean requiring you to pay me, rather than requiring you to mow the lawn, see Randy E. Barnett, "Contract Remedies and Inalienable Rights," *Social Philosophy and Policy* 4, no. 1 (Autumn 1986): 186-95.