

CRIMINAL PUNISHMENT AS A RESTORATIVE PRACTICE

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This article offers a conceptualization of crime and punishment that serves to explain current trends in criminal law doctrine and, at points, recommends their reconsideration. Drawing on Hegel's concept of mutual recognition and on insights developed in fair-play accounts of punishment, the article suggests that crime disrupts the subject-subject relation between the victim and the offender, and that punishment works to restore this relation. To advance this argument, the article first proposes that subjects can only exist in equilibrium of connectedness and separateness whereby they mediate each other's equal personal boundaries. It then analyzes crime as a failure by the offender to mediate the victim's equal boundaries, which creates inequality of boundaries and brings about the collapse of the equilibrium and of the victim's subjectivity. Next, it is suggested that punishment re-equalizes the parties' respective boundaries, thus restoring the disrupted equilibrium and the victim's subjectivity. The article then demonstrates that this conceptualization helps explain current developments in areas such as mens rea and justificatory defenses, and that it further provides theoretical foundations for critical evaluation of well-established doctrines such as self-defense and attempt.

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INTRODUCTION

The idea that criminal punishment has restorative aspects is not new; neither is the idea that these aspects bear implications for criminal law doctrine. In his seminal *Punishment, Communication, and Community*, Antony Duff has provided the most recent and probably most robust restorative interpretation of punishment.¹ For Duff, restoration requires a punitive response, “in that the kind of restoration that crime makes necessary can (given certain deep features of our social lives) be brought about only through retributive punishment.”² Yet Duff suggests that restorative punishment may well take the form of mediation,³ and that only rarely, if at all, would it take the form of imprisonment.⁴ His restorative account of punishment thus does not seek to justify traditional criminal punishment. Indeed, only few accounts of traditional criminal punishment are restorative through and through. Even fewer accounts consider the implications of the restorative nature of traditional punishment for criminal law doctrine.⁵ Restorative accounts of traditional criminal punishment, which bear implications for criminal law doctrine, have been developed mainly in two fairly different strands of the literature: the Hegelian strand and the fair-play strand.

For Hegel, punishment restores a constitutive aspect of subjectivity that has been violated by crime. The clearest exposition of Hegel’s account of crime and punishment is found in his *Philosophy of Right*,⁶ but this exposition should be read together with the intriguing *Phenomenology of Spirit*.⁷

1. R.A. DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY* (2001).

2. R.A. Duff, “Restoration and Retribution,” in *RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS?*, 43 (Andrew von Hirsch et. al. eds., 2003).

3. *Id.* at 53.

4. *Id.* at 57–58.

5. An exception can be found in Alan Brudner’s Hegelian account of criminal punishment in his *Punishment and Freedom: A Liberal Theory of Criminal Justice* (2009).

6. G.W.F. HEGEL, *OUTLINES OF THE PHILOSOPHY OF RIGHT* (T.M. Knox trans.; Stephen Houlgate rev., ed., intro., 2008) (1952, 1821).

7. HEGEL’S *PHENOMENOLOGY OF SPIRIT* (A.V. Miller trans., J.N. Findlay, analysis, forward, 1977) (1807).

When these sources are read together, they suggest that subjects are constituted through processes of mutual recognition; that crime is an instance of wrongful misrecognition; that righting the wrong of crime involves healing processes replacing misrecognition with recognition; and that these processes are essentially substantiated as state punishment. State punishment is a practice of confession by the particularistic “acting consciousness” (here: the offender) and of forgiveness by the universalistic “judging consciousness” (here: the modern just state)—a practice that culminates in their mutual recognition. As recently demonstrated by Alan Brudner, such an account of crime and punishment can provide the basis for detailed critical evaluation of criminal law doctrine.⁸

Hegel’s restorative account of state punishment builds on two controversial assumptions: that the modern state is the ultimate universalistic or just entity that emerges at the end of a long course of historical development,⁹ and that it is an organic whole that constitutes individual subjects rather than an aggregation of individual subjects that exist prior to it. Although these assumptions lay the ground for constructive critique of social and political institutions, they may devalue persons living under undeveloped institutions, and they further leave no place for the subject to exist as such and at the same time to maintain its distance from the state. Hegelian theories of crime and punishment are thus vulnerable to critique over the implications of their underlying assumptions.

The second strand of penology that considers punishment as restorative is the “fair-play” strand, and predominantly Herbert Morris’ pioneering work in this area.¹⁰ Morris’ conceptualization of crime and punishment is semicontractual. For Morris, punishment restores equality of liberties and burdens that has been violated by crime. He describes crime as the unfair acquisition of a share of freedom that other members of society had forgone.¹¹ The criminal “renounces a burden which others

8. BRUDNER, *supra* note 5.

9. For an interesting interpretation, see Sibyl M. Schwarzenbach, *Rawls, Hegel, and Communitarianism*, 19(4) POL. THEORY 539 (1991).

10. Herbert Morris, *Persons and Punishment*, 52 THE MONIST 475 (1968). See also John Finnis, *The Restoration of Retributivism*, 32 ANALYSIS 131 (1972); GEORGE SHER, *Desert* 69–90 (1987); Richard Burgh, *Do the Guilty Deserve Punishment?*, 79 J. PHIL. 193 (1982). For a fair-play theory of sentencing, see Michael Davis, *Criminal Desert and Unfair Advantage: What’s the Connection?*, 12 LAW & PHIL. 133 (1993).

11. Morris, *supra* note 10.

have voluntarily assumed and thus gains an advantage which others, who have restrained themselves, do not possess.”¹² In response to crime, punishment encroaches upon the criminal’s freedom, thereby “taking away” from the criminal the extra share of liberty that was unfairly acquired. Equality of freedoms and burdens is thereby restored. Later literature has demonstrated sporadic possible implications of Morris’ restorative account for criminal law doctrine.¹³

Yet Morris’ account has been criticized as misrepresenting crime and punishment. According to this criticism, Morris mistakenly presumes that one is *a priori* free to commit crime, and that the wrongness of crime lies not in its impact on the victim but in taking a share of freedom in a way that is unfair to all other members of society.¹⁴ Fair-play accounts are thus also vulnerable, even if to a different type of critique.

This article follows these two theoretical strands in suggesting that criminal punishment is a restorative practice, but it proposes a different and hopefully less vulnerable analysis of punitive restoration—an analysis that develops and integrates some of the insights offered by each of these strands. The article draws on some of Hegel’s assumptions about subjectivity and intersubjectivity to construct a semicontractual account of crime and punishment that focuses on the relationship between the offender and the victim. It proposes that criminal punishment is restorative of the victim’s subjectivity as it is determined in her relationship with the offender. The article further proposes that this analysis can explain various criminal law doctrines and provide normative basis for their evaluation.

To advance this argument, a preliminary account of (inter)subjectivity is introduced. Naturalizing and qualifying some of Hegel’s assumptions about recognition, it is suggested that subjects exist in equilibrium of connectedness with and separateness from one another. In this equilibrium, subjects recognize one another’s (incomplete) independence or qualified separateness. They do so through a mutual exercise of respect for—and mediation of—each other’s personal boundaries.

12. *Id.* at 477. Various authors have attempted to develop the idea of unfair advantage introduced by Morris. See Finnis, SHER, Burgh, and Davis, cited *supra* note 10.

13. See, e.g., Michael Davis, *Why Attempts Deserve Less Punishment than Complete Crimes*, 5 LAW & PHIL. 1–32 (1986).

14. R.A. DUFF, TRIALS AND PUNISHMENTS 211–17 (1986). For other criticisms, see David Dolinko, *Some Thoughts about Retributivism*, 101 ETHICS 537 (1991).

The article then draws on some insights offered by fair-play accounts to clarify the significance of equality for mutual recognition. It is suggested that equilibrium of qualified separateness can only be maintained as long as subjects hold equal boundaries with respect to one another. Only equals can keep each other's desire out, thus mutually maintaining their (incomplete) independence.¹⁵ Qualified separateness thus presumes and requires equality—equality of boundaries and equality of agency.

Crime is then analyzed as a unilateral and asymmetrical transgression of the victim's boundaries. This transgression involves the creation of inequality of boundaries between the offender and the victim, the disruption of the equilibrium of qualified separateness, and the taking over of the victim by the offender's desire.

Next, it is suggested that the response to crime must be restorative—it must undo crime by re-equalizing the boundaries that the parties hold with respect to one another, thus restoring the equilibrium of qualified separateness. Re-equalization of the parties' personal boundaries and restoration of the equilibrium can only be achieved through the imposition of punishment. Punishment is thus justified as a practice that works to restore the victim's subjectivity in her relationship with the offender.

Last, the article discusses the ways in which the proposed conceptualization of crime and punishment can not only enrich our understanding of well-established criminal law doctrines, but also provide normative foundations for their critical evaluation. Furthermore, it will be shown that the proposed account can explain current trends in criminal law, such as subjectivism, expansion of justificatory defenses, and criminalization of exploitation.

I. CRIME AND PUNISHMENT: MISRECOGNITION AND RECOGNITION

A. Mutual Recognition, (Inter)subjectivity, and Qualified Separateness

Hegel suggests that subjectivity is constituted in universalistic processes of mutual recognition. Mutual recognition takes place upon encounter between

15. And hence also their internal unity. See CHRISTINE M. KORSGAARD, *SELF-CONSTITUTION: AGENCY, IDENTITY, AND INTEGRITY* (2009).

two wills. The human will is, for Hegel, the universal rational will that determines itself through contingencies (that is, through the particular characteristics of every individual). Upon an encounter between two wills, each will's universality is reflected back to it from the other will.¹⁶ Each will thus looks back to itself—or returns to itself—thereby acknowledging that (1) the Other cannot be me despite her universality, because her universality is otherwise determined; (2) the Other cannot be mine despite her contingent existence, because her contingent existence is a determination of universality, and universality makes her un-possessable, or free, like me.¹⁷ This coordinated acknowledgement of the Other as a subject that possesses universality and contingency is mutual recognition. It is the establishment of the rational and universal subject-subject relation.

Through mutual recognition self and Other become separate subjects delineated by personal boundaries, which are in their exclusive control.¹⁸ Rather than uncontrolled expansion that is everything and nothing at the same time, the will that returns to itself gains, through this very exercise, real dominion or control over its bounded self.¹⁹ The will is now realized only through specific contingencies in which it manifests itself, for example, one's body, one's property, or one's concrete preferences.²⁰ The mutual return-to-self therefore marks the realm of the fully formed bounded subject.

Personal boundaries can be fundamental or nonfundamental. Fundamental boundaries are basic boundaries that allow the will to express itself further through other nonfundamental boundaries. Fundamental boundaries include, first and foremost, bodily boundaries. The will requires a bounded body to be able to further express itself, for example, through

16. In Hegel's terminology, mutual recognition takes place when self-consciousness encounters another self-consciousness. Upon this encounter, self-consciousness that has gone out of itself identifies its universality (or rationality) in the other self-consciousness, and then returns to itself, leaving the other self-consciousness free. HEGEL'S PHENOMENOLOGY, *supra* note 7, at III–12 (paras. 178–84).

17. See HEGEL'S PHENOMENOLOGY, *supra* note 7, at III–12 (paras. 178–84).

18. Compare with Hegel's account of recognition in the PHENOMENOLOGY, *supra* note 7. The proposed account places the spotlight on the role of the self in its own constitution.

19. Compare with Hegel's account of freedom, a clear analysis of which can be found in Merold Westphal, *Hegel, Freedom, and Modernity* (1992) 3–19.

20. Compare with Philip Pettit's notion of rights, for example, in *The Consequentialist Can Recognise Rights*, 38 PHIL. Q. 42 (1988).

its musical tastes and tendencies. The term “bodily boundaries” is used in a broad sense here, referring to the will’s exclusive control over the body and over action, which is a bodily manifestation of concrete wills. Arguably, fundamental boundaries also include property, since gaining full subjectivity requires objects in relation to which subjectivity is determined, and property is, allegedly, a pure object against which subjectivity can be fully expressed.²¹ Other boundaries and distinctions, such as the self’s tastes or preferences, are nonfundamental; they are inessential expressions of the will. They are not required for the will to be able to express itself through yet other particularities.²² The subject can thus be initially described as a self-conscious will that gains its existence through fundamental boundaries and further expresses itself through nonfundamental boundaries. This article is concerned with fundamental boundaries that constitute what can be termed “bare subjectivity,” and that, as we shall see below, crime transgresses.

B. Equilibrium and Equality

The mutuality of mutual recognition opens the door to a semicontractual analysis of the universal subject-subject relation—an analysis that is based on the notion of equality.

In mutual recognition subjects exist in equilibrium with one another. Each of the mutually recognizing wills mediates the other’s identification of universality and return-to-self. Connectedness and separateness are thereby formed in a continuous exercise of constitution and dissolution of boundaries. We can therefore speak of equilibrium in which subjects successfully move toward, or create and recreate, their qualified separateness that is delineated by their personal boundaries.

Yet to be successful, the constant movements of the two wills must reflect and produce equality. In equilibrium of qualified separateness, subjects commonly create and maintain *equal* fundamental boundaries with respect to one another. To understand the nature, the significance, and the essentiality of this equality, the characteristics of boundaries should be

21. Compare with Meir Dan Cohen, *The Value of Ownership*, 9 J. POL. PHIL. 404 (2001).

22. Ends reflect the ordering or structure of tastes, desires, etc.; as such they are connected with the Universal, or with unity that is expressed internally and externally.

further observed. It was explained earlier that boundaries are particularities to which the will withdraws upon encounter with an Other; that this withdrawal entails the formulation of delineated dominion or exclusive control over these particularities; and that fundamental boundaries are those boundaries that are essential for the constitution of subjectivity. Another element can now be added to this characterization of (fundamental) boundaries: (fundamental) boundaries are also areas of vulnerable force or power. They are areas of force or power because they are the domain of the will, which is a source of movement and life; and they are areas of vulnerability, because, being mediated by an Other, they are always at risk of transgression by that Other. Rather than mediating dominion over fundamental particularities, the Other might negate dominion;²³ rather than recognizing and returning to itself, the Other might misrecognize and intrude. And to avoid misrecognition and intrusion, fundamental boundaries must be kept equal.

As long as personal boundaries are equal, subjects can keep each other's particularistic desire out.²⁴ Each of the mutually recognizing wills identifies itself in the other *who is equal* to it. It thereby becomes aware of the other's force and of its own vulnerability, and acknowledges that only mutual return-to-self will allow subjectivity to persist. The two wills then mediate each other's return-to-self, thus (re)establishing equal fundamental boundaries and (re)constituting the equilibrium of qualified separateness. We come across one another, we intertwine, our wills meet or clash, but amidst constant and intensive interaction, our equal fundamental boundaries maintain our agency.²⁵ Equality of boundaries is thus an essential aspect of the equilibrium, without which it is doomed to collapse.

23. The next subsection clarifies this point: since the boundary is shared—the boundary of one's body is also the boundary of the Other's will—its existence requires that the Other's will is bounded, or returns to itself.

24. For a discussion of Hegelian desire and its role in self-consciousness, see for example, Robert Pippin, *Hegel on Self-Consciousness: Desire and Death in the Phenomenology of Spirit* (2012).

25. This derivation of a minimal principle of equality avoids the levelling down objection discussed in Andrew Mason, *Egalitarianism and the Levelling Down Objection*, 61 ANALYSIS 246 (2001); Thomas Cristiano & Will Braynen, *Inequality, Injustice, and Levelling Down*, 21 RATIO 392 (2008); Nils Holtug, *Egalitarianism and the Levelling Down Objection*, 58 ANALYSIS 166 (1998).

C. Crime

We can now move on to the analysis of crime. This subsection takes rape, torture, and continuous abuse as instances of extreme criminality that bring to light that which characterizes all crime, namely, the destruction of the victim's subjectivity in her relationship with the offender. It suggests that crime brings about the destruction of the rational and universal subject-subject relation between the parties. The tortured victim goes through internal transformation that leaves him empty of his own self in his relationship with the torturer—he becomes a mere mouth of his torturer;²⁶ the raped or abused victim loses sight of the reality of her relationship with her abuser, and she cannot identify her own abuse within this relationship.²⁷ These alterations reflect a transition from a state of equality between offender and victim to a state of inequality; they are expressions of the disruption of the universal equilibrium of qualified separateness.

In the case of crime, rather than recognition, misrecognition takes place: the offender who encounters the victim fails to identify himself in the victim; he does not acknowledge the humanity or universality of the victim, which they both have in common. Therefore, he does not return to himself and (re)create together with the victim their equal fundamental boundaries, or the universal subject-subject relation. Rather, he disregards what was until that moment the victim's personal boundary (created and recreated by the offender and the victim through their pre-crime mutual noninterference), and deploys his force to transgress it.

Transgression has four logically consecutive meanings: rather than returning to himself, the offender uses his force to push away the victim's boundaries; one of the victim's boundaries is eliminated, removed, or "opened"; the parties' boundaries are no longer equal; and the offender's desire (which is now adopted as the principle of his will) intrudes the victim. This sequence of meanings is the collapse of the equilibrium of qualified separateness. Due to the inequality of fundamental boundaries brought about by the offender, the conditions for successful movements

26. See ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD*, ch. I (1985), to which Honneth also refers. See also David Sussman, *What's Wrong with Torture?*, 33 *PHIL. & PUB. AFF.* 1 (2005).

27. Indeed, help for victims of domestic violence includes helping them identify the violation. See, e.g., *Recognising Abuse*, <http://www.refuge.org.uk/get-help-now/help-for-women/recognising-abuse/>.

toward qualified separateness are no longer present, and the movements fail. In this way crime undermines the victim's subjectivity in her relationship with the offender. The universal subject-subject relation collapses.

The actual expression of this violation of subjectivity is to be found in the forces that motivate the victim for action in her relationship with the offender. Although the victim can still identify some distinction between herself and the offender, and even between her particularistic will and the offender's particularistic will, she is unable to keep the offender's particularistic will out and prevent it from becoming her motivating force.²⁸ Following the intrusion, what motivates the victim's actions in this relationship is not her independently formulated reasons but the offender's particularistic will that has overtaken her.

This alteration of the victim's motivations lasts during and after the intrusion. During the intrusion, the victim is forced to react to the attack (by submitting or by struggling) rather than maintain independence. She becomes, as it were, an extension of the offender, or the offender's tool, rather than a subject motivated by reasons. But the implications of the intrusion do not cease to exist once the intrusion has been completed. This is so because the intrusion is an intrusion by the offender's will, which has adopted the offender's desire as its principle; and whereas desire is contingent and subject to limitations of time and space, the will is infinite. The offender's intrusive will, which was realized through his contingent desire, maintains control over the victim even when the commission of crime has been completed and the contingent desire has withdrawn. Hence the equilibrium of qualified separateness is not restored. The victim's lack of independence thus remains a feature of the parties' relationship.

This permanent nature of the alteration can be demonstrated in cases of continuous victimization as well as in cases of random criminality. In cases of continuous victimization, the victim's will and the offender's desire remain concretely entangled during and following each act of victimization (the desire never fully withdraws). Absent a restorative process, the actions

28. Or if the Rawlsian image of the moral subject is taken on board—crime makes the victim less capable of acting based on suspension of, or abstraction from, (the Other's) desire, which is beyond her control, as required by the universal standpoint. The victim is less capable of any meaningful exercise of self-legislation in the realm of agency and value. Compare with Robert Bruce Ware, *Hegel: The Logic of Self-Consciousness and the Legacy of Subjective Freedom*, ch. 6 (1999); and with Schwarzenbach, *supra* note 9, who provides one example for a possible interpretation of Rawls in Hegelian light.

of a battered woman in her relationship with her abuser may be ones of submission accompanied by rage, and of fear; they are not actions of a separate soul who recognizes its independence.²⁹ Furthermore, the implications of the abuse might remain even after the abuse has stopped, for example, because the abuser has lost his physical ability to abuse, or even because he has decided to change his behavior. The sense of violation, which is an expression of lost subjectivity, with its implications for the woman's abilities in the relationship, remains. In cases of a single random criminality, in the face of which the victim shrugs her shoulders, a similar process takes place, though its concrete expressions are different. Notwithstanding her indifference, the victim whose car has been stolen will not want to have anything to do with the thief, because their potential relationship is now ruined. It is ruined because the thief has taken hold of her area of dominion, and this fact has become a feature of any relationship they might have. One of the victim's boundaries has been eliminated, and the inequality of boundaries with its significance for the equilibrium of qualified separateness will find its destructive, entangling expression in any such developing relationship. The alteration of motivations is thus permanent both when crime is continuous and when it is random.

The intrusion alters the victim's motivations even where there is no out-front attack and the victim does not know that she has been wronged, like in the case of criminal fraud.³⁰ In such a case, the victim is not conscious of the fact that her boundaries have been transgressed and that the offender's desire has gained control over one of her fundamental constituents (her control over her property), but in fact this is how things are. Her dominion over her property has become hollow in this relationship. The victim's qualified separateness is therefore a false one, and the relationship is not one of two independent subjects.

29. See, e.g., LENORE E.A. WALKER, *THE BATTERED WOMAN SYNDROME* (3rd ed. 2009) (especially ch. 4 on learned helplessness); Lenore E.A. Walker, *Post Traumatic Stress Disorder in Women: Diagnosis and Treatment of Battered Woman Syndrome*, 28 *PSYCHOTHERAPY: THEORY, RESEARCH, PRACTICE, TRAINING* 21 (1991).

30. Criminal fraud (and other related offenses) has given rise to various debates, including debates over the justification underlying its prohibition and the limits of the prohibition. For a discussion, see Stuart Green, *Lying, Stealing, and Cheating: A Moral Theory of White Collar Crimes* (2007).

D. Restorative Punishment

For the misrecognition of crime to be replaced by rational and universal recognition, the parties' boundaries have to be re-equalized so that the equilibrium of qualified separateness is restored.³¹ This section analyzes punishment as a practice that replaces transgressive particularity with universal rationality; a practice that reestablishes equality of boundaries between the offender and the victim, and reinstates the equilibrium of qualified separateness.³²

The normative significance of punishment is rooted not so much in its universalistic form but in its universalizing substance or content. Punishment restores the universal subject-subject relation between the offender and the victim. Restoration is achieved thanks to two characteristics of punishment:

First, it is transgressive of the offender's fundamental boundaries. Punishment may forcibly cross the offender's bodily boundaries in the broad sense described above, namely the boundaries that mark the will's exclusive control over the body and over action. This is achieved through the imposition of bodily restraints (imprisonment) or of bodily action (punishment in the community). Alternatively, punishment may cross the offender's boundaries of property by way of imposing a fine.

Second, this punitive transgression stands in symmetrical relation to the offender's original transgression of the victim's boundaries. Crime took advantage of the vulnerability of the victim's boundaries to eliminate one of them; it therefore created inequality of boundaries, and the logical and actual implication of this inequality is intrusion on the victim by the offender's desire and the denial of his subjectivity. Punishment symmetrically eliminates one of the offender's boundaries.

These two characteristics of punishment bring about mutual recognition. Following the imposition of punishment, the offender's transgressive

31. Compare with Brudner's interpretation of Hegel in BRUDNER, *supra* note 5, at 47.

32. Hegel's analysis of crime in the *Philosophy of Right* (*supra* note 6) does not include explicit reference to his analysis of transgressive human action in the *Phenomenology* (*supra* note 7). Brudner refers to punishment as "denying the denial" of the authority of mutual recognition as Law; but this too does not seem to provide a sufficient justification for the imposition of crime, since it is doubtful whether punishment is the only way to deny this denial, and Brudner's own discussion implies that this may not be the case. See Liat Levanon, *Personhood, Equality, and a Possible Justification for Criminal Punishment*, 27 CANADIAN J.L. & JURISPRUDENCE 439, 469-71 (2014).

will encounters the universal but (at that moment) equally transgressive punitive will, which is deployed by the state on behalf of the victim.³³ The offender's will then identifies its own transgressivity in that punitive will; and it defends itself from this transgressivity by returning to itself, thereby also mediating the return of the victim's will to its own self. The victim regains his independence and qualified separateness, and abstracts from the offender's particularistic will. Now, the offender's universality is reflected back to him from the victim, and he successfully identifies it. This entire process is the restoration of the universal rational structure of mutual recognition; it is the reinstatement of the equilibrium of qualified separateness. Punishment thus "fixes" the universal equilibrium of qualified separateness, restoring the victim's subjectivity in his relationship with the offender.

Since state punishment is exercised on the offender on behalf of the victim, it carries significance for the relationship between the two, and only for this relationship. It is the victim's universalistic will that is imposed by the state on the offender in the context of their relationship, rather than the will of other members of society or indeed that of the state. Accordingly, only the offender's boundaries with respect to the victim are altered. The offender's boundaries with respect to other members of society have not been altered through punishment, and equilibrium between the offender and others is maintained.

A related implication of this bilateral understanding of crime and punishment concerns the frequency of punishment. If crime is not entirely destructive of the victim's overall subjectivity but rather only affects it in the context of her relationship with the offender, the duty to punish the offender can be foregone in appropriate cases. The local nature of crime allows for some flexibility in the imposition of punishment. This possibility of foregoing punishment in appropriate cases can explain and even justify the low frequency of punishment in the modern state. It can further support reference to alternative nonpunitive dispute resolution mechanisms in some cases—accepting that the intrusion will remain intact while other aspects of the injury, such as the sense of emotional offense and the loss of confidence in shared values, will be addressed. The proposed account can therefore justify punishment, but it does not necessitate punishing in every case.

33. The next subsection discusses the imposition of punishment by the state.

E. Between Hegel and Morris

The above discussion of crime and punishment started with Hegel. It adopted the Hegelian framework for analyzing subjectivity in the following respects: it acknowledged the significance of mutual recognition for the constitution of subjectivity; and it took mutual recognition to be a process that involves cooperation between self and Other.³⁴ The account further used the Hegelian framework to conceptualize crime as an instance of misrecognition that violates subjectivity and punishment as re-cognition that can undo crime and (re)constitute subjectivity.

The discussion has, however, departed from Hegel in the analysis of the social and political context of mutual recognition; in the analysis of the exact challenge crime poses for mutual recognition; and in the understanding of the way punishment works to undo this challenge.

As for the social and political context of mutual recognition: unlike Hegel, the proposed account suggests that in the context of crime and punishment, the mutually (mis)recognizing subjects are the offender and the victim, rather than each of them and the state.³⁵ In collapsing crime and punishment into bilateral justice, the proposed account is closer to Victor Tadros' account that suggests that by being punished, the offender's duty to the victim is fulfilled.³⁶ This bilateral understanding of crime and

34. The proposed exposition of this cooperation will be partly informed by Axel Honneth illuminating account of Hegelian mutual recognition. AXEL HONNETH, *THE STRUGGLE FOR RECOGNITION: THE MORAL GRAMMAR OF SOCIAL CONFLICTS* (1995).

35. Such an assumption drifts away from Hegelian philosophy of the subject. It draws on psychoanalytic theory, and especially on Donald Winnicott's object relation theory (see especially D.W. WINNICOTT: *THE CHILD, THE FAMILY, AND THE OUTSIDE WORLD* (1964); Donald W. Winnicott, *The Mother-Infant Experience of Mutuality*, in *PARENTHOOD: ITS PSYCHOLOGY AND PSYCHOPATHOLOGY* 245 (E.J. Anthony & Therese Benedek eds. 1970); DONALD W. WINNICOTT, *MATURATIONAL PROCESSES AND THE FACILITATING ENVIRONMENT: STUDIES IN THE THEORY OF EMOTIONAL DEVELOPMENT* (M. Masud & R. Khan eds. 1965); Donald W. Winnicott, *The Theory of Parent-Infant Relationship*, 41 *INT'L J. PSYCHOANALYSIS* 585 (1960). For a brief account, see MICHAEL JACOBS, *D.W. WINNICOTT* 34-37 (Key Figures in Counselling and Therapy, Windy Dryden ser. ed., 1995). Yet the structure of mutual recognition offered by Hegel is very close to the structure offered by Winnicott. See Honneth's illuminating reference to object relation theory in his naturalization of Hegel (*supra* note 34, at ch. 5). Full development of a bilateral account of subjectivity goes beyond the scope of this article.

36. For Tadros, an attacker has a duty to rectify the relevant harm to the victim; the duty is fulfilled by carrying the burden of general deterrence, thus preventing additional (and certain) attacks on the victim; and additionally, the attacker has a duty toward the victim to

punishment resonates with the increasing acknowledgement of victims' rights and roles in the criminal justice system.

Accordingly, the proposed account also departs from Hegel in conceptualizing the challenge for mutual recognition that is posed by crime. It does not assume, like Hegel, that crime violates state-acknowledged Right. Rather, it assumes that crime undermines the conditions of bilateral mutual recognition. The proposed account further assumes, this time together with Morris, that the relation between mutually recognizing subjects is a semicontractual relation for which equality is central. It is also assumed, with Morris, that crime violates this equality and punishment restores it. Yet the relevant equality is not equality of liberty between all the citizens, as suggested by Morris, but equality of personal boundaries between the offender and the victim.³⁷ Crime is an instance of misrecognition whereby the offender creates inequality of boundaries between himself and the victim, and thereby intrudes the victim's boundaries.

Building on this conceptualization of crime, the proposed account further departs from the Hegelian analysis of the way in which criminal punishment restores that which has been violated by crime. Rather than restoring the validity of Right in the context of the just state, the proposed account advances the argument that punishment reinstates equality of boundaries between the offender and the victim, thereby restoring mutual recognition and correcting the victim's violated subjectivity. This conceptualization accords with the increasing acknowledgement of equality and fairness as the foundations of justice without paying the price of an artificial understanding of the nature of crime.

II. OBJECTIONS TO THE PROPOSED ACCOUNT

A. State Punishment

The objection regarding state punishment casts doubt on the ability of the proposed account to justify state punishment rather than (undesirable and

carry a burden that is as heavy as the burden the victim could permissibly have imposed on the attacker in self-defense. See VICTOR TADROS, *THE ENDS OF HARM: THE MORAL FOUNDATIONS OF CRIMINAL LAW* 277, 283, 291 (2011).

37. A relationship in which freedom—that does not include the self-defeating freedom to transgress boundaries—exists.

unjustifiable) private punishment. The proposed analysis has located the locus of crime in the relationship between the offender and the victim;³⁸ the state has been posited in the background of this relationship. But when it comes to criminal punishment, the state rather than anyone else is the active player. This coming to the forefront of the state requires explanation and justification.

There are three reasons why punishment is to be imposed by the state. First, to be able to reestablish the universality of mutual recognition, the punishing will must be at the same time not only particularistic and transgressive but also universalistic. As the offender's will withdraws, the punishing will must be able to recognize its own universality in the offender, thereby mutually withdrawing and reestablishing equilibrium of qualified separateness. In other words, the imposition of punishment must express a universal standpoint, namely a standpoint that suspends particularities.³⁹

Yet adopting the universal standpoint might be a difficult task, particularly in the context of a criminal conflict. It involves identifying and suspending the particularistic, which often appears to be universal.⁴⁰ Private agents can never be sure they fully abstract from particularity, and so their standpoint can never be sure to be the universal standpoint. Furthermore, when the private agent is a victim whose boundaries have been transgressed by the offender and who is therefore incapable of universal rationality in the relationship, the universal standpoint is beyond reach. This becomes crucial in the context of punitive action, which is transgressive of fundamental boundaries, and hence potentially detrimental to the offender's subjectivity. A victim's response to crime is therefore always at least suspected as merely private revenge—as an asymmetrical transgression of the offender's boundaries that does not correspond to his crime but rather

38. Victor Tadros makes a similar move (see *supra* note 36).

39. Compare with Kant's comment on the amount of punishment: "it must be well understood, however, that this determination [must be made] in the chambers of a court of justice (and not in your private judgement). All other standards fluctuate back and forth and, because extraneous considerations are mixed with them, they cannot be compatible with the principle of pure and strict legal justice." (IMMANUEL KANT, *METAPHYSICAL ELEMENTS OF JUSTICE* 138–39 (THE COMPLETE TEXT OF THE METAPHYSICS OF MORALS, PART I, John Ladd trans., intro., 2nd ed. 1999) (1797). But see Rawls' different justification for state punishment in John Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 3 (1955).

40. It may be hard to tell whether one's wish to impose sanctions on a polygamous minority, or not to impose sanctions on those who kill in duel, can hold following suspension of one's particularistic background and upbringing. Accordingly, the debate over such questions is ever-present in civil society.

amounts to another crime against him. Accordingly, victims cannot qualify as punitive authorities. But suspension of particularities is more readily available when done in a collective process where particularities expose themselves as such. The just—or universalistic—state is a sophisticated form of suspended particularity.⁴¹ Hence, the just state, and only the just state (or similarly advanced social mechanisms, such as the international community), can act coercively and yet universally in the imposition of punishment on behalf of the victim.

The second and related reason why punishment is to be imposed by the state has to do with the role of the state as a recognizer (one of many). The state stands in a bilateral relation with each citizen, in which it functions as a generalized recognizer.⁴² Arguably, when the state, which is best situated to respond to transgressions, omits to respond to a transgression, the transgression can be justifiably attributed not only to the individual violator but also to the state; and the omission to respond thereby becomes an instance of misrecognition by the state. The only way to prevent or undo this misrecognition is by acting—by redressing the original transgression by the offender through the imposition of state punishment. State punishment is, thus, an act of recognition of the victim by the state performed in the context of the victim-state relationship.

Last, it can be mentioned that state punishment is also appropriate because the offender-victim relationship and the state-victim relationship cross one another. Although bilateral relationships are independent from one another, they are still affected by one another. The victim can draw emotional and mental energies from the state's punitive act of recognition performed in the victim-state relationship as described above. These energies can be used in her relationship with the offender. They would ease the task of maintaining the equilibrium that was reestablished by punishment. Thus, recognition by the state supports recognition by the offender.

41. There is no need to explain here how exactly the state allows for suspension of particularity (deliberative accounts of democracy provide one possible answer).

42. This argument will not be developed here, but see George H. Mead, *Mind, Self, and Society from the Standpoint of a Social Behaviorist* (Charles W. Morris ed., intro., 1962) at 286–87.

B. The Amount of Punishment

An account of punishment that is based on the principle of equality can be easily suspected of adopting *lex talionis* and leading to excessive punishment. Arguably, the proposed account implies that punishment should transgress the offender's boundaries to the extent that the original crime transgressed the victim's boundaries, with the prospect of reestablishing equality between the two.⁴³ Let us see why this is not the case.

Restoration of the equilibrium of qualified separateness requires reestablishment of equal boundaries, but this does not entail that the punitive transgression be equal to the criminal transgression. Transgression includes elimination of a boundary and intrusion by an Other's will. These two characteristics of the transgression are logically distinct. The locus of crime is the elimination of a boundary. It is this elimination that brings about the collapse of the equilibrium and allows the offender's will to intrude—more or less deeply, as the case may be. Accordingly the locus of punishment is the symmetrical elimination of a boundary; it is not the equal depth of the intrusion. Restoration of the equilibrium of qualified separateness only requires reinstatement of equal boundaries, not the performance of equally deep intrusions.

Thus the amount of punishment should be determined according to the scope or extent of the transgressed boundary (to what extent does it ensure dominion or exclusive control over oneself: how essential for subjectivity as a whole it is,⁴⁴ and how much of it has been eliminated). For example, the victim of a punch in the shoulder loses dominion over some aspects of his body but not over others, whereas the victim of a stab undergoes a more comprehensive loss of dominion—usually over his body in its entirety. Accordingly, the appropriate punitive response for a punch in the shoulder may be punishment in the community with its partial loss of dominion over (bodily) action; and the appropriate punishment for a stab would be imprisonment with its more comprehensive loss of dominion. There is no need for a deeper transgression of the offender's bodily boundary, for example, in the form of physical violence. Indeed, adding to the

43. For a more exhaustive discussion, see Levanon, *supra* note 32, 459–61.

44. For example, bodily boundaries are essential for subjectivity in the sense that without them any form of subjectivity cannot exist; boundaries of property are essential in the sense that without them full subjectivity is impossible (or so the argument may go), but less than full subjectivity is possible.

elimination of a boundary another element of deep transgression goes outside the scope of punishment and is nothing but arbitrary violence.⁴⁵

On the other hand, it could also be argued that at least in some cases, the proposed account cannot justify the imposition of sufficient or indeed any punishment. Significantly, it cannot justify the imposition of even minimal punishment for homicide. In the case of homicide, the victim's subjectivity cannot be restored in its actual existence, and hence the justification for punishment is, arguably, lost. The same might be true for all cases where the victim has passed away, even unrelatedly to the offense: where there is not a victim whose subjectivity can be restored, there is, arguably, no justification for punishment.

But subjectivity does not gain its actuality only through the live victim. In mutual recognition, subjectivity is part of a relationship and is actualized through both parties of the relationship. Thus, even following the victim's death, the relationship between the victim and the offender still has existence and actuality through the offender. In the context of this relationship, the offender's will can be made to withdraw back to its own boundaries in a way that recreates *the conditions* for the victim's actual subjective existence. Recreation of these conditions restores the victim's subjectivity in the relationship without actualizing it through the living victim. As the offender's will withdraws, the dead victim gains the place of a dead subject even in the context of this relationship, rather than the place of a mere object that was disposed of.⁴⁶ Thus, extensive transgression of the offender's boundaries is justified even in cases of homicide or in other cases where the victim has passed away before punishment has been imposed.

45. Moreover, punishment works to reestablish equality of boundaries not only by transgressing the offender's boundaries but also by setting new boundaries for the victim—boundaries that were not there in the precriminal stage. When punishment is imposed, the (state on behalf of the) victim gains immunity from the offender's self-defensive force (the offender, who would otherwise have been permitted to defend himself from violence, is not allowed to defend himself from punishment); and where punishment incapacitates, the victim further gains immunity from trivial and otherwise permitted interferences by the offender. Accordingly, punishment that is as transgressive as crime would be overly transgressive; it would move the parties from disturbed equilibrium that violates the victim's subjectivity to another disturbed equilibrium that violates the offender's subjectivity. It would therefore amount to another crime.

46. Clearly, the task of restoring subjectivity or hypothetical subjectivity would not permit the death penalty.

C. Punishment or Compensation

Civil law usually governs the relationship between private agents. If crime is meaningful in the relationship between the offender and the victim, one may wonder why civil compensation would not have the required restorative effects.

Civil law presumes a healthy subject-subject relation in which some of the victim's interests have been unfairly or unjustly set back. A subject who has been injured by another suffers inconvenience and loss. The responsible injurer should then—as a matter of distributive justice—compensate the injured party, thus adding convenience and eliminating loss, thereby redressing the setback of interests. With the redressing of those interests, that which has been violated is restored.

But where the responsible injurer further has the relevant *mens rea*, the injury does more than setting back interests through the causation of loss and inconvenience. The injury is then also an intrusion by his will of the victim's fundamental boundaries—an intrusion that violates the victim's subjectivity. Civil law cannot undo such violations of subjectivity. Paying compensation would not cause the intruder's will to withdraw and set the victim free. It does not take from the offender that which is his own, but only that which fairly belongs to the victim. Thus, it does not transgress the offender's fundamental boundaries, and cannot reestablish equality of boundaries and correct the disrupted equilibrium of qualified separateness. For this reason, the injured victim who was merely compensated for her loss and inconvenience would still not be able to maintain a healthy subject-subject relation with the offender. To restore the victim's subjectivity in the relationship, criminal punishment is necessary.

It should be noted, though, that punitive compensation works the way punishment works, and can therefore work in some cases to correct that which crime destroyed.⁴⁷ Much like criminal fines, punitive compensation takes from the offender that which belongs to her, thus transgressing her fundamental boundaries and reestablishing equality and equilibrium. Accordingly, where sufficient punitive compensation

47. For this reason, the constitutionality of punitive damages has been put in question. See, e.g., Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269 (1983); John Calvin Jefferies Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139 (1986).

is imposed, there is no room for additional criminal sanction. A different and controversial question of distributive justice is, Who should enjoy that which has been taken from the defendant?⁴⁸ This question does not require answer here.

D. Punishment for Offenses against the Public

Crime does not always target individuals. Often crime targets the state, the public, or indeed animals or the environment. Arguably, since the proposed account locates the justification for punishment in the relationship between the offender and a specific victim, it cannot explain or justify the criminalization of conduct that does not target specified individuals.

Endowing legal protection to public institutions and assets can be justified under the assumptions of the proposed account, since they have a role in the formulation of subjectivity through mutual recognition. Political and social institutions, and even the natural world, can support and catalyze recognition, and they further provide various settings and media for recognition. Such institutions and assets can, for example, allow for the development of essential relevant skills such as language; assist the development of relevant cognitive and emotional abilities (such as appreciation for that which is distinct, empathy, etc.); and protect essential contingent aspects of subjectivity such as the body. Accordingly, it would be justified to protect the state that, in turn, protects our bodies and further provides settings for cognitive and emotional development; and it is arguably also justified to protect our partial and unilateral separateness from animals.⁴⁹ The more significant a social, political, or natural mechanism is for the formulation of recognition, the more justified it is to endow that

48. The question further goes to the basic characterization of punitive damages as punitive or compensatory (of general society or of certain classes in society). See Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 *YALE L.J.* 347 (2003).

49. See, e.g., Tom Regan, *The Case for Animal Rights*, in *ANIMAL RIGHTS AND HUMAN OBLIGATIONS* (Tom Regan & Peter Singer eds., 2nd ed. 1989); KEITH TESTER, *ANIMALS AND SOCIETY: THE HUMANITY OF ANIMAL RIGHTS* (1991); Elisabeth de Fontenay, *Do Animals Have Rights?*, in *ANIMAL WELFARE* 29 (Council of Europe, 2006). This implies the kinds of goods that can be legitimately protected by the criminal law. Evidently, these are narrow in scope, and resemble more the kind of goods protected, for example, by the German criminal law. This point will not be developed herein.

mechanism with institutionalized protection through legal prohibition on its infringement.⁵⁰

The need for legal protection, however, does not yet justify the imposition of punishment in case of violation, and the justification of punishment should be sought elsewhere. In these cases, the justifiability of punishment is rooted in the prohibition itself: the legitimate decision to prohibit certain types of conduct changes the relationships between citizens in a way that justifies sanctions for violation. This decision resets the equilibrium of qualified separateness in the relationship between citizens, and in the newly formulated equilibrium, violation of the prohibition carries the meanings of crime.

The prohibition resets the equilibrium in two ways. First, it places new limitations on everyone's *a priori* permitted actions. Since a random and singular violation of social institutions or assets has no effect on them,⁵¹ it is *a priori* legitimate. Accordingly, its prohibition transgresses, as it were, everyone's boundaries. The prohibition is an interference of each agent with her fellow agents' boundaries; yet its universal application ensures equality and equilibrium.⁵² Second and more importantly, the prohibition manifests (or rather creates) a relation that bears similarities to property relations between each subject and the protected institution or asset. These institutions and assets then become (*posteriori*, after the imposition of the prohibition) an aspect of subjects' fundamental boundaries in their relationships with one another:⁵³ My country is mine in the sense that a fellow citizen who acts against it also acts against me, much in the way that she would act against me if he acted against my property. Accordingly, following the imposition of the prohibition, the equilibrium of qualified separateness consists of more fundamental boundaries than it had prior to the prohibition.

Since the prohibition resets the equilibrium of qualified separateness, its violation does disturb this equilibrium. The offender breaks out of her

50. That is, by having in place a "property rule" of a kind that would ensure that violations would be negligible. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View from the Cathedral*, 85 HARVARD L. REV. 1089 (1972).

51. This aspect of offenses against the public has been analyzed in different ways. See Joel Feinberg's analysis in *Harm to Others: The Moral Limits of Criminal Law* (1990) at 33–37.

52. Compare with Morris' account, *supra* note 10.

53. These elements are *a priori* inessential for the constitution of subjectivity, yet due to their relation to subjectivity, society transforms them into constituents through the imposition of a prohibition that puts them within the fundamental bounds of bilateral subjectivity.

(new) boundaries, and since her boundaries mark not only the edge of her personal realm but also the beginning of the realm of others, this breaking out is also the transgression of others. And this transgressive disturbance of the equilibrium is crime.⁵⁴

III. IMPLICATIONS FOR CRIMINAL LAW DOCTRINE

A. *Mens Rea*

“Even a dog distinguishes between being stumbled over and being kicked.”
—Oliver Wendell Holmes Jr.⁵⁵

The law of mens rea can be straightforwardly justified by retributivist theories of crime and punishment that conceive crime as a violation of universal duty in the formal sense and focus on the offender’s choice to violate this duty. Mens rea is an essential component of that choice, and its different variants (such as recklessness and intent) reflect the strength of the choice and the extent to which it challenges duty.⁵⁶ Such theories, however, do not account for the significance of mens rea for victims. They do not explain why being kicked is more destructive for the victim than being stumbled over.

The proposed account can explain the significance of mens rea for the victim. The basic premises of the proposed account are that crime is a transgression of boundaries, and that boundaries are the subject’s contingent characteristics and under the exclusive control of the subject’s will. “Exclusive control” is not absolute control: the contingent aspect of the subject’s boundaries can always be affected, such as by natural events, and the boundaries would still remain within the subject’s exclusive control. “Exclusive control” is only exclusive of other wills. Accordingly, an act by another will, and only such act, can transgress boundaries and violate the victim’s subjectivity, that is, constitute crime. But acts of will are possible only where there is knowledge of relevant facts or of the possibility thereof, or mens rea in the form of intent or subjective recklessness. Absent mens

54. See Levanon, *supra* note 32, 462–64.

55. OLIVER WENDELL HOLMES JR., *THE COMMON LAW* (Lecture I: Early Forms of Liability) (The Project Gutenberg Ebook: 2000) (1909).

56. The “choice theory” has different variants, leading to different conclusions. For a brief critical account, see BRUDNER, *supra* note 5, at 70–75.

rea, the acts are not acts of will. The offender's will does not claim control over the "victim's" boundaries, neither does it gain such control. Thus, the "victim's" exclusive control over boundaries is not challenged, there is no inequality of boundaries between the two, and no consequent transgression that undermines the victim's subjectivity and requires redress through punishment. Absent mens rea there is, therefore, no crime.

When it comes to standards of reasonableness as exemplified in the law of objective recklessness and negligence, the proposed account can explain the transition from a purely objective standard to a standard that takes count of at least some of the defendant's characteristics (such as sex and age).⁵⁷ Taking count of these characteristics reflects an attempt to understand the defendant's attitude toward the victim: Was the defendant capable of a mental effort that would have alerted him to the risk, but failed to make this effort because of indifference toward the victim's subjectivity? Such indifference is condemnable because what underlies it is a wish to expand the scope of one's will beyond one's boundaries even at the expense of others. This wish poses a challenge to the victim's boundaries, even if only implicitly. The transition to standards of reasonableness that take into account some of the offender's characteristics thus reflects an attempt to capture only those offenders who pose challenges to victims' boundaries.

On the other hand, in the context of the proposed account purely objective standards of reasonableness cannot be the basis for criminal sanctions. The actions of the objectively negligent do not manifest any explicit or implicit claim for control over the victim's boundaries, neither do they reflect a desire to control the victim's boundaries. Accordingly, intrusion of the actor in the form of punishment would not undo that which has been done. Rather, it would amount to an unnecessary violation of the actor's subjectivity. To be sure, objectively reckless or negligent actions do hinder interests. Furthermore, they affect contingent aspects of subjectivity (such as the body, which is an aspect of action) and might

57. In the United States, see Model Penal Code § 2.202(2)(c)–(d) (defining recklessness and negligence with reference to the actor's situation), and, e.g., *State v. Leidholm*, 334 N.W. 2d 811 (N.D. 1983) (in the context of battered women's syndrome); in Canada, see, e.g., *R v. Ruzic* [2001] 1 S.C.R. 687, para. 61 (in the context of the common law defense of duress); in the United Kingdom, see § 54(t)(c) of the Coroners and Justice Act 2009 (in the context of the partial defense of loss of control). For a thorough analysis, see MAYO MORAN, *RETHINKING THE REASONABLE PERSON: AN EGALITARIAN RECONSTRUCTION OF THE OBJECTIVE STANDARD* (2003).

therefore have contingent implications for the victim's subjectivity in his future relationships with others, including the actor. They should therefore be discouraged and give rise to compensatory duties. But once such actions are taken, punishment will have no restorative implications. Punishment on the basis of purely objective reasonableness tests should therefore be avoided.

B. Aggravating and Mitigating Factors

The proposed account further offers insight with respect to the distinction between basic crime and aggravated or mitigated crime, especially to the extent that this distinction is applicable to "one-off" random criminality as opposed to repetitive and continuous criminality. It is often the case that repetitive criminality is taken as inequivalent to random one-off criminality.⁵⁸ The gradation is, however, not uniform: in some jurisdictions repetitive criminality is conceived as an aggravating factor, and others the lack of previous criminal activity is conceived as a mitigating factor.⁵⁹ Retributivist theories can account for the gradation based on the greater antisocial attitude, and hence greater blameworthiness, demonstrated by repetitive criminality. Such theories do not, however, provide the theoretical basis for determining which of the cases should be conceived as the basic form of crime. Furthermore, retributivist theories do not explain the differences and the similarities between repetitive crime directed at the same victim and repetitive crime directed at different victims. The significance of repetition for the victim is therefore lost. The proposed account provides a theoretical basis for considering repetitive criminality directed at the same victim, or similarly destructive criminal acts, as the basic or typical forms of crime.

The proposed analysis of crime took violence against women as its typical case. It was demonstrated that the most striking characteristic of such violence—the elimination of the victim's subjectivity in her relationship with the offender—can be identified also in cases of random one-off criminality, even if in a different form and to a lower extent. Theoretical grounds were laid down for describing crime with reference to that

⁵⁸ See, e.g., § 210.6(4)(a) of the Model Penal Code, which sets lack of previous criminal activity as a mitigating circumstance in sentencing for murder; 18 U.S.C. § 3592(c)(2)–(4), which set previous convictions as aggravating factors for homicide.

⁵⁹ *Id.*

characteristic (violation of the victim's subjectivity in the relationship). Thus, the typical case of crime, which is also taken as the basic form of crime, is characterized with reference to its context: it is either continuous and has accumulating implications for the victim, or it has some other characteristics that, given social or other realities, bring about a serious violation or even elimination of subjectivity.

Although violence against women is the typical case that highlights the characteristics of basic criminality, there may be other forms of basic criminality. One of these is the case of multiple victims—either of the particular commission (such as terrorism) or of a series of previous commissions (such as professional criminality). Multiplicity of victims demonstrates the offender's special difficulty in identifying himself in others. This difficulty makes it harder for the victim to shrug her shoulders and continue with her life. Accordingly, the manner in which the violation of her subjectivity will be expressed is likely to be closer to that exemplified by victims of abuse (including submission and lack of clear sense of self in the context of the relationship with the offender). Given its similarity to the typical case, this case too should be treated as basic.

On the other hand, where crime is a one-off, random act and has no context that makes it entirely destructive of subjectivity, liability should be mitigated. In such a case, the victim will be able to regain her independence within the relationship more easily, with the help of some mild form of state punishment. This approach accords more with the Model Penal Code, which takes the lack of previous criminal activity as a mitigating circumstance, than with the Federal Code, which takes previous convictions as an aggravating circumstance.⁶⁰

C. Omissions

“Commission by omission” is consensual yet not an unproblematic doctrine.⁶¹ It is not easy to account for the imposition of criminal liability for “harmful omissions.” The main difficulty is that if the empiricist concept of causation is taken on board, omissions do not cause any consequences,

60. *Supra* note 58.

61. For an a critical account of liability for omissions in American law, see Paul H. Robinson, *Criminal Liability for Omissions: A Brief Summary and Critique of the Law in the United States*, 29 N.Y.L. SCH. L. REV. 102 (1984).

notwithstanding criminal consequences.⁶² Accordingly, it is hard to explain why a person who does nothing should be criminally liable for consequences he does not cause.⁶³

Retributivist theories with deontological underpinnings might try overcoming this difficulty by focusing on the offender's duty to act in the face of possible harmful consequences (agent-relative obligation).⁶⁴ Yet the source of such duties must still be accounted for. More often than not, the literature addresses this issue as one of responsibility.⁶⁵ It argues that the actor who fails to act can rightly be seen as responsible for consequences that could have been prevented by his action. But a doctrine of responsibility is not yet a doctrine of criminal liability;⁶⁶ the fact that an actor is responsible for a consequence does not yet justify imposing liability for this consequence.⁶⁷ Thus, criminalizing and punishing for "harmful omissions" would often remain difficult.

62. See generally Jonathan Bennet, *Whatever the Consequences*, 26 ANALYSIS 83 (1966); P.J. Fitzgerald, *Acting and Refraining*, 27–28 ANALYSIS 133 (1966); Douglas N. Husak, *Omissions, Causation, and Liability*, 30 PHIL. Q. (1980). See also Arthur Leavens' defense of the causal status of omissions in *A Causation Approach to Criminal Omissions*, 76 CALIF. L. REV. 547 (1988).

63. For an extensive discussion, see MICHAEL S. MOORE, CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS 51 (2009). See also J. C. Smith, *Liability for Omissions in the Criminal Law*, 4 LEGAL STUD. 88 (1984).

64. Compare with George Fletcher's analysis in his RETHINKING CRIMINAL LAW § 8.2 (2000).

65. There have been many suggestions in the literature. See, e.g., Jacobo Dopico Gómez-Aller, *Criminal Omissions: A European Perspective*, 11 N. CRIM. L. REV. 419 (2008). See also Jesús-María Silva Sánchez, *Criminal Omissions: Some Relevant Distinctions*, 11 N. CRIM. L. REV. 452 (2008); and VICTOR TADROS, *Criminal Omissions: Culpability, Responsibility, and Liberty*, in CRIMINAL RESPONSIBILITY 182 (Oxford Monographs on Criminal Law and Justice, 2007).

66. An exception can be found in Geoffrey Mead, *Contracting into Crime: A Theory of Criminal Omissions*, 11(2) OXFORD J. LEGAL STUD. 147–73 (1991). Mead is aware of the need to conceptualize crime before accounting for criminal omissions, yet he does so only briefly.

67. Where principles of responsibility are relied on to justify liability, the outcome might well be internal tension between the assumptions underlying the two. See, for example, Gómez-Aller's presumptions regarding the possibility of acting through tools and other objects. Such presumptions bear similarity to existentialist conceptualizations of the self (see Meir Dan Cohen, *Responsibility and the Boundaries of the Self*, 105 HARVARD L. REV. 959, esp. 967–68 (1992)). They cannot be straightforwardly reconciled with classical retributivism, whose theoretical underpinnings are Kantian (including the very different Kantian account of the I or the self).

The proposed account can ease the tension between the empiricist conception of causation, conceptions of responsibility, and conceptions of criminal liability, crime, and punishment. It suggests that the will can expand through contingencies other than the body and bodily action—for example, through property or other objects over which it takes control via mediating social mechanisms (for example, dangerous machines that are under an employee’s control based on the contract between the employee and the employer/owner).⁶⁸ When a will gains control over an object, any danger posed by this object is a danger posed by this will; the movement of the object is the movement of the will, and hence the will is active in creating the risk.⁶⁹ The fact that the body, which is also under the will’s control, is passive is contingent and morally insignificant. Similarly, on other occasions the will takes control over specific risks to specific others (the doctor who takes control over risks to patients’ health; the parent who takes control over risks to children). Here, too, taking control over risks—turning them into “the will’s business,” or to contingencies through which the will expresses itself—turns the will into a cause capable of bringing about intrusion (or criminal harm). Thus in all these cases, the essentially dynamic will can be seen as actively causing harm where it does not counter-act through bodily action. If the will is active, the body’s passivity should not stand in the way of imposing criminal liability. Where the will is active, the actor is responsible for the consequences it causes; and where its activity is intrusive and destructive of the victim’s subjectivity, the actor is also liable for crime.

The more difficult question concerns instances in which the will does not take control over the danger in any way. An example would be where by mere chance a person can use his car to block the way of a rolling rock that would otherwise injure another. Legal systems and legal theorists hold different views on this question.⁷⁰ The proposed account suggests that criminal law should not impose a duty to rescue in such circumstances.

68. Compare with MEIR DAN COHEN, *Part Three: Boundaries of Self*, in HARMFUL THOUGHTS: ESSAYS ON LAW, SELF, AND MORALITY (2002).

69. Compare Gómez-Aller, *supra* note 65.

70. See, e.g., Note, *The Failure to Rescue: A Comparative Survey*, 52 COLUM. L. REV. 631 (1952); Kathleen M. Ridolfi, *Law, Ethics, and the Good Samaritan: Should There be a Duty to Rescue?*, 40 SANTA CLARA L. REV. 957 (1999); Hanoch Dagan, *In Defense of the Good Samaritan*, MICH. L. REV. 1152–1200 (1999); John Kleinig, *Good Samaritanism*, PHIL. & PUB. AFF. 382–407 (1976).

The will is not in any way active in bringing about the harmful consequences, and can therefore not be seen as causing these consequences for purposes of criminal law. This would be the case even if the actor who perceives the danger wants the harmful consequence to occur, but does not take control of it in any way. This conclusion accords with, and provides foundations to, the legal reality in common law jurisdictions.⁷¹

D. Attempt

The relation between the amount of punishment for full commission of offenses and the amount of punishment for attempt is neither uniform across different jurisdictions nor consensual amongst legal theorists.⁷² Retributivist theories with subjectivist underpinnings might be able to justify a law of attempt, such as the English one, according to which the maximal punishment for attempt is as high as the maximal punishment for successful commission.⁷³ The justification of such a legal position would rely on the moral significance of the defendant's choice to commit crime, on the determination and antisocial attitude manifested in her actions, and possibly also on her dangerousness.⁷⁴ But retributivist theories with subjectivist underpinnings, or at least the classical Kantian variations of those,⁷⁵ encounter a more difficult challenge in the face of a law, such as the Canadian one, which sets lower punishments for attempt than for successful commission.⁷⁶ Similar challenges are posed by more nuanced approaches

71. For another attempt to explain the lack of a duty to rescue, see Philip W. Romohr, *A Right/Duty Perspective on the Legal and Philosophical Foundations of the No-Duty-To-Rescue Rule*, 55 DUKE L.J. 1025 (2006). It should be noted, though, that this legal reality has been heavily criticized. See, e.g., Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980); Robert Justin Lipkin, *Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of the General Legal Duty to Rescue*, 31 UCLA L. REV. 252 (1983–84).

72. See Antony Duff's overview and discussion in CRIMINAL ATTEMPTS (1996) Part I, ch. 4, p. 116.

73. The Criminal Attempts Act 1981 (UK), § 4.

74. For an account of subjectivist theories of attempt, and an attempt to develop an objectivist deontological theory, see Antony Duff, CRIMINAL ATTEMPTS (1996).

75. For an attempt to justify milder punishment, based on a fair-play account of crime and punishment, see Davis, *supra* note 13. But see R.A. Duff, *Auctions, Lotteries, and the Punishment of Attempts*, 9 LAW & PHIL. 1–37 (1990); David Dolinko, *Mismeasuring "Unfair Advantage": A Response to Michael Davis*, 14(4) LAW & PHIL. 493–524 (1994).

76. Canadian Criminal Code § 43. The punishability of attempt has received much attention in the literature. See, e.g., Duff, *supra* note 75; Björn Burkhardt, *Is There a Rational*

such as those exemplified in the United States Code and in the Model Penal Code, which set the same maximal punishment for attempt and full commission for all but the gravest offenses.⁷⁷ The variety of legal positions and the difficulty in accounting for them seem to reflect conflicting but equally valid intuitions regarding the punishability of attempt.

The proposed account reveals the theoretical proximity of attempt to full commission, and it can therefore explain the willingness to punish attempt as gravely as full commission. An attempt to commit crime already includes within itself a challenge to the victim's boundaries. The statement that the attempter makes: "your boundaries are mine to control"—a statement backed by action that could potentially have developed into a full intrusion—already changes the balance between the two. Following this initial act with its provocative meaning, the attempter already gains hold of the victim's boundaries—the victim's boundary has not yet been removed, and the offender's will has not intruded the victim, but their wills are struggling for exclusive control over this boundary. When an offender points a gun at a victim, he coerces her to engage in a struggle over her boundaries if she is to maintain her subjectivity; and this coercion already demonstrates the lack of exclusivity of her control over her boundaries and his partial control over them. Furthermore, given the noncontingent nature of the will, once crime has been attempted, both parties continue exercising control over the victim's boundaries in a way that no longer puts the victim at risk but still requires her engagement. The survivor of a failed rape does not lose her subjectivity entirely in her relationship with the attempting rapist who has not been punished; she can still face him and act as an agent

Justification for Punishing an Accomplished Crime More Severely than an Attempted Crime?, 1986 BYU L. REV. 553 (1986); Mordechai Kremnitzer, *Is There a Rational Justification for Punishing an Accomplished Crime More Severely than an Attempted Crime: A Comment on Prof. Dr. Bjorn Burkhardt's Paper*, 4 BYU J. PUB. L. 81 (1990). The question is related to the more general question of moral luck and its implications for criminal law. See Nir Eisikovits, *Moral Luck and the Criminal Law*, in LAW AND SOCIAL JUSTICE 105 (Joseph Keim Campbell et. al. eds., 2005).

77. Model Penal Code § 5.05(1): "Except as otherwise provided in this Section, attempt, solicitation and conspiracy are crimes of the same grade and degree as the most serious offense which is attempted or solicited or is an object of the conspiracy. An attempt, solicitation or conspiracy to commit a [capital crime or a] felony of the first degree is a felony of the second degree." See also, e.g., 18 U.S. Code § 1349 (attempt to commit fraud offenses) and 21 U.S. Code § 846 (attempt to commit drug offenses), and compare with 18 U.S. Code § 1113 (attempt to commit murder or manslaughter).

in their relationship. But this requires more effort than is required in her relationship with any other person, and she is at constant risk of regressing into loss of subjectivity following even the smallest challenge the attempting rapist may pose. The relationship is thus affected; it is an unequal relationship, even if the inequality is not as extreme and as destructive as it would have been had the victim been raped. Accordingly, attempt is theoretically close to full commission, and significant punishment is required to alleviate the inequality.

Yet the proposed account can further provide normative foundations for the intuitive moral (and in some jurisdictions also legal) distinction between attempt and full commission. Alleviating the inequality of attempt does not require punishment as grave as required for alleviating the inequality of full and successful crime. The victim who has not been intruded and has not lost subjectivity is still an active player in the relationship, capable of adopting the universal standpoint and resisting the offender's will with some assistance from, and mediation by, the state. Given that the victim's force is still partly viable, limited intrusion of the offender's boundaries will suffice to make the offender identify this force and his own vulnerability, and withdraw back to himself in a mutual exercise of recognition. An equal subject-subject relationship between the failed rapist who spent only a limited time in prison and his victim is thus conceivable. Accordingly, the maximal punishment for attempt should not be as high as the maximal punishment for full commission.

E. Self-Defense

It may be wondered whether the proposed account does not put into question the basic legal doctrine of self-defense. After all, self-defense is often justified with reference to the threat the attacker imposes on the socio-legal order.⁷⁸ This threat explains why the legal system accepts and indeed encourages the use of defensive force even where the costs of such use are high. But if crime only works in the relationship between the parties, it becomes harder to justify a defensive response that causes the offender more harm than the original attack would have caused the victim.

⁷⁸. For a comprehensive review, see BOAZ SANGERO, *SELF-DEFENCE IN CRIMINAL LAW* (2006).

It may therefore seem that the proposed account can only justify a thin right to self-defense that is based on a narrow balance of personal harms.

Recently, legal theorists have been developing accounts of self-defense that dispose of reference to the socio-legal order. Victor Tadros refers to the attacker's duty to prevent the harm she has unleashed to justify the use of defensive force against her.⁷⁹ But this line of argument gives rise to several difficulties, the most serious of which is Tadros' conclusion that the use of deadly self-defensive force against a completely innocent agent is justified (rather than merely excused).⁸⁰ Tadros' conceptualization thus leads to an overly broad right to self-defense. John Gardner and François Tanguay-Renaud provide partial theoretical foundation to self-defense with reference to the asymmetrical moral standing of the attacked and the attacker and to derivative considerations of desert.⁸¹ Yet Gardner and Tanguay-Renaud acknowledge such considerations do not provide full justification for the use of self-defensive force.⁸² A full and satisfactory conceptualization of self-defense that disposes of reference to the socio-legal order is thus still hard to find.

In the proposed account, self-defense is justified based on the inequality between the parties—inequality that develops in a nonlinear fashion throughout the commission of the offense, and that therefore justifies different responses at different stages. The development of inequality starts as early as the stage of threat-creation or attempt. This initial inequality may actually be particularly radical.⁸³ At the stage of attempt or threat-creation, the offender reaches toward a yet-unknown extent of the victim's boundaries; the offender claims control over some of the victim's

79. TADROS, *supra* note 36.

80. *Id.* at 246–56. For critique of Tadros' argument, see Liat Levanon, *Punishment, Duty, and Self-Defense: A Comment on Victor Tadros' The Ends of Harm*, 5 JERUSALEM REV. LEGAL STUD. 75 (2012). See also Larry Alexander's Critique in *Can Self-Defence Justify Punishment?*, 32 LAW & PHIL. 159, esp. 168–71 (2013).

81. John Gardner & François Tanguay-Renaud, *Desert and Avoidability in Self-Defense*, 122(1) ETHICS, III–134, Symposium on Jeff McMahan's *Killing in War* (October 2011).

82. They suggest that a full account of self-defense would also need to be supported by considerations of comparative justice similar to those proposed by Jeff McMahan in *Killing in War* (2009). I do not address McMahan's account of self-defense here, but it too provides an example of disposing of reference to the socio-legal order. Yet, as already implied, Gardner and Tanguay-Renaud have argued, above, that McMahan's account mistakenly fails to acknowledge the relevance of factors such as the attacker's desert.

83. One should distinguish here between the stage of attempt or threat-creation and the stage of punishment, in which the inequality has already moderated.

boundaries and further claims power to determine how extensive this control would be. At this unstable point, all of the victim's boundaries are not in her exclusive control: the robber might take her money or he might also injure her; the rapist might rape or he might rape and kill her; and the reckless driver might miss the victim or injure her or cause her death.⁸⁴ The developing inequality is therefore more radical than it is after the completion of crime, where the uncertainty is removed. Accordingly, a radical response by the victim—a response that is more intrusive than the punitive response to the full commission, and possibly also more intrusive than the intrusion the offender would have committed otherwise—is justified. The use of defensive force is thus justified by the need to free the victim's boundaries in their entirety.

Defensive force can be similarly used to protect a third person from crime.⁸⁵ Here, defensive force is exercised on behalf of that third person by someone who is better situated for that exercise. As we saw, the state is usually best situated to deal with threats to individuals' subjectivity. This is definitely the case following the materialization of the threat (the commission of crime), when punishment is due; but it is often the case also prior to crime and during crime, where the police are best situated to intervene on behalf of the victim. However, in some instances someone other than the police is better situated for dealing with the threat. This might be another citizen using defensive force to protect the victim. Still, the citizen who defends a third person does so on behalf of that third person, and his will should be conceived as the third person's will.

Yet a radical defensive response would be harder to justify where the threat is created by an innocent agent (the child, the insane, or the person blown by a tornado⁸⁶). Here, the victim maintains exclusive control over her boundaries even in face of the threat, as there is no meaningful claim of control over her boundaries by another subject: where the innocent agent is a person blown by a tornado, there is no claim of control over boundaries whatsoever; and where the innocent agent is a child, the claim is empty since the child has not yet gained the full separateness and equilibrium

84. See a discussion of the cost of this uncertainty for the victim in Levanon, *supra* note 80, at 83–84.

85. See Model Penal Code § 3.05 (Use of Force for the Protection of Other Persons); in Canada, Canadian Criminal Code § 34(1)(a); in the United Kingdom, Criminal Justice and Immigration Act 2008 § 76(10).

86. TADROS, *supra* note 36, at 248.

required for such a claim to be a challenge. In the absence of a real challenge for her boundaries, the victim may be excused if she reacts in a way that causes more harm than she would have had to suffer had she not responded, but in most cases she will not be justified in so doing.⁸⁷

F. Necessity

The proposed account can also explain why courts in many common law jurisdictions have been reluctant to acknowledge justificatory necessity;⁸⁸ and it can further account for the critique of the law that suggests that there might be reasons to acknowledge such a defense⁸⁹ and for the growing willingness in American law to acknowledge it.⁹⁰

The doctrinal reluctance to acknowledge justificatory necessity can be explained with reference to the nature of the risk in conditions of necessity. In conditions of necessity, the risk of harm is created by circumstances rather than by another subject. It is therefore similar to the risk created by an innocent agent. Such a risk is not a risk to one's boundaries in his relationship with another subject. It does not pose a threat to any subject-subject relation, or to anyone's subjectivity. It is merely a risk of setback of interests of full subjects. Intrusion of another subject's boundaries and violation of his subjectivity in order to prevent a mere setback of interests is hard to justify.

But arguably, violating subjectivity to prevent such a setback of interests can be justified in some conditions. Natural circumstances are harmful nonintrusions that set back contingent aspects of subjectivity, such as bodily integrity. Where the risk is particularly extensive, these harmful

87. But see the discussion of justificatory necessity below.

88. *Perka v. The Queen*, [1984] 2 S.C.R. 232 [Canada]. In the United Kingdom, the defense of necessity is rarely granted. One restricted exception has been recognized in *Re A (Conjoined Twins: Surgical Separation)* (2000) 4 AER 96.

89. See, e.g., in Ireland, The Law Reform Commission, Consultation Paper: Duress and Necessity (LRC CP 39-2006). See also Michael Bohlander, *Of Shipwrecked Sailors, Unborn Children, Conjoined Twins and Hijacked Airplanes—Taking Human Life and the Defence of Necessity*, 70 J. CRIM. L. 147 (2006).

90. See Model Penal Code § 3.02, and see also, e.g., The New York Penal Law § 35.05(2). Yet the Supreme Court has been reluctant to allow a defense of necessity (*United States v. Bailey*, 444 US 394 (1980); *United States v. Oakland Cannabis Buyers' Cooperative*, 532 US 483 (2001)). For a well-nuanced review, see Stephen S. Schwartz, *Is There a Common Law Necessity Defense in Federal Criminal Law?*, 75 U. CHI. L. REV. 1259 (2008).

nonintrusions may have implications for the formulation of subjectivity in the context of various bilateral relationships. Bodily harm that creates extreme dependency on others, as well as certain types of brain damage, can make it more difficult to be a full participant in processes of mutual recognition. Although punishment is out of the question absent an actor who possesses *mens rea* (as it cannot undo these implications), preventing these implications by allowing a defense to the preventer may indeed be justified. Accordingly, extensive threats to fundamental contingent aspects of subjectivity can give rise to a defense of justificatory necessity, as seen in American law.

Furthermore, the actor who acts under conditions of necessity does not even seem to violate the subjectivity of another. This actor does not make a claim that the boundaries of the subject he harms are his to control. Rather, by taking responsibility for the situation he takes over the risk, and then he acts to minimize its potential transgressivity by way of redistribution. The actor is, therefore, not an intruder; he works to minimize the expansion of that which he has taken over rather than to maximize it. If the actor does not intrude anyone's boundaries, he does not commit crime. Allowing a defense of justificatory necessity can be understood as reflecting this noncriminal nature of the actor's conduct.

G. Criminalization

Last, the proposed account has implications for criminalization. We can take the hard case of sexual exploitation as an example. Sexual exploitation of young persons and of disabled adults is often explicitly prohibited by law,⁹¹ and its prohibition is hardly controversial. Yet some countries further prohibit sexual exploitation of a capable adult who is placed in a weak position vis-à-vis the exploiter.⁹² Such prohibitions are more

91. See 18 U.S. Code § 2251 (Sexual Exploitation of Children), and more generally 18 U.S. Code ch. 110 (Sexual Exploitation and Other Abuse of Children). For a specific prohibition on sexual exploitation of the mentally disabled, see, e.g., in Alaska, AS 11.41.420 Sexual Assault in the Second Degree. In Canada, Criminal Code § 153 sets an offense of sexual exploitation by a person "who is in a position of trust or authority towards a young person, who is a person with whom the young person is in a relationship of dependency or who is in a relationship with a young person that is exploitative of the young person." Section 153.1 addresses sexual exploitation of disabled persons.

92. Wisconsin was the first American state to criminally prohibit, in 1983, sexual relations between psychotherapists and patients (Wisconsin Criminal Code § 940.22). Other states

difficult to justify. They are particularly difficult to justify where they apply to a capable adult victim who submits to sexual intercourse in the hope of some gain that the offender is uniquely situated to provide. Should sexual activity be criminalized when the victim chose to pursue it in order to advance another interest (such as progress at work) or to satisfy a childlike psychological need (such as the need for love from an authoritative figure)? And if so, why?

There may be different ways to account for criminalization in such cases. It is possible to resort to the notion of consent, arguing that the victim did not freely consent to the intercourse.⁹³ One practical difficulty with such a solution is that like any consent-centered solution, it puts the legal spotlight on the victim rather than on the offender; this, in turn, can be exploited by the participants in trials for sexual offenses. Another way to account for criminalization of such sexual exploitation focuses on the coercive violation of autonomy it involves—a violation that can be brought about in different ways, some of which are not articulated in existing definitions of consent.⁹⁴ This solution requires thorough investigation into sexual autonomy.

The proposed account takes a different route, focusing on the victim's preexisting cognitive or emotional vulnerability and showing how exploitation of this vulnerability amounts to crime. In the proposed account, crime is characterized as an asymmetrical dissolution of fundamental boundaries resulting in the merging of the victim's will into that of the offender. The asymmetrical dissolution of boundaries destroys the victim's ability to act independently from the offender, and this destruction is the essence of crime. Usually such a destructive asymmetrical dissolution takes place through coercive transgression of one of the victim's fundamental boundaries, as we have seen. But in some cases coercive transgression is not required. When the victim is, for example, a child or an adult with childlike psychological needs who is placed in a weak position where these needs

have since enacted similar prohibitions. In Israel, § 346(b) of the criminal code prohibits sexual intercourse where consent is achieved by way of exploiting a relation of authority at work; and § 347A prohibits sexual intercourse between a therapist and a patient or past patient, where consent is achieved by way of exploiting emotional dependency.

93. See, e.g., STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* (1998), especially in chapters 9–II.

94. Compare Victor Tadros, *Rape Without Consent*, 26 OXFORD J. LEGAL STUD. 515, esp. 538 (2006). See also SCHULHOFER, *id.*, esp. chs. 8–II.

might express themselves, the offender would not face an attempt to keep his desire out. The victim would voluntarily remove one of her boundaries, and he can “enter the front door.” And once the victim has given way for an asymmetrical intrusion by the offender’s desire, she would not be able to push this desire out by reestablishing the boundary she had voluntarily removed. The same preexisting vulnerability that made her remove the boundary would make her incapable of reestablishing it. The preexisting vulnerability thus makes coercive force redundant, but the basic characteristic of crime—the asymmetrical dissolution of boundaries—remains intact.

Sexual exploitation falls within this last characterization of crime: First, it involves dissolution of the victim’s sexual (bodily) boundaries. Second, this dissolution is noncoercive and does not involve forced removal of a boundary—the victim’s preexisting vulnerability brings about a voluntary dissolution. Third, the outcome is a merge of wills—the victim no longer distinguishes her reasons and motivations from those of the offender.⁹⁵ Fourth, the merge is asymmetrical—only the victim, and not the offender, cannot distinguish her motivations and reasons from those of the Other (unlike in symmetrical relations where a momentary merge is the outcome of love or deep solidarity). The offender’s will thus hooks the victim and puts her within the offender’s power.⁹⁶ And fifth, the victim’s ability to separate herself from the offender is thereby destroyed: given her preexisting vulnerability, she cannot bring this condition to an end by deciding to actualize her potentially equal boundaries (which have not been removed by the offender) and bring about mutual recognition.⁹⁷ In these conditions, reestablishment of symmetrical equilibrium requires punishment.

95. In this, amongst other characteristics, sexual exploitation is distinguishable from other forms of exploitation, such as the shovel case introduced by Wertheimer in ALAN WERTHEIMER, *EXPLOITATION* (1996) at 22.

96. See the illuminating analysis in John R.S. Wilson, *In One Another’s Power*, 88 *ETHICS* 299 (1978).

97. In this, criminal sexual exploitation is different from other forms of sexual exploitation—for example, by way of a false love statement. See Wilson, *id.*

CONCLUSIONS

This article suggested that subjects exist in equilibrium of connectedness and separateness. Following Hegel, it argued that only persons who recognize their separateness from one another can exist as subjects who are connected through an essential universal structure. It further argued that the condition for the existence of the equilibrium of connectedness and separateness is equality of personal boundaries.

The article then analyzed crime. Rather than taking random and isolated criminality as its paradigmatic case, it took the common case of continuous victimization as its paradigm. This allowed putting the spotlight on some characteristics of all crimes that are often ignored. It has been demonstrated that crime removes one of the victim's personal boundaries, thus creating inequality of boundaries between the victim and the offender—inequality whose meaning is the collapse of the equilibrium of connectedness and separateness between the two. Crime thus violates the victim's subjectivity in the context of her relationship with the offender.

Next, criminal punishment was accounted for. If crime is understood in the abovementioned way, punishment can be accounted for as a practice that reinstates equal boundaries, reestablishes the equilibrium of connectedness and separateness, and restores the victim's subjectivity in her relationship with the offender.

Last, the implications of the proposed analysis for criminal law doctrine were explored. It was demonstrated that the proposed analysis can explain well-established doctrines such as commission by omission, general aggravating and mitigating circumstances, and justificatory defenses; that it can account for current trends in criminal law such as subjectivism and the expansion of sexual offenses; and that it has various normative implications for the development of these doctrines and offenses.