

Rights Reclamation

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Abstract: According to a rights forfeiture theory of punishment, liability to punishment hinges upon the notion that criminals forfeit their rights against hard treatment. In this paper, I assume the success of rights forfeiture theory in establishing the permissibility of punishment but aim to develop the view by considering how forfeited rights might be reclaimed. Built into the very notion of proportionate punishment is the idea that forfeited rights can be recovered. The interesting question is whether punishment is the sole means for reclaiming forfeited rights. I argue for a pluralistic theory of rights reclamation, according to which, there are multiple ways by which a wrongdoer can recapture her forfeited rights. In particular, I argue that offering remorseful compensation is a valid means by which a wrongdoer might partially, or fully, reclaim her right against punishment.

Keywords: punishment, rights forfeiture, compensation, mens rea, rights reclamation

1. Introduction

According to a rights forfeiture theory of punishment, liability to punishment hinges upon the notion that criminals forfeit their right against hard treatment. For the purposes of this paper, I assume the success of rights forfeiture theory in establishing the permissibility of punishment. No defense of this approach will be offered. Rather, taking rights forfeiture theory as my starting point, the focus of this essay is upon the correlative notion of rights reclamation. Barring perhaps the very worst of criminal activities, wrongdoers very rarely forfeit their rights against punishment permanently. Indeed, it is built into the very notion of proportionate punishment that forfeited

rights can be regained once a proportionate punishment has been exacted. The interesting question is whether punishment is the sole means for reclaiming lost rights, or whether there might be alternative avenues by which a wrongdoer is able to recapture forfeited rights. Answering this question is important to determining whether non-penal responses to wrongdoing are consistent with forfeiture theory. Ultimately, I argue for a pluralistic theory of rights reclamation, according to which, there are multiple ways by which a wrongdoer might partially, or fully, recapture her forfeited rights. In particular, I argue that providing *remorseful compensation* is a legitimate mode for full rights reclamation.¹ If correct, the argument could have significant implications for how we think about criminal justice. Moreover, my hope is that by focusing upon the issue of rights reclamation, other questions pertaining to the nature of rights forfeiture will be cast in new light and thus potentially new insights gleaned.

The bulk of my essay, then, is devoted to considering four ways, aside from being subject to punishment, by which forfeited rights might be reclaimed: the passage of time, rehabilitation, forgiveness, and compensation. The order of presentation proceeds from what I consider the weakest to strongest candidates for rights reclamation. I will argue that the first two options lack rights-reclaiming significance, whereas the latter two do. Because I suspect that my claims about compensation will garner the most resistance, it is that section which will receive the lion's share of my attention.

2. Rights Forfeiture and Punishment

To begin, I will briefly lay out my views on rights, forfeiture, and punishment, before introducing the notion of rights reclamation.

¹ While a number of philosophers have argued that apology and reparation can play an important role in achieving reconciliation between wrongdoers and victims, the focus here is upon how apology and repair might mitigate one's liability to punishment.

For the purposes of this paper, my focus is upon moral, as opposed to legal, rights. Thus, I am primarily concerned with pre-institutional rights—rights which individuals possess prior to the establishment of any institutional or political conventions.² I am not an absolutist about moral rights but believe they can be overridden by other moral considerations if such considerations are weighty enough. Furthermore, I understand all moral rights to be enforceable, and they are enforceable in two distinct ways correlative to the two distinct domains under which a person may forfeit her rights against the imposition of harms: self-defense and punishment.

Moreover, I believe that *any* right can be waived or forfeited. In waiving some right X, I voluntarily relinquish my claim upon others to not perform those actions constrained by right X. For example, a boxer waives his right against being punched by his opponent during a boxing match, and a football player waives his right against being tackled when he steps onto the football field. Contrary to Locke, I believe a person may even waive her right to life, making it permissible for others to kill them.³ However, nothing so controversial need be assumed for the purposes of my argument. One may maintain that certain rights—such as the right against torture—are nonforfeitable and/or inviolable, and still accept the argument(s) pursued below. Furthermore, I believe that all moral obligations are correlative with *others'* moral rights.⁴

Importantly, it should be kept in mind that there are two different types of forfeiture theories. On the one hand, there is a forfeiture theory of self-defense, which states something like

² This is not to say that all rights are pre-institutional, nor that some rights do not become more specified after the establishment of social and legal conventions.

³ For an interesting and provocative analysis of such matters, see Wellman's (2017: 15-16) discussion of a real-life case of consensual homicide involving former computer repair technician Armin Meives, who acquired the consent of Bernd Brandes to kill and cannibalize the latter. I accept Wellman's reasoning that if Brandes really did consent to being killed, then Meives acted permissibly, though we may still say his actions exhibited (the utmost of) deplorable values.

⁴ Because I believe that all rights can be waived, and that our duties correspond to correlative rights, it follows that there are no self-directed duties and thus can be no self-inflicted wrongs—at least if such wrongs are conceived of as being rights-violating. While an individual who engages in self-harm may fail to appropriately value her own life and/or well-being, such harms are precluded from the realm of the deontic. Given that an agent only forfeits rights against punishment when she culpably attempts to violate the rights of another, it follows that one cannot forfeit rights against punishment for any sort of self-directed behavior.

the following: People have basic rights against being harmed by others, but when an agent threatens to violate the rights of an innocent party, the wrongdoer forfeits her right against the imposition of defensive force and whatever harm that entails.⁵ For instance, suppose Brad is threatening to shoot and kill Olivia, who is entirely innocent and thus lacks no rights. Olivia may permissibly defend herself by imposing intentional harms upon Brad (assuming this is her only option for averting the attack) because Brad, by posing an objectively unjustified threat, has forfeited certain rights against defensive force thereby rendering himself morally liable to attack. Thus, if Olivia responds by pulling out a gun and firing back in self-defense, she does not infringe or violate the rights of Brad.

Notice, there is little of interest to say about rights reclamation in the context of defensive force. There is near unanimous agreement among those who work on such issues that the permissible use of defensive force is governed by a necessity condition. For example, if Olivia can just as easily avert Brad's attack by hopping on her motorcycle and speeding away, then applying the necessity constraint would entail Olivia's shooting of Brad to be morally wrong. It straightforwardly follows from this that as soon as an attacker no longer poses a wrongful threat, she ceases to be liable to defensive force, and her rights against attack are reclaimed.

Things are more interesting in the context of a rights forfeiture account of punishment. According to a forfeiture theory of punishment, the moral permissibility of punishment is grounded in the fact that wrongdoers forfeit their right against hard stigmatizing treatment.⁶ Many of the most-discussed theories of punishment (e.g., utilitarianism, retributivism, reformatory theory, etc.) answer the motivational-question of *why* we might want to punish a wrongdoer, but make little headway in answering the permissibility-question of why we would be morally justified in punishing a

⁵ Defenders of some version of a forfeiture theory of defense include Thomson (1990 and 1991); Rodin (2003); Ferzan 2005; Fabre 2009; McMahan 2009; Quong 2020.

⁶ Proponents of some version of a forfeiture account of punishment include Goldman (1979), Morris (1991), Simmons (1991), Kershnar (2002), and Wellman (2012 and 2017).

wrongdoer in the first place. Typically, people possess rights which protect their life, liberty, and property. In order to be morally justified in punishing someone, then, it is not enough to point out how such punishment may bring about good consequences (e.g., deterrence); rather, one needs to show that a wrongdoer lacks a right against the sort of hard treatment constitutive of punishment, thereby making such treatment permissible.⁷ So, continuing with the above example, if Brad were to successfully shoot and kill Olivia, the forfeiture theorist claims that Brad forfeits his right against hard treatment, leaving him with no standing to complain about the imposition of punishment. Furthermore, there are two versions of a forfeiture theory of punishment: a weak and a strong version. According to the weaker version, forfeiture of rights is necessary in justifying the permissibility of punishment but must also be accompanied by some positive moral aim (e.g., deterrence or moral education). According to the stronger version, forfeiture is both necessary *and* sufficient in justifying the permissibility of punishment—no further aim must be attached in order to permissibly visit hard treatment upon a wrongdoer.⁸ Again, while I am sympathetic to a strong version of rights forfeiture theory, nothing so controversial need be assumed to follow the arguments advanced below; the weak version will suffice.

The notion that rights can be waived or forfeited naturally raises the principal question of this essay: *Can rights which are lost be reclaimed, and if so, how?* In many cases involving the waiving of rights, it is easy to see how such rights may be regained: consent may be withdrawn, or the waiving of rights might be specific to a particular occasion or purpose, and thus carry time-restrictions, etc. For instance, when a boxing match concludes, the participants each reclaim the right against being punched. There are trickier cases. The unflinching libertarian who permits individuals' selling themselves into slavery presumably allows for individuals to enter into contracts where one's rights

⁷ On this point, see especially, Wellman (2012 and 2017: 2-3).

⁸ While there are many defenders of the weak version, proponents of the stronger version are a much rarer breed. For the most capable defender of the strong version, see Wellman (2012 and 2017).

are permanently waived.⁹ The focus of this paper, however, is upon rights reclamation in the context of forfeiture.

I begin by drawing attention to what is obvious, namely, that a wrongdoer's rights against punishment are rarely permanently forfeited. This is because when a wrongdoer violates the rights of another party, the sort of punishment to which the wrongdoer is rendered liable must be proportionate to the severity of the rights-violation itself. For example, if I were to steal my neighbor's chicken, I might make myself liable to some degree of punishment, but I have assuredly not forfeited my right against capital punishment. A state which punishes chicken theft by executing chicken thieves would be guilty of engaging in over-punishment—violating the rights of the thieves in much the same way an innocent's rights are violated when subjected to unjust punishment. While I make no attempt to outline a theory of proportionate punishment here, it is reasonable to presume that when determining the fittingness of a punishment for a particular crime, the severity of a penal response should in some sense match the level of harm incurred by a rights-violation (or the stringency of the rights violated).

Still, it seems plausible that some agents are guilty of such egregious transgressions against others that they do in fact forfeit rights which can never be reclaimed. Murders, serial rapists, or even more plausibly, those who participate in ethnic cleansing and genocide, may be liable to permanent rights forfeiture—whether this takes the form of capital punishment or of life imprisonment.¹⁰ However, the notion of permanence considered here is relative. Suppose that, through the technological singularity, or general advances in human medicine, it becomes possible to

⁹ The eyes cross when they read that the Nozickean utopia might include slavery (1974: 331). Above, I asserted that any right can be waived, but on this point, I hesitate to maintain that stance. Given certain run of the mill problems regarding the persistence of an individual's identity through time, I am reluctant to say that the 30-year-old version of myself may permissibly bind my future 60-year-old self to a contract of slavery.

¹⁰ It seems that in some cases, such as when we consider the Hitlers and Ted Bundys of the world, capital punishment might qualify as under-punishment—that such morally heinous figures are liable to something much worse and severe than death.

extend human life indefinitely. Is it possible for an agent to commit an act so morally atrocious that she would forfeit her rights against punishment in perpetuity? Could *eternal* punishment ever be justified? Traditional conceptions of Hell in which God consigns individuals to eternal conscious torment seem to run afoul of the proportionality constraint.¹¹ The permanence and severity of Hell hardly seems a fitting response to even the most egregious of finite wrongs committed. But is it possible to imagine a case in which an exceptionally heinous person does something so monstrous that she eternally forfeits her rights against hard treatment? For instance, would a supervillain responsible for building and using a doomsday device that annihilates all life on Earth be deserving of eternal punishment in Hell? What if the doomsday device wipes out not only all life on Earth, but eliminates all sentient life in the universe? Perhaps the supervillain in this case is deserving of a million years of hard treatment, but not a literal eternity? If certain science fiction scenarios are on the table, I believe there is at least one plausible case in which a person might be rendered morally vulnerable to eternal punishment. Consider a scenario, disturbingly depicted by the television series *Black Mirror*, where a sadist digitally recreates a person's consciousness and then subjects that person to an experience of eternal agony—being electrocuted repeatedly for all time.¹² It seems defensible that the person who creates and executes this sort of eternal digital Hell, might themselves be the only sort of agent vulnerable to everlasting punishment. Or, extending this scenario one step further, imagine that an agent creates an eternal Hell that houses only saints and the morally innocent. Ironically, perhaps the only subject that could be truly vulnerable to eternal punishment is a God who eternally damns those not liable to eternal damnation.

¹¹ To be sure, there are versions of the doctrine of hell which avoid such worries; in particular, I have in mind those models which emphasize the damned individual's decision to persistently reject God, even in the post-mortem state. For a recent excellent treatment of the many philosophical and theological problems associated with the doctrine of hell, see Manis (2019).

¹² See the episode *Black Mirror* episode, "Black Museum".

Setting aside the possibility of perpetual forfeiture, the main point here is straightforward. Once proportionate punishment has been exacted for a rights violation, the forfeited rights of a wrongdoer are reclaimed, and so the wrongdoer is no longer morally liable to punishment. To illustrate, suppose Theo kidnaps Helen, confining her to his basement for a period of one month. Upon discovery, Theo is apprehended, charged, convicted, and given a twenty-year prison sentence. Such imprisonment is justified on the grounds that in kidnapping Helen, Theo forfeited his right against proportionate punishment (for the purposes of argument let us assume that twenty years in prison is a proportionate penal response for kidnapping). After serving his sentence, Theo is released: a fitting punishment has been exacted, and so Theo is no longer morally liable to punishment. Theo once again enjoys full rights against the hard treatment associated with punishment. This is *rights reclamation*: the right against punishment Theo forfeited in committing the crime of kidnapping, after having received a proportionate punishment, is now restored.¹³ The moral barriers which were lowered due to a rights-violating act are raised and restored following the imposition of punishment. And so, just as rights forfeiture is a theory about the *permissibility* of punishment, rights reclamation is a theory about the *impermissibility* of punishment; more specifically, a theory of rights reclamation seeks to elucidate under what conditions punishment ceases to be just.

At first glance, it may seem curious to speak of rights popping in and out of existence—rights being forfeited and reclaimed. However, I doubt much metaphysical mysteriousness lurks here. The alienability of rights becomes less enigmatic when we remember that all a claim right

¹³ Can self-punishment also function as a way to capture forfeited rights? Suppose that Jean administers five lashes to himself after stealing a loaf of bread, as penance for the theft. Does this self-inflicted hard treatment accomplish rights reclamation in the same way that third-party punishment typically does? It is typically assumed that self-punishment does not count as genuine punishment, but I believe it can. However, more than mere deprivation must be applied. Consider Douglas Husak's definition of punishment: "A response amounts to a punishment when it deliberately imposes a stigmatizing deprivation or hardship" (2016: 98). If this is right, then for self-inflicted punishment to count as genuine punishment the hardship must be stigmatizing—i.e., the self-imposed hard treatment must express a public and condemnatory attitude toward the wrongful action. However, this seems perfectly possible. It is not difficult to imagine a scenario in which a wrongdoer subjects herself to hardship *and* provides public condemnation of her wrongful conduct. For such an example, see Wellman (2017: 140).

amounts to is an entitlement, or enforceable obligation, which limits the admissible actions of others; and there is good, commonsense reason to think that such claims upon others are not absolute, but subject to various conditions. At its essence, forfeiture theory merely says that after Theo kidnaps Helen, his moral status has been altered so that he may now be treated in ways that would have been impermissible prior to the kidnapping. Surely there is nothing strange about our claim rights being conditional upon our treatment of others. So, too, it is entirely natural to think that once the appropriate punishment has been meted out, certain rights of Theo's which had been lost are now fully recovered—his moral status restored. How could it be otherwise?

3. Rights Reclamation Beyond Punishment

Now we arrive at the more interesting question this paper aims to address: Is there something special about punishment that makes it the unique and sole mechanism for rights reclamation? Or might there be other channels by which the wrongdoer can reclaim her forfeited rights?

3.1 The Passage of Time

Many states and countries have enacted statutes of limitations which restrict prosecutors from bringing criminal charges against an individual after a certain amount of time has elapsed since the alleged offense. Such laws are in place primarily for practical reasons involving the supposed deterioration of evidence over time. However, setting aside such practical considerations, it is worth asking whether the mere passage of time by itself can help wipe clean the moral slate of a criminal. Should a criminal be absolved of the moral responsibility for an offense committed two or three decades ago?

In one sense, I think it very clear that time's passage can help accomplish this, but only because of the effects time has upon a person's self and psychological constitution. Notice that the permissibility of punishment assumes that the identity of persons persists through time. If the sixty-year-old Jim serving a life sentence for murder is not the same person as the thirty-year-old Jim who

committed the act, then it seems that punishing sixty-year-old Jim is impermissible; sixty-year-old Jim is a different psychological subject than thirty-year-old Jim and has done nothing to forfeit his rights against punishment. Or take the real-life example of Ricky Ray Rector. After murdering a man in a restaurant and then shooting a police officer, Rector turned the gun on himself and shot himself in the head, destroying his frontal lobe, and resulting in the equivalent effects of a lobotomy. Left severely cognitively impaired, Rector was unable to understand the charges against him, and when being led away to the execution chamber after his final meal, famously asked the guards to save his dessert for later. I believe then-presidential candidate Bill Clinton's decision to sign off on Rector's execution in Arkansas was a doubly egregious miscarriage of justice. First, using capital punishment on those with intellectual disabilities has since been banned by the U.S. Supreme Court as cruel and unusual punishment.¹⁴ But second, it is plausible to think that the effectively lobotomized Rector lacked sufficient psychological continuity with the agent who committed the crime—the pre-injury Rector. Along this line of thought, Victor Tadros writes:

As the connection between the person as they are now and the person who committed the offence weakens, as it does over time, we have less reason to punish the person, and we are more likely to conclude that punishing her is disproportionate. Imposing severe punishments for offences committed many years ago, even if those offences were very serious, can seem disproportionate. The strength of the connection between the person as she is now and the person as she was when she offended may help to explain this appearance.¹⁵

If post-shooting Rector is so psychologically disconnected from his past self that it raises doubts about whether a singular self has persisted over time—but rather we are dealing with a causally connected but psychologically distinct subject—then it seems post-lobotomy Rector is not liable to

¹⁴ *Atkins v. Virginia* (2002).

¹⁵ Tadros (2011: 308-309).

capital punishment because he never forfeited rights in the first place (and consequently, pre-injury Rector never reclaimed his forfeited rights). However, nothing so extravagant needs to be posited to explain Rector-like cases. For, even if Rector remained the same person, I believe that the substantial psychological discontinuity between Rector-the-perpetrator and lobotomized-Rector justifies saying that the latter has forfeited *fewer* rights than the former. Regardless, the central question in this paper concerns how rights can be reclaimed in situations where there is a sufficiently strong connection between a criminal's past and current self.

So, apart from transformations to a person's psychology, is there any other reason to think that the passing of time in and of itself might function to restore forfeited rights? This seems much more unlikely. Suppose that Buster James, an outlaw cowboy living in the latter half of the 19th century, robs a bank and shoots two people in the process. While attempting to escape from authorities, Buster falls into a frozen pond which preserves him for 150 years in a state of cryostasis. Assuming Buster James's mind and body were frozen in time, it seems self-evident that if plucked from the ice and thawed, Mr. James would still be vulnerable to severe punishment, regardless of how many years had passed since those offenses were committed. For in this scenario, absolutely nothing has been done to address James's criminality—his wrongdoing remains entirely uncondemned.

But perhaps there is an alternative rationale behind the idea that the passage of time mitigates one's culpability. Outside of cases involving murder and other extremely grievous harms, it is likely that the negative impact of lesser rights violations upon a victim's psychic well-being fades with time until such offenses are mostly forgotten and no longer felt. Do the diminishing effects of a wrongful action upon a person's psychic economy make a difference with respect to a wrongdoer's vulnerability to punishment? Again, I believe they do not. After all, there is good reason to think that one can culpably violate the rights of another, and so forfeit rights against punishment, without ever

negatively affecting the victim's mental state. For example, consider a Peeping Tom whose voyeuristic activities are only brought to light after the passing of his victim. Such behavior still constitutes a severe rights-violation despite never impacting the victim's state of mind. Or similarly, suppose that against my wishes, Tom plugs me into a Nozickean experience machine while I am sleeping. In this state, I have only positive experiences, but am no longer connected to reality. By disregarding my desire to remain unplugged and connecting me up anyway, Tom is guilty of violating my autonomy and right to self-determination even though my mental economy remains undisturbed by his actions. If all this is correct, then it is doubtful whether statute of limitations laws can be given theoretical justification by referencing some sort of intrinsic significance to the passing of time itself.

3.2 Rehabilitation and Regret

The next possible mode of rights reclamation to be considered is effective rehabilitation. The primary question pursued here asks whether significant transformations of one's moral character might contribute to the reclaiming of forfeited rights. Consider Jeff the Psychopath: entirely devoid of empathy, impulsive, egotistical, and sadistic. Jeff kills Alice merely for the thrill it brings and exhibits no remorse over his crime. In prison, a new experimental psychopharmaceutical is administered to Jeff which dramatically transforms his affective orientation. Whereas Jeff was once callous and cruel, his empathetic capacities are elevated and he now experiences normal levels of compassion and sympathy for others. The effectiveness of the moral-bio-enhancement drug not only produces alterations to Jeff's mood propensities, but also results in Jeff's adopting a new moral outlook. Whereas Jeff once viewed people as mere objects—instruments to be manipulated and used in achieving his own narcissistic ends, now Jeff, like a good Kantian, sees and respects other persons as ends in themselves. In short, Jeff's moral character is radically transformed: his emotional economy reoriented, his preferences and attitudes toward others revamped, and his commitments

and beliefs about how others ought to be treated entirely reformed. Jeff is now filled with deep regret when he reflects upon his previous ruthlessness and barbarous deeds. Suppose Jeff is only five years into a fifty-year prison sentence. Should Jeff's prison sentence be reduced because he has undergone thoroughgoing rehabilitation of character and is immensely sorry for his past sadistic behavior?

I confess that this case and question give me pause. On the one hand, I feel the intuitive pull of the judgment that Jeff is now liable to a lesser punishment. Presumably, the worry of recidivism is off the table. Furthermore, if one subscribes to a weaker version of rights forfeiture theory which insists that punishment is only permissible where there is both forfeiture plus a rehabilitative aim, then Jeff is no longer vulnerable to punishment since that aim has been realized. And yet, Jeff's liability to punishment is not due to his once-deplorable character, but for his culpable right-violating behavior. People are not made morally vulnerable to punishment because they have a vicious character. Rather, people forfeit rights against punishment because they culpably violate the rights of another. And because rehabilitation does nothing to address the out-there-in-the-world harm caused by a rights violation, I believe that rehabilitation by itself fails to be a legitimate mode of rights reclamation. This reasoning also extends to apologies for wrongful behavior which, no matter how sincere or contrite, fail to fully recapture forfeited rights.

Thus, I do not believe that we are *obligated* to shorten the length of Jeff's imprisonment. Jeff's moral transformation may provide us with strong moral reason to forgive, pardon, or reduce his prison sentence. Perhaps, it would even be callous or suberogatory of us to not lessen the severity of punishment Jeff faces in this case.¹⁶ Still, I do not believe there is an enforceable duty to

¹⁶ On the notion of the suberogatory, see Driver (1992). In brief, just as there are morally praiseworthy acts which go above and beyond the call of duty (i.e., the supererogatory), so there are harms or moral ills in this world which fall short of the forbidden. For example, it might be suberogatory to be slothful, but slothful behavior does not (typically) violate the rights of others; being slothful, while a vice, is still morally permissible.

cease punishment, such that continuing to punish Jeff would be in violation of his rights. While rehabilitated Jeff has surely made himself a more worthy candidate for pardon than the unrepentant psychopath, I believe it is entirely left to the discretion of the wronged party, or the state, whether Jeff is in fact pardoned or granted a reduced prison sentence.

3.3 Forgiveness

To begin with a bit of terminological disambiguation, I will reserve using the term forgiveness to refer to an action taken by a wronged party toward a wrongdoer, while the notion of pardon will refer exclusively to the action of a governmental authority in nullifying the punishment of a convicted criminal. Forgiveness is an act that can take place in the state of nature; pardoning is an act which can only take place in an institutional context.

It seems unlikely to me that what we call forgiveness can be captured by any single definition. Rather, I take forgiveness to be a cluster concept: there are a variety of different conceptions of forgiveness loosely connected in a myriad of ways, and the attempt to give a unified account is likely doomed to fail. According to one popular account of forgiveness, to forgive is to swear off feelings of anger and resentment that one might rightfully hold toward a wrongdoer.¹⁷ Alternatively, others have argued for a punishment-forbearance analysis of forgiveness, according to which, “to forgive is to deliberately refuse to punish”.¹⁸ Notice that on a resentment-forbearance account of forgiveness, it seems possible for the victim of a crime to forgive a perpetrator—that is, to swear off any negative emotions they might hold toward the perpetrator—while simultaneously seeking for punishment to be inflicted. And vice versa, it seems possible that the victim of a crime may swear off punishment while failing to discharge all feelings of resentment.¹⁹ Here, I am primarily

¹⁷ Though different authors understand the notion of resentment in different ways, many have defended an emotion account of forgiveness, according to which, to forgive is to in some way discharge feelings of resentment toward a wrongdoer. See, for example, Strawson (1962: 76), Murphy & Hampton (1988: 21); and Darwall (2006: 72).

¹⁸ Zaibert (2009: 368).

¹⁹ For a recent treatment of this issue, see Russell (2016).

interested in the species of forgiveness as punishment-forbearance. When the victim of a crime forgives a wrongdoer in this sense, she *commits* to permanently forgoing punishment of the perpetrator. Put another way, the resolution to not punish is equivalent to the victim's permanently waiving her right to visit hard treatment upon the perpetrator. Thus, the conception of forgiveness considered in this section may be quite idiosyncratic. Ordinarily, if the forgiving victim were to waive her right to mete out punishment against a wrongdoer, it would merely render future punishment morally inappropriate, not impermissible.²⁰ However, the conception of forgiveness I have in mind possesses a sort of promissory quality, involving an explicit commitment by the forgiver to forgo punishment both in the present and in the future.²¹ If such a form of forgiveness is possible, and I find little reason to doubt its possibility, then subjecting a wrongdoer to punishment after being forgiven would be akin to renegeing on a promise.

At this juncture, a number of interesting questions come to the fore. In the contemporary context, the legitimate state enjoys a monopoly on the right to enforce rights and exact punishment. But consider, first, forgiveness from a Lockean state of nature perspective. There are two views about who possesses the right to punish in the state of nature. First, one might hold that the right to punish is exclusive, belonging solely to the victim(s) of a rights-violation.²² Such a position implies a powerful conception of forgiveness, for if the authority to punish rests exclusively with the victim, then when the victim waives her right to punish, as long as that right has not been transferred to another party, the wrongdoer will reclaim her rights against punishment. One reason to reject this view, however, is that it seems if the executive right is exclusive, then a murderer could get off scot-free as long as she killed all of her victims—a decidedly unattractive and awkward implication of the

²⁰ Special thanks to the anonymous reviewer who drew my attention to this fact.

²¹ This view is not without precedent. Christopher Bennett (2018) has recently defended a conception of forgiveness similar to the view explored here in which forgiveness involves a form of commitment.

²² For a defense of this position, see Rothbard (1982).

view. For this reason and others, I believe that the right to punish is “competitive”: *anyone* in the state of nature may permissibly punish a wrongdoer for a rights-violation.²³ Prima facie, it may appear that if the right to punish is competitive, forgiveness amounts to something far less than full rights reclamation. However, I would resist jumping to this conclusion too quickly. It does not strike me as entirely implausible that even in a competitive context, a victim’s move to forgive might deauthorize everyone else’s right to punish a wrongdoer. For instance, is it so far-fetched to think that if John breaks Daniel’s leg in an assault, yet the latter forgives John, then no one else may step in and permissibly punish John? While such a view lacks support in the relevant literature, it merits consideration whether endorsement of a competitive right to punish is compatible with a view of forgiveness that results in full rights reclamation.

Ultimately, however, my view is that forgiveness cannot fully restore the forfeited rights of a wrongdoer in a competitive context. Consider a scenario in which Brad fatally shoots Olivia, but before Olivia passes away, like the dying Jesus, Olivia declares that she forgives Brad and expresses the desire that no one hold her death against him, despite his culpability. Surely it would remain permissible for a third party to punish Brad under such circumstances. But if this intuition is accurate, then in most cases, forgiveness will only result in a very minimal restoration of rights: by committing to forgo punishment, the wronged party imputes to the wrongdoer an agent-relative claim against punishment.

On the other hand, once we move beyond the state of nature, it becomes much easier to imagine cases where forgiveness results in something near full rights reclamation. For instance, suppose that John assaults and breaks Daniel’s leg, but everyone who belongs to the small yet politically self-contained community they reside in, including Daniel, collectively decides to forgive

²³ On this point I follow Simmons, who argues that agents in the state of nature may “compete” against each other to see who exacts punishment first, preempting others of the right to punish (1991). Nozick also famously discusses what a system of open punishment would look like (1974: 137-142).

John for this transgression. If all potential punishers decide to offer forgiveness, then John experiences de facto full rights reclamation, regaining his original pre-transgression status, and therefore is no longer liable to punishment. Moreover, suppose a political community, one in which certain governing authorities are granted exclusive responsibility for punishing criminal wrongdoing, has established a mechanism by which certain executive authorities are given the power to nullify the legal and penal consequences of a crime. Here, we arrive at the notion of pardon, which exists in many modern states as a legitimate executive procedure. While states do not enjoy the moral authority to punish innocent persons, presumably, a legitimate state has some discretion in both sentencing and pardoning criminals. And in a context where the state is uniquely authorized to administer the penalties for criminal wrongdoing, it is plausible to think that pardoning functions as a valid means for reclaiming forfeited rights.

This may be correct, but note, the concept of pardoning is not unproblematic.²⁴ First, if pardons were granted frequently and haphazardly, leading to widespread criminal activity going unpunished such that the constituents of the state felt their rights were not being adequately protected, then the issued pardons could hardly be considered just. In this scenario, the state would be guilty of abdicating one of its most basic political functions: punishing criminal wrongdoing. Presumably, then, pardoning power—like all exercises of state power as it concerns matters of criminal law and justice—should be wielded with great care and sensitivity to the appropriate reasons. Second, it is reasonable to suppose that victims of crime, whose own rights to punish have been transferred to the state, possess a presumptive right to see those who have wronged them subjected to state punishment. But if this is right, does the state’s moral obligation to punish rights-

²⁴ For an excellent and detailed analysis of how mercy can play a role in moderating the amount of punishment to which a criminal is vulnerable, see Tasioulas (2003). I am broadly sympathetic to Tasioulas’s “pluralistic” approach which recognizes the value of mercy as a distinct consideration that must be weighed against the positive reasons we might have to punish a criminal wrongdoer.

violators on behalf of victims render the concept of pardon morally indefensible? I do not believe so.

First, it is reasonable to think that a state which maintains an adequate criminal legal system—capable of safeguarding the basic rights of its citizens—possesses some discretion over when and how to use the pardoning power. Second, even for those unwilling to concede that a legitimate state has the discretion to reduce sentences and grant pardons, a victim can waive her right to see the perpetrator punished. It seems plausible to think that when an executive authority believes they have good reasons to grant a pardon, and when such reasons are conjoined with the consent of the victim, absolving a rights-violator from the penal consequences of their crime is morally unproblematic. Lastly, there may be cases involving extenuating circumstances in which the victim's right to see a criminal punished is overridden.²⁵ Consider the South African Truth and Reconciliation Commission (TRC): the Commission aimed to promote reconciliation between political officials involved in apartheid (and so who were guilty of perpetrating gross injustices and severe rights violations) and the rest of society. Rather than seeking retribution through Nuremberg-like trials, perpetrators of apartheid were summoned to give testimony of their involvement in helping perpetuate a racist and unjust system, and after public confession, were granted amnesty. Some might reasonably complain that by pardoning the political actors responsible for perpetrating apartheid, the Commission wronged those who had a right to see these offenders criminally prosecuted. However, all rights are vulnerable to being overridden, and if the TRC was generally successful in creating the conditions for a peaceful transition of power and in helping establish a new and more just nation, then it is plausible to think that in this scenario, the rights of victims to see their rights-violators punished were justifiably overridden by weightier moral considerations.

²⁵ Similar treatment of this issue is given by Wellman (2017: 88-89) who also highlights the example of the South African Truth and Reconciliation Commission.

My aims at this point in the argument are modest. I have attempted to outline the main views on who possesses the right to punish and the implications such views have for matters of rights reclamation. And although I have not provided a sophisticated theoretical defense for any particular viewpoint, I wish to stress that unless one maintains that pardoning a criminal offender is always morally problematic—even when the victim consents or in extenuating circumstances—then despite the relative rarity of pardons, the legitimacy of such powers entails that punishment is *not* the sole means for reclaiming forfeited rights.

3.4 Compensation

Now we arrive at the main issue: In this section, I will defend and elaborate upon compensation as a legitimate means of rights reclamation. For the purposes of this paper and to give the discussion a starting point, I adopt Robert Nozick's definition of compensation: "Something fully compensates a person for a loss if and only if it makes him no worse off than he otherwise would have been" (1974: 57). If Jon transgresses against Niklas's property rights by stealing the latter's phone, he fully compensates for this transgression by repaying Niklas and making it such that Niklas is no worse off than he would have been if the rights violation had never occurred. This will include returning or replacing the stolen phone but may also include additional compensation to make up for utility loss and any psychological or emotional harm incurred. It is worth highlighting that despite adopting Nozick's definition of compensation, the question pursued here differs from the question asked by Nozick in the famously complex arguments explored in Chapter Four of *Anarchy, State, and Utopia*. Here, I assume that when an agent culpably transgresses the moral boundaries of an innocent party, there is rights forfeiture. The question which concerns me is whether forfeited rights can be reclaimed by providing compensation to the victim(s). By contrast, I think it is standard to interpret Nozick as asking whether forfeiture can be *avoided* so long as victims are compensated. In other

words, while I assume that “all crossings of the moral boundary” are impermissible, Nozick questions whether some boundary crossings are allowable so long as compensation is paid.²⁶

To appreciate how compensation can play a *prima facie* role in reclaiming one’s forfeited rights against punishment, consider the following cases. Imagine that Brad murders Olivia without provocation. Consider the moral situation ten minutes after Olivia has been killed. What rights has Brad lost? Without advocating for the current system of capital punishment, I think it plausible to judge that Brad has forfeited his right to life. He is, at minimum, liable to severe penal consequences. But suppose that after a while, Brad comes to his senses and runs to his basement where he has stored some souped-up Frankenstein-like medical technology he then uses to resuscitate Olivia. For the sake of specificity, let us stipulate that Brad brings Olivia back to life two hours after killing her. The question is: Are the rights forfeited by Brad ten minutes after Olivia’s death still forfeited two hours later, after Olivia’s “resurrection”? I think not.²⁷ Or consider a less fantastical example: Elliot hacks into the bank account of Bill Gates and steals thirty million dollars. After a week of being racked with guilt over this theft, Elliot decides again to hack into Gates’s account and return the money, all before Gates ever realizes his money was gone in the first place. What punishment is Elliot liable to after the money is returned? Finally, suppose that Thomas has a penchant for arson. One day he comes across a small house in the woods and maliciously sets fire to it. The house is owned by Anna, an author who uses the location as a writer’s retreat. After some time has passed, Thomas is filled with remorse, and rebuilds the house so that the new structure is an exact replica of the former—including furniture, conveniences, and all the rest. Anna never even learns of the original house’s destruction.

²⁶ Nozick (1974: chap. 4).

²⁷ Of course, murder is typically the sort of rights-violation which compensation cannot address. But nothing argued here suggests that compensation is effective in recapturing any and all forfeited rights.

These cases are structured so that something near full compensation is unambiguously achieved—at the end of each scenario, things for the victims are as if the transgressions never took place. Perhaps in the first case, additional compensation must be made to amend for emotional or psychological damages sustained from the assault. But assume that the victims are eventually placed on an indifference curve so that they are just as well-off now as prior to whatever rights-violation suffered. The intuition is that the wrongdoer in each of these cases forfeited certain rights after committing a criminal act but reclaimed such rights after restoring things to the status quo. It makes little sense to think that Brad’s right against capital punishment is still forfeited once Olivia is brought back to life, or that Elliot, after returning the stolen funds, is still morally vulnerable to the same sort of hard treatment as a thief who keeps the thirty million dollars. As a provisional defense, the logic behind the intuition that Brad, Elliot, and Thomas have reclaimed their forfeited rights has to do with evaluating the compensatory and original rights-violating acts together as a unified set of actions. From an evaluative perspective, the act of compensation attaches itself to the initial wrongful act by canceling out whatever harm was brought to the injured party, so long as full compensation has been made and the victim made whole. Indeed, what would proportionate punishment amount to in cases where a rights-violator, in the end, leaves the victim no worse for wear?

But as there is with a rights forfeiture theory of punishment, there are at least two versions of a compensation-based account of rights reclamation—a weak and a strong version. On the more moderate interpretation of these cases, compensation by itself is insufficient to restore the wrongdoer’s rights—something else is needed in addition to providing compensation. Ultimately, I subscribe to the weak version and so more will need to be said about what the additional something is which must accompany compensation if it is to be a legitimate channel for reclaiming rights. However, I will take a slightly circuitous route getting to what I take are the primary theoretical

grounds for endorsing a compensation-based account of rights reclamation. I believe it beneficial to first consider the strong version and what objections and potential responses there are to it.

According to the strong view, the act of compensation by itself accomplishes full rights reclamation.

Before considering objections to the strong view, a quick conceptual point about compensation should be made. One might ask: For a wrongdoer to reclaim her lost rights, must compensation paid to the victim of a transgression be made with the *intention* of compensating for a rights-violation?²⁸ Suppose that Angela, never a great parallel parker, accidentally backs into Amy's sedan. Because she is in a great hurry, Angela flees the accident scene without leaving her information for Amy. Damages to Amy's car amount to five hundred dollars. A week later, Angela visits her favorite local bistro. The lively atmosphere elevates her mood, and she decides to generously gift her waitress by leaving a seven-hundred-dollar tip. Little does she know that her waitress, Amy, is the owner of the sedan she backed into a week ago. Does Angela's seven-hundred-dollar tip count as compensation for hitting Amy's car and then fleeing the scene? I think the answer is clearly "no". If culpability is a necessary requirement for rights forfeiture, then presumably something like its opposite is required for reclamation via compensation. In other words, compensation only counts as compensation if it is done for the right reasons, by the relevant persons, and under the appropriate conditions.²⁹ Definitionally, compensation is payment made *in*

²⁸ I take this question to be an analog of the "problem of relatedness" as it pertains to the permissibility of punishment (see Lippke 2001). The relevant question as it pertains to punishment is: may a wrongdoer be subjected to hard treatment for any reason whatsoever, or must the visitation of hardship be properly related to the wrongdoing? Warren Quinn (1985) was the first to highlight this worry by asking whether a young man guilty of car theft could be permissibly kidnapped and denied liberty for reasons having nothing whatsoever to do with his thievery. Consider the morality of self-defense: McMahan argues that lethal defensive force can be applied in war only if a combatant has forfeited their right against attack, but such forfeiture only applies "for certain reasons, by certain persons, in certain conditions" (2009: 10). Similarly, with regard to the punishment, one might argue that criminals only forfeit their rights against hard treatment for certain reasons. On this distinction between a "limited-reasons" versus an "unlimited-reasons" account of punishment and rights forfeiture, see Kershnar (2002).

²⁹ Another intriguing question concerns whether a third party can act on behalf of a transgressor in providing compensation to a victim. In other words, can a criminal transfer the obligation to compensate to an innocent-but-willing third party? While I find the notion of vicarious punishment incoherent—since I take rights forfeiture to be a conceptual component of punishment—I hesitate to dismiss the possibility of vicarious compensation. John Gardner helpfully frames this question by asking whether duties of repair are "delegable" (2018: 111-116). Though I have not yet

response to the infliction of a harm caused by wrongdoing. Because Angela's motivations lack a rectificatory aim, her tip should not be construed as compensation to Amy.³⁰

Moving forward, there are three main objections to the view that compensation can function as a legitimate mode of full rights reclamation. First, there is Nozick's worry that a system of justice which allows criminals the opportunity to evade punishment by compensating for crimes such as assault may produce a society full of generalized fear and apprehensive persons (1974: 65-71). The second and more worrisome objection highlights the problem of affluent criminals and plays off retributivist inclinations.³¹ Consider Barbarous Banker, who has a vicious appetite for causing pain and the nasty habit of traveling around with an axe and chopping off people's pinkie fingers when they are not looking. After collecting the finger and relishing in the anguish afflicted, our Banker writes his victims an extremely large check. Perhaps losing a finger in such a fashion is non-compensable; certainly, there are some wrongs, such as murder, for which no compensation can be made. But for the sake of this argument, let us stipulate there is some sum of money X that in general can make pinkie-less victims at least as well off now as they were before Barbarous Banker's hacking. Accepting compensation as a legitimate means for full rights reclamation seems to allow persons like Barbarous Banker to consistently commit egregious and morally gross transgressions

arrived at the central argument for how compensation can have rights-reclaiming significance, it is worth highlighting that a crucial aspect of my account is that a wrongdoer *willingly* compensates the wronged party. Forced compensation exhibits something less than a remorseful mind, and thus can play no role in reclaiming forfeited rights.

³⁰ Another interesting case raised by John Gardner concerns "reparative uses of money" (2018: 102-107). Gardner highlights an amusing storyline from Larry David's *Curb Your Enthusiasm* in which Larry becomes incensed at a man named Ben Heinemann. After smashing Ben's taillight, Larry provides payment to Ben with the understanding that the latter would use such money to repair the damages to his car. However, Ben did not use the money to fix his smashed taillight, instead giving it to his daughter. Gardner is sympathetic to Larry's frustrations as Ben's actions seems to undermine Larry's attempt to remedy the situation by helping to repair the car. However, on the account of compensation endorsed here, so long as Ben is indifferent between Larry smashing his taillight and Larry smashing his taillight plus being paid the relevant sum of money, then Ben is compensated. It does not matter what Ben subsequently does with the money.

³¹ This objection is raised by Pilon in response to Barnett's proposal to abandon criminal law in favor of restitution. Pilon writes (1978: 351): "What, really, does the wealthy criminal care about having to compensate his victim... If a rich man rapes a rich woman, are we really to suppose that monetary damages will restore the status quo, will satisfy the claims of justice? A wealthy child molester will treat compensation simply as the price of pleasure."

because of their atypical ability to compensate. Because he is unfathomably wealthy, Banker does not care about having to pay compensation, so it seems justice has hardly been satisfied.

In response to these first two criticisms, one possible and intriguing strategy involves modifying our account of compensation for criminal action to include uptake as a necessary condition. In other words, compensation must be *accepted* for it to have rights-reclaiming effect. If a victim wishes to forgo compensation because she would rather see the perpetrator punished, that is her prerogative. A victim of assault has no obligation to accept compensation for her rights being violated. And if this is so, then Barbarous Banker cannot assume his victims will accept his compensatory payments. They might opt for old-fashioned retributive punishment—a fact which may have significant deterrent value. Such a view also offers a distinctive understanding of the privileged moral status of the victim of a rights violation. On this account, the victim would possess an exclusive right to choose between punishment or compensation (or some combination of both).³²

One can contrast this view, which endorses a victim's ability to reject compensation, with Randy Barnett's influential account of restitution.³³ Barnett famously argues that our criminal justice system should adopt a "new paradigm" of restitution in place of the "old paradigm" of punishment. Barnett discards the public/private (crimes/torts) distinction, arguing that crime is "an offense by one individual against the rights of another" and not "an offense against society."³⁴ Eschewing the public element traditionally associated with criminal liability, Barnett argues that our conception of justice and the criminal legal system should be overhauled so that the focus is upon making the

³² For a quick review of the main options: Some claim that the victim of a rights violation possesses the authority to determine what happens to a perpetrator, including an exclusive right to punish or forgive the victim. Others maintain that the right to compensation is exclusive, but that there is no right to punish. Third, there are those who hold that the right to punish is competitive, but the right to compensation is exclusive.

³³ Barnett (1977). In general, I have avoided the terminology of "restitution" but preserve it here because it is the language Barnett uses. Typically, however, there is a distinction made between restitution and compensation. While compensation is usually understood as the raising of the victim's well-being back to the status quo, restitution refers to remedies involving unjust enrichment.

³⁴ Barnett writes, "The armed robber did not rob society; he robbed the victim. His debt, therefore, is not to society; it is to the victim." (1977: 288).

victim of a criminal exchange whole again. A criminal incurs a debt to the victim when they violate the latter's right—a debt which calls for compensation to be made to the victim, but not punishment. To be sure, I am sympathetic to Barnett's rejection of the amorphous distinction between crime and tort.³⁵ Yet, while I maintain that compensation can play a significant role in reclaiming forfeited rights, I believe Barnett's proposal to eliminate state punishment in favor of a system of civil law and restitution is vulnerable to both objections highlighted above. Moreover, while I believe the modified account of compensation considered here works to mitigate some of the force of such criticisms, there is a third objection that I believe is decisively fatal.

The primary problem with the strong version of a compensation-based account of rights reclamation is that it entirely discards the *internal* element of criminal behavior. When a person's moral boundaries are culpably disrespected, that person is not simply harmed, rather, her rights are violated. The wrongfulness of a criminal's actions cannot be reduced to the harm found out there in the world. Rather, the wrongfulness of a criminal act is also located in the mind of the perpetrator. Thus, according to standard criminal law, two distinct elements are required in comprising a criminal offense: a bad act (*actus reus*) and a guilty mind (*mens rea*). It seems that compensation by itself, while potentially effective in addressing the objective wrong which befalls a victim, does little to address the *mens rea* element of a crime. Arguing this point, Roger Pilon writes: "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...For compensation does not reach the whole of what is involved—it does not reach

³⁵ On this point, see also Wellman (2017: chap. 4).

the *mens rea* element” (1978: 352).³⁶ If this is right, does it follow that compensation can play no part in returning forfeited rights to a wrongdoer?

As it turns out, while I believe this objection convincingly rebuts the strong version, it simultaneously provides the main theoretical grounds for endorsing a weak version of a compensation-based account of rights reclamation. When first introducing the distinction between the strong and weak versions above, I left unspecified what additional something might be required to accompany compensatory measures if such measures are to have rights-reclaiming significance. By now, what this additional something is should be fairly obvious, and the main line of argument brought into focus. There is near unanimous agreement that criminal culpability exists only where there is both *mens rea* and *actus reus*. An agent does not forfeit her right against punishment unless she is found to have both a guilty mind and to have committed an objectively bad act. The main argument, then, is advanced via symmetry considerations: if a guilty mind and a bad act are requisite and sufficient for rights forfeiture, then a *remorseful mind* and a *redemptive act* should be sufficient for rights reclamation.

Concerning the redemptive act, the goal of compensation is to undo the harmful consequences that follow from a rights violation. While it is plainly true that time cannot be reversed and thus wrongful deeds cannot be erased from the histories they mar, compensation can provide justice by creating a world which approximates the *ex ante* position of the victim. As Nozick writes, “Full compensation keeps the victim on as high an indifference curve as he would occupy if the other person hadn’t crossed” (1974: 63). But aiming to make the victim whole again is only half of the story. In each of the cases considered at the top of this section, the perpetrators acted not only to set things right, but crucially, they were motivated in their compensatory actions by feelings of

³⁶ To be sure, while Pilon seems to focus exclusively upon intentional harms in his discussion of criminal wrongdoing, it is worth highlighting that the *Model Penal Code* identifies four different culpable mental states associated with the *mens rea* element of criminal responsibility: purpose, knowledge, negligence, and recklessness.

remorse and regret. The contention here is that the judgments and feelings associated with a remorseful mind make all the difference in the world when it comes to matters of rights reclamation, for it is this aspect of remorseful compensation which extends to the *mens rea* element of criminal culpability.³⁷

Most generally, there are at least three components which are constitutive of the remorseful mind. First and foremost, there is a cognitive component: the remorseful criminal recognizes she has acted wrongly. Second, there is a conative component: the remorseful criminal will likely have some desire or wish to provide rectification to the victim and repair the severed moral relations to the extent that doing so is reasonably possible. And third, there is an affective component: genuine remorse will almost certainly include the experience of negative emotions such as guilt, regret, and disappointment.³⁸ For practical reasons, it may also be necessary for a wrongdoer to publicly express her remorse to the victim. Indeed, it seems that a genuinely repentant wrongdoer would naturally wish to issue an apology, condemning her past rights-violating conduct and so simultaneously honoring the victim's dignity.³⁹ Thus, I believe that an account of compensation which requires rectificatory measures to be accompanied by a remorseful mind is better suited to handle the

³⁷ The account defended here is highly revisionist, cutting against the relative independence of criminal punishment and tort compensation. That said, I do not believe the two completely collapse into each other. Importantly, I contend that compensation only has rights-reclaiming significance if it is carried out voluntarily. It is crucial that a wrongdoer's act of compensation stems from a genuine desire to repair and undo the negative consequences that followed from their rights-violating conduct. Tort compensation can be forced. But according to the argument advanced above, compensation which is not accompanied by a remorseful mind fails to contribute to the recovery of forfeited rights.

³⁸ In building an argument against the retributivist, Tadros questions whether the negative emotions inevitably suffered by the repentant wrongdoer have any intrinsic value. For Tadros, the answer is such emotions do not: what is important is the wrongdoer's recognition that he or she has done wrong (2011: 44-51). Such negative feelings may be psychologically necessary if the repentant wrongdoer genuinely regrets her rights-violating actions. Still, the question of whether such suffering is intrinsically good is peripheral to my concerns here. It is enough to note that negative emotional reactions are likely psychologically inevitable if the wrongdoer's remorse is sincere.

³⁹ From a theoretical perspective, however, it is unclear to me whether a wrongdoer must necessarily offer a public apology in order to reclaim forfeited rights. To reiterate, the key claim advanced in this section is that for compensation to have rights-reclaiming significance, it must connect to both the objective *and* subjective elements associated with criminal wrongdoing. Revisiting the example of Thomas, the arsonist, the pertinent question concerns whether Thomas, after having been moved by feelings of remorse and rebuilding Anna's house, is required to take further action, and publicly express his remorse. Or is the mere adoption of an apologetic attitude enough? I believe this is something about which reasonable people can disagree.

considered objections above.⁴⁰ Crucially, the unrepentant wrongdoer, such as Barbarous Banker, fails to reclaim forfeited rights through compensation precisely because he lacks the appropriate understanding and emotional reaction toward his wrongdoing.⁴¹

If one accepts this argument, we may again distinguish between two versions of the view: a partial reclamation and a full reclamation version. According to the former, remorseful compensation only realizes partial restoration of the wrongdoer's rights; even after remorseful compensation is made, one might argue that the wrongdoer is still liable to some punishment, though presumably not as much as if no compensation had been made. According to the latter view, remorseful compensation realizes complete reclamation of one's forfeited rights; after compensation has been paid, the perpetrator's status is as it was prior to the rights-violation, so no punishment may be permissibly visited upon her. Which view should we adopt? I believe the burden of proof lies with the advocate of the partial version to establish why punishment, presumably, is capable of fully discharging liability, but remorseful compensation is not. Why think that the infliction of stigmatizing pain and deprivation upon the criminal is the only true mode of full rights reclamation? If anything, the onus is upon those who endorse the partial version (or who reject remorseful compensation altogether as a means for addressing criminality) to explain why hard treatment is a more adequate means of recapturing forfeited rights than providing remorseful compensation, when the former does little to redress the harm suffered by victims.

⁴⁰ One might still worry that if our criminal justice system were to incorporate remorseful compensation as a legitimate means for addressing criminal behavior, then poorer criminals who lack the material resources to provide immediate compensation may remain liable to full punishment, while wealthier defendants (who are able to exhibit genuine remorse) would not. While it is certainly true that wealthier criminals may have an easier time compensating victims than poorer criminals, the latter do not lack this ability altogether. Rather, poorer criminals may have to compensate victims over an extended period of time by taking a portion of their monthly wages and making a series of payments. Barnett argues this point (1978: 289).

⁴¹ Another objection that might be raised to the above argument is that wealthier criminals may have better access to mental health services, enabling them to more easily cultivate a remorseful mindset compared to those who lack such resources. While this may be so, I do not believe such worries about inequality and fairness are specific to my account. For instance, notice that individuals who are economically privileged and so have better access to mental health resources may also tend to possess a stronger capacity to refrain from criminal behavior. Suppose this last point is true: it is not obvious what the implications are with regard to our sentencing practices and approaches to punishment.

Suppose the above argument is correct. A natural question to ask is: What are the institutional and practical implications of a theory which posits multiple modes for reclaiming rights? While it is beyond the scope of this paper to work out an answer to this question in any detail, I would be remiss to not gesture at some broad possibilities, though I arrive at no firm conclusions. First, there is a question concerning how a system of criminal justice could reliably determine the sincerity of a criminal's remorse when compensating a victim. One possibility is that first-time offenders should be given the benefit of the doubt when they claim contrition, but that the recidivist's display of remorse and apology should be met with suspicion, thus making the latter more susceptible to punishment. Yet this response only highlights the central puzzle regarding the practical consequences of a pluralistic theory of rights reclamation: How are we to determine whether a particular criminal should receive punishment for their right-violating action, or whether an act of remorseful compensation is to be preferred?

There are (at least) two main options: Which mode of rights reclamation is realized is determined by either (i) the victim, or (ii) the perpetrator. If the victim has discretion over what happens to the perpetrator, then presumably remorseful compensation includes an uptake condition, and this could be understood in two different ways. First, as discussed above, perhaps the victim can reject compensation in favor of punishment. Alternatively, perhaps compensation can be accepted, but the victim need not acknowledge or accept a criminal's repentance, thus the criminal's liability to punishment remains unchanged. This last position is problematic, however, because while it is perfectly possible to refuse to acknowledge a perpetrator's apology, it does not seem possible to reject a person's remorseful state of mind—a person is either remorseful or they are not. Regarding (ii), it seems reasonable to think that a criminal has some say-so in what happens to her—that a criminal may avoid punishment if she provides compensation and is able to make an apology which comes from a place of true remorse and regret. Finally, and most plausibly, I believe a legitimate

state enjoys not only the moral authority to punish the guilty, but also the discretion to determine whether punishment or remorseful compensation should be the default strategy in matters of criminal justice. If the adoption of a paradigm that makes compensation the default over punishment (or vice versa) helps to promote the state in its ability to secure peace and protect basic rights and liberties, then consideration of such general positive aims may help determine how the criminal justice system ought to be structured.

A few final clarificatory remarks are now in order. First, just as there is a proportionality constraint that governs the valid use of punishment, so too is the exaction of compensation governed by a proportionality constraint. Just as it would be disproportionate to impose capital punishment upon a chicken thief, it would be disproportionate to exact compensation of one million dollars from a person guilty only of stealing a candy bar. The compensation exacted for a rights violation must match the severity of the crime committed. While it may be tricky to figure out exactly how much compensation is owed in cases involving personal injury, in general, the rule I have adopted is that the amount of compensation owed a victim is determined by what it would take to raise that individual's well-being to the original status quo. And the point that should be stressed is that if there is a problem here, it is not one unique to the account defended in this paper. It is just as difficult to specify the logical relationship between personal injury and length of imprisonment, as it is to determine what monetary damages are owed in a case of assault.⁴²

More interesting is the question: What role can compensation play in cases involving failed attempts? Consider Brad, who, without lethal intent, attempts to shoot Olivia in the leg so as to prevent her from competing against him in an upcoming marathon competition. However, a gust of wind disrupts his aim, and he misses. Moreover, suppose that Olivia is oblivious to Brad's attempt to harm her, and that he poses no future threat. In this case, Brad acts culpably, and because I take

⁴² Barnett emphasizes this point about "incommensurability" as well (1977: 292).

rights-related culpability as the grounds for forfeiture of rights, I believe Brad is liable to punishment even though Olivia's well-being is unimpacted by the incident. Or, suppose Brad uses a voodoo doll in an attempt to injure Olivia. Again, what role can compensation play in such cases where there is an attempted rights violation, but no actual harm committed? What should we say about *harmless wrongdoing*?⁴³

I consider this one of the most challenging questions a compensation-based theory of rights reclamation faces. Here, I aim only to outline what I take to be the four main options, while noting the potential weaknesses of each. First, one might maintain that in cases of failed attempts, compensation is simply not feasible, leaving punishment the only appropriate response. Yet this seems unfair to the extent that a successful perpetrator would have multiple channels for reclaiming rights, while the unsuccessful perpetrator does not. Second, and more plausibly, one could maintain that the adoption of a genuinely apologetic attitude is sufficient for recovering forfeited rights in cases of failed attempts. In section 3.2, I argued that having a reformed character and offering a sincere apology is inadequate for reclaiming forfeited rights because apologies do nothing to address the objective wrong caused by a rights violation. Perhaps that argument moved too quickly. It seems *prima facie* reasonable that in cases where no harm is done, if a perpetrator adopts a remorseful mindset, and is prepared to undertake reparative measures (if needed), then there is nothing left to do in order to reclaim rights against punishment. Yet, I hesitate to endorse this option for reasons having to do with the irrelevancy of outcomes as it pertains to matters of forfeiture and reclamation. In my view, the magnitude of forfeitures against punishment should not be influenced by matters of

⁴³ Another difficult set of cases that raise similar questions involves what John Gardner and Stephen Shute (2000) refer to as cases of "pure" wrongdoing. Gardner and Shute ask us to imagine a hypothetical scenario in which the victim of a rape is drugged to the point of complete unconsciousness, with no physical harm resulting from the incident. Moreover, the victim remains entirely oblivious to the episode, never discovering what transpired. I assume that cases of "pure" rape ought to be criminalized and constitute a serious wrongdoing. The pertinent question in the context of my argument concerns what sort of compensation should be provided given that the rape does not cause any experiential harms.

chance, such as whether a criminal is successful in causing harm; rather, forfeiture of rights should be determined entirely by a perpetrator's intentions.⁴⁴ Indeed, I contend that the concept of forfeiture is fundamentally about our voluntary behavior, and *not* about results. And given that rights reclamation is correlative with the notion of forfeiture, I am inclined to think that what is required to reclaim rights via compensation should likewise not be dependent upon external variables of luck and happenstance, such as how much harm, if any, results from an attempted rights violation.

Third, one might hold that Olivia is deserving of compensation. All criminal actions, even failed attempts, create a debt owed to the victim. And even though she is not *experientially* harmed by the incident, Olivia is still the victim of a rights violation by being subjected to Brad's risky behavior, and thus deserving of compensation.⁴⁵ Of course, much depends upon whether one believes Olivia's interests are set back by Brad's attempted wrongdoing. For, if Olivia's well-being is not negatively impacted by such rights-violating behavior, then compensation simply does not come into play; Brad cannot act to restore Olivia's welfare if her welfare is unaffected by the incident. To problematize matters even further, consider a variation of this case: Brad shoots and seriously injures Olivia, but before having the opportunity to compensate Olivia for her loss, Olivia dies in a tragic car accident. It would seem that compensation can play no role in reclaiming forfeited rights when the victim is dead. In light of this, consider a fourth option, which I very tentatively endorse: in cases of failed attempts, or where the victim has passed, a "redemptive act" may be directed toward the public. In other words, perhaps failed attempts create their own sui generis class of actions where the "debt" created by an attempted rights-violation is relegated to the public domain,

⁴⁴ For a sophisticated defense of the view that results are irrelevant in determining what counts as proportionate punishment, and that only culpability matters, see Alexander, Ferzan, and Morse (2009: chap. 5).

⁴⁵ Moreover, if one adopts a desire-satisfaction account of well-being, it can be argued that even if Olivia remains completely unaware of Brad's attempt to shoot her, one of her fundamental desires goes unsatisfied, and so her interests are in fact set back as a result of Brad's actions.

in which case, the perpetrator may have to, for example, complete a certain number of community service hours in order to account for the external element of her criminal conduct.

4. Conclusion: A Forfeiture Theory of Freedom

To offer the briefest of summaries, there are two basic theories of rights reclamation. First, one might subscribe to a theory of rights forfeiture according to which there is only one avenue for reclaiming forfeited rights—presumably punishment. On the other hand, I have attempted to elucidate and defend a pluralistic account of rights reclamation, according to which, there are multiple non-punitive means by which a criminal can reclaim forfeited rights against punishment. To recap, the mere passage of time lacks rights-reclaiming significance as it does nothing to address the subjective or objective aspects of criminal wrongdoing. Rehabilitation fails to recapture forfeited rights because it does not account for the *actus reus* component of criminality, and compensation alone is inadequate because it fails to address the *mens rea* component. In response, I advanced a symmetry argument: because remorseful compensation extends to both the subjective and objective elements of criminality, I believe it should be considered a legitimate rights-reclaiming alternative to punishment.

Finally, I began by stating my hope that in thinking through the issue of rights reclamation, new light might be cast upon a theory of rights forfeiture. Thus, I was happy to begin the discussion by assuming a rights forfeiture account of punishment. Philosophical discussions must start somewhere, and since a lively discourse about a forfeiture theory of punishment already exists in the literature, that seemed like as good a starting place as any. And yet, the conclusion of my arguments suggests something slightly different—a more general theory of forfeiture. I believe that when a criminal culpably violates another's rights, what she forfeits is a certain amount of freedom or autonomy—or put another way, what a wrongdoer forfeits is a general right against interference from others. There is an alteration to the transgressor's moral status so that she no longer has

complete control over her self-regarding affairs or how she is treated. But there are more ways to interfere with a person's rights than via punishment. The criminal may forfeit her right against hard treatment, or she may incur a special obligation to provide remorseful compensation, thus forfeiting complete control over her wealth or income. If this is so, then, while I do not withdraw my endorsement of a forfeiture theory of punishment, in order to avoid assuming that punishment is the default mode of rights reclamation, it might be more accurate to say that what I endorse is a forfeiture theory of freedom.

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