

## RESTORATION OVER RETRIBUTIVISM: A HOLISTIC APPROACH TO RECONCILING HARM

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In this paper, I focus on which justice method, either retributive or restorative, is the most effective in reconciling the harm done by a crime. Retributivism focuses on the punishment a wrongdoer deserves as a result of breaking a legal standard. Restorative justice instead focuses on the fact that the harm of the victim is the true matter to be reconciled. I advocate for a restorative model because it more comprehensively addresses and rehabilitates the wrongs committed, as it puts the primary focus on persons rather than laws. I show the benefits of a restorative model by first outlining the aims of retributive justice, drawing largely from H.J. McCloskey, to show that retributivism's aim is to punish offenders because of the violation of some legal standard. In outlining what and how retributivism punishes, I show that retributivism is inherently flawed in its approach, failing to address who has actually been wronged and inadequately considering each case. I then use Lode Walgrave to show that retributivism is highly limited and morally dubious. After considering possible responses from a retributivist, I end by offering a restorative approach to justice as a method for more adequately addressing the harm of a victim and the rehabilitation of the perpetrator, while still incorporating the mechanism of a third-party justice system to act as a mediator. This allows for an overall more inclusive and holistic system aimed at the service of justice for all persons involved.

To begin, offense in the retributive model is committed principally against laws and the ideals woven in the fabric of the justice system. The main differences between retributivism and restorative justice are what a wrongdoer has offended and how she is treated as a result. These aspects highlight the main failings of retributivism. I begin with the problem that, generally, retributivism requires punishment because of some offense against a legal standard. I use McCloskey for a positive articulation of retributivism, as his arguments underscore that wrong should be considered when committed against laws. The focus of retributivism is not what effects are produced by punishment, including the rehabilitation of the offender or the reconciliation of harm for the victim, but what wrong was committed in principle and what compensation the state demands as retribution from the wrongdoer. For McCloskey, "...punishment must be of an offender who is guilty of an offence in the morally relevant sense of 'offence.'"<sup>1</sup> McCloskey goes on to give instances of harm done, always offering examples in terms of offender against some preset standard.<sup>2</sup> This goes to show that, in the way that McCloskey talks about guilt in terms of offenses in given instances, wrong is committed against principles mainly; persons, as far as they are victims, are just the beings that bear the brunt of the offence.

Additionally, many support the retributive model as it uses the broadly applicable standard of proportional punishment that many believe is a necessary feature of justice.

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<sup>1</sup> H. J. McCloskey, "A Non-Utilitarian Approach to Punishment," *Inquiry* 8, no. 1-4 (1965): 250. doi: 10.1080/00201746508601433.

<sup>2</sup> *Ibid.*, 250-251

For McCloskey, a wrongdoer<sup>3</sup> must singularly and intentionally commit an infraction against an actively practiced and visible law.<sup>4</sup> Retributivism dictates that, in terms of treatment for these perpetrators, "...equals should be treated equally and unequals unequally."<sup>5</sup> In this way, persons who deal fairly with the law are dealt with fairly in return. Those who infringe upon the law and upon others' entitlement to protection are dealt with unfairly. This "...unequal treatment amounts to deliberate infliction of evils—suffering or death."<sup>6</sup> McCloskey's point here is to illustrate that, in many ways, retributive justice does call for "an eye for an eye" in the context of wrongs of justice. However, this is not to be understood in the purely literal sense. To punish a rapist, we do not rape him. Instead, McCloskey introduces the idea that the punishment for an infraction must be "commensurate with the offense."<sup>7</sup> In this way, retributivism levels a punishment on the wrongdoer that is proportional to her infraction. She deserves this as a result of breaking the law and causing harm to the system.

Though this system may make for a more easily applicable standard on a larger scale, I think that retributivism is troubling in its means and aims. While I do see the merits of incorporating such concrete and broadly applicable standards that retributivism upholds, I think McCloskey's account of retributivism fails to characterize for whom justice should work. If a wrong is committed, we generally do think of to whom the wrong is done, not what. If I scrape a woman's car in a parking garage, I feel remorse for harming her property and causing her inconvenience, not for violating a legal standard. I may fear that she may sue me, but I still recognize that wrong has been done to her. I owe her, not the law. In this way, retributivism misses who has truly been wronged. Furthermore, while proportional punishment for a particular crime may be a more universally easy standard to apply, it fails to dole out justice to perpetrators by considering them in a reductively similar way. When I hit the woman's car and she sues me for damaging her property, I want the law to consider my circumstances and subjectivities as well. In this way, I feel that retributivism fails because it will not judge individually and differently from cases that may nearly match it.

In addition to these objections, I draw on Lode Walgrave to show retributivism to be actually limited and morally dubious in its approach. Under Walgrave's characterization, retributivism looks at means, using punishment for the specific purpose of urging complicity with the laws.<sup>8</sup> Punishment is a way of upholding a structure and reinforcing the rightness of law. It is a "primary yardstick" in compelling justice, intentionally causing suffering to teach a lesson.<sup>9</sup> As it seeks to *force* compliance with the law, retributivism

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<sup>3</sup> McCloskey does provide limits to this, saying that someone who does not have the mental state to register the offense committed, those punished disproportionately, retroactively, with secret laws, those punished as scapegoats, and persons subjected to collective punishment cannot be considered to be deserving of punishment in the morally relevant sense (250-251). Furthermore, a person in a retributive model could not be truly innocent *and* be punished; if a person has not actually committed an offense, she is not morally culpable (250).

<sup>4</sup> McCloskey, "A Non-Utilitarian Approach to Punishment," 250-251.

<sup>5</sup> *Ibid.*, 260

<sup>6</sup> *Ibid.*, 260

<sup>7</sup> *Ibid.*, 260

<sup>8</sup> Lode Walgrave. "Restoration in Youth Justice," In *Why Punish? How Much?: A Reader on Punishment*, ed. Michael Tonry (New York: Oxford University Press, 2011), 325.

<sup>9</sup> *Ibid.*, 325

proves to be limited in its ability to actually rehabilitate the offender, reinforce a victim's faith in the law, and underscore that law's validity. Furthermore, when considering the infliction of pain for the purpose of punishment and legal retribution separately from this justification, punishment becomes ethically questionable as a practice.<sup>10</sup> Walgrave makes the point that we only feel comfortable punishing so long as we think we use punishment to serve justice or act as a deterrent to criminal activity. Because retributivism is limited and because it employs morally questionable methods, it is an inferior justice theory, not actually reconciling harms or reinforcing faith in the system.

In response to these objections, the advocate for retributivism might say that these are unduly harsh critiques of his position, claiming that I emphasize the negative components of the method and fail to highlight the positive attributes. He might argue that while the law is the yardstick by which just punishment is enforced, and that an offence of the law undermines its authority, garnering compliance with legal standard and an adherence to the law is essential in securing justice for people. Furthermore, punishment, in the way that retributivism does it out, is not rendered unfairly.<sup>11</sup> Those who steal for their own personal greed and those who steal to feed their family have committed wrongs in the same way against the law. Both deserve to be punished. To level a harsher punishment against the investment banker than the bread thief is merciful. If both persons are given the maximum sentence, the judge passing the sentence is harsh, but not unjust.<sup>12</sup> Retributivism will pay some attention to the offender's instances in considering punishment and in its consideration of what is most just.<sup>13</sup> However, these considerations are always weighed against what consequences might result if this type of behavior is not impeded.<sup>14</sup> The ultimate test for what punishment is just is whether that punishment is "commensurate with the offense."<sup>15</sup> In this way, I believe that retributivism always falls back on a paternalistic punishment that *dictates* what is deserved, rather than considering what best rehabilitates the whole situation, ultimately proving to be limited in its ability to actually serve justice.

Because of this, I believe that retributivism fails to provide a holistic approach to justice, both for the wrongdoer and the victim. As Walgrave presents it, restorative justice has a different aim than retributivism, focusing on rehabilitating the damage done to a particular individual or community. Under Walgrave's restorative theory, harm is done when a crime is committed against a person.<sup>16</sup> Walgrave defines harm as "...the material damage, psychological and relational suffering by the victim, social unrest and community indignation, uncertainty about legal order and about authorities' capacity to assure public safety, and the social damage the offender causes to himself."<sup>17</sup> His view of harm presents a larger opportunity for justice and restoration. Not only does it seek to mitigate the losses

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<sup>10</sup> Walgrave, "Restoration in Youth Justice," 325.

<sup>11</sup> McCloskey, "A Non-Utilitarian Approach to Punishment," *Inquiry* 8, no. 1-4 (1965): 251. doi: 10.1080/00201746508601433.

<sup>12</sup> *Ibid.*, 260, 261

<sup>13</sup> *Ibid.*, 261

<sup>14</sup> *Ibid.*, 261

<sup>15</sup> *Ibid.*, 261

<sup>16</sup> Walgrave, "Restoration in Youth Justice," In *Why Punish? How Much?: A Reader on Punishment*, ed. Michael Tonry (New York: Oxford University Press, 2011), 321.

<sup>17</sup> *Ibid.*, 321

of singular victims, it can also move to heal the wounds of a community.<sup>18</sup> This is particularly important in communities that feel that justice has not been served. Whether or not laws exhaust justice in a particular context, there is an intuitive sense of when the harm done to oneself has not been fully restored. While legal channels may think they give the final word on the matter of a particular community's harm, the feeling of unresolved harm may linger.

In this way, one can see the benefit of restorative justice in applied contexts. Take the example of Ferguson. In this particular instance, legal channels have all but closed the books on the matter. Following a retributivist model, Officer Darren Wilson used the proper amount of force, and as such broke no law. He therefore deserves no punishment. This decision, in the eyes of the law, is just. However, it is hard to shake the feeling that there is lingering harm that needs to be resolved. Both Michael Brown's family and his community (as well as an extended community of like-minded individuals, concerned with implicit racism, institutional biases, and police brutality) may require further compensation for the harm to which they have been subjected. They lost a son, a friend, a person. Whether or not Officer Wilson is innocent or guilty in the eyes of the law matters little when compared with the harm that those surrounding Michael Brown feel. So while retributivists argue that the justice system itself should be the object of restoration, this seems artificial. Restorative justice highlights the reality that the *people* affected are the objects of harm. In this way, restorative justice seeks, first and foremost, to rehabilitate the harm visited upon the victims, reinforcing an authentic faith that the system will do them justice.

Furthermore, as restorative justice focuses on persons in the context of justice, its means of reconciling harm are more holistic in the employment of different deliberative processes between victim and offender. Walgrave argues that deliberation among the different parties is essential to arriving at a consensus for psychological and material compensation for a victim's suffering.<sup>19</sup> While controversial in his belief, Walgrave argues that the person who commits an offense is necessary for restoration.<sup>20</sup> Ideally, the offender consents to this deliberative process voluntarily.<sup>21</sup> Walgrave does acknowledge the possibility that when an offender might not willingly consent to deliberate as to what compensation is appropriate to restore the victim's harm, the reconciliation is arrived at through coercive means.<sup>22</sup> Furthermore, this enforced deliberation will likely yield "partial reparations."<sup>23</sup>

The virtue of the restorative model lies in the fact that deliberation, in any form, lends itself to a social healing, always focusing on the rehabilitation of the victim, first and foremost. The deliberative process not only allows for the exchanges of such emotions as "...shame, guilt, remorse, empathy, compassion, support, apology, and forgiveness in the offender, the victim, and other participants," but also a true awareness of "...the harm and

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<sup>18</sup> Walgrave, "Restoration in Youth Justice," 319.

<sup>19</sup> *Ibid.*, 320

<sup>20</sup> *Ibid.*, 321

<sup>21</sup> *Ibid.*, 320

<sup>22</sup> *Ibid.*, 320

<sup>23</sup> *Ibid.*, 320

suffering caused.”<sup>24</sup> The process allows for an environment of true reconciliation, in which the offender becomes aware of the extent of her wrongs and is truly earnest in her agreement to repair the pains inflicted.<sup>25</sup> The fact that she is treated as a morally considerable agent that has her own interests and flaws underscores the fact that the restorative process preserves the humanity of the offender. Ultimately, the process allows for “...the satisfaction of the victim, reintegration of the offender, and restored assurance of rights and freedoms in society.”<sup>26</sup> In this way, through direct interaction, the victim is more authentically restored, and the offender is truly rehabilitated in the way that he can see the error of his ways, rather than just fearing a punishment that might result.

With this intimate interaction between victim and offender, some might object to the restorative model putting undue stress on the victim. As the focus of the deliberative process, the victim might be unable to express her anger, resentment, pains, or aims. I think this objection is particularly strong in the case of rape victims. The rapist might maintain his innocence of any involvement. He might protest ignorance to her resistance to the act. He might do these things before, during, and after the deliberative process. This has several clear and harmful consequences. The deliberative process, in which a victim must engage her attacker, might cause further and deeper psychological harm that can neither be addressed in the deliberation process nor identified immediately. While this instance seems to introduce some very serious implications for the deliberative process, it does not render the system null and void. There are a number of alternatives to a direct encounter between an offender and a victim. A court-appointed litigator might advocate on behalf of the victim so she does not have to undergo any additional trauma. Furthermore, while these concerns are practical, they do not effectively discredit the purpose of the deliberative process. It seeks to aid in the restoration of a victim's faith in the system. It compensates her, both psychologically and perhaps financially, for the harm that has been inflicted upon her.<sup>27</sup> Justice is served by a direct intervention with the offender, whether actually or for all-intents-and-purposes.

For this reason, the justice system still plays an important role in the restorative model, acting as a member of the community of justice with certain limited privileges that ensure the deliberative process takes place. If law enforcement fails to arrest an offender, both the victim and her community are in a dangerous place that might allow for the loss of faith in the system. As such, she expects that they will protect her rights and freedoms, or dominion, as Walgrave refers to as the protection of these privileges.<sup>28</sup> “Crime is an intrusion upon dominion, and especially on the assurance of rights and freedoms.”<sup>29</sup> The justice system intervenes to play the role, as a member of the community, of ensuring dominion over one's affairs remains a “collective good.”<sup>30</sup> The system is still not the primary functionary, though. The power structure of the justice system takes on a role very similar to the United Nations does in global affairs. It acts as a third party mediator and peace

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<sup>24</sup> Walgrave, “Restoration in Youth Justice,” 323.

<sup>25</sup> *Ibid.*, 323

<sup>26</sup> *Ibid.*, 323

<sup>27</sup> *Ibid.*, 324

<sup>28</sup> *Ibid.*, 322

<sup>29</sup> *Ibid.*, 322

<sup>30</sup> *Ibid.*, 322

keeping force. Sentencing might be mediated by the courts system, but courts will not pass sentences down. Rather, a victim passes sentencing and her community that surrounds her supports her, for the crime affects the larger scope of the community.<sup>31</sup>

As a whole, in its aim of restoration on multiple fronts, restorative justice is a system that lends itself to a more holistic approach that repairs harms, all the while reinforcing the worth of each individual involved in the process. First, as a goal, it is aimed at social healing.<sup>32</sup> This is true for both individuals that have been harmed and communities that feel victimized. Furthermore, while restorative justice reinforces the rehabilitation of the victim first and foremost, it in no way leaves out the offender. Through a deliberative reconciliation process, it actively considers the rehabilitation of the flawed humanity of the perpetrator. Including the offender in this deliberative process, whether voluntarily or compulsively, ensures authentic rehabilitation. This is true for both the suffering the victim has encountered and the understanding of the offender of the entire situation. And while retributivism is a conversation between a system of laws and a perpetrator, restoration presents itself as a holistic conversation. It addresses and includes every social actor in the end goal of positive reconciliation and actual rehabilitation, rather than merely punitive judgment.

## WORKS CITED

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<sup>31</sup> Walgrave, "Restoration in Youth Justice," 323.

<sup>32</sup> *Ibid.*, 324