

## **CLASS 4: REPAIRING WRONGS I: RETRIBUTION, RESTITUTION, REPENTANCE**

### **Introduction**

Humans necessarily commit harms and wrongs. Whether intentionally or not, we do damage to our relationships with others. Usually, these are people we know well, but sometimes we wrong perfect strangers. We can do this by harming them directly, but we can also do this by violating the moral code upon which we all rely.

We know that these mistakes are significant, in part, because of the emotional reactions they elicit. Our feelings about ourselves, and others' feelings about us, can be deeply impacted when we do wrong. We arguably feel guilty because we intuitively know when we have done wrong. And when we are the wronged party, we feel angry because we feel diminished by someone who has harmed us. Part of our obligation to others is to understand these emotional responses when we commit harms and wrongs.

Yet even if we understand these emotional reactions, we are still left with an important moral question: What do we do in response? If we want to maintain our relations with others – and if we want to maintain our status as responsible moral actors – then we should try to repair damage when we cause it. If we have ruptured the moral order, others will likely expect us to take some steps in response. Indeed, to be a responsible moral actor means that we should have this expectation of ourselves.

This week, we want to consider three possible responses to harms and wrongs – retribution, restitution, and repentance. We are particularly interested in these as responses to wrongs that we legally define as crimes.<sup>1</sup> Each of these potential responses possesses a strong logic to support them, which we wish to explore. But each arguably has some drawbacks, which we also wish to explore.

### **Righting the Balance – Retribution and Restitution**

As we discussed previously, wrongs arguably incur moral obligations. When we wrong another person, we treat them with insufficient value: we take unfair advantage of them. This sends a symbolic message that we see ourselves as more important than they are. We have upset the expectation of equality. Because each of us possess the same moral worth, our actions should respect that reality.

When we diminish another person with our wrong, some would argue that we now owe a debt. Something should arguably happen to us to rebalance the scales, to challenge our presumed superiority. This means, for many, that we should experience some form of pain to compensate for the damage we have caused. We need to be taken down a peg, we need to learn clearly that we are not better than anyone we might choose to victimize. Gabrielle Taylor (1996, p. 93) captures this point this way:

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<sup>1</sup> Our discussion next time will focus on a fourth “R” word – reconciliation.

“It is because the agent at the time of feeling guilt thinks of himself as the person (causally) responsible for the relevant state of affairs that he sees the disfigurement in himself as brought about by himself. So, if at all possible, he should do something about it. He cannot wipe it out, for what is done is done. But by paying in some way he can make up for it. One form the payment may take is that he accepts retribution. It is from this debit and credit point of view that the notion of punishment as restoring the balance makes its point.”

As Taylor notes, the concept of **retribution** rests upon this basic assumption. If we have caused pain, then so too must pain be visited upon us. Otherwise, the diminished status of the victim cannot be restored.

This pain often takes the form of coerced punishment. For an advocate of retribution, punishment is a moral obligation that someone who has committed a wrong should accept. Here’s Linda Radzik (2009, p. 103) on this:

“To re-establish oneself as a trustworthy member of the community and as having recommitted oneself to the norms that one has wrongfully violated, one must accept the legitimate penalties that the community associates with those norms. It is a form of reparation that the local community specifies.”

So, retribution advocates see punishment as a means by which the perpetrator experiences the pain that was visited on the victim. It is a way to re-set the moral equilibrium.

Retributionists also argue that coerced punishment benefits not just the victim, but society as whole. That is because the punishment can reinforce the importance of our shared moral code. Punishment not only symbolizes the perpetrator’s obligations to the wronged victim(s), but to everyone. Ronald Duff (2003, p. 154) makes this point this way:

“Punishment must be understood in *communitarian* terms, as an *act of communication* between the community and a person who has flouted one of that community’s shared norms. The suffering endured is that of separation from a valued community—a community that the criminal values (perhaps without realizing it until he experiences its loss) and to which he would like to return—and communicated to the wrongdoer the judgment that his actions have made him, at least temporarily, unworthy of full participation in the life of the community. It requires that he experience the pain of separation so that he can come to see, in his heart, the appropriateness of that separation and thus seek, with the appropriate humility, reconciliation with the community that he has wronged.”

If we do not mark a wrong with a punishment, we arguably diminish the power of our moral code. Christopher Bennett (2008, p. 118) argues that:

“The amount of penance that we expect someone to do in order to redeem herself (its duration and onerousness) is the way in which we express our sense of the seriousness of the action. . .It would be wrong for the state simply to treat the

offender as it treats everyone else. The state has to condemn by treating the offender differently.”

So, one response to a wrong is to expect retribution -- to enforce a painful punishment. This arguably works to set a new level of equality between perpetrator and victim, and it communicates the importance of the moral code that has been violated. The wrongdoer pays with an unpleasant punishment.

**Restitution** also relies upon the metaphor of a debt. Again, the idea is that to commit a wrong is to take advantage of another person. Because this moral imbalance is unjust, it must be re-calibrated. If retribution turns this debt into punishment (commonly incarceration), restitution turns it into a specific amount of service or resources. We pay back our debt with something very tangible, up to and including money.

This idea of restitution makes much sense in the context of some specific harms. If a teenager shoplifts \$50 worth of items, then it is reasonable to ask them to compensate the store owner with that amount. If we damage another’s car through our reckless driving, then paying for the resultant repairs seems easily justifiable. For clearly-specified harms like these, restitution is sensible.

But how to measure wrongs? How should we compensate for an injury that renders someone unable to walk? For an injury that generates post-traumatic stress disorder?

Indeed, this is where the use of the economic metaphor of a debt perhaps fails to serve us well. This is true of both retribution and restitution. Here’s Linda Radzik (2009, p. 54) again:

“Wrongdoing is conceived as the incursion of a debt, and atonement is described as a form of repayment. However, on close examination, these metaphors lose their power. Debt and repayment are useful concepts when we are thinking about how goods may be transferred among persons. Nonetheless, the suffering of one person does not (or anyway *should not*) count as an intrinsic good to another person. Furthermore, many of the ‘goods’ that may be damaged by wrongdoing are clearly not transferrable. Trust, friendship, community, self-esteem, health, life, a sense of security, and a feeling of wholeness are all valuable things that, once damaged or destroyed, cannot simply be repaid or compensated.”

When we try to translate a wrong into a certain number of years of incarceration or a certain dollar amount of financial restitution, we will inevitably struggle, for just the reasons that Radzik outlines. We are trying to measure things that are unmeasurable.

Thus, without an obvious yardstick, we will struggle to find the “correct” measure of punishment. Indeed, the history of mass incarceration in the United States demonstrates our collective inability to keep retribution within any reasonable bounds.

In addition, what is at the core of retribution and restitution is the central idea that someone needs to suffer. This suffering is arguably connected to the idea that the moral scales need to be re-balanced: the perpetrator must experience a level of pain commensurate with that suffered by the victim.

Yet is inflicted suffering morally just? Might instead the balance be restored in less punitive ways? Gwynn Davis (1992, p. 44) makes this point: “An apology, an act of service, an expression of caring, or a helping hand can achieve the same ends and is usually more effective than the pursuit of suffering.”

Another issue with retribution and restitution concerns the self-understanding of the person who is punished. If the goal of a punishment is to somehow change the perpetrator and their ability to form morally-sound relationships, does a coerced punishment always help achieve that goal? If someone is imprisoned for an extended period of time but sees his conviction or the broader criminal justice system as illegitimate, what level of real social repair results? What if the moral order of prison frustrates the likelihood of reforming the moral reasoning of the perpetrator?<sup>2</sup>

Perhaps our emphasis should be less on the pain the perpetrator should feel and more on their ability to learn a moral lesson. This concern for the moral transformation of the perpetrator leads some to emphasize repentance as a better way forward.

## On Repentance

Many moral philosophers see guilt as productive. If we commit a wrong, they argue, we *should* feel guilty. Otherwise, we do not respect our shared moral order.

For many, guilt becomes especially productive when it leads to **repentance**. It is not enough just to experience guilt, but one must act on that emotion in a productive way. One rebalances the scales by proactively changing some aspect of oneself. This serves to remind the perpetrator that they have indeed done wrong, but also commits them to doing everything possible to avoid future such acts. Linda Radzik (2013, p. 88) captures this idea:

”Repentance, which not only looks back remorsefully to the past act but also rests on a resolution to pursue a better future, is the most appropriate emotional response to the past because of the more comprehensive judgments and the intentions it embodies.”

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<sup>2</sup> One might also ask whether and to what extent retribution helps the victim, particularly if their injury contains strong emotional components. This is an issue we will explore next time.

The repentant actor makes an assessment of their character, seeks to understand the wellsprings of their problematic behavior, and takes affirmative steps toward self-improvement. Here's Radzik (2019, p. 67) again:

“Repentant persons reject their former actions, habits, thoughts, or character traits in favor of a new set of values, commitments, dispositions, and intentions. They acknowledge that their former actions were wrong and neither excused nor justified by some other consideration. In repenting, one acknowledges that one's past values – the moral views to which one had dedicated oneself—were wrongful.”

Christopher Bennett (2007, p. 255) makes a similar point: “When a person *repents* of a wrong, she rejects it, in the sense that she accepts that it was wrong and that it came from her; and she repudiates that aspect of herself.”

Repentance is thus more active than guilt; it motivates different practices in the future. Stephen Garvey (1999, p. 1815) puts this idea in these terms:

“Compared to repentance, guilt is passive. The guilty self is preoccupied with the stain left upon it by its own wrongdoing. Repentance, in contrast, is active. The repentant self focuses on the wrongdoing that produced the stain in the first place and on what the self can now do about it.”

Repentance thus is arguably superior to retribution or restitution because it involves a commitment to moral change. It indicates that the person who committed a wrong has learned and incorporated the proper moral lesson. They will endeavor to move forward in a new direction. Repentance is thereby a means by which moral repair can occur. Indeed, Richard Swinburne (1989, p. 83) argues that this is the most important thing a wrongdoer can accomplish:

“An agent cannot alter the fact that he did the past act, but what he can do is make the present ‘he’ in his attitude as different as possible from the past ‘he’ who did the act; that is the most he can do towards undoing the act.”

So, if our emphasis is on moral lessons that can flow from wrongdoing, then we arguably favor repentance. Here, we hope that when we harm others, we take stock of ourselves, and find the wherewithal to ensure that we do not act similarly in the future.

Yet an emphasis on repentance can raise some concerns, particularly if it is part of a state-run criminal justice system. For starters, if we expect some form of repentance-induced behavioral change from a wrongdoer as part of their punishment, how can we assess that? If we expect some degree of difference in a person to judge them morally worthy, how do we define that, and who gets to judge it? What is a proper amount of repentance?

We can also wonder how much repentance provides any help to the victim. Most victims would undoubtedly hope that the perpetrator changed such that future violations do not occur. But to what extent is that central to their specific needs for healing? Might victims want some more direct benefits to them besides whatever change repentance might inspire? If so, does the perpetrator owe something more to help the victim heal?

This latter concern prompts many, particularly those with a commitment to restorative justice, to promote a fourth “R” word as a response to wrongdoing – reconciliation. That will be our focus of our next discussion.

## Questions to Consider

Please reflect on the following questions in preparation for our class discussion:

- What is the strongest form of argument for *favoring* each of retribution, restitution, and repentance?
- What is the strongest form of argument for *disfavoring* each of these approaches?
- Are there situations in which one of these is to be favored over another?
- How can any of these approaches be incorporated satisfactorily in a state-run system of criminal justice, especially one that includes incarceration as a potential punishment?

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