The Punishment Debate in Restorative Justice

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revised 3 November 2011

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The relationship of punishment to restorative justice is uneasy. Many restorative justice promoters are 'against punishment', seeing little or no connection between it and restorative justice. Others see a complementary relationship in which restoration depends, in part, on punishment. Understanding the relationship of punishment to restorative justice (the 'punishment debate') is hampered by varied and imprecise use of key terms such as punitive, retribution, restoration, and punishment itself.

In this chapter, I clarify and analyze the punishment debate in restorative justice. My focus is on domestic contexts of criminal justice in affluent democratic societies, as compared with transitional justice or international criminal justice contexts. Part I presents the early arguments that formed the basis for restorative justice, and how analysts construed punishment in making their case for justice alternatives. Part II examines contemporary work on restorative justice; it reveals differences in analysts' aspirations for restorative justice, what practices are called 'restorative', and how key terms are defined. In Part III, I present and assess different positions on the punishment debate; these turn on the meanings of 'punitive' and the role of punishment in restoration (or reparation).[1] I compare the arguments of three analysts—Lode Walgrave (2008), Ross London (2011), and Antony Duff (2003)— on punishment and restorative justice. Their arguments reflect differing aims and presuppositions: Walgrave is concerned with socio-ethical principles; London, with political pragmatism and empirical evidence, and Duff, with demonstrating the compatibility of restorative and retributive justice.

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[1] Analysts in domestic criminal justice use 'reparation' and 'restoration' interchangeably; thus, for simplicity, I do so in this chapter.

THE MAIN POINTS

Embedded in a selective history of restorative justice,[2] here are the main points. First, the early thinkers who are today associated with restorative justice were generally 'against punishment'. Eccentric and somewhat radical for their day, their views reflected the optimism of their times, the 1960s and 1970s, when it seemed possible to shift criminal justice toward a more constructive and less punitive direction. Such optimism spiralled downwards in the 1980s and 1990s, with rising imprisonment rates and a conservative turn in penal politics. Building on other proposed justice alternatives circulating at the time, the idea of restorative justice emerged as a new term in the late 1980s, consolidating in the 1990s. For many, it offered renewed hope and optimism for progressive change in criminal justice, despite a continuing conservative landscape.

Restorative justice has no agreed-upon definition. However, if we restrict the concept to one of several responses to common crime in the penalty or post-penalty phase of the criminal process, it has these common elements. Victims and admitted offenders are active participants and subjects of justice processes; and crime is addressed directly by the actions and words given by, or burdens imposed on, offenders directly to victims, and where relevant, to their supporters and a wider social group. These activities are intended to 'repair the harm' and 'restore' social relations broken by crime. Restorative justice is a form of informal justice, which means that emphasis is placed on dialogue, interaction, and engagement of the protagonists, with relatively less reliance on strict notions of legal procedure or the involvement of legal professionals. At the same time, most proponents want clear legal standards and protocols in place, particularly to limit sanctions. The activities associated with restorative justice in domestic contexts are conferences, dialogues, circles, and expanded types of victim-offender mediation (see McCold 2001). These take place at

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[2] For more on the history of restorative justice, its concepts, and popularity, see Bottoms (2003), Daly and Immarigeon (1998), Daly and Proietti-Scifoni (2011), and Johnstone (2002, 2003: 1-18).

many points in the criminal process, as diversion from court, pre-sentence advice, supplemental to the court process, and post-sentence. Restorative justice dialogues are also used to address wider political conflict, although these typically do not include criminal justice processes or sanctions.

It is important to emphasize that restorative justice occurs only in the *post-plea* or *penalty phase* of the criminal process.[3] There is as yet no 'restorative' or 'reparative' mechanism of adjudication; and thus, there is no complete justice system based on these ideas. Often it is said that restorative justice differs from conventional criminal justice in being consensually based, not adversarial. This sounds pleasing, but it is misleading. Conventional criminal justice is adversarial (whether the procedure is formally described as 'accusatorial' or 'inquisitorial') because the accused is put in the position of having to defend against an accusation by the state. There may be better ways to adjudicate crime, but no one believes that we should dispense with the right of individuals to defend themselves against a state's power to prosecute and punish alleged crime.

During the 1990s, restorative justice became immensely popular, eclipsing and overtaking other justice ideas circulating during the 1970s and 1980s—a range of restitution, reparation, reconciliation, and informal justice projects. Restorative justice seemed to offer something for everyone, on both the left and right side of politics. With so many people involved, often with a partial view of the expanding literature, discussion flew in many directions. This leads to the second point: although most proponents put forward a general case 'against punishment', terms were not defined with precision. Instead, advocates wanted to move the idea onto the public agenda and to sell its benefits. Governments were attracted to the idea, rebranding some rehabilitation programs as 'restorative' and incorporating the term 'restorative justice' in new justice initiatives for youthful offenders. The pace of change

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[3] It may also occur post-sentence and pre-release or independent of a legal process, but my emphasis here is on the adjudication and penalty phases of the criminal justice process.

and the thousands of people involved—academics, practitioners, and faith-based community members, among others—created an ever widening field of knowledge.

Third, amidst the diversity, simple metaphors seemed to bind people together. A significant one, introduced by Zehr (1985, 1990), is the contrast of retributive and restorative justice, which helped proponents to argue for the superiority of restorative justice over what was called retributive justice. Some elements in the contrast are worth preserving, in particular, Zehr's effort to re-define crime and justice. However, at the time, anything to do with *retribution*, a term with many meanings, or *punishment*, as a social institution or 'a repertoire of penal sanctions' (Garland, 1990: 17), was eschewed by proponents as irrelevant or as being against the principles of restorative justice. The retributive-restorative oppositional contrast stalled a more sophisticated conceptual development of restorative justice in its formative years. Although some were critical of the contrast (Daly, 2000, 2002; Duff, 1992, 1996, 2001; Hampton, 1992, 1998; Watson et al., 1989; Zedner, 1994), at the time, such views were in the minority. Now, by contrast more considered attention is being given to the relationship of retribution and restoration (or reparation), and of punishment to restorative justice.[4] I identify three positions (not just two) on the punishment debate, and my analysis of the arguments by Walgrave, London, and Duff shows that despite differences, there are many points of overlap.

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[4] A partial exception arises in the literature on justice in societies undergoing processes of political transition, classically from dictatorship to democracy or in the aftermath of civil conflict. With some exceptions (e.g., Combs, 2007), however, transitional justice analysts have a caricatured understanding of restorative justice and they often rely on the (now outdated) retributive-restorative justice contrast. This arises, in part, because justice can be bifurcated in transitional justice contexts, when distinguishing 'justice' (punishment of offenders) and 'reparation' (a variety of mechanisms for victims); and in part, because transitional justice analysts, as a new group to restorative justice, find the simple contrast attractive (for review, see Daly and Proietti-Scifoni, 2011).

I. KEY ARGUMENTS IN RESTORATIVE JUSTICE: FORMATIVE IDEAS

Among others, these key thinkers are associated with the development of restorative justice: Albert Eglash, Randy Barnett, Howard Zehr, and Nils Christie. All say that conventional criminal justice is inadequate and accomplishes little for victims or offenders.

Eglash

Eglash is credited with first using the term restorative justice. A psychologist based in the United States, he worked in programs for youthful offenders and adult prisoners; and he drew from these experiences in outlining a 'creative' meaning of restitution (Eglash, 1957-58a, 1957-58b, 1959-60). Creative restitution varies depending on context, is offender self-determined but guided, and relates to constructive acts for a victim or others (Eglash, 1957-58a). Eglash distinguishes the 'first mile' of the return of property under court order or by the expectations of friends and family from the 'second mile' of restitution 'in its broad meaning of a complete restoration of good will and harmony ... [and] a situation left better than before an offense was committed' (p. 620). Restorative justice does not appear in this article or the two others appearing at the same time (1957-58b, 1959-60; but see fn. 4).

Almost two decades later Eglash (1977) explicitly used the term restorative justice.[5] He defined it as the 'technique of [creative] restitution' (p. 91), contrasting it to retributive and distributive justice, which he associated with techniques of punishment and therapeutic treatment, respectively.[6] The elements of the 'restitutional act' are an 'active, effortful role',

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[5] The story is more complicated. In Eglash (1957-58b: 20), he says 'the relationship between offense and restitution is reparative, restorative'. In Eglash (1959-60: 116), the term 'restorative justice' appears, but it is indented in the text as 'condensed' from Schrey et al. (1955), which is an English translation of a German text, *The Biblical Doctrine of Justice and Law*. Skelton (2005: 84-89) discovered that one of the authors, the Reverend Whitehouse, carried out a translation and adaptation of the original German text; and he created the term 'restorative justice' from the German expression '*heilende Gerechtigkeit*' ('healing justice'). Restorative justice was viewed as adding a 'fourth dimension' to justice, differing from secular forms of retributive, commutative, and distributive justice in that it 'can heal the ... wound of sin' (Skelton, 2005: 88). See Immarigeon (2005) and Van Ness and Strong (2006: 22) for additional background.

[6] His linking of distributive justice to treatment (or rehabilitation) seems odd, but this is what he said.

which is 'constructive [and] directed toward the victim, and ... reparative of the damage done to a person or property' (p. 94). Eglash again includes 'the second mile', saying that creative restitution goes 'beyond coercion into a creative act' by leaving a situation better than before (p. 95). He says that it 'fits best as a requirement of probation', but does not say how it relates to other sentence elements. He concludes by saying he is 'offender oriented', 'seldom thinks about the victim', and it has never occurred to him to ask victims what they thought of creative restitution (p. 99).

Restorative justice, as defined by Eglash (1977), is some distance from principles and practices associated with the term today. However, these similarities can be discerned. Eglash makes a strong contrast between the failure of older justice forms (retributive and distributive) and the superiority of a new type (restorative). The latter form goes 'beyond coercion' by assuming an offender will take an 'effortful role' in redressing the damage and harm caused by an offense. He has a highly optimistic view of offenders' abilities and interests to want to go 'the second mile'.

Barnett

The elements in Randy Barnett's (1977) 'new paradigm' of restitutional justice are directly linked to current ideas in restorative justice. He defines crime as an offense of one person against another (rather than against the state), defines justice as a 'culpable offender making good the loss' caused, and is against punishment, which he equates with 'retributive justice'. In its place he proposes 'pure restitution', a 'non-punitive' form of restitution. This differs from 'punitive restitution', which Barnett defines as forced compensation or imposed fines.[7] The goal is 'reparations paid to the victim', which would be ordered, when an offender is

[7] In domestic criminal justice, analysts define and use key terms of restitution, reparation, and compensation in different ways; and there are also differences in usage by US and UK authors. Differences are also evident in the transitional justice literature, where authors use the term reparation (in the singular) and reparation*s*. In all cases, I preserve an author's use of terms, but would point out that key terms are not used consistently.

'sentenced to make restitution to the victim' (p. 289). In Barnett's analysis, reparations (he uses the plural) and restitution refer to the same thing: financial payments. He considers a variety of ways of 'repaying the victim' (pp. 289-91), but concedes at the end of his paper that his proposed restitutional system collapses the distinction between crime and tort (p. 299).

Barnett's argument is an early example of the 'civilization thesis' in two meanings of that concept: to bring offenders under civil, not criminal law; and to have a more enlightened response to acts called 'crime' (p. 300).[8] His ideas raise questions for how elements of civil law could be incorporated within restorative justice (see Johnstone, 2003: 8-14). However, he does not satisfactorily explain why 'we are not entitled to impose punishment upon offenders but are entitled to *force* them to pay restitution' (Johnstone, 2003: 21-22, 26 fn. 4, emphasis in original). Furthermore, Barnet argues that 'pure restitution' is accomplished by sentencing an offender to make restitution, but it is difficult to see how this differs from sentencing an offender to pay compensation[9] or do work for the victim. Both are imposed on the offender in some way.

Zehr

Howard Zehr's (1985, reprinted 2003) contrast of retributive and restorative justice tracks Barnett's argument closely, but also departs from it. Zehr argues for a new paradigm, but names it restorative justice. Like Barnett, he redefines crime (an offense between two individuals, not just an offence against the state). For justice, he cites a variety of terms, including restoration, reconciliation, the process of making things right, right relationships

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[8] See Bottoms (2003) for discussion of the 'civilization thesis' and the problems it raises for restorative justice.

[9] This is Campbell's (1984: 347) argument: reparation (which he defines as criminal justice schemes for victim compensation) is a 'form of punishment', not in opposition to it. In his view, 'the idea of compensation as punishment is, in general, a restoration of the moral breach between victim and offender created by the offence' (p. 346).

measured by the outcome, repair of social injury, and healing. Like Barnett, his preferred response to crime is restitution, which he sees 'as a means of restoring *both* parties' (p. 81, emphasis in original), not as a type of punishment. Zehr is also concerned to address the conflict between individuals: he calls for offenders and victims 'to see one another as persons, to establish or re-establish a relationship' (p. 79). Compared to Barnett, who draws mainly from legal authority, Zehr draws from religious history and Judeo-Christian ideals. His work with the Victim-Offender Reconciliation Project, a Mennonite-based program that facilitated meetings between victims and imprisoned offenders, informs much of his thinking on restorative justice. Although the retributive-restorative justice contrast was an 'elegant and catchy exposition' at the time (Roche, 2007: 87), major restorative justice proponents acknowledge today that it was misleading because retribution can and should be part of restorative justice (e.g., Walgrave, 2004, 2008; Van Ness and Strong, 2006; Zehr, 2002).

Christie

Of the four authors detailed here, Nils Christie (1977, reprinted 2003) focuses more on the processes and procedures of optimal justice activities than sanctions alone. His article opens by taking us to a small village in Tanzania, where there is a conflict about property after a marital engagement broke off. He approves of the way the dispute (a civil matter) is settled: the protagonists are at the centre of attention, with family members and other villagers participating. They are the experts, not the judges.[10] Christie puts forward two related points. First, professionals, especially lawyers 'are particularly good at stealing conflicts' (Christie, 2003: 59) between individuals. Second, these conflicts should be seen 'as property' because they have great value. They offer a chance for people to participate in society, they provide 'opportunities for norm clarification', and they help protagonists to meet and get to

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[10] See Bottoms (2003) for analysis and critique of Christie's romantic view of dispute resolution.

know each other (p. 61). His ideas for a model court go further than those of other analysts in that he shows how civil and criminal processes might be blended.

Christie's proposed court is victim-centred and lay-oriented, and it has four stages. The first is to establish that a law has been broken and the right person is identified. The second is to focus attention on the victim's situation and what can be done to address it, 'first and foremost by the offender' (p. 63), then the local neighbourhood, and then the state. Christie has in mind repairing windows and locks, offenders paying compensation with money or by doing work for a victim, and in other ways, 'restoring the victim's situation' (p. 64). After all of this occurs, the third stage is a judicial officer deciding if further punishment is required, 'in addition to those unintended constructive sufferings the offender would go through in his restitutive actions [for] the victim' (p. 64). The last stage, which is post-sentence, is service to an offender, which includes addressing his or her social, medical, and educational needs.

Several observations can be drawn from these early works that are now linked to restorative justice. First, the authors all say that conventional criminal justice is a failure, and they propose different models of criminal justice. Second, they argue that admitted or convicted offenders should have a more direct and constructive role in 'repaying' victims for crime. This new role is variably termed creative restitution, pure restitution, restorative justice, or restoring the victim's situation; and its outcome is restoration, making reparations, healing, among other terms. Third, all struggle in imagining how this new role for offenders relates to conventional criminal justice. For all, there is a desire to identify 'non-punitive', more constructive responses to crime, and except for Christie, a rejection of the term punishment. Finally, for some (Zehr and Christie), there is also a new role for victims and others, who should be able to speak and participate in decisions about responding to crime.

II. RESTORATIVE JUSTICE TODAY

Restorative justice became immensely popular from the 1990s onwards and was viewed by many as a social movement of global dimensions. As increasing numbers of people got involved, conceptual and definitional problems emerged; and they remain today.

Defining restorative justice

Johnstone and Van Ness (2007: 6) argue that restorative justice is not only a 'persistently vague concept, it is in fact a deeply *contested* concept' (emphasis in original). There is no one definition, nor should this be expected, they say, because the restorative justice movement is not coherent or unified. Johnstone (2008) identifies five political agendas of advocates. Agendas 1 and 2 are the most familiar and widely used: changing the response to crime, and changing the way in which crime and justice are defined. Agenda 3 is concerned with widening the use of restorative justice to other organisational settings (e.g., schools, prisons, workplaces); and Agenda 4, with activities of political reconciliation (e.g., applications in post-conflict societies, among others). Agenda 5 is concerned with transforming social organization and one's personal life. Punishment is particularly relevant to Agendas 1 and 2, but relatively less so for the other agendas.

To make this discussion concrete, I turn to definitions of restorative justice by well-known recent advocates: Tony Marshall, Lode Walgrave, and John Braithwaite. Marshall's definition is as follows:

> Restorative justice is a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future. (Marshall, 1998, reprinted in Johnstone, 2003: 28)

Marshall focuses on *the deliberative processes* of face-to-face negotiation and resolution of a criminal offence, and he gives passing reference to reparation in discussing practices. His definition is aligned with Agenda 1, a concern to change the response to crime. Walgrave's definition is aligned with Agenda 2; he is concerned with *the outcome* of restorative justice (restoration), and he defines restorative justice this way:

> an option for doing justice after the occurrence of an offence that is primarily oriented
>
> towards repairing the individual, relational, and social harm caused by that offence.
>
> (Walgrave, 2008: 21)

His definition is 'maximalist' because it may 'include non-deliberative interventions ... or imposed restitution or community service if intended as a symbolic compensation for the harm to social life' (Walgrave, 2008: 20). He wishes to advance a 'revolutionary' understanding of crime and justice by asking 'how the harm can be repaired' rather than 'what should be done the offender'? He sees this difference as distinguishing restorative justice from 'punitive justice' and also from rehabilitation (p. 23). Further he says that restorative justice is not the only way to respond to all types of crime, but it is an 'option'. He calls for a 'shift from the punitive apriorism to a restorative apriorism' in that the first task 'must be to assess what the harm is and how it can be repaired ... not which punishment is to be inflicted on the offender' (p. 24).

Walgrave argues for a restricted definition of restorative justice, one focusing on the way criminal offences are dealt with. Thus, he would exclude activities in Agendas 3, 4, and 5. Among his reasons are that restorative justice 'risks becoming empty of significance' by including other contexts, and the focus should centre on how the state uses coercion in responding to crime. Compared to Walgrave's restricted definition, others such as Braithwaite are more expansive.

Braithwaite's work has evolved from applications to youth crime in the early and mid 1990s (e.g., Braithwaite and Daly, 1994, Braithwaite, 1996) to broader mechanisms of regulation and societal transformation (Braithwaite, 1999, 2002, 2003). Indicative of his vision of 'holistic restorative justice', he argues that it is not just about 'reforming the criminal justice system, [but] a way of transforming our entire legal system, our family lives, our conduct in the workplace, our practice of politics' (Braithwaite, 2003: 1). He continues by saying that restorative justice is

> about struggling against injustice in the most restorative way we can manage. ... It targets injustice reduction [not merely crime reduction]. It aspires to offer practical guidance on how we can lead the good life as democratic citizens by struggling against injustice. It says we must conduct that struggle while seeking to dissuade hasty resort to punitive rectification or other forms of stigmatising response.
>
> (Braithwaite, 2003: 1)

This definition exemplifies Agenda 5 with its call for struggling against injustice and providing guidance to citizens to lead the 'good life'. In that struggle, 'punitive rectification' and 'stigmatising responses' should not ideally be used.

Defining restorative practices

A significant question for the restorative justice field is what is to be considered a 'restorative' practice or response to crime. The term is often used to refer to any response that does not involve a prison sentence or that is 'non-punitive'. For instance, Pennsylvania's sentencing guidelines identify 'restorative sanction programs' as 'least restrictive, non-confinement intermediate punishments" (section 303.12 (a) (5)). Roberts and Stalans (2004: 325-26) contrast 'punitive' and 'restorative' sanctions: the latter includes any type of community or non-custodial penalties. The problems here are two-fold. First, many justice

activities that would formerly be termed diversion from court, rehabilitative, or community-based penalties are now being termed 'restorative'. This is a simple rebranding that may have little to do with the principles and practices of restorative justice. Second, and importantly for this chapter, is how restorative justice sanctions can be distinguished from other types. Typically, 'non-punitive' is used to refer to a restorative response or outcome, but this begs the question: when is a response 'punitive' or 'non-punitive'? Is this in the mind of the decision-maker, is it implied in any coerced sanction, is it how an offender experiences a sanction, or is it how a victim interprets a sanction? I turn next to consider these problems of definition.

Defining key terms

Restorative justice proponents define terms variably and imprecisely. Furthermore, key terms are not independently defined but collapsed on each other: thus, for example, retributive justice is associated with a punitive attitude, punitive sanctions, and punishment of the offender as the primary response. To understand and assess the punishment debates, we need to unravel these terminological knots. A key term is 'punitive'.

Punitive. Research on public punitiveness (e.g., Maruna, 2006) defines it as support for harsh sanctions of offenders.[11] Drawing from Maruna (2006), to be punitive implies an attitude of mind that sees offenders as 'bad persons', who require 'more harsh', 'tougher', or austere responses to crime, their suffering in some sense 'repaying' for the harm they caused another person. This contemporary understanding can be linked to earlier work on the idea of punitiveness. In the early 20th century, George Herbert Mead (1917-18, reprinted 1998) described two attitudes of mind in responding to crime: one, an 'attitude of hostility toward the lawbreaker' and the other, a 'reconstructive attitude'. Whereas the former 'brings with it

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[11] Maruna (2006) devised a punitive scale with items tapping a respondent's interest to toughen sentencing laws, bring back the death penalty, condemn offenders more, treat offenders harshly, use prison more, have more austere prisons (without television and gyms), and not support alternatives to prison or community sentences.

the attitudes of retribution, repression, and exclusion' (pp. 47-48), the latter tries to 'understand the causes of social and individual breakdown, to mend ... the defective situation ...., not to place punishment but to obtain future results' (p. 52). In the essay, Mead was defending the merits of the then emerging juvenile court; but his ideas are evident not only in the language and assumptions of the early figures of restorative justice (especially Eglash, Barnett, and Zehr), but all those since.

If punitive is defined as an 'attitude of mind', associated with social exclusion and seeing no value in (or expectation of) attempts to change an offender, then a minority of criminologists in the world today would align with this position. Although members of the broader public may hold a punitive attitude of mind, I suspect that most criminologists (both advocates and critics of restorative justice) would say that they have a 'non-punitive' attitude of mind and that criminal justice decision-makers should as well. 'Punitive' is rarely defined in the restorative justice literature except as a pejorative term to refer to any aspect of the conventional criminal justice system, or as a substitute name for that system (see e.g., Walgrave, 2008 on punitive justice compared to restorative justice). However, there can be greater conceptual precision if we define 'punitive' and 'non-punitive' as types of attitudes toward offenders. For example, in responding to crime, we may choose to distinguish (or not) an offending *person* from an offending *act*: a good person who committed a bad act (a non-punitive attitude), or bad person who committed a bad act (punitive attitude).

This distinction was made by Braithwaite (1989) in his theory of reintegrative shaming, an early theory in restorative justice: shame the act, but then reintegrate the person as a 'good person'. Braithwaite contrasted reintegrative shaming with stigmatising shaming, in which both the act and person were shamed, and which he associated with conventional criminal justice. We can associate a non-punitive attitude with reintegrative shaming, and a punitive attitude with stigmatizing shaming. However, that does not tell us how we may

distinguish between 'punitive' and 'non-punitive' *sanctions*. A prison sentence could be decided in a process that used reintegrative shaming, and compensating a victim could be imposed in a process that used stigmatising shaming.

Retribution. According to Cottingham (1979), philosophers have put forward at least nine theories of retribution to justify punishment, although he believes that there is a 'basic sense' of what the term means: repayment (p. 238). Although the relationship between repayment and 'inflicting suffering' is 'left unexplained', it is 'both ancient and widely held' (p. 238). For this reason, he says that the 'repayment sense' of retribution should be viewed as a metaphor more than a theory of punishment. Cottingham's observations help us to see why there are varied meanings of retribution in the restorative justice field. Some use the term to describe a *desert justification* for punishment (e.g., intended to be in proportion to the harm caused; see Walgrave and Aertsen, 1996), whereas others use it to describe a *form* of punishment. For the latter, some use retribution in a *neutral* way to refer to a censuring of harms (e.g., Duff, 1996), but most use the term to connote a *punitive* response, which is associated with the intention to inflict pain (Wright, 1991).

Punishment. Punishment conjures many images in people's heads, but for many restorative justice proponents, it is equated with prison and other forms of unacceptable ('uncivilized') pain infliction. More acceptable, they believe, are constructive efforts by an offender to do something for a victim (to mend, repair, or restore the harm caused by crime), whether by working directly for a victim or paying back money or property in some way. At issue is whether such sanctions or outcomes—which are intended to repair or restore— are (or should be viewed as) forms of punishment because they are coerced or imposed as a burden.

Some argue that incarceration and fines are punishments because they are *intended deprivations*, whereas probation or what are termed 'reparative measures' (such as doing

work for a crime victim) are not punishment because they are *intended to be constructive* (Walgrave, 2004: 48-49). Others define punishment to include anything that is a form of suffering, is unpleasant, a burden, or an imposition; the intentions of a decision-maker are less significant or irrelevant (Davis, 1992; Duff, 2001). Therefore, because any criminal justice process is coercive, outcomes from a restorative justice process are types of punishment (Crawford and Newburn, 2003: 46-47; Daly, 2000, 2002; Johnstone, 2003: 22), despite the benevolent intentions of restorative justice promoters (Levrant et al., 1999).

Are these word games and sleights of hand? At times, yes they are. For example, consider Barnett's (1977) contrast of *punitive* and *pure* restitution. In punitive restitution (punishment), an offender is forced to compensate a victim; in pure restitution (non-punishment), an offender returns stolen goods or money (or 'makes good' in some way), but the aim is not that the offender should suffer, but that a victim 'desires compensation' (Barnett, 1977: 289). The line Barnett draws is fine indeed: punitive restitution is forcing an offender to do something, but pure restitution does not involve force because the intent is to satisfy a victim. The intent to help a victim seems to magically remove the use of 'force' in punishment.

III. UNRAVELLING THE KNOTS

A way forward is to observe that there are three positions in the punishment debate, not just two.

> *Position 1*: Assumes a decision-maker has a 'punitive' attitude, who sees the offender as a 'bad person', who should pay back the suffering caused to a victim. This position is associated with conventional criminal justice, although we know that it is a caricature because there are varied responses, including those intended to help and change an offender.

Position 2: Assumes a decision-maker has a 'non-punitive' attitude, who sees the offender as a 'good person', who should repair or restore *the harm* caused to a victim. This position is associated with restorative justice promoters, who argue that because the intention of restorative justice decision-makers is 'constructive', the outcomes are not punishment. Furthermore, the intent and outcome is to repair the harm—reparation or restoration— rather than to punish an offender (Walgrave, 2008).

Position 3: Assumes a decision-maker has a 'non-punitive' attitude, who sees the offender as a 'good person', who should repair or restore *the wrong* of crime (Duff, 2003) or the *harm* (London, 2011) caused by crime. This position is associated those who see restorative justice (and restoration) and punishment as compatible.

The punishment debate today in restorative justice is between Positions 2 and 3, although most assume it is between Positions 1 and 2.[12] To unravel the knots further, we need to address these questions: how do analysts define restoration, and what do they see as the role of punishment in restoration? I examine Walgrave (2008, Position 2) and London (2011) and Duff (2003) (Position 3) on the matter. I chose these authors because each has been engaged for some time in analyzing the role of punishment in restorative justice and its relationship to restoration.[13]

The Appendix compares their arguments with respect to (1) the ideal aim of sentencing; definitions of (2) restoration and (3) punishment; the relationship of (4) retribution to restoration, (5) punishment to restoration, and (6) punishment to restorative justice; (7) key phrases that encapsulate the argument; (8) the analyst's unique contribution ;

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[12] There may be some individuals who because of their particularly heinous offending are 'outside our moral and imaginative community [and] excluded from membership and beyond the reach of empathy' (Hudson 2003: 204). For those offences, most everyone would take Position 1 and not view an offender as deserving of help or support of society, at least not until after a sentence has been served.

[13] Others have done so (e.g., Barton 2000; Daly 2000, 2002; Dignan, 2003; Dolinko, 2003; Garvey, 2003; von Hirsch et al., 2003), but the arguments of three considered here are more recent and extensive.

and (9) points of overlap and agreement. I sketch the core argument of each and then compare them.

Walgrave

> I look for a socio-ethical justification of punishment and do not find it. (2008: 66)

> If [a maximalist model of] restorative justice succeeds, it may represent a new step in human civilisation, [which] is a process of increasing control over spontaneous violence and of bringing violence under state monopoly (Elias 1939/1982). The next step ... is to reduce state violence itself, by not taking for granted pain infliction after a crime. (2008: 57-58)

Walgrave is concerned with the socio-ethical problem of conventional criminal justice: at its core is 'intentional pain infliction'. He argues that 'punishment [as] the *intentional* infliction of suffering is not at all an appropriate tool in the pursuit of restoration' (p. 49, emphasis added). He acknowledges that the 'obligation to repair is mostly painful for the offender, ... [but] it is a *consequence* of a restorative process, not the objective (p. 52, emphasis added). And although there is no intention to inflict pain, 'there must be an awareness of the painful effects, which must be taken into account' in a restorative process (p. 48). Restoration and retribution are not opposites, 'but two sides of the same coin' (p. 62). Common to both is to 'rebalance the consequences of wrong', but the difference lies in the way 'the balance is going to be restored'. Restorative justice does not 'add more hurt, but tries to take hurt away by inverting punitive retributivsm into a constructive restorative retributivism'. The latter takes a constructive approach to censuring crime, to the offender's responsibility for crime, and how the balance is to be restored (pp. 60-61). By contrast, 'punitive retributivism assumes that intentional pain infliction is indispensible to balance wrongful behaviour and to censure it' (p. 62). Walgrave looks to the 'next step in human civilisation' of reducing 'state violence itself, by not taking for granted pain infliction after a crime' (pp. 57-58).

London

> Punishment *alone* is an extraordinarily poor way of restoring trust either in an offender or in society. ... [Punishment may] operate as an instrumentality of healing ... when it is administered *in combination* with all other means of restoring trust, including the expression of apology, the agreement to pay restitution, and ... to undergo rehabilitation'. (2011: 105, 108, both emphases in the original)

> The claim that punishment is irrelevant or antithetical to healing lacks a firm empirical foundation. (2011: 99)

London is concerned with bringing restorative justice from the margins to the mainstream, i.e., from a justice activity that responds to less serious forms of youth crime to one that can address more serious types of adult offending. The primary goal of sentencing is the restoration of trust. London's definition of trust is the 'presumption of reciprocity in others' (p. 84, 87, 118), which operates at two levels: personal trust (trust in the offender) and social trust (trust in society). The restoration of trust 'replaces punishment as the primary goal of sentencing and regards punishment as simply one means—and not necessarily the most important means—to achieving the goal of restoring trust' (p. 191). London proposes that the more an offender does to restore personal and social trust, 'the severity of punishment regarded as appropriate is correspondingly decreased' (p. 319). Because punishment is one means of restoring trust ('especially if voluntarily accepted', p. 319), it cannot be eliminated, but it can be minimized (p. 319).

The potential positive effect of punishment on victims' ability to recover from crime is pursued in a survey of 400 Rutgers University (Newark) college students.[14] Participants were asked to show their emotional reactions to several crime scenarios, and 'how their emotional well being in the aftermath of crime might be improved or impaired by apology, payment of restitution, and submission to a deserved punishment' (London, 2011: 111). He found that punishment was one of three major elements (the others were restitution and being

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[14] Although research on samples of undergraduate students is limited, London (2006) finds that the responses of students who had experienced the incident and those who only imagined it were similar. Furthermore, the conceptualization of the survey appears sounds and could be extended to other populations.

treated with respect by the court) that would *aid* the imagined victims' recovery from crime. But when asked what would *harm* their recovery, the absence of punishment was the most important factor. Thus, punishment was important to (imagined) victims 'not so much as a means of promoting satisfaction as it was a means of avoiding further distress that would ensue from the failure to punish' (p. 114). London tested three models of emotional recovery, based on differing combinations of punishment, apology, and restitution: punishment only (the 'punitive model'); apology and restitution only (the 'non-punitive model'); and apology, restitution, and punishment (the 'comprehensive model'). The punitive model was least effective in promoting emotional recovery; and the comprehensive model was more effective than the non-punitive model (pp. 115-116). It is not, he argues, 'the accumulation of additional factors', but 'transforming the character of these very factors' when used in combination (p. 117).

Duff

> [Restoration] requires retribution in that the kinds of restoration that crime makes necessary can be brought about only through retributive punishment. (2003: 43)

> We should recognize criminal mediation and reparation as punitive, indeed as a paradigm of retributive punishment ... Criminal mediation and reparation [are] a kind of secular penance: as a burden undertaken by the wrongdoer, which aims to induce and express her repentant and apologetic understanding of the wrong she has done. (2003: 53)

Duff is concerned to reconcile the 'restorative paradigm' and 'punishment paradigm'. He argues that 'restoration is not only compatible with retribution', it *requires* retribution in that the kind of restoration that crime makes necessary can ... be brought about only through retributive punishment' (p. 43, emphasis in original). Duff differs from London in that he views punishment as *necessary* for restoration. Although London (2011: 172) sees 'the value of punishment in the processes of censure and penance', he views punishment as an

'instrumentality ... that may be justifiably applied when other means are found to be inadequate'.

Duff observes a lack of precision in the definition and aims of restorative justice. He asks (rhetorically), what does it mean to 'repair' the 'harm' caused by crime, what are crime protagonists 'to deal with' in the 'aftermath of an offence', what is the nature of the 'conflicts', and what would it mean to 'resolve' them (Duff, 2003: 44)? He argues that the use of euphemistic language by restorative justice proponents obscures the public qualities of criminal law: crime not only *harms* a person, but it also *wrongs* him or her. Wrongs require a criminal (not civil) mediation response; and their repair requires something that 'only an offender can provide', which 'involves the offender's punishment' (p. 48). This means to 'suffer remorse, ... suffer censure, and [to take on] 'a burden of making reparation to a victim' (p. 49). This is an 'appropriate kind of suffering, [which] is intrinsic to confronting and repenting one's own wrongdoing' (p. 53-54); therefore, 'reparation must be burdensome if it is to serve its restorative purpose' (p. 49).

Making comparisons

Common to the three analysts is identifying restoration as the aim of criminal sentencing, although London usefully identifies two levels of restoring trust (interpersonal and societal). Each understands punishment to be the intentional infliction of pain (or suffering) on another as a consequence of wrongdoing. Whereas London and Duff view punishment as compatible with restorative justice, Walgrave does not. Furthermore, Walgrave wishes to distinguish what is and is not punishment by the 'intention' of the decision-maker: if it is constructive and not to inflict pain, then it is not punishment. At the same time, he recognizes that various types of reparative or restorative actions may be painful for an offender, although this is not the intent of the decision-maker. Walgrave concedes that 'if

every painful obligation ... is called a punishment', then most initiatives in reparation may indeed be considered punishment' and that 'accepting coercive sanctions' (as Walgrave does) 'may leave no or very few distinctions from punishment' (p. 45). Further, he says that if an offender does not accept the invitation of 'inverted constructive retributivism', a sanction will be imposed. Here, we see that punishment appears to have a role in Walgrave's restorative justice framework as an enforcement mechanism; however, later he says that such 'reparative sanctions are not punitive because they ... are meant to serve a reparative goal' (p. 153).

Differences are evident on the necessity of punishment to achieve restoration. For Walgrave, the 'a priori option of punishment is a serious obstruction' (p. 49); and for London, restoration of trust is the overall aim, and punishment is one of several types of mechanisms to achieve it. In some cases, punishment may only be minimal or not needed, depending on what actions an offender undertakes to restore personal or social trust. For Duff, restoration can only be achieved by 'retributive punishment', which is not contingent or separate from an offender's actions (as London conceptualizes it), but rather embodies them. A key passage by London (2011: 172) distinguishes his position from that of Duff.[15] He acknowledges 'the value of punishment in the processes of censure and penance', but he does not view punishment to be an 'essential communicative aspect of censure or a *necessary* inducement to penance' (emphasis in the original), as does Duff. Rather, punishment is 'an instrumentality ... that may be justifiably applied when other means are found to be inadequate' (p. 172). Thus, for London, the restoration of trust is the primary goal of sentencing, and punishment is secondary; whereas for Duff, restoration is achieved by punishment.[16]

Differences are evident in the degree to which each analyst is concerned with the public dimension of crime. Walgrave (like Barnett, 1977) wants to see an increased

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[15] London cites Duff's (2001) earlier, more extended analysis, which is encapsulated in Duff (2003).

[16] These differences flow from the fact that whereas London's justification for punishment is consequentialist, Duff (2001: 89) attempts to create a unitary justification that combines retributive (backward-looking) and consequentialist (forward-looking) justifications.

'civilisation' (in both meanings of that term) in the state response to crime; its public

dimension is relevant for the most serious offences and dangerous offenders (pp. 154-55).

London and Duff, who also desire a more enlightened response to crime, differ from

Walgrave in identifying a need to restore both personal and social trust (London) and

defining crime as a public wrong—of concern to a victim and the 'whole political

community' (for Duff, 2003: 47)— for all types of crime, not just the more serious.

The legacy of the earlier theorists is evident Walgrave's and London's arguments,

although they seem unaware of it. Walgrave's desire to identify a constructive approach to

censuring crime with an offender taking 'active responsibility' and an 'active paying back

role' is similar to that of Eglash (1977), and his concern that a sentencer have a non-punitive

intent and not impose punishment is like that of Barnett (1977). London draws partly from

Christie's (1977) ideal court in identifying punishment as a step that may be taken after

apology or restitution, if it is required.

The points of overlap are of interest. Duff says he cannot 'justify our existing penal

practices' (p. 55), and Walgrave says that 'restorative justice cannot simply rule out criminal

justice' (p. 46). Retribution as 'rebalancing a wrong' is a common theme to all three,

although London and Duff place more emphasis on the public dimension of retribution. For

example, London says that 'retribution is imposed for the good of others yet unknown' (p.

186), while Walgrave aims to 'invert' retributivism by focusing on what constructive actions

an offender can take.

Distilling the punishment debate

At the risk of simplifying nuanced arguments, I distil the essence of the punishment debate,

using Walgrave, London, and Duff as examples. Walgrave is 'against punishment' because it

offends socio-ethical principles about how a judge should relate to wrong-doers in a civilized

society: there should be no judicial intention to inflict pain, even if the consequences may be painful. The ethical relationship toward an offender should be one of respect and solidarity, and an expectation of active responsibility. Walgrave contends that these virtues are not evident in the 'punitive apriorism' in criminal justice, which he equates with Duff's argument of imposed punishment intended to be painful and burdensome on an offender. However, Walgrave's point requires interrogation: what if an imposed punishment is made with a 'non-punitive' attitude of mind? My reading of London and Duff is that this is what they have in mind in contemplating the relationship of punishment to restorative justice (and to restoration): for London as a means of regaining trust in an offender and society; and for Duff, as a means of repentance to right a wrong. As such, ethical relationships of respect and solidarity, and active responsibility, are not compromised. Thus, by distinguishing punishment with punitive and non-punitive intent, apparent differences in their positions begin to dissolve.

Differences remain on what is required to achieve restoration. Walgrave focuses on an offender 'taking hurt away' by taking constructive actions, but so too does London (apology and restitution) and Duff (undertaking reparative measures). However, Duff assumes that wrongdoers must suffer remorse and censure, and that reparation must be burdensome—all elements he terms punishment; whereas London takes a more contingent position, and Walgrave imagines that in most cases, restoration can be achieved more effectively without a decision-maker *intending* to cause suffering or burdens. Thus, differences turn on whether painful effects or burdens on offenders should be imposed and intended, or whether they should be invited and unintended, but nonetheless welcome consequences of restorative justice.

IV. CONCLUSION

In the last decade, the punishment debate in restorative justice has matured. Analysts are increasingly reflecting with care on the relationship of restorative justice to retribution and punishment, rather than analysing retributive and restorative justice as oppositions in caricatured and simplified ways. My analysis of Walgrave, London, and Duff shows that they have similar and differing ways of imagining the ideal relationship between a state official, an offender, a victim, and the public as participants and onlookers in a sanctioning process guided by restorative justice. Their arguments are informed by differing objectives: Walgrave, to create a new socio-ethical foundation; London, to bring restorative justice into the mainstream of criminal justice; and Duff, to identify the elements of retribution that make restoration possible. Walgrave, who in principle, is 'against punishment', recognizes that it cannot be completely excised from criminal justice. London is certain that if restorative justice is to be part of mainstream criminal justice, it will need to address more serious offences; thus, it must include punishment as one of several types of responses. Duff seeks to redefine the meaning and practice of punishment as a means to achieve restoration.

My view is that the civilising project of reducing violence, including state violence, will not be achieved by being 'against punishment', even as a socio-ethical principle. The reason is that punishment itself is an evolving concept and practice. It will continue to change and perhaps to become 'more civilized'. However, changing its meaning and practice is not the same as being 'against' it. The latter is not practical or desirable because the moral intuition that an offender should 'repay' crime is too strong. We recognize today that most penalties imposed on offenders (fines, probation, and other community-based penalties) are not corporeal forms of pain infliction, nor contrary to Walgrave's assumptions, are they likely to be imposed with the mere intent to inflict pain (although this is an empirical question). For some time, restorative justice proponents have recognized that the expression of a sincere

apology can be painful for an offender, even if the intent of a decision-maker or justice process is not to 'inflict pain'. Punishment therefore includes emotional forms of suffering, as well as physical forms or burdensome activities. In practice, it is difficult to separate the intent and consequences of an official's decisions, as Walgrave proposes we should; and in practice, the line between 'imposing' a sanction and 'inviting' an offender to take on a burdensome task is difficult to discern. In reflecting on the punishment debate in restorative justice, the different positions turn on what analysts imagine a state official intends to be doing, or what an official is or should be doing, when relating to an offender in redressing a wrong. They also turn on what the precise practices are (or should be) when restoration is the goal of sentencing. In all cases, punishment as an idea and practice is omnipresent, hovering: it cannot be willed away or made to disappear.

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