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To Harm or to Heal: The Just Response to Crime

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Introduction

Theft, drunk driving, and murder are all firmly accepted as wrong or as impermissible actions, but how to respond to wrong or impermissible actions is still debated. What is justice and how to achieve it in the face of crime and tragedy is a very old issue--the perfect solution is unlikely to be found within these pages. This paper will attempt to shed light on the strengths and weaknesses of various arguments as well as evaluate what is the most just response to crime. In particular, is a retributive system that punishes crime or a restorative system that heals more just? Choices abound in modern society. This choice, how we ought to respond to crime, is a very important one that is best encountered with an informed perspective. Each argument has strengths that are compelling. Therefore, it is within the best interests of those who desire a just society, those who are tasked with pursuing justice, and those who may find themselves at the hands of justice to discover what truly is the just response to crime.

In the realm of criminal justice, Western society has primarily relied on retributive justice system. A retributive system uses punishment as the standard response to crime for a variety of reasons such as deterring future crime and because those who commit crime deserve to be punished. Nevertheless, retributive frameworks are not the only frameworks that are used to pursue justice. In recent years, some have formulated a different criminal justice system, that of restorative justice. Restorative justice does not see punishment as the adequate or appropriate response to crime.¹ Rather than punishment, restorative justice proponents argue that justice is

¹ While it is possible that some may understand the process of how restorative justice holds offenders accountable to involve or be punishment, these processes, which will be described later, are seen not as punishments inflicted on an offender, but actions taken willingly by an offender to make amends.

achieved in the aftermath of crime by healing the trauma incurred by crime. A look at the Western justice system is informative in understanding the motivations of restorative justice proponents, as restorative justice was created in response to what is viewed as an unjust system.

If one were to go into any Western criminal courtroom, what they would hear would be cases referred to as “the state vs the offender.” These, the state and the offender, are the two primary players in Western criminal justice.² The process of this criminal justice system further emphasizes this point; the offender is found to be guilty or not guilty, the appropriate punishment is doled out to the offender, and the offender is either removed from the system or the process continues. While this grossly simplifies a very complex system, the general pieces are there. The offender has been found, convicted, sentenced, and lives out that sentence. Justice has been done.

But proponents of restorative justice believe that justice has not been achieved. To take an example, a man assaults someone. The victim is beaten, terrified of going out alone, disempowered, and alienated from their community, friends, and family who do not want to hear the details of the assault, and who tell the victim to move on. Once again entering the courtroom, we hear the case called: “the state vs the offender.” The offender is charged with assault and battery. The victim is brought to the stand and gives a retelling of the assault. The offender is convicted and sentenced. The offender pays his fine, serves his sentence, does any other punishment deemed necessary, and the process concludes. Besides telling some part of their story, which may include being verbally attacked by the defense counsel, the victim is left only with the knowledge that the person who hurt them has subsequently been hurt as well. But is that truly a just resolution of this situation? The victim remains terrified to go out alone,

² This is in contrast to the Western civil system that resolves disputes between two individuals; the civil system does not use punishment as the primary action, but instead seeks to have one individual make restitution to the other.

disempowered, and alienated. While they might feel some closure at the offender being punished, the victim remains hurt. The machine of retributive justice has left them behind.

Restorative justice focuses on the needs and obligations of all those involved in and affected by crime. For the offender, these are primarily obligations to the victim and community, but the offender also has a variety of needs in order to reduce the likelihood of reoffending and to help the offender eventually become a fully functioning member of the community. Most importantly for restorative justice advocates, and in contrast to what was described above, justice must acknowledge and address the victim's needs. The first concern of restorative justice is not that punishment is wrong, but rather that punishment is an entirely inadequate response to the reality of the victim's as well as community's harm and the offenders rehabilitation. Restorative justice has only recently begun to enter a wider arena of public thought. Despite its youth, there is value in the restorative path to justice.

The aim of this project is to articulate the value of restorative justice and evaluate its prospects. Towards that end, the first chapter will be a discussion of what justice requires in the realm of crime. That is, an understanding of when justice has been achieved, and creating a standard by which to evaluate systems that attempt to achieve justice. While this will necessarily be incomplete, retribution and restoration cannot be compared and evaluated without a baseline notion of justice. The second and third chapters will explore two theories of how to do criminal justice, retributive and restorative respectively. Finally, the fourth chapter will compare the two theories of justice to the standard discussed in chapter one, followed by a brief discussion as to how restorative justice may be implemented. This chapter uses case studies and data to further confirm the conclusions.

I: What Is Justice?

Like many old ideas, the problem of justice was confronted by the ancient Greeks; justice is famously discussed in Plato's *Republic*. In the *Republic*, Socrates speaks at length about what justice is not. He shows that justice is not merely the paying of debts and giving each what is due, nor is justice the interest of the stronger, as his opponent Thrasymachus claims. At even more length, Socrates explains that it is good to be just. These points are understood by society: justice is more than the interest of the stronger, for a weaker person deserves justice as well. While some may argue--as Thrasymachus does--that injustice brings larger riches or power, and that this difference makes injustice better, it seems apparent that most would prefer a system that benefits just action over unjust action. In Book IV, Socrates defines justice as doing one's own. This definition comes about by comparing the polis to a human being. Plato argues that the city is just when all parts of the city are doing as they ought to be. Similarly, an individual is just when the parts, and therefore the whole, are doing as they ought to be. This can be summed up as "doing one's own." This idea has come to be very commonly used and broadened in the latin "*suum cuique*"--doing one's own, to each his own, to each what is owed. While this is a working definition of justice, this definition is not the last to come from the Greek tradition.

In the *Nicomachean Ethics*, Aristotle elaborated on Plato's theory and incorporated his understanding of character into justice. Aristotle, in his "Virtue Ethics," argues that justice is a condition of character. He also distinguishes this general justice from specific justice that is exemplified differently in different areas of society. Aristotle begins by describing that the condition, justice, that is being referred to is the condition that allows one to perform just actions.

This does seem clear, for the only indicator that an agent is just are the actions he or she takes; one who performs just actions is just, and one who performs unjust actions is unjust. In order to perform these just actions, one must be enacting the virtues. General justice is the individual condition of complete virtue. “It is complete because he who possesses it can exercise his virtue not only in himself but towards his neighbour also.”³ Therefore, being of virtuous character is being just. Furthermore, because justice is a state, Aristotle says that it can be studied by looking at its opposites.⁴ Aristotle describes unjust action to be both unfair and unlawful, by which he means that just action must include fairness and lawfulness. Aristotle defends that position by arguing that the law promotes the virtues and prohibits vices. With the law and the virtues connected, Aristotle then connects observing the law and being just, for to act against the law is equally to act against the virtues, which would mean being unjust. Justice also requires fairness. As an unjust person will reflect the vices, this person will have the vice of greed. Like all vices, greed does not exist in moderation--one may either have an excess of greed or be deficient of greed. Greed means that one takes more than one’s share of good things and less of one’s share of bad things, which is unfair. Having proven that enacting vice means to be unfair, Aristotle has shown that being unfair is also to be unjust. Therefore, to be just is also to be fair.

These qualities of justice do seem good, but they raise practical issues. Foremost among these is the problem of “proper” law. It is hopefully true that all law aims to promote virtuous action and either prohibit or disincentivize vice, however it is unlikely to be the case. Is it just to follow a law that promotes vice? Aristotle states that “the correctly established law does this

³ Aristotle. *The Nicomachean Ethics*. Translated by H. Rackham. Cambridge, MA: Harvard Univ. Press, 1999. Section 5.1.

⁴ Aristotle. *The Nicomachean Ethics*. 5.1.

[promote virtue] correctly, and the less carefully framed one does this worse.”⁵ While Aristotle does acknowledge the existence of improper law, he neither acknowledges truly *unjust* law, which does not aim to promote virtue, nor advises on what to do when confronted with such a law. It seems that the reader of Aristotle is left to fall back on their virtues, and continue to enact personal virtue in the face of unjust law, for to enact the virtues is to be just. If the law promotes the enactment of virtue then it is just to be lawful, but if the law promotes vice, then it may be just to go against the law.

A further problem of this definition of justice as lawfulness is that it may not apply to a more libertarian society. For Aristotle, laws were directly concerned with the character of the citizens, but this is not perfectly the case in the modern Western world. The laws of the United States are primarily based around a conception of negative liberty, which prevents citizens from infringing on the rights of others; while this may in part prohibit vice, it does not promote virtue. A law against the formation of monopolies may prevent one from enacting an excess of greed, but it does little to nothing to promote the virtue of temperance. It follows from this that if modern liberal laws are not concerned with virtue, then a just person also need not be concerned with liberal laws. Nevertheless, lawfulness is only one descriptor of justice given by Aristotle, and justice as a state of character continues to be essential to his definition.

The final problem is the issue of a just *state*. If justice is defined as a condition of character in which one is able to perform just actions through enacting the whole of virtue, then it seems as though one would not be able to describe a state or government as just or unjust, since it does not possess character virtues. This was actually answered by Socrates in his

⁵ Ibid., 5.22.

conception of justice as harmony within the soul by showing that harmony within a republic yields a truly just state. This thought is easily applied to Aristotle's definition, for the virtues revolve primarily around the avoidance of extremes. A state or government would then be virtuous in the same way that a person is virtuous. A person is virtuous by making a habit of enacting the mean between extremes within actions, and the same can be said about a government. A government that is unbalanced in any category can be identified as not virtuous and unjust--for instance, a government that is either too quick or too slow to violence can be characterized as having the vices of rashness or cowardice. Of course, the language of individual character virtues do not describe a government perfectly, but that a government can be virtuous and therefore judged as to its justice does seem true.

By looking at Plato's and Aristotle's definitions of justice, we can ascertain a working definition of general justice. This justice would then be what the various kinds of justice aim towards: theories of distributive justice aims to achieve broad justice in the social realm of goods, and retributive, (or more broadly, "rectificatory") justice aims to achieve broad justice in the criminal realm. General justice is a state of virtue that in some way comes from a harmony of parts--harmony of the parts of the self as Socrates argued, or harmony of the virtues as Aristotle argues. It is a state which is noticeable by the performance of just actions befitting the specifics of that person, as Plato said to "do one's own." To be just is also to follow the law, so long as the law is one that promotes virtue. Likewise, to be just requires being fair because an unfair person is not a virtuous person.

With an understanding of justice as a general individual goal, it is necessary to outline the specifics of criminal justice, or the realm of rectificatory justice. By rectification, Aristotle refers

to actions taken by judges after someone has been harmed.⁶ Clearly, rectificatory justice and criminal justice are part of the same realm. I will use the term “rectificatory justice” not as a specific model for achieving justice, such as retributive justice or restorative justice, but rather as the term for how justice is to be understood in the criminal justice realm. Aristotle’s description of rectificatory justice can thus be used as context for and a standard against which retributive and restorative justice can be judged.

Aristotle states that rectificatory justice “involves numerical proportion and equality.”⁷ This is to say that crime and harm necessarily involves someone who gains and someone who loses. The simplest example of this is theft, for the thief gains in proportion to what the victim loses. As he himself acknowledges, Aristotle’s use of loss and profit to describe all crime is problematic. At base in all crime there is an existing inequality: whoever has been assaulted has suffered more than the one who assaulted. In this sense, profit is seen as to be on the positive side of the inequality after harm is done, and loss is to be on the negative side of the inequality. This understanding of profit and loss is fitting for all crimes, for one party is naturally harmed and the other naturally is not. Therefore, the injustice involved herein is an unjust inequality created by crime or harm. It follows that justice will be the rectification of that unjust inequality, which will be the establishment of equality among those involved with respect to the unjust act. This is not to say that justice in rectification necessitates that those involved be brought to a perfectly equal condition, but only that the unjust inequality that was created by an unjust act be rectified.

Aristotle’s metric of the intermediate condition is the essential requirement for rectificatory justice. In order to find the intermediate between profit and loss in crime, one must

⁶ Ibid., 5.52.

⁷ Ibid., 5.5.

first find the states of profit and loss. The effects of a crime have two dimensions, the internal and the external. The internal effects for a victim of crime are fear, the feeling of isolation, the loss of autonomy, and other like harms. External effects of crime are effects that are manifest external to the mental such as structural damage to property and bodily harm among other effects. The effects listed here are what Aristotle would describe as losses, and while many of them have corresponding profits for the offender, some may appear to achieve no profit for an offender. For instance, there is no readily discernible profit for a murderer unless he does so to further another cause. Aristotle says that the words ‘profit’ and ‘loss’ are used to describe unequally divided suffering.⁸ Loss then is the larger amount of suffering that is the victim’s, and profit is the smaller amount of suffering that is the offender’s. Suffering caused by crime has many manifestations both internal and external, subjective and objective, and all aspects must be accounted for. The object of rectificatory justice is then to ensure that those involved have neither a profit nor a loss, which will be the middle point between the incurred suffering of the crime.

As profit is the condition of having more pleasure or less suffering than deserved, and loss is profit’s opposite; the intermediate condition can be therefore described as the correct amount of pleasure and suffering, which Aristotle advises ought to be numerically equal among participants.⁹ Further, justice does not treat the decent person differently than the base person regardless of who profited or lost due to the harm; Aristotle implies by this that profit and loss are a zero sum game because only the inequality incurred is dealt with by adding and subtracting within a closed system, and that there exists a condition of having “precisely what belongs to

⁸ Ibid., 5.52.

⁹ Ibid., 5.54.

them.”¹⁰ An important note is that this process does not involve previous inequalities between the victim and offender. All that is taken into account is the suffering that the crime has caused.

In the example of crime, Aristotle says that equality is found by subtracting from the offender half the difference between the profit and the loss incurred from the unjust action, and then giving that value to the victim. This is what Aristotle describes as equality. “What is just in rectification is what is intermediate between loss and profit.”¹¹ Which is to say that, in the example of theft, that what has been stolen is returned and thus the offender and victim are returned to their precrime state without profit or loss. Aristotle states that if a victim is at $-X$ and an offender is at $+X$, then that the half of the difference, X , ought to be subtracted from the offender and added to the victim, which would bring both to zero. This definition or goal of rectificatory justice both seems reasonable and to match a common understanding of criminal justice. Injustice, in this case crime, imposes unjust inequality, and the judicial process is the process that rules on the extent of a specific inequality and what actions will restore the equality. This definition allows for not only material loss to be accounted for, but also can account for the emotional harm incurred by crime, which modern criminal justice does try do. Nevertheless, there are a number of possible critiques of justice as equality, two of which will be discussed here.

When a person commits a crime, it is possible that they lose some of their rights. Put more plainly, the question to be raised against this definition is, “does a criminal deserve equality?” When a crime is committed, the offender infringes and inhibits the rights of the victim. For instance, a theft is similar to the loss of the right to property. Likewise, the offender

¹⁰ Ibid., 5.52.

¹¹ Ibid., 5.53.

ought to lose some or all of their rights, for they took the rights of the victim; this is one formulation of *Lex Talionis*, a core idea of retributive justice that will be explained in the following chapter. While such an argument still pursues equality, it believes that equality necessitates the offender losing their rights because that is what happened to the victim. Nevertheless, this approach cannot achieve justice in rectification as defined by Aristotle. Aristotle defines equality as the intermediate between loss and profit, and in this argument, equality is seen as subtracting the entire difference from the offender. This would mean that when a thief stole X dollars, the full 2X dollar difference between the offender and victim would be subtracted from the offender, leaving the offender at a loss. Neither if the victim is brought to profit and the offender left at loss, nor if either the victim and the offender end at a loss is justice in rectification achieved.

A second argument against criminals having a right to the equality described by Aristotle is that they have willfully left the bounds of society, which is the body that gives rights to individuals. Now that they exist outside of society, the rules of society no longer apply, and they have thus forfeited the right to equality.

There are two responses to this issue. The first is on the basis of the process for criminals re-entering society. If criminals are to be punished, rehabilitated, socialized, restored, or any such process of justice before being brought back into society, then they are not outside the bounds of society, or are no longer outside such bounds. Furthermore, it seems true that in order to be a part of a society, one must have the basic rights of society, which includes equality before the law. Therefore, a justice system that includes an avenue for criminals to rejoin society must give criminals equality before they return to the larger community. However, it is true that some

crimes and some criminals do not have avenues open for rejoining society--e.g. those with life sentences, or those in earlier times who were banished from their society--, and even the language of “rejoining” and “re-entering” imply that the criminal at some point is outside of society. For while the criminal is being acted upon by the justice system, they necessarily lose some of their rights, such as the right to live as they choose. However, so long as there is a goal of rejoining society, a criminal is entitled eventual equality.

The other response to the second issue rests on Aristotle’s definition of justice. The above speaks about what the criminal deserves, but that question need not be asked. All agree that the pursuit of justice is good and ought to be done, and as shown above, justice in the realm of rectification is pursued and achieved through a kind of equality. This means that the criminal deserves equality based on no merit of their own, but the criminal must have this kind of equality based on the demands of justice. A just system would then be one that rectifies unjust inequality into just equality. Aristotle states that, “The law looks only at the differences in the harm inflicted, and treats the people involved as equals.”¹² Both victim and criminal, regardless of their position within or without society ought to be treated as equals before the law. Except, of course, Aristotle holds that unequals must be treated unequally, for to treat a child like an adult or an adult like a child is unjust. There are echos of Aristotle’s understanding of general justice as virtue in this argument, for the law can be judged virtuous based on its action. A virtuous law is not a vindictive law but a fair law. Therefore, a just law is a fair law as well.

Aristotle gives a theory of justice in rectification that is informed by but separate from his understanding of the personal quality of justice. This theory, that justice is the intermediate

¹² Ibid., 5.52.

between profit and loss, allows us to evaluate methods of justice; a strong theory for how justice ought to be pursued will fulfill the conditions laid out by Aristotle.

II: Retributive Justice

Almost as long as human beings have sought justice, they have employed retribution. One of the earliest sources of retributive justice can be found in the book of Leviticus chapter 24 lines 17-22. “Anyone who injures his neighbor will get back the same as he gave: fracture for fracture, eye for eye, tooth for tooth. This passage refers to the so called “*lex talionis*” conception of retributive justice; those that commit a crime will be punished in proportion to the crime they committed. This is to say that the offender will always be harmed no more and no less than what is proportional to the crime in response. It is sometimes, but never consistently, taken literally; some interpretations read that punishment must be *identical* to the exact crime committed, but this law only requires proportionality. Justice does not require that all rapists be raped, and a man who has murdered two people cannot be put to death twice. Furthermore, *lex talionis* implies consistency. The law does not allow for inconsistency in punishment because each crime is always responded to proportionally. Should one of these requirements, proportionality and consistency, be broken the other would be lost as well. In order to compare restorative justice to retributive justice, we must first find an adequate conception of and justification for retributive justice. The core conception of retributive justice we will use is *lex talionis*, the law of retribution, understood in terms of proportionality and consistency of punishment. Therefore the question at hand is which motivations and justifications used in retributive theory best motivate and justify retributive justice as seen through *lex talionis*. For the purpose of this chapter three

such arguments will be discussed. The first will be the *emotional motivation* for retribution, which says that punishment is just because people feel negative emotions, like revenge, due to crime, and those emotions ought to be acted upon. Emotion will be found to be an inadequate motivation for retributive justice. Secondly, the *deterrence justification* will also be discussed. Deterrence, related to consequentialist ethical theory, says that punishment is just because of the consequences, namely that crime is deterred through punishing criminals. Deterrence will also be shown to be an inadequate justification for retributive justice. Finally, the Kantian deontological justification for retributive justice, which argues that punishment is right and obligatory in itself rather than because of its motivations or consequences, will be discussed. This, it will be argued, is the strongest philosophical justification for retributive justice.

Revenge

The *lex talionis* understanding of retribution has frequently been interpreted as the law of emotional revenge. It can appear that this law is the vocalization of humanity's desire for violence in response to violence. However the eye for an eye law cannot be just a prescription for emotional revenge but rational retribution. Revenge is motivated by negative emotions such as anger, hate, remorse, or rage, which are brought into life via crime. Rather than merely satisfying emotion, a just retribution would have to be governed by the rational rules of proportionality and consistency, as described above. To take an example, a man's wife is murdered, he feels the urge to kill the murderer, and he does so; this is clearly emotion motivated revenge. In contrast, imagine the community has a consistently enforced law that all murders are executed because

death is the proportional punishment to murder, and the murderer is executed. Rather than merely emotional revenge, this is *lex talionis* and retributive justice.

Nevertheless, some may still believe emotional revenge to be a reasonable justification for retributive justice because both the rational and emotional cases above lead to the same outcome. This belief focuses on the proportionality requirement of *lex talionis* that deals with the outcome of retributive justice, but forgets to consider how consistent emotional revenge will be. If emotion decides the outcome of justice, then it is possible that murders will go unpunished because no one feels motivated to retaliate. This is to say that the emotions felt by the victims of crime and third parties are not consistent, so punishment based on that emotion will be inconsistent. Equally possible is that lesser crimes will be disproportionately punished; if emotion rules justice, then victims of theft may decide to kill the offender. When the onus of deciding punishment is put on the feelings of victims, inconsistencies will exist between punishment. These inconsistencies inevitably result in disproportionate punishments.¹³ A rationally just version of *lex talionis* cannot be motivated solely by the emotion of victims, and therefore neither can retributive justice.

Deterrence

A second justification of retributive justice is deterrence. The law of deterrence says that punishment is just because it deters future crimes from happening. This means that crimes ought to be punished insofar and to the extent as the punishment will deter future crime. Deterrence

¹³ Brettschneider, Corey. *Punishment, Property and Justice: Philosophical Foundations of the Death Penalty and Welfare Controversies*. Aldershot (Gran Bretaña): Ashgate, 2004. Pages: 18-19

theory argues that the existence of punishment deters initial offense as well as recidivism. This belief has many supporters and critics, but for the purpose of understanding a retributive justification based on deterrence let us assume it to be true, and turn to how well deterrence follows the requirements of the rationally just version of *lex talionis* that have been set out as the core of retributive justice.

The deterrence justification of retributive justice states that punishment is just because it prevents crime by punishing criminals for their actions. This seems to be an improvement on the revenge justification, for there is a rational system for deciding the punishment of an offender; this rational system seems to avoid the issue of inconsistency and disproportionality. Furthermore, “the general deterrence theory does not encourage the populace to fixate on the horror of the crime but provides them with a constructive response to it.”¹⁴ Deterrence has a rational basis for punishment and may well improve society. It therefore may then be supported by a Utilitarian moral theory, in which those actions are right for which the consequences optimize social welfare.

Unfortunately, deterrence does not function as well for *lex talionis*. Because deterrence uses the consequences of punishment as justification, deterrence is equally as inconsistent as a revenge-based system. If a respected agent, who is depended upon by society, is accused of stealing, then his community may distrust this accusation and react negatively to any punishment, or decide that punishment is unnecessary. This means that the punishment will likely serve to increase social unrest. Because of this, deterrence may say that the agent ought not to be punished in order to deter further crime, or the agent will merely be lightly punished.

¹⁴ Brettschneider. *Punishment and Property*. 23.

However, if a disliked agent commits the same crime, there will be a societal call to punish this man, and the law of deterrence will do so. By basing the justification on the effect deterrence has on society, deterrence based punishment becomes inconsistent because otherwise equivalent crimes may be understood differently by society.¹⁵ Deterrence based punishment also inadvertently places great worth on the momentary feelings of citizens about a crime, for how people will feel about the punishment affects how they will be deterred or motivated.

Deterrence based punishment will also fail to be proportional to the crime because it will over punish or under punish. Under a system of deterrence, the law may find that the most effective way to deter theft is to amputate a hand of the thief. While this may indeed be the best way to prevent theft, it does not adhere to the proportionality requirement of *lex talionis*. This disproportionality can swing in the other direction as well, as if no way of deterring a crime exists, then there is no need to punish that crime; if it is impossible to create a punishment capable of deterring people from committing murder, then there is no justification to punish murderers. This would be clearly unjust because of the disproportion between the crime and punishment. Of course, these examples are exaggerated, and a consequential judicial system would likely take into account multiple consequences through which the unreasonable examples given above would likely be avoided. Nevertheless, what is being shown here is that a retributive system cannot be adequately justified or governed by deterrence alone because it will fail to be fully proportional and consistent. Deterrence may still exist as a positive byproduct of retributive justice.

¹⁵ Ibid., 24.

In short, retributive justice cannot be justified on either the emotion of revenge or desire for deterrence because neither aligns with retributive justice's requirements for consistency and proportionality. Retributive justice requires a justification all the same. We may note that while restorative justice and retributive justice disagree, they have something in common. Restorative justice relies on an understanding of harm as bad and healing harm as good and is motivated by the desire to do good. This is somewhat mirrored in retributive justice; retributive justice understands that crime is wrong and that consistent and proportional punishment is the good and appropriate response to crime. We will see that Kantian deontology gives an account of that understanding.

Kantian Punishment

In the first part of Immanuel Kant's 1796 *The Metaphysics of Morals*, is his *Philosophy of Law*, where Kant describes the requirements for punishment. "But what is the mode and measure of punishment which public Justice takes as its principle and standard? It is just the principle of equality..."¹⁶ Kant agrees with the law of *lex talionis*. Punishment is ruled and decided by equivalence; an eye for an eye, and a tooth for a tooth. Again, this is not identical punishment, but rather proportional punishment. This also implies that Kant's theory of punishment and a deontological justification of retributive justice will not rely on revenge or deterrence, as those justifications do not provide proportional outcomes. In order to explore Kantian retributive

¹⁶ Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right*, by Immanuel Kant, trans. W. Hastie (Edinburgh: Clark, 1887). <http://oll.libertyfund.org/titles/359>. 196.

justice, a preliminary understanding of his deontological ethics is required. With that in hand, we will turn to the essential question of “can it be morally justified to punish and inflict harm?” How one answers this question will lead to either a strong defense or critique of retributive justice.

Kant’s deontology prescribes one moral law, which Kant refers to as the categorical imperative in his 1785 publication *Groundwork for the Metaphysics of Morals*. “The categorical imperative would be one which represented an action as objectively necessary in itself, without reference to another end.”¹⁷ Kant says that following the categorical imperative is the basis of moral action, and moral actors use rationality to ascertain what is and is not a duty, for “in it [a rational being], and in it alone, would there be the ground of a possible categorical imperative, i.e., of a practical law.”¹⁸ Kant understands rationality to be valuable, and that rationality is capable of finding practical moral laws.

Two formulations of the categorical imperative, the universal law formulation and the humanity formulation will be reviewed. The universal law formulation first dictates that moral actions must be universalizable. Indeed, Kant explains that universalizable maxims are not categorical imperatives, but rather that “there is only one categorical imperative.. Act only according to that maxim whereby you can at the same time will that it should become a universal law.”¹⁹ To do this, a maxim or law is formulated, such as “lie to acquire what you need.” The moral actor tries universalizes the maxim by imagining a theoretical world where the law is followed universally, and the moral actor evaluates the theoretical world on its ability to exist and whether it is willable by a rational agent. In this case, the theoretical world would be self

¹⁷ Kant, Immanuel. *Groundwork of the Metaphysics of Morals*. Edited by Mary J. Gregor and Jens Timmermann. Cambridge, U.K.: Cambridge University Press, 1998. Page 25

¹⁸ Kant. *Groundwork*. 35.

¹⁹ *Ibid.*, 30

defeating; if everyone in the world would lie regularly, then “no one would believe what was promised him but would merely laugh at all such utterances as being vain pretenses.”²⁰ This formulation of the categorical imperative shows that when the moral actor tries to universalize the maxim, they can rationally comprehend whether it is morally right.

Kant also explains a second formulation of the categorical imperative. This formulation finds the imperative to be, “act in such a way that you treat humanity, whether in your own person or in the person of another, always at the same time as an end and never simply as a means.”²¹ This is to say that because humanity is rational and therefore valuable in itself, it must always be treated as valuable; treating rational beings as ends with value to be respected rather than means to further other ends is the basis of moral action. Using the lying example given above, one will find the same answer that lying for what one needs is wrong. In this case, the moral actor ought not to lie because it treats others as means rather than ends. By lying to a rational human in order to further one’s own ends, one uses another rational human as a means towards the betterment of the self. This directly contradicts the humanity formulation and is therefore wrong. For Kant, these two formulations will always give equivalent answers to the same questions because they are two ways of accessing the single moral law.

Some believe that deontology will define judicial punishment as wrong because deontology so defines many other forms of harm. Eoin O’Connell argues against this in *Kantian Moral Retributivism: Punishment, Suffering, and the Highest Good*. He writes that, “a murder and an execution may be considered the same as pieces of behavior--the intentional killing of

²⁰ Ibid., 31.

²¹ Ibid., 36.

another person--but there are different reason for killing in the two cases.”²² The difference being described is a difference of maxims. O’Connell states that the different intents behind a murder and an execution separate the two maxims: a *criminal maxim* that states that crime is permissible and a *punishment maxim* that states that crimes will be punished. “Therefore, the non universalizability of a criminal maxim does not transfer to the punishment maxim.”²³ This understanding of the issue fits with Kant’s ethics because Kant is not interested in consequences of actions; while the two maxims may result in similar consequences (death), that does not mean they are the same maxim of moral action. With the separation of the criminal and punishment maxims, the punishment maxim may be tested on its own. If the punishment maxim were universalized, all crimes would be punished. This is a universalizable world. This maxim is also rationally willable because it seems correct that crime must be responded to.

Nevertheless, for punishment to be an acceptable response the critique that the purposeful infliction of suffering is always wrong must be answered. Starting with the humanity formulation, intentional harm does not appear to violate the categorical imperative. Intentional harm is the purposeful infliction of pain, injury, or similar states. Intentional harm covers more than simple bodily harm, as incarceration certainly seems to be harm. An example of this type of harm would be a dentist forcing a man to floss. The man will likely feel harmed by this imposition. However, this action is taken for *the sake of the man*. More specifically for deontology, being healthy will support the man’s rationality. Therefore, this is a morally just action under the humanity formulation.

²² O’Connell, Eoin. "Kantian Moral Retributivism: Punishment, Suffering, and the Highest Good." *The Southern Journal of Philosophy* 52, no. 4 (2014): 477-95. 481.

²³ O’Connell. *Kantian Moral*. 482.

The maxim hidden in the flossing example will also pass the test of universalization. This maxim could be, “one ought to harm if it is done to better the person harmed.” Very similarly to a maxim of benevolence, this harm acts in order for the betterment of one’s humanity. A world where this maxim rules is quite willable. Harm is employed as a powerful teaching mechanism on both adults and children. Society sees harming children as good when it is done for the betterment of the child; while spanking may be a controversial topic, giving a child a time out or forcing a child to eat vegetables rather than ice cream, both of which fall under the definition of harm given above, are seen as acceptable and necessary. Clearly the world of this maxim is not only conceivable but is also willable. Intentional harm for the betterment of the other is therefore a morally just action as well as a moral duty. Therefore deontology does not always forbid harm.

Indeed, for Kant the categorical imperative defines punishment as a duty. A retributive system of punishment follows the humanity formulation because it need not be based on the consequences of punishment. This system would punish because the humanity of the offender *requires it*; Kant would see other justifications and motivations to criminal justice such as deterrence or emotion as using the offender as a means to another end. In contrast, the retribution Kant describes is not for any end save that of the criminal’s. Punishment under this conception is not only for the purpose of harming the wrongdoer. Kant implies that it is beneficial to punish someone who has committed a crime because they acted immorally by acting against the categorical imperative--punishment is justified harm being administered, which is morally necessary and beneficial. Punishing is a moral duty, and failing to is immoral. Kant argues that “the law of punishment is a categorical imperative.”²⁴ For punishment must happen in order that

²⁴ Kant, Immanuel. *The Metaphysics of Morals*. Edited by Mary J. Gregor. Cambridge: Cambridge University Press, 1996. 6:331.

“...blood guilt does not cling to the people for not having insisted upon this punishment; for otherwise the people can be regarded as collaborators in this public violation of justice.”²⁵ Not punishing a criminal makes one complicit and collaborator in the crime. Therefore, punishment is a necessary reaction both because of the moral requirements of the wrongdoer, but also because of the duty of the punisher. This seems intuitively correct, as not acting to rectify injustice sustains injustice. Sustaining something unjust would presumably be an immoral action. Therefore, this system sees the only just response to injustice as punishment.

Kant finds retributive justice to be valuable for itself rather than by its consequences. He writes that, “Juridical Punishment can never be administered merely as a means of promoting another Good either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime.”²⁶ As it was explained above, Kant firmly states that punishment is good in and of itself. retributive justice is not right because of its consequences, but rather retributive justice is right because punishing crime is right and necessary.

This sets up the two prerequisites for punishment that Kant defines; the offender “must first be found to be guilty and punishable..”²⁷ One may only be punished if they are indeed both guilty and proven to be so. It is not enough simply to be guilty, for the word “found” requires a process of finding. This means that a judicial system is needed in order to confirm one’s guilt. Beyond being found guilty, one must be found to be *punishable* in order to be punished. What Kant means by punishable is less clear. However, Kant consistently sees value in rationality and finds punishment to have value because of how it treats rational humans. It is likely that Kant

²⁵ Kant. *Metaphysics of Morals*. 6:333.

²⁶ Kant. *Philosophy of Law*. 195.

²⁷ *Ibid.*, 195.

means the having a sound mind as a requirement for punishment. Kant has set up an understanding of retributive justice that is justified by punishment itself and relies on a process to establish the accused's guilt and aptness for punishment.

With the duty to punish explained, it is necessary to find how that duty is to be carried out. It has already been shown that punishment is to be done after a process for finding guilt and punishability, but the requirements of proportionality and consistency have yet to be explored. O'Connell asserts that Kantian retribution must be proportional through Kant's discussion of the *highest good* and our duty to promote the highest good. While, for Kant, morality is obligatory regardless of any good, he does present a notion of the highest good in his 1788 *Critique of Practical Reason*. O'Connell begins by explaining Kant's highest good, the synthesis of moral virtue and happiness. He states that "virtue without happiness cannot be considered *completely* good. Kant's point is that while we would consider Job a good person, we would not say he had a good life."²⁸ This makes very good sense, as all of a human life must be good for a life to be considered fully good. Furthermore, "virtue has moral precedence and therefore takes the antecedent position."²⁹ This theory does not posit a causal relationship between virtue and well-being; if it did, it would directly contradict the example of Job because Job was virtuous but not happy. Rather, Kant's formulation of the highest good is to be understood as an ideal, where well being is proportional to virtue. It is right for virtuous people to be happy, and it is wrong for unvirtuous people to be happy. Nevertheless, it is clearly apparent that Kant's highest good does not describe reality. Rather than describing reality, Kant's highest good is a condition of the ideal world.

²⁸ O'Connell. *Kantian Moral*. 487.

²⁹ *Ibid.*, 487.

Kant's formulation of the ideal life, or highest good, is a morally good and happy life. Part of understanding moral virtue as part of the highest good is to see the pursuit of moral virtue to be good. This is somewhat obvious, but important to state, as it means that actively supporting the connection between virtue and happiness further pursues the highest good. Also, deontology does not take into account individual contexts, but creates universal imperatives; this imperative would be to further the positive relationship between virtue and happiness. The inverse of this would also be true. The highest good would be a world in which virtue corresponds to happiness, so it follows that lack of virtue ought to correspond with unhappiness. The duty that comes from this conception of the highest good can be summarized as, "the proper targets of benevolence are permissible ends, whereas the proper targets for retribution are impermissible actions."³⁰ Simply put, a moral actor ought to promote the well being of virtuous people through benevolence and punish non-virtuous people. O'Connell distinguishes between ends and actions in the above quote. Because ends and actions are distinguished, one can be treated with benevolence for desiring a permissible end, while still morally requiring punishment for impermissible action.

The duty to promote the highest good requires that punishment be done proportionally. Crime is morally wrong, deserves to be punished, and violates the desired relationship of virtue and happiness; an immoral man might be happy because his crimes make his life very easy by treating others as means to improve his own ends. Crime may also damage a virtuous victim's wellbeing. The Kantian justification for proportional punishment is found through Kant's understanding of the highest good. By taking into account both the duty to pursue the highest good and how crime affects the relationship between virtue and wellbeing, the justification for

³⁰ Ibid., 485.

proportional punishment can be established. Punishment ought to be proportional to how a crime has damaged the relationship between moral virtue and wellbeing.

As noted, Kant establishes that retribution must only be done after one is found guilty and apt for punished. The justification for both prerequisites of punishment are founded in how deontology seats value in rational autonomy. Humans have value because of their rationality, and this applies equally to those that have committed crimes as well as those who have not. This rational nature, and the value inherent within said nature, demands a process for establishing guilt. This is to ensure that the person is being treated as an end rather than a mean, for vigilante justice is both more likely to misplace guilt as well as be motivated by revenge; both situations disrespect the rational humanity of the person.

The justification for the punishability requirement also rests on rationality. Punishment's justification under deontology is that a rational person has a duty to follow the categorical imperative, and a criminal fails to do so, which necessitates punishment in order to respect the humanity of the criminal and pursue the highest good. That justification rests on the offender having rationality. Should the offender not be rational or generally not be of sound mind, then this justification will not apply to them.

The requirements of guilt, punishability, and proportionality require a judicial process. Indeed, Kant says that judges or courts are "the moral person that is authorized to impute with rightful force."³¹ While Kant singles out the court system in this quote, it is not any specific type or model of judge, but rather simply judges that are endowed with authority to judge. This only

³¹ Kant. *Metaphysics of Morals*. 6:227.

further confirms that there must be an officially designated process and institutional arrangement for retribution in order to conform to the requirements of moral duty.

Having explored several facets of retributive justice of which some stand and some do not, brings us to a clarified picture of retributive justice. Beginning with what true retribution is not makes clear that retributive justice is motivated by a moral duty rather than emotion and the desire for revenge. Likewise, retributive justice is not justified by the consequences of the punishments that are given. Rather than consequences, retribution is justified in itself because it is right to punish crime. The ideas presented above are unlikely to be found shocking; many people understand crime as wrong and punishment as right without feeling motivated by revenge or justifying punishment through consequences. Kant justifies a consistent and proportional notion of retributive justice; while it may create the byproducts of deterrence or satisfy the need for revenge, this justice treats those as secondary to the duty of punishment.

III: Restorative Justice

Restorative justice is another framework or perspective for understanding issues of injustice and how society or individuals ought to be treated in order to achieve justice in the aftermath of crime. It focuses on how best to heal the harm caused by crime. The definition of justice varies not only between theories but also within them. Nevertheless, restorative justice has an underlying foundation in an understanding of justice. As restorative justice is a relatively new field, the best practices fluctuate greatly among proponents.³² Still its sought-after ideal of

³² Restorative justice is new to academia, but it has deep historical roots. The inspiration for many of the specific practices of restorative justice as well as much of the initial wave of academic development is the judicial practices of indigenous peoples. It is not a coincidence that Canada, Australia, and New Zealand--countries with surviving

justice is identifiable; restorative justice understands crime to violate relationships and cause harm. It seeks to restore those harmed by crime.

In 1990, Howard Zehr published a seminal book on restorative justice, *Changing Lenses*. In his book, Zehr describes a restorative justice opposed to retributive justice, and while this contrast is useful for an initial understanding of restorative justice, it is lacking when it comes to explaining the justifications of the theory. In 2003, Zehr published a follow up to his initial volume in which he acknowledges the shortcomings of the first and gives an independent account of restorative justice. Helpfully titled *The Little Book of Restorative Justice*, this book refined much of what Zehr stated earlier. In *The Little Book of Restorative Justice*, Zehr softens the contrast between the two theories and gives a clear account of what restorative justice is. Because of this, the second book will be more useful for this project. As Zehr leads us through the foundational signposts of restorative justice, supplementary authors and readings will add depth to our understanding.

A useful perspective in understanding restorative justice is put forth by Zehr in a 2000 paper titled *A Journey to Belonging*. Zehr argues for understanding crime as tragedy. When a tragedy strikes, it is a traumatic to all those involved. In the context of a crime those involved are the *victim*, the *offender*, and other members of the *community*, all of which are referred to as *stakeholders*.³³ Justice then is healing the trauma in those affected, however that may look, that has occurred. Importantly, the state is not understood as a stakeholder in such trauma, although a national community may be. This is because restorative justice does not define crime as offense

indigenous traditions--are the leading practitioners of Restorative Justice. (*Reviving Restorative Justice traditions? (Handbook of Restorative Justice*. 113))

³³ Zehr, Howard. "Journey to belonging," in *Restorative Justice Theoretical Foundations*. Weitekamp, Elmar, and Hans-Jürgen Kerner, eds. Portland, Oregon: Willan Publishing, 2002. pg 20

against the state, but as “a violation of people and of interpersonal relationships.”³⁴ If the law is understood as a set of rules put in place to represent and protect relationships then when one violates a law, they actually violate the web of relationships. So, while crime violates relationships instead of the government, the law is something in between the two.

This view of tragedy and trauma brings our attention to the internal experience of crime. Restorative justice does not only focus on the objective facts of crime, for the objective nature is inadequate in understanding the full extent of the trauma that occurs--the focus is on the total effect of a crime as opposed to which particular crime was committed. This is because the trauma that one victim of burglary may feel might not match another burglary victim, but may be similar to the victim of a hit and run car accident. What matters to restorative justice is healing trauma.³⁵ Once the correct offender has been identified, understanding the objective facts of the crime has value primarily in how the facts may help to heal trauma, which will be further explored later.

A common misconception about restorative justice is that it is essentially blanket forgiveness for all offenders and requires victims to forgive offenders. This is not the case. While facilitating honest forgiveness is viewed as a success in restorative justice, it is not a demand or requirement. Some believe that by aiming to reintegrate the offender into the community, restorative justice must forgive offenders, but this process is the same as the retributive process that releases offenders after they serve their sentence. Neither retribution nor restoration necessitates offender forgiveness, but in either case when the offender has been held responsible and accountable, they are, in the vast majority of cases of either system, brought back to the

³⁴ Zehr, Howard. *The little book of Restorative Justice*. Vancouver, B.C.: Langara College, 2016. 17

³⁵ In cases where death is involved, the ultimate victim may be unavailable, or it may be argued that they did not suffer. Nevertheless, trauma remains in the community they leave behind--trauma that ought to be healed.

community at large. Forgiveness is, for restorative justice, a desirable, but not always achievable goal.

As alluded to above, restorative justice revolves around the needs and obligations that arise out of crime. Restorative justice sees that multiple people are involved in a crime and believes that all these people should be involved in the judicial process. The needs and obligations are different for each stakeholder; some stakeholders have more needs than obligations, some more obligations than needs. Because of the effect focused perspective being taken, it is impossible to give a exact list of needs and obligations prior to a individual crime. Nevertheless, Zehr gives a sketch.

The victim of a crime has primarily needs. Zehr identifies four victim needs: information; to tell their story; empowerment; and restitution or vindication.³⁶ The victim needs “answers to questions they have about the offense. Why it happened and what has happened since.”³⁷ This information is subjective information; it is not enough for the victim to know the time, place, and actions done. There is need to know the intent of the offender, as well as other experiential facts. The victim wants to understand why what happened to him or her has happened. This goes beyond the type of information allowed in a courtroom. The speech and vocabulary of the courtroom is carefully chosen to determine guilt or degree of culpability, and regularly not quite accurate of either the victim’s or offender’s internal experience of the crime. People experience life in a subjective, first-person way. Victims of crimes need subjective, first-person answers to their questions. Not seeking the impersonal information of the courtroom, the victim needs to be given answers to their questions in terms that reflect how they experience in order to heal.

³⁶ Zehr. *Little Book*. 13.

³⁷ *Ibid.*, 13.

Secondly, the victim needs to tell his or her story. The need for storytelling is likely to be understood; society understands storytelling to be deeply connected to catharsis. For Zehr, this retelling is a way for the victim to come to understand his or her life in the aftermath of trauma. This allows their life narrative to be reclaimed.³⁸ The goal here is a “re-storying of one’s life by telling the story in significant settings, often where it can receive public acknowledgement.”³⁹

The inclusion of public acknowledgement shows Zehr’s knowledge of John Braithwaite’s *Crime, shame and reintegration*, a criminology text that is essential to much of how restorative justice practice accounts for victim and offender needs. Braithwaite describes two types of shaming: reintegrative shame and stigmatizing shame. Both forms of shame begin with the same general shaming, which is a community response of disapproval of an action. Braithwaite is most interested in what action follows the initial period of shame; reintegrative shame is shame “followed by gestures of acceptance into the community...”⁴⁰ Stigmatizing shaming, which is not followed by these gestures, further alienates one from their community. Zehr argues that the victim of trauma feels an alienation much like that which comes from shame, as crime “represents a wound in the community, a tear in the web of relationships.”⁴¹ The victim feels torn from their community, and they must be reintegrated. This is the secondary need involved in the retelling of their story--the victim tells their story to their community in order to receive Braithwaite’s “gestures of acceptance” thereby reintegrating into their community.

³⁸ In *After Virtue*, Alasdair MacIntyre explains the narrative essence of human life, and the necessity of narrative for understanding human life and action. These narratives are more than individual’s stories, but how individuals view their place within a whole, as well as how a greater community understands the individual. (Alasdair MacIntyre, *After Virtue*. (Sandel, Michael J. *Liberalism and Its Critics*. Oxford: Blackwell, 1984.))

³⁹ Zehr. *Little book*. 13.

⁴⁰ Braithwaite, John. *Crime, shame and reintegration*. Cambridge: Cambridge University Press, 2007. 55.

⁴¹ Zehr. *Little book*. 18.

Next, victims need to be empowered. Zehr writes that, “Their sense of personal autonomy has been tarnished by the trauma, and they need to have this sense of personal power returned to them.”⁴² This empowerment is heavily linked to control, as “being victimized is by definition an experience of powerlessness - the victim was unable to prevent the crime from occurring.”⁴³ Because of this, the victim requires the restoration of a sense of control and autonomy. While the reassertion of control is accomplished in no set way, it is essential that the victim be heavily involved in the process of justice. In giving the victim elements of control over their case, it empowers and works to restore the victim’s sense of autonomy.

Finally, Zehr says that the victim needs restitution or vindication. Restitution is a relatively basic need; if something is stolen or destroyed, the victim needs their previous status of life restored. However, “restitution, in fact, is a symptom or sign of a more basic need, the need for vindication.”⁴⁴ Similar to why many view punishment as valuable, restitution works to vindicate the victim by showing them that they are in the right. It is as if the offender is saying, “I am taking responsibility, and you are not to blame.”⁴⁵ The need for public restitution and vindication is central to restorative justice because the relationships between victim and community are damaged as well. Vindication is another way that victims are reintegrated as members of the community in the way that Braithwaite describes. Vindication confirms for the victim that they are not at fault and remain community members in good standing or are re-integrated as such.

⁴² Zehr, Howard. *Changing Lenses: A New Focus for Crime and Justice*. (Christian peace shelf selection). Herald Press, 1990. 27.

⁴³ W., Van Ness Daniel, and Karen Heetderks Strong. *Restoring justice: an introduction to Restorative Justice*. Waltham: Anderson Publishing, 2015. Pg 38

⁴⁴ Zehr. *Little Book*. 14.

⁴⁵ *Ibid.*, 14.

In brief, the victim needs answers to questions they may have about their trauma, the opportunity to tell and retell their story in order to reintegrate into their community, to be empowered by having their autonomy returned, and vindication through restitution.

The crime is tragedy for the offender too. Restorative justice holds that the just response to tragedy is that which heals the trauma that has occurred. This includes trauma of the offender, which implies that the offender has needs and obligations as well.⁴⁶ First, Offenders may initially and temporarily require restraint in order to keep the greater community safe. The second of the offender's needs and obligations is the obligation to be accountable for their actions through making amends. Third, offenders need community support in their efforts to be accountable; this support must also be directed at efforts towards personal transformation and community integration, such as through drug or alcohol rehabilitation, relocation, employment, or learning skills.⁴⁷

Zehr states that restraint is necessary in some cases. For the safety of the victim, the community at large, and the offender themselves, restraint may be necessary. This may also be a need of the community. However, Zehr clarifies that this restraint is likely temporary in nature. The purpose of restraint in a restorative justice perspective is to keep stakeholders safe during the judicial process--restraint as punishment is not the goal. Of course, how long this restraint must last in order to insure the safety of the community as well as how severe the restraint must be is a matter of consideration and may rightfully vary among like crimes. What is important for the theory of restorative justice is that an appropriate level of restraint is used and is used as protection as opposed to punishment

⁴⁶ All of the needs and obligations of the offender assume that the determination of guilt has been established.

⁴⁷ Ibid., 15.

For the offender, the primary need is closer to an obligation; the offender ought to be accountable and responsible for what they have done through making amends to the victim. The current criminal justice system holds offenders accountable for crime through punishment, but Zehr argues that this is not true accountability, for “offenders are discouraged from acknowledging their responsibility and are given little opportunity to act on this responsibility in concrete ways.”⁴⁸ While restorative justice and retributive justice both aim to hold offenders accountable, restorative justice believes that accountability is accomplished through actual actions and interactions with the victim that attempt to make amends and give restitution.⁴⁹ This process is motivated by an understanding of the victim’s trauma; while the victim needs information from the offender to understand and set their world view straight, the offender needs to listen to the victim and understand the impact of their actions. This is an important step for the offender to be able to give proper restitution and be accountable--one can only work to make something right if they understand what is wrong.

The victim of a crime is frequently ashamed however, it is the offender that ought to be. More so than in the case of the victim, Braithwaite’s theory of reintegrative shaming is foundational to the needs and obligations of the offender. Braithwaite defines shaming as “all social process of expressing disapproval which have the intention or effect of invoking remorse in the person being shamed and/or condemnation by others who become aware of the shaming.”

⁵⁰ By this definition, the current justice system functions as an institution of shaming, and that a correct understanding of its outcome, but shame is not an intentional product of retributive

⁴⁸ Ibid., 14.

⁴⁹ In a retributive justice system, it is natural for offenders to deny and fight accountability for their actions. Indeed, the system is built such that this is required.

⁵⁰ Braithwaite. *Crime, shame*. 100.

justice. However, a retributive system functions deintegratively because it removes the potential of further shaming by labeling those within the system irrevocably as criminal and often removing them from society.

In contrast, restorative justice is a system that practices reintegrative shaming, in which shame is followed by a process of reintegration.⁵¹ Shame also functions as a type of deterrent to crime in that it embeds societal conscience in individuals similarly to how parents teach children. However, Braithwaite states that, “there are times when conscience fails all of us, and we need a refresher course in the consequences of a compromised conscience.”⁵² A refresher course is the process of reintegrative shaming, which aligns offenders closer to societal understanding of crime and pulls them back into society where their conscience will function to the greatest extent. To this end the offender needs “encouragement and support for integration into the community.”⁵³ With the theory of reintegrative shaming in mind, this encouragement and support are an obvious need; the offender needs to be brought back into the community because that will increase the likelihood of restoration of the victim while decreasing the likelihood of reoffending.

Braithwaite also argues that stigmatization increases the likelihood of reoffending. He writes, “To the extent that shaming is of the stigmatizing rather than the reintegrative sort, and that criminal subcultures are widespread and accessible in the society, higher crime rates will be the result.”⁵⁴ This is because the offender is pushed outside of the community, and is pushed into

⁵¹ A system that correctly practices reintegrative shaming can better perpetuate itself than a deintegrative system, for a deintegrative system actively weakens its ability to further shame, while a reintegrative system strengthens its ability to shame in the future.

⁵² *Ibid.*, 72.

⁵³ Zehr. *Little Book*. 15.

⁵⁴ Braithwaite. *Crime, shame*. 102.

a criminal subculture where the stigma of the primary culture serves as a unifying trait. Furthermore, the existence of these subcultures enables those labeled as criminals to become *better* criminals; in the same way that learning is enabled in a community of students, crime is enabled in a community of criminals. Techniques of crime, social support for crime, and criminal role models are strengthened and localized when offenders are pushed out of the general community.

The theory of reintegrative shaming shows that offenders do not just need encouragement to reintegrate, but also need encouragement to personally transform.⁵⁵ Because of how trauma may lead to offending, being stigmatized without subsequent reintegration pushes one into offending behavior. Therefore, it is likely that offenders need help to heal trauma that may have led to their offending. While this may seem contrary when viewed in a retributive perspective, it is crucial to remember that restorative justice views justice as the healing of trauma and the restoration of people. Therefore, justice includes not just the healing of the victim, but the healing of the offender. This healing could involve help in overcoming addiction, training in skills, or other techniques that either restore the offender or encourage the offender to reintegrate back into the community.

Finally, beyond the victim and offender comes the needs and obligations of the community, such as friends, family, neighbors, etc. In order to understand what restorative justice sees as the needs of community, it is necessary to understand how restorative justice perceives community. “Community is *not* a place.”⁵⁶ Rather, community is understood as “a web of

⁵⁵ Zehr. *Little Book*. 15.

⁵⁶ Walgrave, Lode. “From community to dominion: in search of social values for restorative justice.” in *Restorative Justice Theoretical Foundations*. Weitekamp, Elmar, and Hans-Jürgen Kerner, eds. Portland, Oregon: Willan Publishing, 2002. 74.

affect-laden relationships... and a measure of commitment to a set of shared values...”⁵⁷ Braithwaite understands community as a set of “dense networks of individual interdependencies with strong cultural commitments to mutuality of obligations.”⁵⁸ While these definitions are different, they include similar essential elements such as the importance of relationships and interconnectivity. Furthermore, a community does not have a minimum or maximum physical size, but does have shared values. Because community is interconnectivity and a shared vision, and it has needs in the aftermath of trauma. When this understanding of community is combined with the understanding of crime as a violation of interconnected relationships, it becomes clearer in what sense community has needs; the web or network of relations has been wounded. Taken literally, there is a hole in the community that must be repaired.

This brings us to Zehr’s list of community needs and obligations. These needs and obligations are split into those for the community at large and those that apply to so called “communities of care”, which is made up of individuals who are involved in the victim’s and offender’s lives. These are families, neighbors, co-workers, or other connected people within the community.⁵⁹ Initially, individual members of the community have needs as the victim because they may be personally traumatized as well. First, any individual community member must have their needs as victims addressed. An important case of this need is one where the primary victim has been killed, as their family will be the primary victim. Second, a community must be able to validate the values of the community--accountability in particular. Third, the community is obligated to pursue the welfare of community members, such as victims and offenders, but also other affected members; this includes creating an environment that promotes the welfare of all.

⁵⁷ Walgrave. “Community.” 74.

⁵⁸ Walgrave. “Community.” 74.

⁵⁹ Zehr. *Little Book*. 26.

The community also needs encouragement and assistance towards this end, which will come from the judicial system. Finally, the community needs assurance that the offender will not repeat their offence.⁶⁰

Individuals in the community affected need “encouragement to take on their obligations for the welfare of their members, including victims and offenders, and for the conditions that promote healthy communities.”⁶¹ This is the connection between the community and the victim/offender dyad. The community is responsible for the reintegration and general welfare of the victim and offender as far as possible. Further, it is how the community is primarily set to be involved in the process. Community members must be encouraged to work with the needs of victims, to hold offenders accountable, and to reintegrate both victim and offender back into the community.

This will allow the community at large the opportunity to heal the trauma that occurs from crime. If community is made up by both interconnected relationships and a shared understanding or goal, those are the areas that must be maintained and further strengthened; the first step to healing the greater community is healing the broken section of the web or network. This is Zehr’s third community need listed: the need for “opportunities to build a sense of community and mutual accountability.”⁶² Again, community is not primarily a physical thing, so repairing the understood idea of community and reassuring community members of mutual accountability are the essential ways to heal community trauma although repairing physical community structures is important when necessary. This process will likely also include

⁶⁰ Ibid., 16.

⁶¹ Ibid., 16.

⁶² Ibid., 16.

discussion on why the trauma occurred initially, as addressing problems in the community that might have led to offending behavior is part of the restorative process.

To that end, the community also must work toward assuring that the offense will not be repeated. This is the final community obligation that Zehr lists, and is important for the survival of the community going forward. This obligation, ensuring future security, is in part a community need: community members must discuss why the offense occurred, and what obligations the community has in order to decrease the likelihood of future offenses. Similarly, the community must work with the offender in assuring the offense does not happen again. The offender is accountable for the damage they have caused to the victims relationship to the community, and working to lower the victim's worry of another trauma is integral to that process. The community is involved in this process by insuring that the offender is held accountable to their obligations. While the community needs and obligations are much less specific than the victim or offender needs and obligations, the nature of the interconnected understanding of community implies that all needs are in some way community needs and community needs are in some way all needs.

Familiarity with a formal thesis of restorative justice is not common. However, restorative justice can be found in many aspects of society. As previously stated, the western criminal justice system contains a number of non-retributive aspects, of which the goals are restoration or reintegration of stakeholders rather than punishing the offender. Parole is chief among these with its emphasis on successful reintegration of offenders. Parole often is in conjunction with mandatory rehabilitation for addiction or other issues such as mental health or anger, which fall under restorative justice's call for offender transformation. Beyond the criminal

courts, the civil, juvenile, and family courts are even more restorative. The civil court focuses on the offender making reparations to the complainant, the modern juvenile court is more and more often attempting to increase the offenders community connection ala Braithwaite's reintegrative shame rather than incarceration, and the broader area of family law pursues a situation that is best for all involved rather than prescribing a requisite punishment. Finally, restorative justice can be seen in the ways that people with close ties resolve conflict; when someone in a relationship, be it a friendship, marriage, family, or otherwise, is hurt by another, it is unlikely that they will appeal to a third party for the appropriate punishment. Instead, they will acknowledge the hurt, the offender will work to make amends, and the offender will ensure that they will not harm the victim again, which may require support. This is not formal justice, but it follows from the same understanding of community and harm from which restorative justice proceeds.

To summarize, restorative justice holds that crime inflicts trauma by damaging individual's relationships to each other and a greater community. This trauma impacts not only the victim of a crime, but the offender, as well as other community members and the community at large. Those affected by trauma are referred to as stakeholders within the restorative justice theory, and these stakeholders have both needs and obligations towards the achievement of a state of justice that is restorative in nature. How these needs and obligations are carried out varies based on the type of practice that is put in place. Nevertheless, a brief overview of practices is necessary for a full understanding of how restorative justice aims to restore the victim, offender, and community.

Restorative Practices

Restorative practices are primarily based on engagement of stakeholders. This is fairly visible when the needs and obligations are taken in sum, as most are things for the stakeholders to do rather than things to be *done to* the stakeholders. Zehr states that “a direct, facilitated, face-to-face encounter with adequate screening, preparation and safeguards is often an ideal forum for this involvement...”⁶³ What is described here is a primary ideal of restorative practice; that individuals interact in order to fulfil their needs and obligations such as the victim’s need for answers or the offenders obligation to give that information--when stakeholders encounter each other depends on the practice or program, but encounters always occur after guilt has been found and the encounter has been properly prepared. Of course, there are cases when direct encounters are not possible, inappropriate, or perhaps even safe. In these cases, proxies are used, or other methods to fulfill the needs described above. As much as is possible, restorative justice works to have the judicial process be a collaboration between stakeholders in order to achieve a mutually agreed upon and understood outcome.

Many believe that the best example of restorative practices is *conferencing*, as it involves the most stakeholders. A conference is an encounter between all three sets of stakeholders in which the victim and offender needs for understanding are facilitated and amends are decided upon. It should be noted that traditional practices of pre modern societies inspire many models of restorative practices. The prototypical conference, which reflected a traditional Maori practice, occurred in 1989 New Zealand in order to empower the children of the Maori aboriginal people.

⁶³ Ibid., 25.

This set a standard that has been used to institutionalize restorative justice in New Zealand. That conference “was designed to bring families of victims and offenders together to find their own solutions to conflicts.”⁶⁴ This is quite in keeping with the tenants of restorative justice, for a collaborative, healing focused outcome is the aim.

What is called *victim-offender mediation* is another good example of restorative practices. Based on an Ontario vandalism case in 1974, Canadian victim-offender mediation, or VOM, was “essentially the only restorative process”⁶⁵ being practiced in a modern institutional justice system until 1989. VOM is an encounter between a victim and offender in the presence of a mediator in order to fulfill the needs and obligations listed above. The mediation is a stage for the victim and offender to have honest interactions; the third party is a facilitator who ensures safety but does not lead toward a specific goal. A facilitator might be a judge, but the qualification for this role is facilitation and restorative justice training. This also shows the highest goal of a VOM and restorative justice at large: healing trauma. A VOM is different from civil mediation, a current judicial process in western justice systems in that, “where a civil mediator may be quite willing to offer opinions about a party’s position and direction about a possible outcome, most VOM facilitators do not...”⁶⁶

The primary distinction between a VOM and a conference is that the community is involved in a conference while a VOM is solely a dialogue between the victim and offender. Nevertheless, variations of VOMs have developed such that it may seem as though there is “...little difference between a multi-party VOM and conferencing.”⁶⁷ There is certainly some

⁶⁴ Raye, Barbara, and Roberts, Ann. “Restorative processes.” in Johnstone, Gerry, and Van Ness Daniel W. *Handbook of Restorative Justice*. London: Routledge, 2011. 213.

⁶⁵ Raye and Roberts. “Restorative Processes.” 212.

⁶⁶ *Ibid.*, 213.

⁶⁷ *Ibid.*, 214.

truth to this viewpoint, but the necessary inclusion of family members and other non-victim, non-offender parties can allow for other viewpoints to overwhelm that of the direct stakeholders. A further distinction is that it is possible to have a conference without the victim, where a VOM requires victim participation.

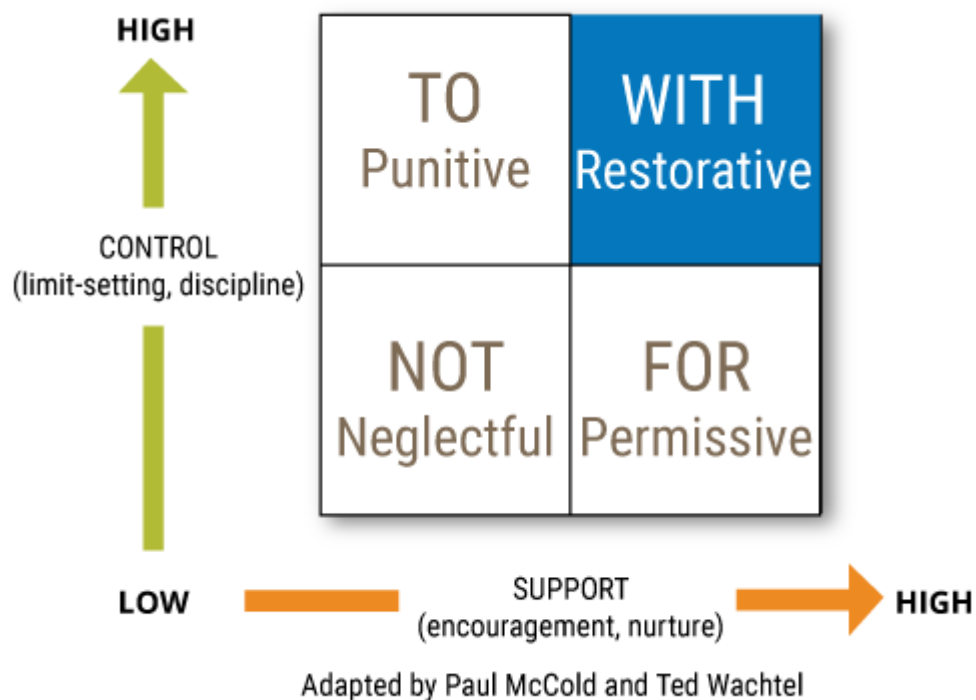
A final example of a typical restorative practice is what are called *circles*. Circles originate from North American aboriginal people, and can be distinguished from circles in that they allow for the involvement of any community member regardless of connection to the crime. This involvement means that circles may include a dramatically more diverse group with more connections. Circles share the same restorative traits as VOM and conferencing; circles are facilitated meetings between stakeholders--like conferences, circles include other community members--in order to achieve a mutually agreed to outcome and understanding.

In effect, all three described practices involve dialogue that works to directly fulfil needs and obligations or to decide how those needs and obligations will be fulfilled. The difference comes from who is there, who speaks, and the amount of framing for the meeting among other factors. What has been described above is a restorative justice approach to sentencing. While the “sentence” agreed to ought to fulfill stakeholder needs and obligations, which helps to protect the process from uneven outcomes, the lack of an objective standard may be of concern. Restorative practices do not follow the same laws of consistency and proportionality of retributive justice in that the sentence is not only based on the specific crime done. Nevertheless, when practiced correctly and done with strong stakeholder participation, restorative practices are able to achieve meaningful justice.

Making amends can be very difficult for an offender; anyone who has felt truly guilty and ashamed, who has apologized to someone they have deeply hurt, or has struggled to right a wrong they have done all know the truth of that statement. This has led many to object that the process of restorative justice that offenders undergo amounts to punishment. Some proponents of restorative justice use this to argue that restorative justice is not mutually exclusive from retributive justice. Others work to distance restorative justice from punishment due to the view that there can be no good intentional harm, which some restorative justice proponents hold. Of course, rehabilitative shaming casts a large amount of doubt as to the strength of the latter belief.

Nevertheless, restorative processes do not constitute a punitive process and are not punishment. One can theorize different judicial processes on a chart, where one axis measures levels of control, and the other axis measures levels of support, as pictured below. A system that has low levels of both will be neglectful, as it fails to either support offenders and victims after crime and it fails to hold offenders responsible for their actions. A neglectful system practically does not act. A system that is low in control and high in support is overly permissive, for it supports stakeholders without promoting responsibility. Many incorrectly identify restorative justice as permissive, but they forget how restorative justice holds offenders accountable and instills a responsible disposition. A system that is high only in control is a punitive system that does not seek to support stakeholders, but it only controls the offender. Last, a system that is relatively high in both support and control is restorative; it works with stakeholders in the ways described above in order to account for needs while maintaining obligations. Wachtel, the creator of this Social Discipline Window, summarizes how each category processes stakeholders as

“not”, “for”, “to”, and “with” respectively.⁶⁸ This is to say that the actions of each type of system--neglectful, permissive, punitive, and restorative--can be well summarized by the words above. Most importantly for this discussion, a punitive punishment is done *to* offenders, while restorative processes are done *with* offenders. When evaluating programs, process, and practices as punishment or otherwise, a strong start is to question whether the system is being done “to” or done “with” offenders.



IV. Evaluating the Systems

Restorative justice and retributive justice see injustice in crime and seek to identify the offender, as well as accept the importance that rectification occur. After identifying injustice, the

⁶⁸ McCold, Paul, and Wachtel, Ted. “Restorative Justice theory validation.” in *Restorative Justice Theoretical Foundations*. Weitekamp, Elmar, and Hans-Jürgen Kerner, eds. Portland, Oregon: Willan Publishing, 2002. 110-113

two systems diverge. Restorative justice posits that it is the harm essential to crime that is unjust, harm that the victim, offender, and community all have stake in. Justice is done through healing the harm inflicted by crime. Retributive justice, in contrast to restorative justice, states that while the harm is relevant, the crime is essentially unjust and ought to be punished. Crime is not bad because of any consequences that come from it, such as harm, but rather crime simply is immoral. The different understanding of why crime is unjust causes different paths to achieving justice. For Restorative and retributive justice, there are differences from the outset to the conclusion of the judicial process. Each system will be evaluated using Aristotle's definition of justice in rectification described in chapter one, namely that rectificatory justice is the "intermediate between profit and loss."

Retribution

The overwhelmingly accepted technique for pursuing rectificatory justice in the west, retributive justice holds that justice is done through consistently proportional punishment. Crime must be punished because those that disobey the moral law ought to be punished, because society has a duty not to perpetuate injustice by not punishing, and because punishing crime is in keeping with Kant's formulation of the highest good. This final point is very important to evaluating retributive justice because the highest good is a condition by which each individual gets exactly what they deserve according to their virtue. While a Kantian deontological system of retributive justice firmly holds that no one ought to be used to achieve an end, it also holds that the best and most ideal world is one that follows the rules of just desserts, and that punishing

crime is part of how that world is brought about or accessed. This is in keeping with Aristotle's justice as rectification because it pursues the law of no profit and no loss and does so using a numerical system, and while different from, it continues with *lex talionis* (understood proportionally) and *suum cuique*.

Kantian retribution pursues justice in the manner described by justice as rectification. Aristotle is clear that this is to be done numerically, and retributive justice follows this requirement. Due to the dual tenets of proportionality and consistency, punishment is meted out on a quantitative basis. The offender is judged to be guilty of a certain wrong action, and they are to be treated akin to every other person who has committed that action. Indeed, they are not to be treated based on any individual characteristics they possess, but only as "murderer" or "thief." This allows for a system that works with exceptional clarity and precision in its proportionality and promotes consistency between punishments. The consistent proportionality of retributive punishment aligns with justice as rectification's pursuit of numericality because the proportionality effectively assigns quantitative values to the crimes committed. Retributive justice allows the justice system to numerically understand the crime and therefore to dole out the numerically equivalent punishment. The offender is a certain amount or distance away from the condition of just desserts, and a certain amount of punishment will right that situation.

Nevertheless, it is my claim that a Kantian system of retributive justice will always fail to achieve the intermediate state described by Aristotle *because it neglects the victim*. Justice in rectification requires that the profit be subtracted from the offender and added to the victim such that the victim and the offender exist at the intermediate, which is where each has the just amount of suffering and pleasure. Retributive justice certainly fulfills the initial step of

subtracting from the offender, as punishing the offender adds suffering to them. Indeed, this punishment is done to bring the offender to the condition of just desserts, which is the same condition desired in justice as rectification. This is the strength of retributive justice. Punishing crime rights one side of the imbalance that crime creates between morality and well being. Punishment brings offenders and punishers alike into the world of the highest good, where moral ends and actions are treated with benevolence, and immoral ends and actions are punished. Retributive justice strives to bring the offender to where their well being reflects their virtue, and this is what justice as rectification calls for.

However, it is not all of what justice as rectification calls for. It has forgotten the victim, whose suffering is likely not reflective of their virtue, but caused by the immorality of another, to say nothing of the community. The victim may be eased by the punishment of the offender, but a Kantian retributive justice forbids using the offender as a means to to promote the end of the victim, so punishment of the offender cannot be done to improve the situation of the victim. This means that in a system where punishment is the primary and only judicial function, the victim is entirely disregarded beyond their part in discovering the guilt of the offender and perhaps affecting sentencing. By failing to alleviate the victim's loss, retributive justice only succeeds in half of the Aristotelian metric laid out. Justice in rectification as described by Aristotle and as generally understood includes the rectification of the victim. By failing to work towards the betterment of the victim, retributive justice does not fully rectify the effects of crime; only the offender if brought to the intermediate position.

This is not to say that rectification for the victim does cannot be justified through a Kantian system. Kant's conception of the highest good is one justification for why offenders

ought to be punished, but it also serves as a justification for victim rectification; the victim's well being has been worsened because of the immorality of another. The victim's suffering is likely not reflective of their virtue, which implies that, in pursuit of Kant's highest good, the victim should be made to suffer less. Furthermore, the categorical imperative likely holds that the victim ought to be rectified as well although this cannot be achieved through punishment. A retributive system, even one justified through Kant, puts the well being of the victim secondary to the punishment of the offender. This does not abide by the requirements put forth by Aristotle, nor is it consistent with Kant.

Kantian retributive justice, along with the revenge and deterrence centered formulations described above, focuses entirely on punishment to the neglect of the victim. This goes against the general understanding of how injustice ought to be rectified, which put broadly will likely be that the offender is worsened and the victim is benefited. That general understanding can also be seen in the American criminal justice system, which does not just punish thieves, but also compensates victims for their losses (although the family of a murder victim receive no compensation). If Aristotle's description of injustice in rectification is to be followed here, the victim remains at a loss, and the offender--assuming that retributive justice achieves what it aims--will be at or around the intermediate condition, which is a numerically higher position than the victim. According to the justice as rectification and a general sense of how rectification ought to be, retributive justice is substantially lacking.

Restoration

Restorative justice understands harm as the reason crime is unjust, sees community as a web of interpersonal relationships that is harmed by crime, involves a broad amount of

stakeholders, accounts for the internal experience of harm, and believes the judicial process ought to be the process of healing incurred harm. In turn, restorative justice defines injustice through harm rather than the failure to follow a deontological law or code, and accounts for harm to all stakeholders. A final characteristic of restorative justice is the primacy placed on the goal of restoration; restorative justice is primarily a teleological and communitarian theory of justice.

These characteristics can now be evaluated from the perspective of Aristotle's standard for rectificatory justice, the intermediate between profit and loss. Immediately upon seeing the theory next to the standard, it is clear that both are interested in a condition or outcome of justice. The intermediate is a "place", which can only be conceived of as a goal. This goal must be, according to Aristotle, the object of the judicial process. On this preliminary requirement, restorative justice agrees. Restorative justice is a teleological, or goal oriented, theory that posits justice as an achievable state rather than a way to act.⁶⁹ Whichever process achieves the most restorative outcome is best. This can be seen through the use of evidence based validations of restorative justice, which "demonstrate positive impact on outcomes such as reoffending, victim satisfaction and other indicators."⁷⁰ Restorative justice preliminarily fits into Aristotle's rectificatory justice, as they both aim to achieve a just condition.⁷¹

As stated above, Aristotle's pursuit of the intermediate condition between profit and loss is the other essential piece of rectificatory justice. Loss is the larger amount of suffering that is the victim's, and profit is the smaller amount of suffering that is the offender's. Suffering caused

⁶⁹ It is partially for this reason that the practices of restorative justice are not explicitly stated, for the process of restoration after crime will be different between like crimes.

⁷⁰ Bazemore, Gordon, and Elis, Lori. "Evaluation of restorative justice." in *Handbook of Restorative Justice*. Johnstone, Gerry, and Van Ness Daniel W. London: Routledge, 2011. 418

⁷¹ It is partially for this reason that the practices of restorative justice are not explicitly stated, for the process of restoration after crime will be different between like crimes.

by crime has many manifestations both internal and external, subjective and objective, and both aspects must be accounted for. The object of rectificatory justice is then to ensure that those involved have neither a profit nor a loss, which will be the middle point between the incurred suffering of the crime. Profit is the condition of having more pleasure or less suffering than deserved, and loss is profits opposite. The intermediate condition can be therefore described as the “correct” amount of pleasure and suffering in reference to the unjust act. The question then becomes how the intermediate condition compares to the condition sought in restorative justice.

Restorative justice pursues restoration, which, in the analogy of harm, ought to be understood as healing. Healing is essentially the process of becoming or being brought closer to completeness, as harm destroys or disrupts completeness or fullness, healing restores to a full and complete state. In the case of restorative justice, that state has individual and community aspects. Individually, the negative harm, or loss, that the victim has experienced ought to be healed, and the offender, individually, is obliged. It is true that it may not be possible to return to exactly the pre-harm state, but the overall aim is a restorative solution to harm. A lost limb can never be restored, but this does not prevent a restoration of general quality of life; the aim is to bring the victim back to a comparable quality of life and to a comparable level of functioning.

Offenders too ought to be restored as far as possible. Of course, the offender’s path to restoration is essentially different from the victims; offenders need to be held accountable for their actions, to make amends, and be reintegrated into the community. Linked to the needs of individual stakeholders is the need to be restored as full community members because restorative justice holds that crime removes victim and offender alike from a just state of individual and community functioning.

The further question is what is involved in being a full community member, and if that aligns with Aristotle's requirement of the intermediate between profit and loss. For restorative justice theorists, there is an active conception of being a full community member beyond simply existing in the same space. A full community member respects his or her other community members for their intrinsic value rather than their practical value. The full community member also practices solidarity with their community members. To practice solidarity requires companionship and mutual support, so community members are to be with their fellow members during good and bad times. Partly, this comes from living with one another, but involves reciprocated support and empathy. The community member also is responsible for their actions in both the internal and external effects.⁷² Therefore, restorative justice pursues two connected but separate conditions for stakeholders, restored individual selves and full community members.

Restorative justice seeks to achieve balance through bringing all stakeholders up to the dual conditions of unharmed individual life and full community member rather than by balancing through addition and subtraction. Justice is to heal suffering, so it is not just to seek equilibrium by giving the offender half or all of the victim's suffering because that is only changing the location of suffering. This may seem to imply that restorative justice does not seek an intermediate condition between victim and offender however that is not the case. Restorative justice pursues an equivalent position for victim and offender intermediate between extremes of suffering by pursuing a condition without profit or loss for all stakeholders. When neither victim, offender, nor community have profit or loss, then justice has been achieved. It can be argued that restorative justice leaves the offender at a profit due to lack of punishment, but this fails to

⁷² Walgrave. "Community to dominion." 81.

account for and misunderstands the demands of restorative processes, for restorative justice requires the thief to return what they have stolen and ensures that the thief understands the value of the victim and community. The process of restorative justice assigns the victim significant needs and few obligations, while it assigns the offender few needs and significant obligations. This process does not necessitate the offender suffering, but making amends and being responsible may cause the offender to suffer; being restorative does not bar these obligations from requiring due tolls from the offender, and offender obligations are likely demanding. Learning the breadth of the harm you have caused, apologizing, and working to amend a harm that likely cannot be fully fixed is unlikely to leave the offender with their profit. By assigning the offender demanding obligations restorative justice strives towards Aristotle's intermediate condition.

Restorative justice aims to bring victims and offenders exactly to the condition they deserve. It does not wish to elevate the victim over the offender, nor to push the offender down to the level of the victim, but rather pursues an equal condition for both that of restored individual and full community member. For the victim, this is a decrease in the amount of suffering they have. Primarily through the work toward individual restoration, restorative justice fully acknowledges and confronts the internal experience of harm that victims have; this includes how the victim feels alienated and separated from their community. Restorative support techniques and practices reduce the victim's suffering, and they are restored to their deserved condition of full community member. For the offender, restorative justice has primarily expectations, and it is through fulfilling those expectations and obligations that an offender is brought to justice. Beyond victims and offenders, restorative justice acknowledges that the community has needs as

well. The condition that restorative justice aims to restore community to is very similar to the aimed condition of victims. A community is understood to be damaged by crime, and that damage being restored is an essential condition for success in restorative justice. Restorative justice should not be imagined as balancing a scale where an offender rests on one side and a victim the other. Instead, one ought to imagine three independent scales, one for the victim, offender, and community, which are all to be balanced; one scale may tip more to the left while another may tip to the right, so while the balancing process will be different, the end result ought to be the equivalent.

The traits of restorative justice as described above slightly differ from the zero sum game that can be inferred from Aristotle. Aristotle describes a zero sum game where the goal is the intermediate condition between suffering of the victim and offender, loss and profit. Restorative justice indeed seeks a goal and an equivalent position, but that position is not necessarily, nor likely to be, the numerical middle point between the suffering the victim has experienced and the lack of suffering the offender has experienced. Instead, restorative justice aims to have those involved in crime to be brought to an equivalent state that accounts for all the suffering that has occurred, and fulfills Aristotle's urge that stakeholders "have their own share, and make neither a loss nor a profit."⁷³ While Aristotle describes the pursuit of rectificatory justice as a numerical zero sum game, the requirement of so-called just deserts and one's own share hold the primary position in Aristotle's metric. This means that restorative justice, which seeks to have stakeholders reach their own deserving position, is in fitting rectificatory justice.

⁷³ Aristotle. *Nicomachean*. 5.52.

The discrepancy between restorative justice and the Aristotelian metric points to the originality of restorative justice. By moving away from a zero sum game in which the offender must be worsened in order to better the victim, restorative justice shows that justice can be accomplished in a non-adversarial manner. Indeed, restorative justice shows that justice in rectification is better achieved “with” stakeholders rather than done “to” the offender. Restorative justice further critiques the conventional understanding of justice in rectification and questions the primacy of objective and external facts in rectificatory justice by elevating the internal experience of trauma as the vital understanding of harm. However, this focus does not blind restorative justice to the reality of external harm, for restorative justice does not disregard stolen property to focus on the victim’s experience; if a victim’s car is stolen, then restorative justice will insure that the car is returned or replaced. Rather than stop after returning the victim’s car, restorative justice holds that the stolen property affects a harm beyond the lack of a car. The experiential aspect as well as the physical aspects of crime must be rectified in order for justice to be done.

While both retributive justice and restorative justice fail to fully meet the standards of justice in rectification, how they fail brings light to their assets and flaws. Retributive justice focuses so much on the offender in effect and justification, that it neglects the victim. Failing to bring the victim to the intermediate condition between profit and loss is the major flaw of retributive justice. Restorative justice pursues a similar, but different kind of condition; while Aristotle speaks about a linear line that contains the victim and the offender and measures equality, restorative justice argues that the victim and offender have their own line. Neither

system perfectly achieves the justice in rectification set out by Aristotle, but restorative justice's ability to account for both the victim and the offender elevates it over retributive justice.

Restorative justice more broadly and fully accounts for the needs of justice as rectification than retributive justice because it seeks to rectify the victim, community, and offender rather than only the offender. This has been shown via theoretical analysis, but is also visible in the world. The following section will delve into restorative justice in the world: how it can be best implemented, how well the theory of restorative justice represents implemented restorative programs, and finally a brief analysis of research on the effectiveness of restorative justice.

Restorative Justice Applied

How then ought restorative principles and practices be implemented? While it may be possible to answer this question from the armchair, historical implementations of restorative principles give useful models on failures and successes. The South African Truth and Reconciliation Committee is one such model, and while it is not restorative justice through and through, it does “combine a notion of restorative justice with a search for truth.”⁷⁴ Restorative principles such as the victim's need for truth, the absence of punishment, and the goal of reintegration are all present in the TRC. Of course, the scale and depth of injustice that the TRC attempt to address are far different than the individual level justice described in this paper. Nevertheless, the principles remain restorative and the TRC can fairly be described as a type of restorative justice. Furthermore, despite reasonable critiques on the fairness of the TRC and its

⁷⁴ Minow, Martha. *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*. Boston: Beacon Press, 2009. 56

success in achieving justice, that South Africa successfully navigated the transition between governments without violence and has continued to exist is a compelling testament towards the success of South Africa's TRC. The design of the TRC provides a good model as to how restorative justice may best be implemented.

The South African Truth and Reconciliation Committee contained, along with the primary body a Committee on Human Rights Violations, a Committee on Amnesty, and a Committee on Reparation and Rehabilitation.⁷⁵ These committees can be analogized to the primary pieces of restorative justice; human rights violation is generalized to harm created from crime. Amnesty, which is a political concept, is instead generalized to the absence of punishment that restorative justice has. Finally, reparation and rehabilitation are simply the amends made for the victim and the reintegration of victim and offender. Drawing these analogies further shows the restorative principles within the TRC, but also illuminates how restorative justice can be institutionalized. South Africa created an official body for discovering harm, and another for working towards directly rectifying victims and reintegrating stakeholders. A restorative system could follow a similar model, where different bodies, such as a group for discovering harm, and a group for guiding the process of making amends and rehabilitation, govern the processes of restorative justice. To extend the TRC as an example, the Committee on Amnesty acts as a gatekeeper into the restorative system. However, restorative justice in part assumes the absence of punishment. This is to say that the Committee on Amnesty had the function of giving amnesty, but such a function does not exist within a restorative system. Nevertheless, the Committee on Amnesty illuminates a concern in actualizing a restorative system.

⁷⁵ Minow. *Between Vengeance*. 53.

Will a system of restorative justice work for every case, and if not, how will those cases be identified and handled? To answer this question, the Committee on Amnesty must be further explained. The Committee on Amnesty should not be thought of as a bread line, which gave amnesty to whoever joined the line. Instead, “amnesty would be available, but only conditionally: to individually who personally applied for it and who disclosed fully the facts of misdeeds...”⁷⁶ This is in keeping with restorative justice’s requirement of active participation; it is not enough simply to get into the line, one must admit their guilt and work towards making amends. For the TRC, which was heavily focused on finding the truth of harms that only outgoing officials knew of, full disclosure of their political misdeeds and crimes is enough for amnesty. For restorative justice, it is through offenders taking responsibility, admitting guilt, and making amends that justice is done, and this process assumes the lack of punishment that is analogous to political amnesty. If one applied the language of the Committee on Amnesty, an offender being accountable and responsible is enough for amnesty; it is enough for justice.

Of course, the TRC was formed for a special situation that may seem not to be applicable to an ordinary justice system. Nevertheless, the TRC gives a model for how to solve the problem of how a justice system can process offenders that cannot be processed by a restorative system. If an offender will not take responsibility for their actions and be accountable, then restorative justice will not work for them; an offender that never admits their guilt cannot take part in restorative justice, but in the TRC, amnesty was given through application and earned. Those who did not receive amnesty were processed in a retributive system.

⁷⁶ Ibid., 55.

A similar model of restorative justice can be theorized that exists alongside another system based on a different theory, such as retribution. This would mean that offenders could be processed through either the restorative or retributive system according to how they are responsible and accountable to their actions. In a system such as this, all victims would go through a restorative body, such as the Committee for Reparation and Rehabilitation.

Perhaps this would include a process such as the *Sycamore Tree Project* that connects victims and offenders from separate crimes, for those victims whose offenders denied their guilt. However it may look, any system must include actively addressing victim rectification. This dual theory model would allow for a pure restorative justice that is entirely based on voluntary participation. It is noteworthy that very few offenders would fall under this category. Not only does this system incentivize an offender to admit their guilt, as a restorative process is less threatening than punishment, but already the vast majority, around ninety percent, of United States criminal cases result in a guilty plea.⁷⁷ This implies that a similar, if not greater, percentage of offenders would admit their guilt in a restorative system, and the number of offenders who could not be processed by a restorative system would amount to the great minority.

Another possible model for implementing restorative justice is one in which all offenders are required to make amends to victims and participate fully in restorative processes regardless of how they understand their responsibility. This would mean that even an offender who denied their guilt would be forced to participate. Of course, it is questionable whether this would be beneficial to either the victim or offender; if the victim should have an encounter through VOM or a group conference with an unrepentant offender, will this further harm the victim? The

⁷⁷ Plea and Charge Bargaining Research Summary Prepared by: Lindsey Devers, Ph.D
(<https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf>). pg. 3

system of restorative justice would not allow this case to happen. Before any type of encounter, there is a long process of preparation with a facilitation party, who would prevent such an encounter from taking place. What then would a coercive restorative system look like? Would there be value in an offender who is forced to make amends or apologize to the victim? Could such a system be called restorative, as this is being done “to” rather than “with” the offender? A coercive restorative system brings with it many added difficulties and questions. Furthermore, a system that coerces restorative practices does not have the same body of research, and cannot be said to have the same effects as its non coercive counterpart.

It appears then that the best possible institutional system of restorative justice will fall under a dual model, such as the design of the South African TRC. Indeed, the societal effects of a system that promotes offenders to be responsible and accountable rather than an advisory of the state who ought to deny their guilt could be tremendous; it is possible, perhaps even likely, that the existence of a restorative system would greatly increase the amount of offenders that come forward after committing a crime. This stands on an assumption that restorative justice is more than a strong theory. By comparing two cases, one which moves through a retributive system and another that is handled through a restorative system, the actual strengths of restorative justice are clarified.

Our primarily retributive system is not solely retributive. It includes some quasi-restorative elements such as parole. In order to compare a retributive system and a restorative system, a case from each system will be put forth and analysed. The first is taken from a variety of news articles written on the case, the following is a description of one particular

offender process through the American justice system. Like the retributive system it comes from, this description focuses on objective external facts.

On a Saturday at 11:30, 18 year old Phillip Allen Garcia crashed into the car of Edward Czarnecki. An investigation of the crash including the offenders airbag control module and cell phone records found that the offender was travelling around 73 mph and his phone was in use around the time when he failed to stop at a stop sign, drove through an intersection, and crashed into the victim's vehicle. Edward Czarnecki was killed, and Phillip Garcia was charged with a felony charge of reckless driving causing death.

Months later, Mr. Garcia waived his right to a preliminary hearing and was convicted as guilty of his felony charge. Waiving his right to a preliminary hearing, Mr. Garcia likely pleaded guilty to the charge, and was sentenced to 270 days in jail as well as five years on parole in the presence of the victim's sister and niece.

When the offender is released from jail, around September of 2018, he will be put on parole. In the state of Michigan, where this case occurred,

“Parolees must meet certain conditions to maintain their parole status. There are general conditions of parole which require the parolee to report regularly to the parole agent, prohibit travel out of state without the agent's permission, require the parolee to maintain employment, to obey the law, to submit to drug and alcohol testing at the agent's request, and to reside at an approved residence. The parolee must also avoid any unauthorized association with known criminals and cannot possess firearms.”⁷⁸

⁷⁸ Michigan Dept of Corrections Website
(http://www.michigan.gov/corrections/0,4551,7-119-1435_1474---,00.html)

Parolees are also matched with a parole officer, who manages a number of parolees through the transition from prison or jail. Parole officers are responsible for ensuring that the parolee abides by the rules listed above, and are supported by a variety of community resources such as housing and employment personnel, mental health and substance abuse professionals, and community faith leaders. So, when the offender of this case is released, he will be matched with an officer. That officer will ensure that Mr. Garcia abides by the rules of parole, and may make use of community resources as they see fit. Should all things go as well as possible, Mr. Garcia will be released from parole and return fully to society after a period of five years,.

Of course, parole is not an entirely retributive notion. Parole is a process that helps offenders re-enter society, which could certainly be understood as restorative in nature. This case is representative of retributive justice all the same. It follows the requirements of consistent and proportional punishment because the particular crime has a minimum and maximum punishment, which forces proportionality and consistency, and this process seeks to give the offender their just deserts. Mr. Garcia will re-enter American society if all goes well having been brought to justice through punishment. Assuming that happens, the retributive system has accomplished the primary goal of punishing crime as well perhaps deterring future crime. Despite Mr. Garcia's case fulfilling the expectations of retributive justice, it also shows the neglect of victims.

My point in using this example, is that this heavily retributive system uses quasi-restorative methods such as parole. Even so, it neglects what restorative justice does not, the victim and community. The hole left in the community from the death has been neglected as anything other than a reason to punish; there has been no judicial action done in order to rectify

the other stakeholders, and the family members of the deceased were part of the judicial process as spectators only.

In comparison to Mr. Garcia's case, the following describes a similar crime in New Zealand that was remanded to their restorative justice system. The crime in this case is also reckless driving causing death; here, a woman crashed into a car which a pregnant mother was driving. While the baby survived, the mother did not. The stakeholders, after a significant amount of preparation, engaged in a conference in order to encounter each other and work out what amends the offender could make. "The offender, unemployed, did not have much money to offer in reparation. All she could do was sob and blurt inadequate apology. The surviving husband, holding the baby in his arms at the conference did not want money to compensate for the loss of his wife." The conference continued for several hours, and a variety of possible reparations were put forth, however what was eventually decided upon was that the offender and her family would pay for the cost of deceased's headstone, which was currently too expensive for the family to afford. In the words of the victim's husband,

"The reason I ask for this is that, in the future, when I take my boy," looking down at him as he spoke these words, "to where his mum is buried, I can tell him that the young woman responsible for your mother's death put this headstone here for us." The offender agreed. A justice meaningful to these parties had been identified."

With the reparation decided upon, the conference brought their decision to the court that remanded them, the judge agreed that it was acceptable, and the offender was left with the

responsibility of fulfilling the decision. Of course, if she failed to do so then she would be recalled for further sentencing.⁷⁹

This case study validates the explanation of restorative justice given here. The case described aligns with the needs and obligations framework, places great importance on stakeholder involvement, and achieves an outcome that helps all those involved be restored as individuals and community members. It does not neglect anyone, nor does it fail to hold the offender accountable. It has judicial oversight to ensure a fair and reasonable process as well as outcome. The primary pursuit of justice is to right the wrong that has been committed as best as possible. This case is a successful model for restorative justice.

Some may state that a single case does not prove a successful theory, and they would be correct. Indeed, the question of how effective restorative justice is has been the subject of debate and research in recent years. This research has shown that restorative justice not only *more* actively pursues a just condition for *more* stakeholders than retributive justice, but restorative processes also leave stakeholders *more* satisfied with the justice achieved. Satisfaction and the feeling of fairness are used as metrics of success for restorative justice because the theory focuses heavily on the internal experience of harm. If participants feel as though justice was achieved and done so in a fair manner, then restorative justice considers that a success. A 2000 meta study analyzed 40 different studies of victim and offender satisfaction as well as sense of fairness.⁸⁰ These studies researched several countries including the United States, Canada, England, Australia, and New Zealand, and range from juvenile burglaries to adult drunk driving. Roughly a third of the programs studied are retributive processes, another third are partially

⁷⁹ Adult Restorative Justice in New Zealand. Helen Bowen and Jim Boyack Restorative Justice Trust Auckland, New Zealand. (<https://www.iirp.edu/eforum-archive/adult-restorative-justice-in-new-zealand-aotearoa>)

⁸⁰ McCold, Wachtel. "Restorative Justice theory validation." 120-125.

restorative--defined as involving two sets of direct stakeholders-- and the final third are fully restorative, which is defined as having all three sets of stakeholders, victim, offender and community. The study then measured how victims and offenders rated their levels of satisfaction after their case has been processed and how fairly they felt the case was handled.

The results of this research are quite compelling. Of offenders studied here, 95% felt satisfied with the fully restorative programs. In the partially restorative program, 85% felt satisfied with the partially restorative programs, and 83% felt satisfied by the non-restorative programs. The percentages for fairness roughly follow the percentages for satisfaction. The fully restorative program had a 94% fairness rating, 87% of offenders felt that the partially restorative programs were fair, and 78% of offenders felt that the non restorative programs were fair.

Of victims, 91% from fully restorative programs reported feeling satisfied with the outcome of the program. These fully restorative programs are conferences such as the case above. For the partially restorative programs, which are primarily victim-offender mediation programs, 81% of the victims reported being satisfied by the process. Finally, only 55% of victims from non-restorative, or retributive, programs reported feeling satisfied by the justice achieved. Using the theoretical restorative framework, it appears as though this confirms the victim's need for involvement, as the victim is most involved in the fully restorative program and not involved in the non-restorative program.

These numbers are roughly consistent for victim's feelings on the fairness of the programs. For the fully restorative programs, 96% of victims reported feeling as though the program was fair. In the partially restorative programs, 87% reported that the partially restorative programs were fair, and only 56% of the non-restorative programs felt that they were fair. This

data not only gives a strong case for validating the theory of restorative justice that puts great stock in victim involvement, but shows that, on average, restorative programs do indeed rectify the victims of crime.

This further keeps with the evaluation of retributive justice earlier, for retribution may in fact do a satisfactory job bringing offenders to the intermediate condition of justice, and retributive justice certainly focuses more strongly on the offender than the victim, which helps to explain why the offender will on average be more satisfied than a victim by a retributive process. Nevertheless, the restorative programs also exceed the retributive programs in offender satisfaction. One may think that this is because the offender is more satisfied with getting away with their crime without harsh punishment, but when taken in tandem with the high percentages of victim satisfaction and victim feelings of fairness, this seems unlikely; a case where an offender is not accountable and responsible would likely mean that the victim would not be satisfied.⁸¹

Restorative justice successfully brings the great majority of victims and offenders, as well as their communities, to a satisfying condition of justice through a process that the great majority deem fair. This topic has been further researched in the years since, and the results given above further supported, as well as further data that suggests offender recidivism is reduced in offenders who go through restorative programs.⁸² This is to say that restorative justice has both a strong theoretical validation in how it meets the expectations of justice in rectification, but that it

⁸¹ Ibid., 120-125.

⁸² Latimer, Jeff, Craig Dowden, and Danielle Muise. "The Effectiveness of Restorative Justice Practices: A Meta-Analysis." *The Prison Journal* 85, no. 2 (2005): 127-44., Bradshaw, B., Roseborough, D. (2005). "Restorative justice dialogue: The impact of mediation and conferencing on juvenile recidivism". *Federal Probation*, 69 (2), 15 – 21. 19., Sullivan, Dennis. *Handbook of Restorative Justice: A Global Perspective*. New York: Routledge, 2008. 115.

also has compelling statistical data that supports the truthfulness of its theoretical validation. Restorative justice achieves justice in rectification.

However an implementation of restorative justice ought to be done, the lessons of restorative justice are quite clear. If justice requires all those affected by crime to be rectified, it is not enough to punish offenders. Victims must be restored, and the harm done to the community must be rectified as well. Restorative justice shows how we ought to acknowledge and confront harm in our communities, understands the needs of victims, the obligations offenders have towards those needs, and how the greater community fits into achieving justice. While restorative justice is not perfect, the appropriate comparison is not between this theory and perfection; it is between the currently used overwhelmingly retributive system and restorative justice. The two paths explored here, inflicting harm and promoting healing, both pursue justice. Nevertheless, harm, even a just harm, cannot fix a victim or community, nor does it attempt to do so. The retributive path neglects tremendous parts of injustice, and thus fails to lead to justice. It is the restorative path to justice that can accept a complete picture of injustice. A greater justice is achieved through healing and restoration.

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