

# THE MISSING ALTERNATIVE OBJECTION TO CRIMINAL LAW ABOLITIONISM

- Valerij Zisman -

**Abstract:** Criminal law abolitionists claim that legal punishment cannot be morally justified and that we should therefore abolish criminal law. While this is still a minority position in the current debate, the number of proponents has been increasing, and even opponents have developed a certain degree of sympathy for such claims in recent years. Yet one of the reasons many remain hesitant regarding the abolition of criminal law appears to be the lack of a thought-through alternative, in addition to abolitionists disagreeing considerably amongst themselves on what an alternative should look like. I will call this the missing alternative objection. To address this central concern, I will argue in this paper that the most prominent versions of abolitionism actually converge on the same alternative core to criminal law – even though they are driven by vastly different motivations. This core that current abolitionist theories converge on is two-fold: first, the claim that the state should compel offenders to provide restitution for the victim; second, the claim that restorative processes should be used wherever possible when addressing criminal wrongdoing. This common core is enough to reject the missing alternative objection.

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## 1. Introduction

While criminal law abolitionism is not an altogether new position, an increasing number of proponents have been advocating different versions of it in the debate on criminal law in recent decades.<sup>1</sup> Even many of those scholars who defend some form of criminal punishment now acknowledge that the abolitionists' arguments and overall challenges need to be carefully addressed.<sup>2</sup>

Despite this development, criminal law abolitionism fails to convince most of those currently working in legal philosophy. Many still see serious problems that ab-

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<sup>1</sup> Barnett (1977); Bianchi (1994); Boonin (2008); Golash (2005); Haan (1990); Hulsman (1986, 1991).

<sup>2</sup> Duff (2001): xv.

olitionists have yet to address.<sup>3</sup> Among the many objections, one of the most powerful is that abolitionism can only be taken seriously if a viable alternative to punishment is presented.<sup>4</sup> Such an alternative, critics argue, is not yet available – or inasmuch as there are alternative suggestions, almost every abolitionist theory has a different angle, making it difficult to know which one to opt for. I will refer to this line of criticism as the missing alternative objection.

The objection has great appeal. Whilst abolitionists largely agree that criminal punishment is not morally justified, there are different proposals as to what an alternative to criminal law might look like, and what the reasons are to endorse such a system. In addition, it goes without saying that abolitionists should appreciate that fundamentally restructuring criminal law is a serious claim whose risks cannot be taken lightly. Although the problems with current criminal law practices are evident, at the very least we need to know whether a potential alternative would address the exact same issues and not introduce new ones. This is the two-step response that abolitionists need to offer: first, what to replace criminal law with; and second, showing that the alternative fulfills the functions or upholds the values that we would like our responses to criminal wrongdoing to fulfill or uphold.

I want to focus on three versions of abolitionism, which, though they stem from very different theoretical motivations, converge on the same alternative to criminal punishment.<sup>5</sup> The first is compulsory victim restitution, which is (coincidentally or not) often defended by libertarian-minded philosophers,<sup>6</sup> but of course not limited to them.<sup>7</sup> Here, the central argument is either that punishment is morally unjustifiable while compulsory restitution for the victim is not; or that restitution better achieves the very same objectives that punishment aims to achieve, such as restoring fairness and justice, communicating censure, restoring relationships, helping victims, deterring offenders and the larger population, rehabilitating the offender, etc.

The second version of criminal law abolitionism is focused on restorative justice.<sup>8</sup> In most restorative justice frameworks, criminal wrongdoing is primarily understood as a harm to the victim and to the broader community that has been impacted by the crime. The response to crimes should aim at repairing the harm done and the relationships that the wrongdoing has affected; and restorative justice approaches and compensation are argued to best serve this aim, especially when compared to court processes and criminal punishment.

The third version of criminal law abolitionism is the public health-quarantine model, which grew out of the literature on free will skepticism.<sup>9</sup> Its key notion is that retributive punishment is unjustified because of a lack of free will in the basic desert

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<sup>3</sup> Husak (2020).

<sup>4</sup> *Ibidem*.

<sup>5</sup> There are more approaches to abolitionism in the literature than I have the ability to cover in this article. Some take an even more radical stance and not only claim that we ought to abolish criminal punishment, but also call for an overhaul of the political and economic system. I chose the three specific approaches in this paper because, as I will explain, they converge on the same alternative to criminal punishment, which allows us to respond to the objection as a whole.

<sup>6</sup> Barnett (1977); Boonin (2008); Surprenant and Brennan (2019).

<sup>7</sup> Sayre-McCord (2001, 2002).

<sup>8</sup> Braithwaite (1989); Braithwaite and Pettit (1990); Christie (1977).

<sup>9</sup> Caruso (2022); Pereboom (2013).

sense, and that other justifications of punishment fail on independent grounds. Rather than punishing offenders, we should react to wrongdoing solely on grounds of self-defense, which need not involve the intentional infliction of harm (i.e., punishment). These responses to criminal wrongdoing might involve some restrictions on the part of the offender, but only insofar as offenders pose a threat to society. Beyond that, we are better off investing in public health – that is, especially mental health, drug abuse treatment, and social services – in order to prevent criminal wrongdoing from occurring in the first place.

In this paper, I will argue that even though these are indeed very diverse theories of criminal law abolitionism, all these approaches at least converge on a shared core proposal of how to replace criminal law. This shared core is a system that compels offenders to pay restitution to the victim(s) of wrongdoing, and approaches criminal wrongdoing via restorative justice, where applicable.<sup>10</sup> The crucial difference to a punitive system is that compensation and restorative justice do not intent for their sanction to harm the offender, as does punishment. By endorsing my argument, at least the first challenge of the missing alternative objection can be overcome, as there would be a coherent alternative to criminal punishment that at a minimum three versions of abolitionism converge on.

In Section 2, I will outline the three abolitionist positions in more detail before analyzing the missing alternative objection to abolitionism in criminal law in Section 3. I will then respond to the first part of the objection in Section 4 by arguing that the above-mentioned versions of abolitionism converge on the same approach to criminal wrongdoing. In Section 5, I will sketch out a response to the second part of the objection, though a comprehensive argument in favor of abolitionism would go beyond the scope of this paper.

## **2. Three types of abolitionism**

Punishment is typically understood as the intentional infliction of harm on offenders by the state which expresses condemnation for the criminal wrongdoing.<sup>11</sup> All three abolitionist theories under scrutiny here have the key aim to justify a system of responses that completely drops the intention to harm the offender, although such harm may still occur as a side effect (as we will see below). This is the main difference to punishment. As this harm is not intended – it is not the point of the sanction – it should be minimized as much as possible and thus faces a lower justificatory burden than punishment.

The three versions of abolitionism that I would like to discuss are compulsory victim restitution, restorative justice, and the public health-quarantine model. All of these agree (in the version I am interested in) that criminal punishment should be abolished but offer very different reasons as to why that should be the case.

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<sup>10</sup> The use of restorative justice procedures can for example depend on the victim's or the offender's consent to the process. It will thus likely not work for all cases, and some form of court procedure will probably still be necessary in the abolitionist framework.

<sup>11</sup> Benn (1958); Feinberg (1965); Flew (1954); Hart (1960).

## 2.1. Compulsory victim restitution

Abolitionists who propose compulsory victim restitution (restitution for short) typically take one of two related positions. On the one hand, they say that all of the arguments in defense of punishment fail, and that we have a viable alternative in restitution that is plausible in its own right.<sup>12</sup> On the other hand, they do agree with punishment theorists that all of the aims that the criminal law pursues are actually justified, but simply consider restitution the more suitable tool to realize these aims compared to punishment,<sup>13</sup> making it preferable.

Restitution claims that offenders should compensate victims for the losses suffered through a wrongdoing. Boonin puts the theory as follows:

When offenders break the law, they cause wrongful harms to their victims. When people cause wrongful harms to their victims, this generates a debt: they owe their victims compensation sufficient to restore them to the level of well-being that they rightfully enjoyed prior to being wrongfully harmed. People who commit such offenses therefore owe such compensation to their victims. When people break the law, it is thus morally appropriate for the state to compel them to make such compensation.<sup>14</sup>

As mentioned above, the morally relevant difference of such an account is that, unlike punishment, restitution does not aim to harm offenders. Of course, offenders are being harmed when they are compelled to provide compensation, but unlike with punishment, where the intentional harm is a crucial defining factor of this type of action, restitution is said to work without the intention to harm.<sup>15</sup> Similarly to compensation, taxation typically involves harm as many taxpayers would likely want to keep more of their money to themselves; but as this harm is a side effect of wanting to pursue certain other ends, rather than being intended, it does not face the same justificatory burden as punishment and the intentional infliction of harm. Thus, different coercive state actions face different justificatory burdens, with punishment (all else being equal) confronted with the highest one given that it intends the harm that is imposed on offenders.

Compulsory victim restitution is not limited to monetary payments as a form of sanction, though such payments are likely the primary tool. For example, when the harm done to the victim(s) involves a wrongful loss to the feeling of safety, then imposing some measures targeting safety on the offender might be justifiable. If a burglar robs several houses in a neighborhood, and the inhabitants feel less safe as a result of it, the offender might owe it to them to restore their feeling of safety. This can be done by compelling the offender to accept some form of surveillance for a specific time, or, in very grave cases, this might even justify some form of incarceration.<sup>16</sup>

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<sup>12</sup> Barnett (1977); Boonin (2008); Golash (2005).

<sup>13</sup> Sayre-McCord (2001); Zisman (2023).

<sup>14</sup> Boonin (2008): 220.

<sup>15</sup> See Cholbi (2010); Hanna (2017, 2020); Wringe (2013, 2019) on a discussion of the intentionality criterion.

<sup>16</sup> Boonin (2018).

You might suspect that such an account does not differ in any meaningful way from punitive theories. But the relevant difference, for example in the case of incarceration, is that because restoring the harm caused to the feeling of safety is the only aspect that justifies the compulsory measure, we are not justified to impose more harm than is strictly necessary to achieve this aim. Even if some form of incarceration were justified, this would entail that the incarceration may not involve other restrictions – such as on the freedom to go to work, access to recreational facilities, seeing family and friends, having access to the internet, etc. – as long as these are compatible with the aim. In most cases, house arrest, rather than incarceration, would likely suffice. There is an important difference between restitution and punishment given that the abolitionist framework demands that the harm be minimized as much as possible, as it is not the point of the imposed sanction. This is also true for the other types of sanctions promoted by abolitionist theories.

## 2.2. Restorative justice

Restorative justice proponents typically conceptualize criminal wrongdoing not as a wrong against the state or legal system, but as a wrong against the victim, the impacted community, and the relationship between the so-called stakeholders of the conflict. A crucial objection to typical court procedures in criminal law practices, in the words of Niels Christie, is that

[t]he victim is a particularly heavy loser in this situation. Not only has he suffered, lost materially or become hurt, physically or otherwise. And not only does the state take the compensation. But above all he has lost participation in his own case. It is the Crown that comes into the spotlight, not the victim. It is the Crown that describes the losses, not the victim. It is the Crown that appears in the newspaper, very seldom the victim. It is the Crown that gets a chance to talk to the offender, and neither the Crown nor the offender are particularly interested in carrying on that conversation. The prosecutor is fed-up long since. The victim would not have been. He might have been scared to death, panic-stricken, or furious. But he would not have been uninvolved. It would have been one of the important days in his life. Something that belonged to him has been taken away from that victim.<sup>17</sup>

Here, the argument against criminal law theories is first and foremost a procedural one (as compared to compulsory victim restitution). The court-based criminal proceedings that are typically used in many jurisdictions should be (largely) removed. Instead, there should be a mediated process where stakeholders of the conflict can discuss the wrongdoing, where the victim has the opportunity to express themselves regarding the impact the wrongdoing had on them, and the offender has a chance to offer an apology or explain their actions. These mediations can take different forms (victim-offender mediation, family counseling, direct, indirect, personal, impersonal, etc.).

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<sup>17</sup> Christie (1977): 7–8.

Stakeholders in the mediation process are given a say in what the sanction in a specific case should look like. As I am discussing abolitionist theories here, restorative justice should be understood as entailing that stakeholders can have a say in the most adequate form that compensation could take for everyone involved. Restorative justice theories can also vary in how much leeway is given to stakeholders. In principle, the sanctioning decision can simply not be part of the restorative process – which instead focuses more on conversation. Or stakeholders could be given the chance to at least suggest a specific sanction, and a judge or jury would then decide whether that suggestion is adequate. In its most radical version, however, restorative justice would entail that the stakeholders decide for themselves on adequate compensation for the victim(s) – maybe at most limited by some rough boundaries set by law.

### **2.3. Public health-quarantine model**

The public health-quarantine model is rooted in specific views regarding the free will debate. In a nutshell, advocates of that approach argue that we should be free will skeptics, and that therefore retributive justifications of punishment fall short. Forward-looking justifications of punishment are argued to fail on independent moral and criminological grounds. What, then, is the alternative? The clue to the central idea is in the name. We should respond to criminal wrongdoing in the same way that we would to a person who spreads dangerous diseases. Caruso summarizes the basic idea of the theory in the following quote:

In its simplest form, it can be stated as follows: (1) Free will skepticism maintains that criminals are not morally responsible for their actions in the basic desert sense. (2) Plainly, many carriers of dangerous diseases are not responsible in this or in any sense for having contracted these diseases. For instance, the vast majority of those who contracted Ebola during the West African epidemic in 2014 were not morally responsible for having contracted the disease. And yet (3) we generally agree that it is sometimes permissible to quarantine them, and the justification for doing so is the right to self-protection and the prevention of harm to others. (4) For similar reasons, even if a dangerous criminal is not morally responsible for their crimes in the basic desert sense (perhaps because no one is ever in this way morally responsible) it could be as legitimate to preventatively detain them as to quarantine the non-responsible carrier of a serious communicable disease.<sup>18</sup>

Instead of retributivism or consequentialism, the public health-quarantine model is based on the idea that we as a society have a right to self-defense, and thus can react to criminal wrongdoing in similar ways as we would to dangerous diseases (which should not imply that offenders have something akin to a disease, but rather that the rationale behind restricting their freedom is the same). But what about the “public health” part of the theory?

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<sup>18</sup> Caruso (2021a): 185.

Rather than punishing already committed wrongs, we should focus more on preventing criminal wrongdoing from occurring altogether. In the same way that we owe it to quarantined people to take measures to help them, we should help criminal wrongdoers to not commit any wrongs in the future. In addition, we as a society have good reasons to prevent diseases from spreading to start with; therefore, we should focus on the societal and health grounds that lead to criminal wrongdoing in the first place.<sup>19</sup>

You might have noticed that neither compensation nor restorative justice appear to play an important role here. None of those features lie at the center of this type of theory, though they have been discussed by the relevant authors in their most recent publications. Before making my argument that all three theories are compatible with each other, and in practice converge on the same alternative to criminal law and punishment, let me outline the missing alternative objection in more detail.

### 3. The missing alternative objection

As abolitionism has been more prominent in recent discussions on the justification of criminal punishment, more and more philosophers have voiced objections against it.<sup>20</sup> While there is a variety of objections, I want to focus here on a principled one. The rationale behind this criticism is that we should not take the idea of abolishing criminal law lightly, even if much of the criticism of punishment is correct. After all, many abolitionists do not argue that we should simply ignore wrongdoing, but that we should impose a non-punitive sanction in response to it. Given that abolitionists have extensively claimed that criminal punishment fails to achieve the aims of an adequate response to wrongdoing (be it the restoration of justice, rehabilitation, reconciliation, etc.), it is on them to show that, first, they have a coherent system to put in place of criminal punishment, and second, that the latter indeed fulfills the function we want it to fulfill.<sup>21</sup>

This is where the problems start. Abolitionists typically spend more time criticizing punitive theories than they spend on developing the details of what an alternative system could look like. And even where alternatives as the ones mentioned above are elaborated upon, we can see that these suggestions differ vastly. This raises the question of which of these alternatives should replace criminal law. As Duff and Hoskins put it in the section on abolitionism in an SEP article on legal punishment: “Abolitionist theorizing about punishment takes many different forms, *united only* by the insistence that we should seek to abolish, rather than merely to reform, our practices of punishment.”<sup>22</sup>

Similarly, Husak writes regarding these theories in a recent comprehensive critique of abolitionism that “[a]n increasing number of commentators embrace a wide

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<sup>19</sup> Caruso (2022): Section 2.

<sup>20</sup> Dagger (2018): 159–175; Husak (2020).

<sup>21</sup> Criminal law abolitionists thus have to actually respond to the missing alternative objection, which is different from other abolitionist movements, such as the abolition of slavery. Slavery did not have to be replaced by a different system altogether, and it did not have to show that there were values in the system worth preserving – and which would be preserved even in the absence of slavery. Criminal law abolitionists, conversely, do make a positive claim that they want a specific alternative to punishment, and that it serves certain goals.

<sup>22</sup> Duff and Hoskins (2021): Section 7, my emphasis.

variety of positions that lack a unifying theme – apart from their adherence to a loosely defined thesis I call ‘criminal law skepticism.’”<sup>23</sup> Here, too, part of the skepticism towards abolitionism comes from the worry that these approaches are missing a unified alternative to put in place of the criminal law.

But why should it be a problem that abolitionists, assuming their criticism of legal punishment were correct, have failed to offer a comprehensive and coherent alternative to it? Husak clarifies the problem: “As every philosopher knows full well, criticizing an idea is much easier than defending a better alternative. Here is where many criminal law skeptics fall short. Without a detailed account of what is alleged to be preferable to our system of penal justice, an examination of a particular strain is necessarily incomplete.”<sup>24</sup>

The missing alternative objection can be described as a two-step problem. First, we need a coherent idea of what to replace criminal law with. We need this because abolitionists typically do not endorse the view that nothing should be done in the face of criminal wrongdoing. And if Duff and others were right in saying that abolitionists are only unified by their negative position regarding criminal punishment, then we would indeed not know what to put in place of criminal law. Thus, the first step is to prove this claim wrong and show that there is in fact a plan for putting in place such an alternative. And, as I want to show, most abolitionists actually converge on the same proposal.

In a second step, a comprehensive defense of abolitionism and the missing alternative objection would go on to show not only the alternative to punishment, but that this alternative actually serves all the functions that we want our responses to wrongdoing to serve. This would not only amount to an argument against the missing alternative objection, but to a full-blown defense of said alternative to punishment. I will briefly outline the content of such a response and point to those who have already worked on this topic. However, the focus of this paper is merely the first step of a response to the missing alternative objection.

#### **4. Abolitionism united: Compensation and restorative justice**

My aim is to show that the three versions of abolitionism presented in this paper converge on the same alternative to criminal law and punishment: firstly the claim that offenders should be made to compensate victims; secondly the claim that from a procedural perspective, restorative processes should be used more frequently than is currently the case. I want to do that by comparing the three different versions to each other and showing that they are all consistent and they converge on these two claims.

##### **4.1. Compulsory victim restitution and restorative justice**

Compulsory victim restitution and restorative justice complement each other very well. While restitution focuses mainly on the type of sanction, namely payments of compensation or other acts of restitution for the victim(s) of wrongdoing, restorative justice focuses on criminal proceedings and urges us to involve all the stakeholders of the conflict.

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<sup>23</sup> Husak (2020): 29.

<sup>24</sup> *Ibidem*: 58.



Couldn't a unified abolitionist theory simply adopt both? At least for certain forms it can, yes. While David Boonin, an advocate of restitution, does not explicitly endorse restorative justice, nothing in his arguments speaks in principle against it. But what he does endorse is that compensation should be proportional to the harm that has been inflicted on the victim (it should restore victims to the level of well-being they enjoyed before, or at least as close to it as possible). This, in principle, can cause some tension with restorative justice. Some versions of restorative justice promote that the stakeholders should come up with their own suggestion for an adequate payment of restitution.<sup>25</sup> This can be at odds with requirements of proportionality, if, for example, stakeholders demand much more or much less than would be proportional given the harm that was inflicted on them.

But again, nothing commits the restorative justice framework to letting stakeholders decide on sanctions completely independently. There is a debate to be had whether we should focus less on proportionality<sup>26</sup> and more on empowerment of the stakeholders of a conflict,<sup>27</sup> but in principle restorative justice procedures can be used without the right to recommend sanctions – and these still have some beneficial effects for victims and offenders.<sup>28</sup> Restorative justice proponents can allow stakeholders to at least make suggestions for the most adequate kind and amount of restitution, while still giving the state the right to have the last say. If the benefits of restorative justice for victims, offenders, and the community at large still prevail within such a framework (which they appear to do, at least according to current research), then there is no conflict between restitution and restorative justice. Also, given that many restitutionists are libertarian, I can also imagine that if all stakeholders were to agree on less than proportional payments of restitution in a restorative process, the robust consent should be sufficient to make the decision legitimate.

#### **4.2. Compulsory victim restitution and the public health-quarantine model**

With these two approaches, a closer look is necessary, as the public health-quarantine model does not include detailed discussions on the role of compensation. However, in a recent response to critics, Caruso mentions the role of contract and tort law in the public health-quarantine model:

As a free will skeptic, I maintain that contract law and tort law are consistent with the rejection of basic desert moral responsibility, since the restitution and compensation of victims can be justified by appealing to the rights of those harmed and notions of responsibility available to the skeptic. That is, contract law and tort law need not assume agents are blameworthy and morally responsible in the basic desert sense, only that they are causally responsible for some breach of contract or negligent act that caused harm and are therefore responsible, in the civil liability sense, for compensating the victim(s).<sup>29</sup>

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<sup>25</sup> For an overview, see Tiarks (2019).

<sup>26</sup> Lacey and Pickard (2015).

<sup>27</sup> Tiarks (2019).

<sup>28</sup> Latimer et al. (2005); Sherman et al. (2015).

<sup>29</sup> Caruso (2021b): 198.

According to this response, free will skepticism and the rejection of basic desert moral responsibility only apply to compensation where these rely on backward-looking justifications for said compensation. The claim that offenders deserve to be compelled to compensate victims because of the wrongdoer's backward-looking desert or blameworthiness does not hold up. Yet forward-looking justifications are not impacted by free will skepticism. And indeed, Caruso and Pereboom argue that taking the offender's non-desert-based responsibility seriously is "reasonable in light of several forward-looking considerations" such as promoting public safety, reconciliation between the stakeholders of the conflict, moral improvement of the wrongdoer, and helping victims with recovery.<sup>30</sup>

In this context, Caruso and Pereboom do not show in detail that consequentialist reasons do in fact justify restitution, but only that they can in principle do so. Their argument is not complete in that sense, but as I have argued elsewhere, the claim has some support.<sup>31</sup> Taking this to be the case, we have good reasons to accept compensation even in the public health-quarantine model, making it compatible with the other approaches in this regard.

Boonin, who defends the compulsory victim restitution model, does not elaborate on why victims ought to have the right to receive compensation — so I cannot really determine whether his theory would presuppose basic desert responsibility. But given that a non-desert-based argument is possible and at least plausible, these two models again converge on the same alternative to criminal punishment.

### **4.3. The public health-quarantine model and restorative justice**

Lastly, we need to cover whether the public health-quarantine model and restorative justice are compatible with each other. It might appear so, given that Caruso and Pereboom again explicitly endorse some form of restorative justice within their framework. The argument is similar as in the previous subsection:

[W]e also have an interest in the recovery and restoration of victims harmed by wrongdoing. On some conceptions, this is secured in part by the wrongdoer being punished on grounds of basic desert. But instead, it might be secured instead by apology and compensation upon recognition of wrongdoing and sincere contrition.<sup>32</sup>

Compensation was already covered, but how does restorative justice enter the picture? Ultimately, the argument is also consequentialist. Apology and contrition are valuable, and restorative justice leads to them, so restorative justice should be used when addressing wrongdoing.

But there is an important problem here. Restorative justice is typically conceived of as an approach where the stakeholders of the conflict come together and the victim has the opportunity to share their perspective on how the wrongdoing impacted them. This will often involve blaming offenders for what they have done. But there is supposed to

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<sup>30</sup> Caruso and Pereboom (2022): 10.

<sup>31</sup> Zisman (2023).

<sup>32</sup> Caruso and Pereboom (2022): 37.

be no room for backward-looking (basic desert) blame in the public health-quarantine model. How, then, can these two approaches work together? Caruso's solution is to restrict restorative justice procedures to using types of responsibility that are compatible with the rejection of basic desert:

For instance, a restorative justice model consistent with free will skepticism could appeal to *answerability* and *attributability* conceptions of moral responsibility rather than *accountability*. A conversational model of forward-looking moral responsibility like that proposed by Pereboom (2013, 2014) could, for example, serve as a basis for an exchange between victim and offender in a way that does not invoke backward-looking blame or basic desert (see Section 8.3). Such an exchange could aid both in the rehabilitation of offenders and in the recovery of victims.<sup>33</sup>

Blaming people in a backward-looking sense (accountability) should indeed be rejected if we endorse free will skepticism. But we can still ask offenders what led them to their actions (answerability), and we can criticize the type of character that led them to their behavior (attributability). So the victim and the stakeholders can have such a conversation, only without blame in the accountability sense.

How plausible is this response? I think we should reserve at least some skepticism. In my opinion, the truth is that we simply do not have data as to whether a free will skeptic's version of restorative justice will achieve the same as the one we have some data on. In the above quote, Pereboom and Caruso only say that blameless forms of responsibility "could aid" and could serve as a basis for restorative justice. But that is not good enough to make their case convincingly. We barely know any details about to what extent current restorative justice programs help victims – and to the extent that they do help, we – as far as I am aware – are not entirely sure which features of the process are essential.

But even if blameless restorative justice does not work as well as Caruso and Pereboom hope, I think free will skepticism has the resources within the theory to allow for blame to enter the picture. Remember that, in principle, forward-looking justifications of blame and punishment are available to the free will skeptic. Forward-looking punishment is rejected on independent moral grounds, but the same need not apply to blame. So, even if it were true that restorative justice without blame does not work, and if restorative justice were very important for the aims of restoring the victim, then the free will skeptic can in principle endorse blame in such a framework from a forward-looking perspective. Thus, there is no principled conflict between restorative justice and the public health-quarantine model.

## 5. The missing second step

I have argued that the currently most popular versions of abolitionism – compulsory victim restitution, restorative justice, and the public health-quarantine model – all converge on the same alternative to criminal law: compensation as a type of sanction and

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<sup>33</sup> Caruso (2021a): 286.

restorative justice as a procedural approach. If we accept this, then the first part of the missing alternative objection can be rejected.

Of course, the second step would require us to dive much deeper into a positive defense of compensation and restorative justice. The claim that there is a coherent alternative to punishment is just part of the response. The next step would be to show that such an account can make good on its promises to fulfill the functions that we want the account to fulfill. There is disagreement as to which functions are important, but whichever these are, abolitionists need to show that their alternative is able to perform.

This is where Husak's criticism picks up.<sup>34</sup> Do compensation and restorative justice adequately express censure? Can and should they adhere to the proportionality of their sanction? Will the public be content with a non-punitive alternative? Will the alternative be good enough to keep society at large safe?

Husak is right in pointing out that abolitionists need to respond to all of these worries, though I am less convinced of his optimism that defenders of punishment have already convincingly made the case that punishment achieves these objectives (after all, that is exactly what abolitionism denies). This paper was only concerned with the first part of a response to the missing alternative objection, so I cannot go into a detailed defense of the second part. I have argued elsewhere that the chances are quite good that compensation and restorative justice are adequately expressive, do justice to the concern of safety, can respect proportionality, etc.<sup>35</sup> Other abolitionists<sup>36</sup> have attempted answers to these issues as well, and they deserve a detailed discussion – something which in my opinion Husak, for example, does not give enough credit to.

This is not to say that abolitionists have solved these important issues sufficiently yet. Whether alternatives to punishment can shoulder these problems is as much part of an ongoing debate as is the question whether punishment can do so. As such, my aim in this paper was to show that we should take both equally seriously as proposals on how to respond to criminal wrongdoing.

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<sup>34</sup> Husak (2020).

<sup>35</sup> Zisman (2023).

<sup>36</sup> Boonin (2008): Chapter 5.

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