

Compulsory Victim Restitution Is Punishment: A Reply to Boonin

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Abstract: David Boonin has recently argued that although no existing theory of legal punishment provides adequate moral justification for the practice of punishing criminal wrongdoing, compulsory victim restitution (CVR) is a morally justified response to such wrongdoing. Here I argue that Boonin's thesis is false because CVR is a form of punishment. I first support this claim with an argument that Boonin's denial that CVR is a form of punishment requires a groundless distinction between a state's response to a criminal offense and its response to an offender's failure to comply with the sanctions imposed for that offense. I then suggest that this argument points to a definition of punishment that not only meets Boonin's own desiderata for a definition of punishment but also implies that CVR is a form of punishment. Finally, I argue that CVR is a form of punishment even under Boonin's own proposed definition of punishment.

Key words: punishment, restitution, retributivism, intention, harm.

David Boonin's *The Problem of Punishment*¹ will likely shape philosophical discourse about legal punishment for many years to come. The book is thorough, systematic, and careful. Its central thesis – that although no existing theory of legal *punishment* provides adequate moral justification for the practice of punishing criminal wrongdoing, compulsory victim restitution is a morally justified *response* to such wrongdoing – is provocative.

However, that thesis is also false. It is false because compulsory victim restitution (hereafter, CVR) *is* a form of punishment. I shall offer three arguments for this thesis. The first is that Boonin's denial that CVR is a form of punishment requires a groundless distinction between a state's response to a criminal offense and its response to an offender's failure to comply with the sanctions imposed for that offense. I then suggest that this first argument supports a definition of punishment that not only meets Boonin's own desiderata for a definition of punishment but also implies that CVR *is* a form of punishment. Finally, Boonin argues that CVR is not a form of punishment because punishment requires that a sanction be intentionally harmful and CVR does not intentionally harm criminal offenders. I demonstrate that even if CVR is not intended to be harmful, its harms are nevertheless intentional.

I. THE ITERATED SANCTIONS ARGUMENT

CVR is a morally justifiable collective response to criminal wrongdoing, but is not (according to Boonin) legal punishment.

1] This work will be subsequently referred to parenthetically as PP, followed by page numbers.

Let us approach this claim from both ends. Suppose that an individual is justly convicted of theft. A court recommending, but not compelling, the offender to provide restitution to her victim would not be punishment, so *voluntary* victim restitution is not legal punishment. Advice or admonitions are not punishment, even if issued by a mouthpiece of the law.

Suppose, however, that the court does legally mandate that an offender provide her victim restitution in the form of monetary payments, but the offender does not comply. The legal system might then reasonably respond to her non-compliance by forcing her compliance in a literal sense (using electronic funds transfer to garnish her wages, for instance) or by resorting to other coercive measures, such as incarceration. Such responses amount to punishing her non-compliance. But the state is only justified in punishing someone's non-compliance to that which they are legally required to perform in the first place. The state may, for instance, stiffen the sentence for a prisoner who attempts to escape from incarceration but only because the prisoner had a legal obligation to remain in prison to begin with.

But if imposing further sanctions on a person for failing to fulfill the legal obligations they incur as a result of criminal behavior is punishment, then why are the sanctions resulting from the criminal behavior itself—CVR, under Boonin's proposal—not also punishments? Consider an analogy to parental punishment: Suppose a parent mandates a certain sanction for a teenager's misbehavior, such as revocation of the privilege of staying out late on weekends, but the teenager nevertheless connives to enjoy the privilege anyway by sneaking out while the parents are asleep. The parent would appear to be justified in punishing the teenager over and above the existing sanction, but for the parent to tell the teenager, 'I didn't punish you before but I am punishing you now!' is to invoke a distinction with no normative difference (particularly from the teenager's point of view). Both the initial sanction and subsequent punitive measures are coercive measures imposed by the parental authority as responses to a child's violation of a parental imperative. The temporal sequence of the offenses and sanctions makes no difference to the nature of the sanctions. Both are punishments.

Likewise, the state's response to a person's initial violation of the statutory law is not fundamentally different in kind from its response to a person's failure to comply with the legal sanction imposed on her for her initial violation. In the example above, the state is entitled to utilize punitive measures to enforce its mandate that the thief provide restitution only because the thief was rightly subject to *punishment* for having stolen in the first place. Boonin's thesis that CVR is not punishment thus seems to require making morally arbitrary distinctions between these two exercises of the state's coercive power. In each instance, an individual violates a legal imperative and the state responds with sanctions that harm or constrain the offender in specified ways. If the state uses its coercive power as a response to a person's violation of a legal norm, a person is thereby punished, and neither the nature of the norm nor the timing of the state's response matters to whether its use of its coercive power amounts to punishment. Both are punishments.

Let us call this argument against Boonin the *iterated sanctions argument*. As we shall come to appreciate later, Boonin himself may not be impressed by this argument, for according to his definition of punishment, neither requiring an offender to provide restitution nor taking coercive action when she fails to provide said restitution are necessarily punishments. Nevertheless, the iterated sanctions argument highlights the deficiencies of the very definition of punishment that Boonin relies upon in order to deny that CVR is punishment.

II. A PROPOSED DEFINITION OF PUNISHMENT

The iterated sanctions argument casts doubt on Boonin's denial that CVR is punishment by highlighting two essential features of punishment. First, states impose punishments as a consequence of criminal behavior, and second, punishments involve deprivations, suffering, or constraints upon the liberty of offenders. An adequate definition of punishment that incorporates these two features illustrates why CVR is punishment.

Consider the definition of legal punishment as *any deprivation, suffering, or constraint of liberty imposed on criminal offenders by the state or judicial authority as a direct legal consequence of those offenders' unlawful behavior* (Benn 1958, Flew 1970, Hart 1995, Cholbi 2002). Admittedly, this definition leaves some questions concerning the nature of punishment unanswered. For example, this definition explains punishment in terms of criminal, rather than civil offenses, and some might worry that this definition can recognize a distinction between the criminal and civil law only by being implicitly circular. For if the notion of a 'criminal offense' is in turn defined in terms of offenses for which 'punishment', rather than some other species of sanction, is mandated, then 'punishment' and 'criminal offense' are interdefined. Although being subject to punishment rather than some other sanction is taken as a defining feature of criminal offenses, this definition is only circular if the notion of a 'criminal offense' cannot be in turn defined in terms of some other feature that demarcates from civil wrongs. For example, criminal offenses could be distinguished from civil wrongs in terms of the former being more morally serious than the latter or in terms of criminal wrongs being wrongs to society at large rather than only to specific individuals. My aim is not to defend any particular definition of 'criminal offense' here. Rather, I mean only to show that this proposed definition of punishment in terms of criminal offense need not be circular despite first appearances.

The proposed definition is nearly canonical in the philosophical literature, and for good reason: The definition has a number of clear merits. It accounts for the uncontroversial examples of punishments, such as execution, incarceration, and the imposition of fines. This definition also indicates how various measures that some theorists have claimed are merely 'penalties,' rather than punishments, are in fact punishments (Deigh 1988). On this definition, revocation of driver's licenses, mandatory community service, removal of children from the custody of criminally negligent parents, and the disenfranchisement of felons all count as punishments. Conversely, this definition explains why certain costs or

burdens that may be associated with punishment are not themselves punishments. Legal fees, under this definition, are not punishments because they are not consequences of unlawful behavior. The loss of one's job due to incarceration is not legal punishment because it is neither a direct effect or consequence of an offender's unlawful behavior nor is it a legal consequence of that behavior.

More crucially for our purposes, my proposed definition of punishment satisfies Boonin's criterion that a definition of punishment must be "accurate" in that it "clearly demarcates cases of punishment from cases of something else." (PP 4-5). Furthermore, it also satisfies Boonin's criterion that a definition of punishment must be "illuminating," i.e., it must not simply distinguish the class of acts that are punishments in an ad hoc fashion but must capture the essence of punishment by pointing to the facts that constitute an act being an act of punishment (PP5). Finally, the definition I have proposed is "neutral": It does not beg the question concerning the moral permissibility or justification of legal punishment. As a result, my proposed definition does not prejudge possible solutions to what Boonin calls "the problem of punishment." As Boonin outlines it, the problem of punishment is the problem of providing a defensible account of why it is morally permissible for the state to treat those who break reasonable and just laws in ways that it would be otherwise be morally impermissible for those persons to be treated. This in turn requires showing that the boundary between criminal offenders and others is morally relevant so as to generate a plausible moral justification of punishment (PP 1). Under this definition, the problem simply becomes specified as the problem of why the state may impose deprivations, suffering, or constraints on liberty on criminal offenders, where said deprivations, suffering, or constraints on liberty would be impermissible if imposed on non-offenders. Such an understanding of the problem of punishment would presumably have the assent of those pursuing retributive, consequentialist, etc., justifications of punishment.

But note that under this plausible, and nearly canonical, definition of legal punishment, CVR is punishment. To force offenders to provide restitution harms them, as Boonin acknowledges, and so CVR counts as a "deprivation, suffering, or constraint" imposed on criminal offenders. Furthermore, this harm is imposed by the state or judicial authority, rather than being, for example, a harm to one's reputation or to one's livelihood caused by the attitudes that communities may have toward criminal offenders. Finally, CVR is a direct legal consequence of the offenders' unlawful behavior. CVR thus satisfies the conditions for punishment under this definition.

III. CVR AND BOONIN'S DEFINITION OF PUNISHMENT

I have argued, first via the iterated sanctions argument and second via a plausible definition of punishment, that CVR is punishment. Yet even if Boonin rejects these independent arguments, he still has a last avenue to defend his claim that CVR is not punishment. He argues that CVR is a morally justified but non-punitive response to punish-

ment because, in his estimation, CVR does not satisfy his *own* definition of punishment. However, it is not so clear that CVR is not punishment even under Boonin's definition.

Boonin defines punishment as "authorized intentional retributive reprobative harm." (PP 26). In other words, an act of punishment must

- [1] harm an offender
- [2] must harm her intentionally
- [3] this harm must be imposed *because* the offender committed a criminal act
- [4] it must express disapproval of the offender,² and
- [5] must be carried out by an authorized agent of the state acting in her official capacity.

The principal reason that CVR does not satisfy this definition of punishment, according to Boonin, is that "although compulsory victim restitution typically does involve predictable harm to the offender, pure restitution does not involve harming the offender intentionally, either as an end in itself or as a means to a further end." (PP 215). Thus, CVR is harmful, but not intentionally so, and so it does not satisfy criterion (2) of Boonin's definition of punishment.

Now, the notion of an 'end' is notoriously ambiguous, sometimes designating the outcome or state of affairs at which an action aims, sometimes designating the rationale of an action. These need not coincide: In spreading vicious gossip about a rival, the outcome I seek is that he suffer a loss of reputation, but my rationale is that I will enjoy the psychological satisfactions of revenge. But let us concede to Boonin that under either sense of 'end,' a regime wherein CVR supplants orthodox punishments need not intentionally harm offenders as an end. In other words, whosever intentions we take to be relevant, be they those of lawmaking authorities, judges, juries, etc., offenders subject to CVR are not intentionally harmed as an end. Rather, (a) the end *qua* outcome of CVR is to compensate crime victims for their losses, not to cause harm to offenders, and (b) that the moral reason for imposing CVR is therefore not that it harms the offender and so harming the offender is not its end *qua* rationale.

But granting that CVR does not intentionally harm offenders as an end leaves unanswered whether CVR, as a means, is intentionally harmful. Are the foreseeable harms

2] Though my definition of punishment disagrees with Boonin's with respect to criterion [4], I shall not devote much attention here to this disagreement. I follow Davis (1991) in believing that the requirement that a punishment must express disapproval of the offender is neither a constraint on an act's being punishment nor a substantive constraint on a punishment's being justified. The expression of whatever it is punishment may express is achieved solely through a punishment's meeting the standards of justice, both procedural and substantive, that any retributive theory recognizes. A punishment handed down by the proper legal authority, in accordance with valid legal norms, proportionate to the action being punished, etc. carries on its face a counterassertion of the attitudes or beliefs implicit in the criminal's actions. Hence, the reprobative requirement will be satisfied in all cases where the authorization requirement is satisfied. Simply by virtue of a punishment's being the state's response to criminal wrongdoing will a punishment express disapproval of that wrongdoing.

of CVR intentional or not? Since Anscombe (1958), action theorists have carefully investigated the nature of intentional action, and more specifically, the relations among notions such as acting intentionally, intending, having an intention, and so forth. Though he does not say so explicitly, Boonin appears to rest the claim that the harms of CVR are not intentional on the grounds that whichever agents (legislatures, juries, etc.) would be responsible for sanctioning criminal offenders, those agents would not impose CVR *intending* to harm criminal offenders. It is uncontroversial that if an individual intends to A and does A, she does A intentionally. Thus, Boonin would presumably concede that if the sanctioning agents imposed CVR on criminal offenders intending to harm them, that the harm would therefore be intentional. But suppose we grant that the sanctioning agents do not intend to harm criminal offenders by subjecting them to CVR, even as a means. Does it follow that they do not intentionally harm criminal offenders?

On what Michael Bratman has termed the “Simple View” of acting intentionally, intentionally A-ing entails intending to A (1984). Boonin might appeal to the Simple View to argue that CVR does not intentionally harm offenders. For he might argue that those who would impose CVR on offenders do not intend to harm them and so do not intentionally harm them. But the Simple View is vulnerable to the charge that some instances of intentionally A-ing are not instances of intending to A. Gilbert Harman (1976, 433) offers the example of a sniper who fires his gun in order to kill an enemy combatant but thereby knowingly alerts the enemy to his presence. Although the sniper does not intend to alert the enemy, Harman argues, the sniper *intentionally* alerts the enemy, believing that the aim of killing the enemy combatant warrants the risks of alerting enemy forces to his presence (see also Bratman 1987, 133, and Ginet 1990, 75-76). If correct, then the sniper foresaw but nevertheless intentionally alerted the enemy, despite not intending to alert the enemy. A number of recent experimental studies further suggest that ordinary, non-philosophers reject the Simple View in many cases, apparently rejecting any tight relationship amongst intending A, intentionally A-ing and having an intention to A (Knobe 2003, 2004, 2006, Nadelhoffer 2006).

So if there are counterexamples to the Simple View, might a criminal justice system imposing CVR be among these – instances where a harm is intentional without being intended? To answer this question we must identify attributes that distinguish, within the category of acts that are not intended, those acts which are intentional and those which are not. A full analysis of ‘intentionally’ is beyond the scope of this project, but a few central observations are central.

We are particularly concerned here with when an act is done intentionally despite not being intended. Both intending and acting intentionally are species of rational endorsement. As Anscombe put it, intentional actions are those “to which a certain sense of the question ‘why?’ has application.” More specifically, they are actions for which this ‘why?’ question is suitably answered by citing a justificatory, and not simply explanatory, reason for action, and this reason for action provides a description under which the action is intentional (1958, 9-12). Acting intentionally thus involves the endorsement of an act or

outcome that is consciously selected without necessarily being intended. For example, in Harman's sniper example, the sniper does not intend to alert the enemy to his presence because his alerting the enemy will occur, if he fires at the enemy combatant, *despite* his presumably not wanting it to take place. His believing it warranted to risk being exposed to the enemy reflects his reluctant endorsement of alerting the enemy as an unfortunate side effect of the means he must take (firing his weapon) in order to achieve his end (killing the enemy combatant). Hence, he intentionally alerted the enemy to his presence. In such cases, acting intentionally is rationally parasitic on what is intended. In the course of doing what he intended, he also intentionally alerted the enemy, and in so doing, endorsed his alerting the enemy. This endorsement is forced upon him by the facts, so that if the facts had been different (if he could have shot his enemy without bringing attention to himself, say), he would not have had to assess whether alerting the enemy to his presence was warranted in light of his intended aim, killing the enemy combatant.

To do something intentionally, then, requires a deliberative assessment that one has sufficient reason to do that act, and this is so even in cases where this act is not what one intends to do and not an act one would in fact prefer to do at all.³ This observation may seem unhelpfully inexact, for surely not every instance in which an individual foresees an outcome that she does not intend is one in which she rationally endorses that outcome. Yet we do not need to offer precise conditions for when an individual rationally endorses an outcome, and hence produces it intentionally, in order to show that CVR would be intentionally imposed. For whoever would be imposing CVR on criminal offenders in Boonin's scheme would be rationally endorsing the harms that criminal offenders would suffer as a result and would thereby be intentionally harming them. Reasoned *comparative* judgments concerning how strongly a foreseen outcome is endorsed are still possible, and in this case, those responsible for imposing CVR on criminal offenders would be more strongly endorsing their suffering harm than Harman's sniper would endorse alerting the enemy. This is not because of the weight of the harms or consequences, but because of the relationship that these outcomes bear to what the individuals intend. In examples like Harman's sniper, the foreseen outcome is a side effect of the intended outcome. Alerting the enemy is not a way to attempt to kill the enemy combatant. In contrast, were judges, juries, legislators, etc. to impose CVR on criminal offenders, the harms thereby imposed on offenders ought to have their full endorsement as the necessary means to their end of compensating victims for their losses. The harms are no mere side effect of intending to compel criminals to provide restitution. Boonin does not after all deny that CVR harms offenders, and under most any analysis of harm, compelling offenders to provide restitution is not only a harm, but it is the only means of achieving the end of compensating crime victims for their losses. For A to compensate B for the losses A caused B to suffer requires A to suffer harm in turn, i.e., A must in some way turn out to be worse off after

3] This account of acting intentionally is influenced, in broad outline, by Anscombe (1958) and Goldman (1970, 51-6).

having compensated B for her losses. So not only is the harm a means to the end, it is the institutionally designated means to the end. As such, anyone whose end is to compensate victims for their losses and who recognizes that harming offenders is the indispensable means to achieving that end must rationally endorse harming offenders, and in so acting, intentionally harms the offender. In Anscombe's terms, harming the offender is an act for which a 'why?' question can not only be suitably addressed, but also suitably answered by providing a reason that renders harming the offender intentional: because harming the offender is the necessary means to compensating victims for their losses.

To deny this conclusion would amount to rejecting the core principle of instrumental rationality in its customary 'wide scope' sense: Whenever an individual intends an end E, and knows that E cannot be achieved without the deliberate performance of M as a means to E, then the individual must intend M or relinquish E. (Bratman 1987) In this respect, outcomes that are the foreseen means to an end are better candidates to be intentional than are outcomes that are foreseen side-effects because the former bear a closer justificatory relationship to the intended end than do the latter. Kant's dictum that whoever wills an end must will the necessary means thus applies here. In acknowledging that harming offenders is a necessary means to the willed end of compensating victims, judges, juries, and the like are willing this harm as a means. In willing this harm as a means, they rationally endorse harming as a means, and when they act on this endorsement, they intentionally harm offenders. In any event, the important point is that a plausible case can be made that CVR would amount to an intentional harm to criminal offenders even if that harm is not intended. If so, then Boonin's claim that the harms of CVR are not intentional does not look promising and he cannot utilize this claim to put CVR outside the scope of punishment as he defined it. Note that my own proposed definition of punishment avoids these intricacies entirely because it does not require careful investigation of whether the harms, etc., that are essential to punishment are intentional.

IV. CONCLUSION

I have argued, then, that contra Boonin, CVR is a form of punishment. First, the iterated sanctions argument attempted to show that the state's efforts to compel a recalcitrant offender to provide restitution cannot be morally differentiated from its efforts to compel the offender not to have offended in the first place. Second, I defended a more orthodox philosophical definition of punishment that (a) implies that CVR is punishment, and (b) satisfies Boonin's desiderata for a definition of punishment. Finally, I have shown that even under Boonin's proposed definition, CVR turns out to be punishment, for he fails to demonstrate that CVR's harms are not intentional.

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