

A KANTIAN ELABORATION OF BRAITHWAITE'S RESTORATIVE
JUSTICE: DISPELLING ILLUSIONS

A Thesis Submitted to the College of Graduate and
Postdoctoral Studies, In Partial Fulfillment of the Requirements
for the Degree of Master of Art in the Department of Philosophy,
University of Saskatchewan
Saskatoon

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ABSTRACT

Dissatisfaction with the criminal law system has resulted in a call for alternative responses to issues relating to crime and injustice. Restorative justice programs are one of these alternative responses. Restorative justice is a process in which the victim, offender, and any other party affected by crime partake actively in resolving matters arising from the crime, often with the help of a facilitator. This research work seeks to defend the use of restorative justice programs by defending Braithwaite's version of restorative justice over Christie's more radical version, explaining how restorative justice is opposed to 'retributivism', and by providing a Kantian elaboration on Braithwaite's notions of dignity and freedom. The thesis argues that only by applying a Kantian notion of freedom and dignity to Braithwaite's account of restorative justice can restorative justice adequately defend itself against the criticisms made by people like Acorn and Geeraets. Only with a Kantian modification can restorative justice show how the decisions reached in a restorative justice process are not based on mere emotion or emotional coercion, but the rational deliberation and free choice of individual participants.

ACKNOWLEDGMENTS

I wish to thank my family for their support throughout my studies. To my father for his prayers, support, and words of encouragement. To my mother, for her continuous inspiration, and for making every opportunity possible.

I also wish to thank my supervisor for her patience, hard work, guidance, and for always being there whenever I needed her help.

To my Committee Members Daniel and Emer, for their time, interest, and invaluable support. To a special man in my life, Endy Ojukwu for his unwavering support and consistent help. It would not be possible without you. To my wonderful roommate, Chiamaka Ezekwesili. I appreciate you so much. To my friend Nsuoridem Jackson, thank you for your invaluable help and for always being there

I also wish to thank the Graduate Chair, Prof. Leslie Howe for her exemplary leadership and hard work in the department.

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INTRODUCTION

Canada is one of many countries in the world that uses restorative justice programs. On the Government of Canada website, there is an account of restorative justice that includes a definition of restorative justice, an account of the values and principles that inform the restorative justice approach, and a brief account of three kinds of restorative justice programs. However, I would argue that this account of restorative justice raises questions that need answering.

On the Canadian government fact sheet, restorative justice is described as a philosophy and an approach that deals with the harm done to people and relationships as a result of the crime. It is defined as "...a non-adversarial, non-retributive approach to justice that emphasizes healing in victims, meaningful accountability of offenders, and the involvement of citizens in creating healthier, safer communities."¹

The government of Canada then provides a long list of values and principles that provide the basis of the restorative justice approach. The values and principles include the recognition of harm, inclusion, accountability, facilitated dialogue, truth, voluntary participation, safety, choice, holism, humanism, and reparation.² There is an attempt to explain some of these values and principles. For instance, the value of 'recognition of harm' involves attempts to determine who is hurt, what their needs are, and how to resolve them. It is about acknowledging the different kinds of harmful effects on individuals and the community from a criminal offense.³ For the victim, the damage could include loss of property or injury, but also a loss of security or dignity. It entails the act of acknowledgment that damage has been done to parties involved in a conflict and seeking ways to heal the harm. As another example, the value of 'voluntary participation' is explained as requiring the active involvement and uncoerced participation of all people affected by crime in the restoration process.⁴ This value of voluntary participation entails the value of 'inclusion' of the parties by giving all those affected by an offense a voice, allowing for accessibility, and handling of their conflicts by themselves rather than appointing legal professionals, or any other secondary

¹ Correctional Service of Canada, Communications. "About Restorative Justice," *Government of Canada, Corrective Service of Canada, Communications and Citizens Engagement Sector, Restorative Justice*, 13 Jan. 2014, www.csc-sec.gc.ca/restorative-justice/003005-007-eng.shtml.

² Ibid. In their elaboration of specific values and principles, they also add "transformation" and "interaction" to the long list of values and principles.

³ Ibid.

⁴ Ibid.

party as a stakeholder in the meeting. Family members and well-wishers do not speak for the victim or offender but provide social support in the circles or conferencing as the case may be. Parties involved in a meeting, regardless of age, sex/gender, or race, should voluntarily indulge in sessions based on free choice. The value of "accountability" relates specifically to the offender and strives to ensure that offenders take responsibility for the crime and the damage they caused by their actions.⁵ It involves an opportunity for the offender to own up to his action that resulted in the crime. Since the restorative justice process may also involve community participation, the value of 'accountability' can also provide the opportunity for the community to understand and take responsibility for the root causes of crime.⁶ The value of 'facilitated dialogue' emphasizes the fact that communication between parties involved in a conflict is essential. This communication could be direct or indirect, but a dialogue between those directly affected by the criminal offense is encouraged. These values, in addition to values like truth, holism, humanism, and even transformation and interaction, are considered a part of the restorative justice approach.

On the government of Canada website, three kinds of restorative justice processes are highlighted (thus, restorative justice processes include these three, but are not limited to these three). In Canada, restorative justice programs include Victim-Offender mediation, Restorative Conferencing, and Circle processes. Let me provide a brief account of each kind, before explaining the questions raised by the Canadian account of restorative justice.

Other sources and other jurisdictions also acknowledge the three main categories of practices in restorative justice listed by the government of Canada. For example, in the *Handbook on Restorative Justice Programs*, these three kinds of restorative justice programs, namely victim-offender mediation, restorative conferencing, and circle processes, are also included.⁷ First, victim-offender mediation employs trained mediators to convene victims and offenders to discuss their experiences caused by the crime and ways to agree on a resolution to the conflict.⁸ Thus, victim-offender programs are set up to address the needs of victims and offenders. They ensure offenders are held accountable for their offense. The process can take place in settings like meeting rooms,

⁵ Ibid

⁶ Ibid.

⁷ Yvon Dandurant, "Handbook on restorative justice programs," *Criminal Justice handbook Series*. (United Nations Publication, 2006), pp. 15 – 16.

⁸ Office of the Federal Ombudsman for Victims of Crime. "Home Federal Ombudsman for Victims of Crime." *Office of the Federal Ombudsman for Victims of Crime*, 23 Oct. 2017, www.victimfirst.gc.ca/res/pub/gfo-ore/RJ.html.

churches, libraries, or even the home of the victim if agreed upon by both parties. For the mediation to resolve properly, the offender must accept responsibility for the crime, and the voluntary participation by the victim and offender is necessary.

In restorative conferencing, the victim, the offender, their family members, and other members of the community work toward restoration, and a trained third party usually facilitates it.⁹ In community conferencing, programs are usually managed by community groups. The community justice coordinator moderates this process, and it mostly applies to the juvenile justice system.¹⁰ Again, restorative conferencing most often takes place in schools, police facility, or in a welfare building. In the proceeding, the offender speaks first, followed by the victims and other participants.¹¹

Circle sentencing involves bringing together members of the community, which includes the victim, offender, and elders, to discuss the impact of crime and the way forward.¹² As the term indicates, circles occur at the sentencing stage (i.e., after a trial or after a guilty plea). In a circle sentencing setting, the participants, family members, and community residents sit down facing one another in circle. Target groups, in this case, are offenders who take responsibility and express willingness to change. It is often carried out by a community coordinator in the school or community building. The order of process involves the passing of a feather or talking stick to enable parties involved in a crime to express their experiences; in this case, the victim speaks first.¹³

However, there are questions raised by the Canadian approach and understanding of restorative justice, which I intend to address in this thesis. For example, the Canadian definition of restorative justice raises a question bordering on how restorative justice can be non-adversarial and non-retributive. What does it mean for restorative justice to be non-adversarial and non-retributive? Does this mean that restorative justice is opposed to the use of punishments? The definition also raises the question of how such a process can fit into a criminal legal system that does have retributive and adversarial elements. Should restorative justice be taken to as a

⁹ Office of the Federal Ombudsman for Victims of Crime. "Home: Federal Ombudsman for Victims

¹⁰ McLaughlin, Eugene. *Restorative Justice: Critical Issues*. Sage Publ., 2003. p.79.

¹¹ Ibid.

¹² Office of the Federal Ombudsman for Victims of Crime. "Home: Federal Ombudsman for Victims of Crime." *Office of the Federal Ombudsman for Victims of Crime*, 23 Oct. 2017, www.victimfirst.gc.ca/res/pub/gfo-ore/RJ.html.

¹³ McLaughlin, Eugene. *Restorative Justice Critical Issues*. Sage Publ., 2003. p.79.

movement to overthrow the current criminal legal system, or can it work in connection with such a retributivist and punitive system?

The long list of values and principles raises questions of how all these values and principles can be part of one process and whether some of these values are more central or core values. Without clarification of the core values of restorative justice, it is difficult to understand how restorative justice processes differ from other processes in the criminal legal system. This long list of values also raises questions about whether restorative justice processes are being characterized in an overly idealized fashion. How can one realistically expect any response to crime to live up to each one of these values and principles?

Finally, although the Canadian government uses victim-offender mediation, restorative conferencing, and sentencing circles, questions arise in the accounts of these programs. More specifically, the question of how restorative justice can serve the diverse needs of victims and offenders with the same process. Further, if community involvement is a part of the process, then how can one process be expected to 'restore' the victim, offender, and community at the same time? The descriptions of restorative justice programs also raise questions about the rights of offenders and victims, and how restorative justice can achieve some of its aims without manipulation or coercion. How can such a process ensure the voluntary and active participation without any possible pressure or manipulation? How can one achieve goals of reconciliation by forcing participants to feel compassion or to apologize or to forgive? Finally, the description of restorative justice processes also raises questions on whether the goals of restorative justice are too ambitious or idealized.

As I will show in Chapter Three, critics of restorative justice often argue that restorative justice processes involve either the manipulation of emotions ("compulsory compassion", for example) or the coercion that comes from the limited options for criminals (for example, where criminals are forced to choose between participation in restorative justice processes or a harsh prison sentence by a judge). How can such a process ensure the voluntary and active participation without any possible pressure or manipulation? The concepts of 'manipulation' and 'coercion' are complicated notions. In Chapter Three, I will be agreeing with the Kantian understanding of manipulation in terms of treating people as "mere means" to an end. Further, the notion of coercion is complicated by the need to acknowledge the autonomy of people and this, in turn, might be impacted by the lack of opportunities that some people face in light of belonging to historically

disadvantaged groups in society. Any adequate account of restorative justice must respond to and deal with the possibility of both manipulation and coercion in restorative justice processes.

In this thesis, I will aim to defend restorative justice by answering some of these kinds of questions. To do this, I will consider the accounts of restorative justice given by two prominent theorists on restorative justice, namely Nils Christie and John Braithwaite. Both have to provide reports of restorative justice that have been very influential. However, in this thesis, I will argue that Braithwaite's version of restorative justice is more plausible and less problematic than the account given by Christie. Although Braithwaite's version is more credible, there are two kinds of shortcomings in his account of restorative justice that need to be addressed.

First, although Braithwaite explains restorative justice in terms of its opposition to retributivism, he does not adequately explain what he means by retributivism; as a result, his account of restorative justice is unclear. Second, in explaining his account of restorative justice, Braithwaite will emphasize the story of Sam, a composite story of a young offender involved in a restorative justice process. This story, I will argue, provides a picture of restorative justice processes as involving an over-reliance or over-dependence on emotions. This picture makes Braithwaite's version of restorative justice more easily subject to the criticisms of people like Acorn and Geeraets. In this thesis, I will strive to overcome these two shortcomings by first outlining some different kinds of retributivism, and by providing a Kantian elaboration of Braithwaite's notions of "dignity" and "freedom as non-domination."

In the first chapter, I will defend Braithwaite's approach to restorative justice over Christie's more radical version of restorative justice. I will do this by first presenting Christie's account of restorative justice and explaining how radical his version of restorative justice is in terms of its goals. I will show that Christie's account fails to acknowledge the importance of the Western criminal justice system in relation to restorative justice practice. In the second section, I will explain Braithwaite's account of restorative justice with an appeal to the fable of Sam and his account of reintegrative shame. I will also explain how Braithwaite explains the 'restoration' of victims, offenders, and the community, as well as his account of how the core values of restorative justice are conceived in opposition to retributivism and the Western approach to criminal legal practice. In this way, I will address some of the questions that arose from my brief consideration of the Canadian approach (for example, clarifying the "core" or central values and explaining how one process can "restore" victims, offenders, and the community). Finally, I will explain both the

strengths and weaknesses of Braithwaite's account of restorative justice. I will show why Braithwaite's account of restorative justice is more plausible than Christie's version. One of the reasons for preferring Braithwaite's account is that his version allows for the two systems of justice (restorative justice and the Western approach to criminal justice) to work together. Braithwaite, unlike Christie, believes that restorative justice processes are more useful when they are being used to check the excesses of the Western criminal legal approach and vice versa. The Western criminal legal approach is needed to ensure that the rights of all participants within restorative justice processes are protected. The Western criminal legal approach is also needed when offenders and victims do not agree to participate in restorative justice processes or when parties to a conflict in restorative justice do not comply with an agreement. Despite these advantages to Braithwaite's approach to restorative justice, I will also show that there are two shortcomings in Braithwaite's account that require being addressed. As I mentioned, the first shortcoming deals with his inadequate account of retributivism, while the second shortcoming deals with the over-reliance on emotions in his story of Sam. I will address the first shortcoming in the next chapter (Chapter Two) and then address the second shortcoming in the third and final Chapter.

The second chapter aims to explain the different senses of retributivism by examining the influential work of H.L.A. Hart's *Punishment and Responsibility: Essays in the Philosophy of Law*, published in 1968. In this work, Hart makes a number of distinctions that are relevant to the characterization of retributivism. In the first section, I will examine his distinctions between defining punishment and justifying punishment, as well as his distinction between the general justifying aim for a system of punishment and questions of distribution. These distinctions will enable us to distinguish retribution as a general justifying aim from retribution in distribution. In the second section, I will turn to his postscript in *Punishment and Responsibility*, where he introduces a distinction between crude retributivism and a modified version of retributivism. The crude version of retributivism is reflected in biblical views of retribution and a strict interpretation of Kant. Although most contemporary academic defenders of retributivism would disagree with this crude version, the crude version does reflect common views of criminal justice in public. The modified version introduces three kinds of modification and represents a view of retributivism more aligned with contemporary academic defenders of retributivism. With these distinctions in mind, I will, in the final section of this chapter, relate these versions of retributivism to Braithwaite's account of restorative justice. I will show that Braithwaite's account of restorative

justice, as opposed to crude retributivism in all its forms, is not opposed to a modified version of proportionate retributivism in distribution and that act as a check on restorative justice processes. Braithwaite's account does seem to reject retributivism in all its forms as the general justifying aim of the system of punishment.

The third and final chapter of this thesis aims to defend the stance of Braithwaite against criticisms made by Acorn and Geeraets. Both of these critics are concerned with both the reliance on emotions and emotional compulsion, as well as the overly idealized and illusory account of restorative justice. In the first section, I will explain the main elements of Annalise Acorn's criticism from her book "Compulsory Compassion: A Critique of Restorative Justice."¹⁴ In the second section, I will further explain the main criticisms made by Geeraets in his article "Fictions of Restorative Justice."¹⁵ Geeraets presents three claims which he unmasks as fictions. The first claim is that the offender and victim do not attend restorative meetings voluntarily.¹⁶ The offender, for Geeraets, has a limited choice between the punitive criminal trial and restorative justice practice. Based on this, Geeraets explains that "it is inappropriate to describe the offender's consent to participate in terms of volition." Geeraets explains that there is a strong incentive for the victims to participate and do so in a "positive and reasonable manner."¹⁷ The second claim is that parties to a conflict do not actively participate in the conflict. The parties to a conflict, for Geeraets, do not, in the real sense, determine the outcome of the meetings; the determinant factor is emotions. Finally, Geeraets argues that the view that restorative justice involves no intentional infliction of harm is false. Finally, in the third section, I will defend a modified version of Braithwaite's account of restorative justice against these criticisms by Acorn and Geeraets. The philosophical problem here is that the critics propose that the features of restorative justice are not what it claims to be and it is not applicable in the real world, in the sense that any attempt to provide a restorative remedy to justice is fictitious. In the same vein, it is adequate to point out that emotions exist in two senses. First, emotions can be a tool for manipulation in a way of making a person do what they would not normally want to do. On the other hand, emotion backed up by reason results in a good outcome because the person can make decisions for himself by employing the ability to

¹⁴ Acorn, Annalise. *Compulsory Compassionate: A Critique of Restorative Justice*. UBC Press, 2004.

¹⁵ Geeraets, V. Criminal Law and Philosophy. Springerpub.com, 2019. www.researchgate.net/publication/271741109_Fictions_of_Restorative_Justice_Vincent_Geeraets. Accessed 25th April 2020.

¹⁶ Ibid., p.266.

¹⁷ Ibid..

rationalize. However, I will argue that Kantian notions of dignity and freedom are a crucial elaboration needed for Braithwaite's account of restorative justice to be more defensible. I will show that such a Kantian version of restorative justice is not dependent on mere emotion or compulsory compassion. I will also show that such a Kantian version of Braithwaite's restorative justice is not a fictitious theory, but one whose aims are realistic. Since each parties' ability to freely make decisions as rational beings are reinforced, as well as the importance of respecting the dignity of all participants in the process, restorative justice provides the real possibility for a genuine apology and forgiveness to occur naturally. I will also show that such a Kantian modification on Braithwaite's view of restorative justice is not overly ambitious, as presented by some of its more radical proponents. Still, like any other human process, it is not free from inadequacies caused by human errors or the limitations of any human response to crime. Thus, by the end of this thesis, I hope to have adequately defended this Kantian elaboration of Braithwaite's version of restorative justice.

CHAPTER ONE

DEFENDING BRAITHWAITE'S VERSION OF RESTORATIVE JUSTICE OVER CHRISTIE'S

1.0 Introduction

This chapter aims to show how Braithwaite's version of restorative justice is an improvement upon Christie's more radical version. I will begin by explaining Christie's position, which represents a rejection of both legal professionals (and the criminal justice system) and rehabilitation professionals (psychologists, sociologists, social workers, and so on). He calls them both “professional thieves”.¹⁸ He also presents his restorative approach as opposed to modern post-industrial society - these are the structural thieves.¹⁹ Christie presents restorative justice as overthrowing, not just the criminal justice system, but society at large. I will also show that this view is problematic as restorative justice cannot solve social injustice issues.

Later in the chapter, I will present Braithwaite's modified version of restorative justice by first explaining the fable of Sam, explaining Braithwaite's theory of shame, and how Braithwaite explains his theory of reintegrative shaming as opposed to stigmatizing shaming in his story on Sam. In the next subsection, I will explain Braithwaite's three main aims of restorative justice practice (restoring victims, restoring offenders, and communities).²⁰ Restoration, for Braithwaite, is to heal and restore the security, dignity, and to empower all parties involved in a conflict as much as possible. In this section, I will discuss the universality of the values of restorative justice versus the importance of retributive justice, according to Braithwaite's view will be explained. In this section, Braithwaite acknowledges the universality of restorative and retributive values; although, for him, the relevance of retributive values is in times past because, in modern times, cultures tend towards value for repair and not value for punishing an offender.²¹

The main benefits of restorative justice put forward by Braithwaite are the Healing relationships of all parties involved in a conflict. Secondly, community deliberation consists of putting the crime in the center, the idea of freedom through non-domination, which includes the equal participation of the victim and offender in a circle without the domination of one of the

¹⁸ McLaughlin, Eugene, *Restorative Justice: Critical Issues*. Sage Publ., 2003. p.22.

¹⁹ *Ibid.*, p.23.

²⁰ *Ibid.*, pp56-61.

²¹ *Ibid.*, p.61

parties.²² One can achieve this through respectful listening. In the final section, I will present the strengths and weaknesses of Braithwaite's view. One significant advantage in Braithwaite's version of restorative justice is that it does not view the criminal justice system as irrelevant. Still, it considers both methods of justice as a check for the excesses of the other, and it acknowledges the role of the criminal justice system in cases that involve serious crimes or lack of cooperation by an offender to fulfill an agreement reached in a healing circle.

On the contrary, the fable of Sam with its overemphasis on emotions does not represent a secure version of what restorative justice represents. It makes it seem like the success of a restorative meeting is tied to persuasion through the ability of both parties involved in a conflict to appeal emotionally to each other. However, this is not what Braithwaite aims to achieve as he holds the view that apology and forgiveness are the “natural gifts of respectful listening”²³ It follows that any contrary means (including forgiveness or apology based on mere emotional persuasion) would not suffice in restorative meetings.

1.1 Christie's Account of Restorative Justice

In "Conflicts as Property," Christie holds the view that criminology tends to characterize crime and punishment in a way that takes the conflict away from the parties directly involved in the conflict. Christie explains that Western criminal court systems are such that "...the directly involved parties in a conflict do not even attend their court cases."²⁴ Thus, in actual criminal trials, conflicts are taken away from the parties directly affected by the conflict. The cases of individuals in the criminal justice system are organized and defended by legal professionals like the lawyer and judge. As such, it does not include the direct parties affected by the conflict. In this case, parties involved in a conflict are passive. Now their conflict has become "other people's property."²⁵

Christie presents two contrasting examples of societies that experience conflict. In the first example, Christie presents a conflict case in Tanzania. ²⁶Resolving the dispute takes place in a crowded house with people in a good mood, communicating with one another. The case involves

²² Ibid., p.157

²³ Ibid., p.36.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Nils Christie, “Conflicts as Property”. *The British Journal of Criminology*, Volume 17, Issue 1, January 1977, <https://doi.org/10.1093/oxfordjournals.bjc.a046783>, p.2

a couple who were engaged, later had some misunderstanding, and decided to end the relationship. Christie describes how Tanzania approaches a resolution to this conflict.²⁷ Christie explained that:

The parties, the former lovers, were *in the center* of the room and the center of everyone's attention. They talked often and were eagerly listened to. Close to them were relatives and friends who also took part, but they did not *take over*. There was also participation from the general audience with short questions, information, or jokes. The judges, three local party secretaries, were extremely inactive. They were ignorant with regard to village matters. All the other people in the room were experts. They were experts on norms as well as actions. And they crystallized norms and clarified what had happened through participation in the procedure. No reporters attended. They were all there.²⁸

The structure of how the case was handled is what Christie aims to present. From the above quotation, one can deduce about five elements from Christie's argument. The parties involved in the conflict were situated in the center, both the victim and offender shared their experiences and were both listened to. In this case, they "own" their conflicts. Even though family members and friends of the parties involved are at the meeting, the victim and the offender remain most actively engaged in the resolution process. The judges, although present, do not partake in the case. Although Christie knows that the Tanzania case is an example of civil conflict, he believes that this case is relevant for understanding our responses to crimes.²⁹

In the second example, Christie criticizes the process of resolving conflicts in the Western criminal legal system of Scandinavia. He explains that aside from the fact that modern criminal courts are inaccessible and intimidating, in a criminal justice system proceeding, "...the parties are

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid., p.3. Christie is clearly challenging the Western separation between civil and criminal law. In Western legal systems, civil law is considered a 'private' matter between individual and focuses on repair of harm done to private individuals, while criminal law is considered "public" matter involving the state and focuses on public wrongs done. Here he hints at the idea that the Western view of criminal law may be too narrow or inherently problematic.

being represented, the proceeding is converted from something between the concrete parties into a conflict between one of the parties and the state."³⁰ The point for Christie is that society has little knowledge of how the courts operate. He explains that the courts are not accessible by the ordinary person in society.

In the Western legal approach to criminal justice, a case mostly involves the offender and the judge without the attendance of the victim or any other participant involved in the process. Christie calls this "criminal conflict."³¹ In this case, the victim does not participate in the conflict and has "lost the case to the state."³² Christie also finds the interaction between the victim and the offender very minimal and demands for adequate interaction and representation of the parties involved in a conflict. This is due to how they are trained to handle conflicts. Christie calls lawyers, "professional thieves"³³, believing that lawyers resolve cases often for their personal gain and in the process disengage parties directly involved in a conflict from participation.

Christie argues that "there are many honorable and dishonorable reasons"³⁴ why legal professionals "steal" conflicts away from those directly involved. The excellent or honorable aspect is that it fosters the state's need for conflict reduction and certainly also its wishes for the protection of the victim. The dishonorable reason for this stealing of conflict, for Christie, is that "whoever is in power uses the criminal case for personal gain."³⁵

Christie argues that the thieves of the conflict are more interested in converting the image of the case from one of conflict into one of non-conflict. The point here is that the handlers of conflict that Christie describes aims at arriving at a state where the case of offense has attained closure. Closure is the main goal without considering the participation or empowerment of the real owners of the conflict (victim, offender, and community). In the same vein, Christie argues that there are two types of conflict thieves: the "professional thieves and structural thieves."³⁶

³⁰ Ibid.

³¹ Ibid., p.3

³² Ibid. In a Western criminal legal system, the victims of crime either do not participate at all or their role is reduced to the role of a mere witness. Since Christie has written this article, there have been moves within Western legal systems to allow for a role for victims at the sentencing stage (see victims impact statements, for example).

³³ Ibid.,4.

³⁴ Ibid.

³⁵ Ibid. Here Christie is pointing to the fact that lawyers in particular make a living off this kind of theft. However, he also believes that there is an entire industry of rehabilitative experts (like psychologists, psychiatrists, sociologists and criminologists) that also make a living from stealing conflicts from those directly involved.

³⁶ Ibid. p.4. Professional thieves for Christie entail, lawyers, social workers, criminologists and psychologists who steal the conflicts of parties involved and makes them their own. The psychologists and social workers in this case

For Christie, "changes in societal structures"³⁷ have also resulted in the manipulation of conflicts, and thus such changes represent what Christie calls "structural" thieves. Christie describes two kinds of segmentation that occurs in modern industrial society. First, there is what he calls a "segmentation in space," which he describes in terms of functionalization of our lives. In this way, he is describing how, in modern industrial society, we only know people according to the roles they play and not as persons.³⁸ Christie believes that knowing people according to the role they play or jobs they perform, for instance, in the office or at school, would not enable us to understand who they are as people and why they behave as they do.

The second type of segmentation in society relates to the hierarchical placement of people in community or segmentation based on "...our reestablishment of caste society."³⁹ He has in mind hierarchical organizations of institutions and other groups based on "biological attributes such as sex, color, physical handicaps or the number of winters passed since birth."⁴⁰ Both kinds of segmentation or fragmentations, according to Christie, lead to the depersonalization of social life (and an inability to cope with conflicts), the destruction of conditions for living conflicts (i.e., fewer conflicts), and the making of all other conflicts invisible (and thus with no resolution).⁴¹ Christie sees these as the three consequences of segmentation or fragmentation found in modern Western societies. With the depersonalization of social life, we do not know who our workmates, for instance, are aside from being workmates, and we cannot deal with conflicts except in a formal or administered way. With the destruction of conditions for living conflicts, certain kinds of conflicts are no longer recognized or seen (for example, he points to a decrease of crimes of infamy and libel as a "sad symptom of dangerous developments" in contemporary society).

Finally, by presenting conflicts as invisible, he points to both the extremes of over-privatized conflicts (like domestic abuse and child abuse). He also points out to other extremes of the inability to see crimes carried out by economic organizations that are so large that individuals hardly notice when they get victimized.⁴²

try to resolve the conflict or solve the problem by employing various professional techniques in the field to manipulate and study the offender and victim.

³⁷ McLaughlin, Eugene. *Restorative Justice: Critical Issues*. Sage Publ., 2003. p.23

³⁸ Ibid.

³⁹ Nils Christie, "Conflicts as property". *The British Journals of Criminology*, Volume 17, Issue 1, January 1977, <https://doi.org/10.1093/oxfordjournals.bjc.a046783>. P2.

⁴⁰ McLaughlin, Eugene. *Restorative Justice: Critical Issues*. Sage Publ., 2003. p.24.

⁴¹ Ibid.

⁴² Ibid. p.25.

In a fragmented or segmented society such as ours, Christie explains that there would be misconceptions between victims and offenders, coupled with an inability to recognize and deal with conflicts. In the case of the offender, he has "lost the opportunity to explain himself to a person whose evaluation of him might have mattered."⁴³ And when conflicts become a matter of public concern, the conflict is taken away from those directly involved and handled by both legal professionals and "treatment" or rehabilitative experts.

Christie explains that the process involves a meeting between the offender and the victim in a conflict, even if it should be done independently of the offender's wish. He views it as necessary for the victim and offender to be able to confront one another and handle their conflicts. He states that he has no direct interest in "treatment or improvement of criminals."⁴⁴ A rehabilitative approach with "treatment personnel" is just as much a problem for Christie as the more "retributive" approach of the criminal legal system and its legal professionals. According to Christie, a rehabilitative approach with its professional treatment professionals ends up "converting" the conflict into one of non-conflict, by focusing on the offender as a patient in need of expert treatment. He believes that this undermines the offender's responsibility and accountability for his or her actions, by viewing the offense as a mere symptom of an underlying problem with the offender that needs treating. Christie believes that a restorative justice approach can acknowledge the responsibility of offenders for their actions, while also returning the conflict to the people directly involved. This usher in Christie's idea of victim-oriented courts.

Christie explains that the first stage of the victim-oriented court will be a traditional one. "...whether it is established, whether it is true that the law has been broken, and whether it was this particular person who broke it."⁴⁵ The point here is that the conflict will be tried in a criminal court system to find out if the offender is truly the one who committed an offense. The second stage is such that: "the victim's situation was considered, where every detail regarding what had happened, legally relevant or not, was brought to the court's attention."⁴⁶ At this point, the victim communicates by explaining in detail what happened. The victim expresses how he felt and what

⁴³ Nils Christie, "Conflicts as property." *The British Journal of Criminology*, Volume 17, Issue 1, January 1977, <https://doi.org/10.1093/oxfordjournals.bjc.a046783>. p.9

⁴⁴ Ibid., p.27.

⁴⁵ Ibid.

⁴⁶ Ibid.

he suffered, and then agreements are reached on what can be done for the victim by "the offender, the local neighborhood, and the state."⁴⁷

The third stage entails the stage of punishment, where punishment would be meted out to the offender by the judge "in addition to the unintended sufferings; the offender would go through *visavis* the victim."⁴⁸ The fourth stage involves the "stage for service to the offender."⁴⁹ Service could be social, medical, educational, or religious. For instance, one service would involve funding an offender's education to enable him to attend college, which has always been the dream of that offender. But Christie points out that the idea is not to avoid "further crime but because needs ought to be met."⁵⁰

A final point for Christie is that he advocates for "a lay oriented court."⁵¹ For Christie, this is a court devoid of specialization or professionals like lawyers, criminologists, and so on. This sort of court entails "...a court of equals representing themselves, no judges are needed."⁵² Christie explains that lawyers could involve themselves in stage one, where the criminal is in a trial. He says that "...experts are as cancer to any lay body."⁵³ Christie's point is that the experts (lawyers, psychologists, sociologists, and criminologists) should not specialize in resolving crime. Instead, in avoidable situations, they should stand in the gap as "resource persons, answering when asked but not domineering in the center."⁵⁴ The point here is that professionals might help to inform the process, but should never be allowed to "take them over."⁵⁵

1.2 Analysis of how Radical his Account is and the Problem with such a Radical Account

As stated in the previous section, Christie is right to recognize that the problems with modern industrial society do have an impact on crime and how we respond to crime.⁵⁶ These problems include the segregation of people based on race, color, age, and so on. Some group of

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid., p.28.

⁵² Ibid.

⁵³ Ibid., p.29

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid., p.24

people have more privileges than others based on recognized differences. In the same vein, this socio-political issue influences the criminal justice system; society groups victims and offenders into classes based on their race, color, social class, and age. The law favors the majority of the population with the highest level of influence. For instance, in some societies, court proceedings favor racial minorities less than the majority.

Christie is also right to say that within modern industrial society, our sense of community is undermined and that we relate to each other in a more "depersonalized" and functionalized fashion.⁵⁷ Modern society is individualistic, and it has resulted in an estranged behavior of a person to another. He is also right to say that we often rely on the state or institutions to resolve our conflicts, and we feel unable to deal with our conflicts. Finally, Christie is also right about how the victim is excluded from criminal legal processes and how they often feel victimized by the process.⁵⁸ Victims in the criminal justice system do not participate actively in their case. Instead, the victim is represented by the lawyer who converses with the offender. When this happens, the victim has no chance to express himself in a case that involved him. The victim has no opportunity to know the offender and the experiences that led to the crime. He is only left with the emotions of anger, anxiety, and fright.⁵⁹ However, Christie's account of restorative practice is extreme, and this is problematic.

One shortcoming in Christie's view is that he tries to deny the need for the consent of the offender to meet with the victim in what he calls confrontation with the victim. He argues: "we should do it quite independently of his wishes."⁶⁰ The issue here is that not allowing parties involved in a conflict to discuss the effects of a crime and the way forward would be infringing on the significant feature of restorative justice, which is active participation. Just as Christie criticizes the criminal justice system for the stealing of conflicts by not allowing for active participation in the process, he is now proposing that the offender need not 'voluntarily' participate in the restorative justice process; this would be no different from that idea of stealing conflicts, a view that Christie explicitly criticizes.

Another point relating to the offender that Christie argues about is that in the fourth stage of the victim-oriented court, Christie states that these needs are met not to prevent crime from

⁵⁷ Ibid., p.24

⁵⁸ Ibid., p.25

⁵⁹ Ibid.

⁶⁰ Ibid., p.27.

reoccurring but "because needs ought to be met."⁶¹ I ask," what then is the aim of meeting the offenders' need"? One feature of restorative justice as a practice is to be forward-looking and consider the impact of actions on all people. How can restorative justice be forward-looking without trying, as much as possible, to avoid a reoccurrence of that crime in the future? Thus, the goal of meeting the offender's needs must involve a consideration of how to prevent recidivism. The duty here is to diagnose the underlying cause of a criminal act for the offender and find solutions for the betterment of the victim, offender, and the community itself. One of the goals of a community representative in the meeting would be to find out the possible causes of an offense - in the case of a particular offender and for other potential offenders and to find ways in which it can be mitigated at the time and in the future.

Also, I think that Christie's argument on the establishment of a lay oriented court is problematic when he explains that "the Ideal is clear; it ought to be the court of equals representing themselves. When they can find a solution between themselves, no judges are needed. When they are not, the judges ought to be their equals."⁶² The point here is what I will call radical restorative justice practice. It has to do with the overhaul of the criminal legal system of trials and even prisons by restorative justice. By advocating for the replacement of professionals by those with "lay orientation" (or reducing the role of professionals to mere "resource" persons), Christie is advocating for a radical change in the legal system and rehabilitation services. He is advocating that the conflicts of the victim and offender be handled by the owners of the conflict and not professional bodies (whether legal professionals like lawyers and judges, or treatment experts like psychologists, psychiatrists, and social workers), which he views to steal the conflict to put an end to it. More specifically, Christie argues for the irrelevance of legal practitioners like lawyers and judges in the lay court. He goes further to explain: "let us try to get them to perceive themselves as resource persons, answering when asked, but not domineering, not in the center."⁶³

I do not agree with this view because, in cases where the offender refuses to participate in the program, it cannot easily be followed up to ensure he does not abscond. Consider a scenario where a victim and offender reach an agreement mandating the offender to clean up the house of the victim three times a week; if the offender fails to keep to the agreements continuously, how

⁶¹ Ibid., p.28.

⁶² Ibid.

⁶³ Ibid.

can we ensure that the rights of all people are respected in a process governed entirely by laypeople? Are there not meant to be checks and balances by a legitimizing body like the criminal justice system to protect the rights of all participants? I am of the view that restorative justice should be viewed as a supplement to the Western retributive criminal justice system and vice versa, not as a total replacement of the Western criminal justice system. I will come back to this point later in section 1.4.

The radical nature of Christie's version of restorative justice is clear from the opposition he draws between restorative justice and modern industrial society (with all its fragmentation and depersonalized relationships). Christie supports a communitarian view of society and, thus, rejects the individualism of modern society. However, I would argue that there are good elements in our contemporary society. For example, although fragmented, our society supports individual choice and self-determination by promoting individual rights and freedoms. Our society allows for freedom of tastes and pursuits for individuals and toleration of diversity that is absent in past communitarian societies. Although Christie does point to some shortcomings with contemporary society, he does not acknowledge the advantages of modern industrialized society, advantages which other proponents of restorative justice like Braithwaite can and do acknowledge. By characterizing restorative justice in opposition to the structural elements of modern industrial society, Christie presents restorative justice as the solution not just to the problems with the Western criminal legal system (and even to the socio-psychological rehabilitative/medical system), but also as a solution to the problems with society in general! It represents restorative justice as having overly lofty ambitions, which are far too unrealistic for restorative justice processes even to try to accomplish.

1.3. The story of Sam and Braithwaite's – an analysis in terms of stigmatizing shame versus reintegrative shame

John Braithwaite, as a strong restorative justice proponent in his book *Crime Shame and Reintegration*, explained his view on restorative justice. Braithwaite begins with the fable of Sam to show some features of restorative justice. It involves an adolescent offender who attended a diversionary restorative justice conference. Braithwaite says that his story is a "composite" of several Sams he has seen (thus, while based on real stories, he admits that this is not a real story). He represents the story of Sam as a cornerstone of the true story of restorative justice. Sam, who

is homeless and says his parents abused him, has no one who cares about him except his older sister, his former hockey coach at school, and his Uncle George. These people attend the conference, along with the elderly female victim and her daughter.

Sam says he knocked over the victim and took her purse because he needed the money. His significant others rebuke him for doing this, but also remembers that he was a good person before he started getting into trouble. Next, the victim and daughter describe the effects of the robbery, but Sam does not seem to be affected. After his callous response to the victim, Sam's sister cries, and during a break, she reveals that she too had been abused by their parents; she finally seems to reach Sam by "looking straight into his eyes with love and strength."⁶⁴ When the conference reconvenes, Sam's sister speaks directly to Sam, and without mentioning details, says she understands what Sam went through. The victim hears this and begins to cry. Sam's callous exterior begins to crumble. He says he wants to do something for the victim but does not know what he can do without a home or job. His sister offers her place for him to stay, and the coach says he can offer him some work. At the end of the conference, the victim hugs Sam and tearfully says good luck; Sam apologizes again, and Uncle George says he will continue to help Sam and his sister when needed.⁶⁵

Braithwaite explains that there has been an institutional collapse in Western criminal justice or legal systems due to the treatment given to victims and offenders. He argues that Western criminal legal systems employ the tool of stigmatization or stigmatizing shame. These criminal justice systems shame offenders for who they are and thus treats them in disrespectful and dehumanizing manners.⁶⁶ Braithwaite's central thesis is that crime rates are higher when shaming is stigmatizing.⁶⁷ This thesis, for him, explains why some societies have higher rates of crime than others and why some people are more likely to offend than others. Stigmatization entails shaming by treating the wrongdoer without respect and characterizing them as a bad person.⁶⁸ The individual, in this case, is labeled as an offender and treated as worthy of exclusion from law-

⁶⁴ Braithwaite, J. "*Restorative Justice and a Better Future*", in Eugene McLaughlin et al. Sage Publications, 2000. p.54.

⁶⁵ Ibid.

⁶⁶ Eugene McLaughlin, Ross Fergusson, Gordon Hughes and Louise Westmorland (eds). "*Restorative Justice, Critical Issues*," Sage Publications, 2003. p.55.

⁶⁷ Braithwaite, J. "*Crime Shame and Reintegration*". Cambridge University Press. 1989. p.286.

⁶⁸ Ahmed, Eliza. *Shame Management through Reintegration*. Cambridge University Press, 2001. p.4

abiding society. However, Braithwaite supports the use of "reintegrative shame" in restorative justice processes.

Unlike stigmatizing shame, reintegrative shame is not directed to "who" a person is and does not involve labels that exclude people. Thus, in reintegrative shaming, the offender is treated respectfully as a good person who has committed a wrong act, and efforts are being made for the offender to take responsibility for actions that he or she has committed. Reintegrative shame avoids the labeling of offenders by the voluntary act of "forgiveness or reconciliation."⁶⁹ He presents the concept of restorative justice (with reintegrative shame) as a solution to the stigmatizing shaming that is dominant in the Western criminal justice system.

Similarly, Braithwaite presents two theories that affect shaming. First, in the opportunity theory, which incorporates into the stigmatizing kind of shaming, the labeling of offenders results in the formation of criminal subcultures.⁷⁰ This subculture formation is a product of the denial of opportunities for offenders that results from labeling people as criminals. For instance, if a racial minority living in a slum is consistently denied economic opportunities due to the stigma attached to their race, then criminal subcultures will form in those neighborhoods. In general, historically disadvantaged groups of people such as indigenous people in a colonial or post-colonial context, racialized minorities, people subordinated due to gender or sexual orientation and women are often denied the same opportunities as people from the dominant economic and social classes of society, and they are as a result, more likely to be stigmatized as a criminal by society. The identification with this criminal subculture is reinforced with a criminal legal system and a prison system that shames and excludes offenders for being criminals, perpetuating a cycle of reoffending. In this theory, people learn from others that they identify with, both within the prison and outside, on how to offend, methods of rationalizing criminal acts, and the idea of criminal role models begin to exist.⁷¹ He also explains that building more prisons would result in worsening the effects of crime in society. It is because incarceration results in the offenders treated as outcasts in society, and this is not the right way of restoring these offenders and reintegrating them into society. In this way, the stigmatizing shaming of an excessively punitive criminal prison system ends up reinforcing

⁶⁹ Ibid., p.39.

⁷⁰ Ibid. p.292.

⁷¹ Ibid.

the lack of opportunity and increasing subordination of indigenous people , racialized minorities and other historically disadvantaged groups in society.

The identification with this criminal subculture is reinforced with a criminal legal system and a prison system that shames and excludes offenders for being criminals, perpetuating a cycle of reoffending. In this theory, people learn from others that they identify with, both within the prison and outside, on how to offend, methods of rationalizing criminal acts, and the idea of criminal role models begin to exist.⁷² He also explains that building more prisons would result in worsening the effects of crime in society. It is because incarceration results in the offenders being treated as outcasts in society, and this is not the right way of restoring these offenders and reintegrating them into society.

On the other hand, control theory, for Braithwaite, evolves when offenders are reintegrated into society and are not stigmatized. Such an approach more naturally occurs in communities with high interdependency.⁷³ When people are strongly attached to their family, friends, school, or employers, shaming for wrongdoing tends to be reintegrative and effective. Law-abiding identities are cultivated in such "interdependent communities of care."⁷⁴

Braithwaite argues that reintegrative shaming is more effective in preventing the reoccurrence of crime. For him, reintegrative shame does not deter only the shamed individual, it also deters others who wish to avoid shame but partake in offending. Another interesting point Braithwaite raises is that reintegrative shaming entails shame being directed not only to the offender but to their family, friends, or company as the case may be. The idea here is that when a family member or group of people are put to shame, the family or group will often treat the shame in a "regenerative manner."⁷⁵ The family treats the act of guilt as a wrongful act not by labeling the child but enabling the child to see the action as a problem to avoid. The offender who is a part of the family is not singled out, but the family carries out reparation while training a child.

In stigmatizing shaming, Braithwaite explains that the offender loses their self-esteem and worth as a person. The idea is that social support provides a sense of "shame in terms of letting loved ones down by the offender."⁷⁶ By this, Braithwaite explains that including well-wishers of

⁷² Ibid.

⁷³ Braithwaite, J. *Crime Shame and Reintegration*. Cambridge University Press. 1989. p.292.

⁷⁴ Ahmed, Eliza. *Shame Management through Reintegration*. Cambridge University Press, 2001. p. 40.

⁷⁵ Ibid., p.288.

⁷⁶ Eugene McLaughlin, Ross Fergusson, Gordon Hughes and Louise Westermorland (eds). *Restorative Justice Critical Issues*. Sage Publications, 2003. p. 58.

the offender in the process helps make the offender's sense of shame be one that involves letting down loved family members and friends rather than the offender feeling shame for who he or she is. The reason being that it helps offenders take responsibility for their actions with the support of the people around them. A part of restoring the community, for Braithwaite, involves the introduction of social support for victims and offenders. It means that restorative justice practices should include not just families, but also organizations like schools, places of worship, neighborhoods, in professions, and so on.⁷⁷

In the case of Sam, Braithwaite's analysis would be to say that Sam's action is a result of the disconnectedness that Sam experiences in his family and his community. Regardless of what the cause of the disunity is, Sam hardly has a family or community that supports him. Braithwaite states that Sam is closest to his sister, who participated in the meeting. However, the method applied (restorative practice) to reconcile Sam (the offender) with the victim and community involves reintegrative shaming. The process encourages restoring relationships to those who are close to him, providing social circles of support based upon a shared sense of shame for what Sam has done helps Sam take responsibility for his actions in a lasting and supportive way. The shaming, in this case, also puts crime in the center as the wrongful act by the mediator, encouraging Sam to communicate his experience and challenges. The idea is to solve the problem as much as possible in such a way that reintegrates or reconciles Sam back to society and eliminate feelings of failure or stigmatizing shame. Also, the idea of forgiveness becomes a possibility with the victim's understanding of what Sam went through in the process of reintegrative shaming carried out in that restorative circle.

For Braithwaite, criminologists hold the view that one should stigmatize the offender and later carry out rehabilitation on the same offender. He explains this as see-sawing between retribution and rehabilitation. Due to the incompetence of the systems mentioned above, Braithwaite resorts to restorative justice as the preferable system in tackling the issues of crime.⁷⁸

Braithwaite defines restorative justice as the means of "restoring victims, a more victim-centered criminal justice system, as well as restoring offenders and restoring community."⁷⁹ But

⁷⁷ Ibid.

⁷⁸ Ibid., p.56.

⁷⁹ Ibid. Braithwaite views restorative justice as a more rounded theory which not only aims at victim centeredness but is based on inclusion as the offenders and community partake in the healing process. This makes restorative justice encompassing and not one sided. It is the benefit of all. To restore the dignity and to take away the shame

what does it mean to restore victims, offenders, and the community? How can one process do all these different things? What values govern this process? In the first sub-section (1.3.1), I will consider in more detail what it means to restore victims, offenders, and the community. In the second sub-section (1.3.2), I will consider the core values that inform restorative justice processes. Finally, in the last section of this chapter (1.4), I will provide my analysis of the strengths and weaknesses of Braithwaite's version of restorative justice. By explaining some areas of weakness in Braithwaite's account, I will be setting up my defense of a modified version of Braithwaite's account of restorative justice that will occupy the next two chapters of my thesis.

1.3.1 Restorative Justice: Restoring Victims, Offenders, and Communities

Braithwaite defines restorative justice as "restoring victims, a more victim-centered criminal justice system as well as restoring offenders and restoring community."⁸⁰ How can one process work to restore the victim, offender, and the community? First, let me examine what Braithwaite means by the phrase 'restoring the victim' in a restorative justice process. In his article, "Restorative Justice and A Better Future," Braithwaite describes six meanings to the phrase 'restoring the victim.' First, in the most evident and clear sense of the word, he argues that it means "...restoring the property loss of the personal injury."⁸¹ Thus, if a person has been stolen from, restoring the victim means returning that which is lost. If a person is injured, it means providing a solution as to how the injury can be healed. However, simply returning property or healing from an injury will not, by itself, fully restore the victim of a crime. The crime may have also undermined the victim's sense of security. In other words, victims often feel unsafe because they have been assaulted or stolen from. Simply returning the stolen property or recovering from the injury does not address the fear and loss of security felt by some victims. The victim may also suffer a loss of dignity that triggers a shame spiral. The victim may feel a sense of powerlessness or lack of agency. Thus, Braithwaite argues that restoring the victim means more than simply repairing the physical harm done by the crime, whether this physical harm involves personal injury, property damage, or property loss.

that comes with being a victim to crime for the victim and the restoration of the offender's dignity usually taken away by the shame of being arrested as an offender.

⁸⁰ Ibid., p.56.

⁸¹ Ibid.

Braithwaite enumerates five more meanings to the phrase 'restoring the victim'. He adds, secondly, that restoring the victim can also mean "...restoring a sense of security".⁸² Thirdly, Braithwaite argues that it is important to restore the dignity of the offender that has been lost due to feelings of shame.⁸³ The dignity of the victim is usually lost when they have been robbed; this can result in shame. Fourth, since disempowerment is often a part of the indignity of being a victim, restoring the victim also means empowering the victim.⁸⁴ This happens when there is a loss of the victim's sense of power or a sense of ownership towards something. The victim is encouraged to participate in the process and own the solution; their voice is not represented by the state.

Fifth, the restorative justice process restores the victims in general by restoring "deliberative control of justice." Sixth and finally, restorative justice can restore balance and harmony between victim and offender, and this way makes it possible for both to be in the right relationship with each other.⁸⁵ Braithwaite does make it clear here that with cases of social injustice underlying a crime (like when the poor steal from the rich or when men abuse women), restoration to a previous state of injustice is not a virtue. Although restorative justice processes cannot deal with the social injustice underlying crime, the processes can be aware of these injustices and not make things worse.

What does it mean to restore the offender? Braithwaite argues that this restoration of the offender can mean "restoration of dignity" and "restoring a sense of security and empowerment." The offender's dignity, in this case, can be restored by confronting shame, accepting responsibility, and apologizing with sincerity.⁸⁶ It entails restoring the dignity of the offender that was lost due to the shame of the arrest. Empowering and restoring a sense of security to the offender involves rendering employment, education, or any engagement to boost the offender's sense of success.⁸⁷ This consists of the diagnosis of the offender's lack that may have resulted in the crime.

There is a restoration for the lack of empowerment that often leads to crime. It is by seeking to meet the unmet needs of the offender's living in one way or the other. It gives the offender a sense of success. In terms of social support, as it relates to the offender, it provides a sense of

⁸² Ibid.

⁸³ Ibid., p.56.

⁸⁴ Ibid., p.57.

⁸⁵ Ibid., p.57

⁸⁶ Ibid. This entails the offender's willingness to accept responsibility for the responsibility for the outcome of crime. Also, apologizing to the victim for the harms caused by the offence.

⁸⁷ Ibid.

"shame in terms of letting loved ones down rather than a Western sense of individual guilt".⁸⁸ By this, Braithwaite explains that including well-wishers of the offender in the process, helps make the offender's sense of shame be one that involves letting down loved family members and friends. Rather than offenders feeling the stigmatizing shame for who they are, offenders are encouraged to focus on what they have done and feeling shame for their actions. Reintegrative shame facilitates the restoration of the offender and the reintegration of the offender into the community.

What does it mean to restore the community? Although for many people, a sense of community is undermined by many of the structural forces of modern industrial society that Christie described, a stronger sense of community is cultivated through restorative justice processes. In this way, the community is restored. Braithwaite describes the restoration of the community on three different levels (the micro-, the meso-, and the macro-level). On the micro-level or the level of interpersonal relationships, the restorative justice process can contribute to stronger relationships by building social support for both victims and offenders.⁸⁹ For example, a circle of support people was built around Sam in the story of Sam. On a meso- level or at the level of social organizations, restorative justice processes can contribute to the strengthening of these organizations by incorporating restorative justice practices in schools, churches, professions, and ethnic communities.⁹⁰ This entails cultivating a sense of empowerment in these organizations for conflict resolution. On a macro-level or at the level of the democratic process, by cultivating debate about social issues and procedural justice, restorative justice processes develop what is needed for a healthy deliberative democracy. Thus, although modern society may not have as strong a sense of community as we may like, the use of restorative justice processes can contribute to the strengthening of the community on different levels.

1.3.2 Restorative Values Versus Retributive Values

Braithwaite holds the view that all cultures have some deep-seated elements of restorative and retributive traditions.⁹¹ However, he also believes that retributive traditions are less valuable in the 21st century. It is because, in the present world, "retributive emotions are more likely to get

⁸⁸ Ibid. p.58.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid.

us into trouble than out of it."⁹² He seems to be alluding here to the fact that the desire to return hurt for hurt, a view often associated with retributivism, contributed to more "determined violent cultures," and such violent cultures no longer have the value for individuals that it may have once had.

He states that restorative justice values are universal and a "more valuable resource than retributive traditions."⁹³ He argues that this is so because all culture value repairs, security, dignity, and empowerment and are based on a sense of justice and encouragement of social support.⁹⁴ He suggests that these values have a better fit into our society today than retributivism and provide for a community that is less violent and more supportive of individual needs. When he narrows down his list of restorative justice values to three 'core' values, his account of these core values is explained in terms of their opposition to elements often associated with the retributive tradition.

Braithwaite describes the three core values of restorative justice in the following way:

Healing relationships, in place of balancing hurt with hurt, is one of the core values of restorative justice. So is community deliberation: putting the problem in the center of the circle rather than putting the criminal at the center of the criminal justice system. Whatever a retributive system deems as the right punishment for the criminal will usually be the wrong solution to the problem. Non-domination also merits consideration as a core value of restorative justice- ensuring that all voices in the circle are heard and that none are silenced by domination.⁹⁵

The point here is that Braithwaite presents restorative justice values in the light of its differences with retributive values. Restorative justice aims at healing where harm and damage have been done. The value of healing relationships entails that all parties involved in the conflict are part of the resolution. Since injustice hurts, justice should heal.⁹⁶ The questions restorative

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Ibid., p.59.

⁹⁵ Ibid., p.157

⁹⁶ Braithwaite, John (PDF). *The Fundamentals of Restorative Justice*. Sinclair Dinnen, Anita Jowitt, Tess Newton. Dec., 2002, www.researchgate.net/publication/305257334_The_Fundamentals_of_Restorative_Justice. p.35.

justice asks are: How can we restore the victim's losses, including a loss to security, dignity, and power? What can we do to assist the offender and restore dignity, empowerment, and the right relationships with others? How can we restore harmony and balance between victim and offender, as well as the offender and the community? How can we protect security in society by preventing crime from happening in the first place? The restorative justice value of a healing relationship as opposed to the win or lose outcome that the criminal justice system portrays, with its balancing of hurt with hurt. The criminal justice system asks questions like: What is the best way to punish the offender? What does the law say when a person commits this offense? How can we protect society from this criminal?

An instance would be a case where an offender convicted for robbery in a superstore arrives at the criminal court. The idea is usually to punish that offender and achieve the win-lose scenario. The offender is most cases portrayed as the loser, and the state is the winner of the case. One can see that any healing for the victim is an unintentional side-effect of a retributive criminal justice process, that is if any healing for the victim occurs at all.

The value of community deliberation puts the offense at the center and not placing the offender as the central problem. Focus or blame is on the offense committed and not the offender. Thus, the contrast between reintegrative shaming that is part of restorative justice processes is made with the stigmatizing shame that is often part of Western retributivist approaches. While reintegrative shame is directed towards the action and allows for the possibility of reintegration and reconciliation, stigmatizing shame excludes the offender with the label of criminal and facilitates the formation of criminal subcultures. Thus, the value of a restorative justice approach that values community deliberation better provides for the possibility of reconciliation and reintegration of offenders into the community, more so than an approach that stigmatizes the offender for who he or she is.

Braithwaite adds that families who apply restorative practices "...have less delinquent children than families who are punitive and stigmatizing."⁹⁷ This is such that by using the method of reintegrative shaming, through the participation, respect, and maintenance of the child's dignity, the family would hardly produce children that commit crimes. I agree with this because childhood is the right time where children are in an active learning process, and what a child learns to value from childhood in terms of morals can be a foundation for a child in his developing years. The

⁹⁷ Ibid.

child learns how to be a responsible citizen, just by learning the way people manage conflicts in their homes.

Finally, restorative justice processes express the value of freedom as non-domination; the circles are not to be dominated by either of the party to the offense. Here Braithwaite acknowledges that power, understood in terms of power relations and subordination can negatively imply upon restorative justice practices. The power- relations between people of different economic classes, racialized classes, and between people of different genders and sexual orientations can undermine an individual's ability to be heard within any process, including restorative justice processes. For instance the subordination of indigenous people in the context of colonization and in post- colonial contexts make it more difficult for individual indigenous people to be listened to and heard in any process.. Thus, Braithwaite argues that restorative justice processes must be organized in a way that is mindful of these power dynamics within a given society. However, it is organized in a way that "all voices in the circle are heard and that none are silenced by domination."⁹⁸ Braithwaite also expresses respectful listening as one of the fundamental values connected to freedom as non-domination. On his view:

Human beings are storytelling animals. You can tell how much power a person has by observing how many people listen attentively to his or her stories. It follows from this that we can empower the powerless by institutionalizing more effective listening to their stories of injustice. This is what restorative justice is about: the deadly simple empowerment that comes from creating pacified spaces where we listen to those we feel have wronged us and those we think we may have wronged.⁹⁹

⁹⁸ Ibid.

⁹⁹ Ibid., p.36. Braithwaite explains the importance of effective listening in restorative meetings by all parties involved in a conflict. The victim and offender tell their stories on their experience and how they felt. It entails a dialogue where each party to a conflict is listened to without one of the parties dominating the meeting. It entails respect for the individuals' (victim and offender) opinion. In this same article, Braithwaite holds that the other values of apology and forgiveness without any form of persuasion naturally evolves through this act of respectful listening. The true meaning of forgiveness and apology for Braithwaite is in the willingness of the victim involved to freely give it to the offender.

Braithwaite further acknowledges that some critics have accused restorative justice of aggravating the problem of social justice based on the view that "just systems tend to generate and result in orientalism."¹⁰⁰ The point here is that restorative justice practice can be viewed as a way of homogenizing justice as it relates to a particular culture to absorb distinct cultures into one system of restorative justice. The concern expressed here is that restorative justice processes might be used to dominate indigenous people and other historically disadvantaged groups in society by undermining the diversity of these different groups. Braithwaite is acknowledging that the power dynamics within society can also impact on the use of restorative justice processes (i.e. restorative justice processes are not immune from the relations of domination and subordination that are part of a given society). However, he also believes that restorative justice proponents that are aware of these power-dynamics can and should organize restorative justice processes in such a way that provides spaces for diversity, while at the same time promoting, valuing, and respecting the rights of all people involved. However, Braithwaite believes that restorative justice processes can and should aim at creating spaces for diversity while at the same time promoting, valuing, and respecting the rights of all people involved. So, there is a need for Restorative justice to create spaces where indigenous people and other minority groups can approve of justice matters in a way that makes sense to them.¹⁰¹ He goes on to assert that "restorative justice must be a culturally diverse social movement that accommodates a rich plurality of strategies in pursuit of the truths it holds to be universal."¹⁰² Despite the difference in cultures, one from the other, there is a ground of commonality they share in restorative values, which are necessarily found in all cultures.

While Braithwaite generally believes that the values of restorative justice are a more valuable resource for our society than retributivist values and the Western approach to criminal law, he does believe that there is a need to retain some elements of punishment and retributivism in order to protect the rights of people in restorative processes. He states,

Unlike the most radical versions of abolitionism, restorative justice sees promises in preserving a state role as a watchdog of rights and concedes

¹⁰⁰ Ibid.

¹⁰¹ Ibid., p.156.

¹⁰² Ibid., p.59.

that for a tiny fraction of the people in our prisons, it may be necessary to protect the community from them by incarceration.¹⁰³

Here, Braithwaite portrays his view on restorative justice as a midway view which does not attempt to replace the criminal justice system entirely with restorative practices. The idea for him is to shift the power of handling the conflict from the criminal justice system to the parties involved in a conflict, and the criminal justice system must apply checks and balances to this practice, making sure the power is not misused. Healing all parties to a conflict, for Braithwaite, is at the core of restorative justice, but the rights of all participants need to be protected in the process.

Braithwaite concludes by acknowledging some limitations of restorative justice processes:

While I am cautiously optimistic that the empirical evidence will continue to be encouraging about the efficacy and decency of restorative justice compared with retributive justice, the evidence is also clear that restorative justice also fails. Victims sometimes resent the time involved in deliberation; sometimes, they are extremely vengeful, though more often, I am moved by how forgiving they are when genuinely empowered with process control.¹⁰⁴

In this quotation, Braithwaite acknowledges the efficiency and decency of restorative justice practice and its superiority in both respects to retributivist approaches. However, he also explains that there are setbacks, and the process is not perfect. One of the problems may be the lack of interest from the victim to partake in the circle. In contrast, others may involve the unwillingness of the offender or the community to participate. There also may be problems with participants accepting the core values of restorative justice, and in enforcing the agreed-upon resolution to the conflict. Braithwaite is saying that when people refuse to participate or refuse to abide by agreements, there is no choice but to fall back on our dominant Western approach to criminal law. This approach involves both punishment and retributive elements.

¹⁰³ Ibid., p.60.

¹⁰⁴ Ibid., p.63. Braithwaite points out that restorative justice does not work out in all cases. There are constraints in the system. The willingness to partake in the restorative meeting by victims and offenders does not always evolve.

1.4 The Strengths and Weaknesses of Braithwaite's Version

Braithwaite's argument on restorative justice is thoughtful and articulate. For the most part, it is a comprehensive explanation of restorative justice. Braithwaite's restorative justice view is a more moderate approach to restorative justice than Christie's approach. The reason is that Braithwaite, unlike Christie, does not rule out a role for the Western criminal legal system in issues that involve crime. Braithwaite still acknowledges the importance of the Western legal system and holds the view that the criminal legal system and restorative justice are effective when applied in conjunction with each other. Both can act as a check on the excesses and deficiencies of the other. For instance, in a case where an offender refuses to carry out his part of an agreement in restorative justice practice, such a case can be forwarded to the criminal justice system. Also, the addressing of severe cases like murder should take place in the criminal court where the rights of the accused can be better protected. I would argue that Braithwaite's view is more realistic and adequate because neither restorative justice nor a purely retributivist Western legal system would progress adequately by itself. There is a need for balance in the criminal justice system.

While Christie advocates a more communitarian society and sees restorative justice as a panacea for problems with society and the Western legal system, Braithwaite presents a more moderate expectation for restorative justice and a more positive picture of modern industrial society. Braithwaite would acknowledge that many of the changes that Christie has described have happened in Western industrial society (for instance, Braithwaite would not deny that society has become more fragmented and depersonalized, undermining our sense of community). Braithwaite also believes that the restorative justice process has the possibility of restoring community in the sense of strengthening relationships on an interpersonal level, at the level of churches, schools, and other organizations and at the state level by cultivating deliberative democracy. But restorative justice processes cannot overcome the structural elements that define the modern industrial society. Further, Braithwaite sees the good of individualism and protecting individual rights and freedoms in our society. Thus, Braithwaite states that "...we can aspire to a society that is strong on rights and strong on responsibilities, that nurtures strong community and strong individuals."¹⁰⁵

¹⁰⁵ Ibid., p.63. Braithwaite acknowledges the issues involved in communitarianism and individualism. His point is that there should be a balance between the two such that, they learn from each other's as the success of an individual constitutes and affects the society, vice versa. He explains that community justice could be oppressive and have

Braithwaite's version of restorative justice is also preferable to Christie's because he acknowledges that the consent of the offender is essential in terms of choosing to partake in restorative justice circles. It follows that for Braithwaite, voluntary participation is a crucial feature of restorative justice practice as it brings about the genuinely successful progress of the meeting. Obtaining the consent of the offender is a sign of respect for their dignity, whether he wants to participate or not. The same applies to the victim. Equal opportunity for participation is presented to both victim and offender. However, there are some shortcomings in Braithwaite's theory, shortcomings that need to be overcome. For instance, in Braithwaite's example, he provides the following account of the restoration of Sam; he explains:

When the conference reconvenes, Sam's sister speaks to him with love and strength. Looking straight into his eyes, the first gaze he could not avoid in the conference, she says that she knows exactly what he has been through with their parents. No details are spoken. But the victim seems to understand what is spoken of by the knowing communication between sister and brother. Tears rushing down the old woman's cheeks and over a trembling mouth. It is his sister's love that penetrates Sam's callous exterior. From then on, he is emotionally engaged with the conference."¹⁰⁶

My point here is that Braithwaite makes it seem like emotion implies manipulation in restorative justice practice. It makes it seem like Sam's sister's action of speaking to him with love and strength was what made him commit to taking responsibility for his actions. Also, it makes it seem like the emotional responses between sister and brother caused the victim to develop compassion for Sam. That particular emotional moment appears to have resulted in the supposed success of the conference because "from then on, he is emotionally engaged with the conference."¹⁰⁷ Are we saying that restorative justice totally relies on the emotional compliance of

individual rights and needs suppressed under the concept of community. At the same time, there is competitive individualism which can be checked by communitarianism for excesses. It is this idea of check and balances in the social system that he applies as well in terms of tolerating some aspects of the traditional criminal legal system with its punishment.

¹⁰⁶ Ibid., p.55

¹⁰⁷ Ibid.

the offender or victim in other for it to be practicable? My view is that, although restorative justice practice is not devoid of our emotions, people can act based on their reasoning as well. I believe that essentially, there is an overlap between emotions and reason. In Chapter Three, I will appeal to some Kantian notions in order to explain this overlap between emotions and reason. Although Kant is known for providing a clear divide between reason and emotion when characterizing the nature of our moral duty, he also acknowledges that some emotions can help us in performing our moral duty, while other emotions can hinder us in performing our moral duty. In this way, Kantians can argue that it is important to cultivate our emotions to enable us to better perform our moral duty. When we cultivate our emotions in a way that helps us to perform our rational duty, emotions "overlap" with reason. In this way, restorative justice processes can be and should be directed to the cultivation of both our emotions and our reasoning. The story of Sam makes it seem as if Sam is only moved by emotions and the manipulation of any emotions will do. However, I believe that restorative justice processes should be directed to the cultivation of those emotions that aid reason in performing our moral duty.

Emotions are part of human life, and restorative justice is no exception. Even in criminal law, there are cases where judges appeal to emotions and respond emotionally to testimony before them (and no doubt juries do as well). Our Western legal courts are not devoid of emotion, and restorative justice processes will have emotional elements as well. However, emotional influence should not be placed at the forefront of either restorative justice practice or Western legal systems. Further, restorative justice should not be characterized as a mere appeal to emotion, while contrasted with Western retributive approaches that supposedly represent a mere appeal to impartial reason. These are mischaracterizations of both approaches. The story of Sam that Braithwaite presents is misleading since it makes it seem as if the appeal in restorative justice is merely a matter of emotional coercion and that the appeal to emotion is unproblematic. Appeal to mere emotion is a problem since it seems to manipulate and coerce people. This is one of the criticisms made by people like Acorn and Geereats, a criticism that gains some credence due to this problematic story of Sam given by Braithwaite.

Finally, although restorative justice is explained in terms of its opposition to retributivism and its punitive approach, Braithwaite never specifies what he means by retributivism. As a result, it is not clear in what sense restorative justice is opposed to retributivism and in what sense they can act as checks on each other. In a related matter, there is also no clarification of restorative

justice's opposition to the concept of punishment. Is restorative justice as opposed to punishment per se? Can restorative justice processes end with the "agreement" that the offender ought to be punished? Braithwaite does not clarify what he means by punishment and whether or not restorative justice processes in focusing upon healing must be opposed to punitive resolutions. Braithwaite just explains that proportionality in the criminal justice system is not applied in the same way when it involves punishing rich and poor offenders. Also that "restorative justice, we contend, has a better chance for being made equitably available to rich and poor than just desserts."¹⁰⁸ I will deal with these weaknesses in the next two chapters that follow.

Conclusion

In this chapter, I have explained the views of Christie and Braithwaite on restorative justice, and I have shown how Braithwaite's version is less extreme and more plausible than Christie's approach. I have explained Braithwaite's version of restorative justice in terms of his notions of reintegrative shame, the story of Sam, his account of restoring victims, offenders and the community, and his account of the core values of restorative justice (healing, voluntary participation, active listening, nondomination, and problem centeredness). Braithwaite believes that a process that respects these core values of restorative justice naturally sets the stage for apology and forgiveness to take place. Braithwaite's unintended appeal to and reliance on emotions in his fable on Sam present problems for his version of restorative justice. Additionally, Braithwaite does not adequately explain what he means by retributive justice, and its values, and thus restorative justice's opposition to retributive justice is unclear. Finally, since his concept of punishment is also not explained, it is not clear how restorative justice stands in relation to punishment.

The next two chapters aim at overcoming these deficiencies in Braithwaite's argument to defend restorative justice. In the next chapter, I will appeal to the influential work of Hart to provide some distinctions to clarify the meaning of punishment and retributivism. With these distinctions in mind, it will become clearer in what senses restorative justice is opposed to retributivism and punishment, and how elements of both could be part of the same legal system.

¹⁰⁸ Ibid., p.61. There is no outright definition of punishment or its relevance to restorative justice (at least Braithwaite's view). Although Braithwaite's moderate version of restorative justice by acknowledging the role of the criminal justice system in extreme cases would suggest a partial acceptance of the system of punishment. He states this implicitly.

In the final chapter of this thesis, I will turn to examining criticisms by Acorn and Geeraets, objections that relate to the role of emotions in the restorative justice process. I will argue that with some Kantian modifications to Braithwaite's notions of dignity and freedom, a more plausible version of restorative justice will result, one that can respond adequately to these criticisms by Acorn and Geeraets.

CHAPTER TWO

IMPORTANT DISTINCTIONS TO CLARIFY BETWEEN RESTORATIVE JUSTICE AND ITS OPPOSITION TO RETRIBUTIVISM

2.0 Introduction

H.L.A. Hart's book *Punishment and Responsibility: Essays in the Philosophy of Law*, originally published in 1968, has been very influential for legal theorists dealing with philosophical topics in the area of criminal law and punishment. In this book, he makes a number of distinctions that many philosophers in this area now take for granted. For instance, he distinguishes questions concerning the definition of punishment from questions concerning its justification. He also distinguishes questions concerning the general justifying aim of punishment versus questions concerning its distributions (who should be punished and the amount). In the first chapter of his book, Hart distinguishes two kinds of retributivism based on these distinctions. He distinguishes "Retributivism as a General Justifying Aim" from retributivism in distribution of punishment. This distinction, Hart believes, is important for anyone understanding retributivism. However, when he finished writing this book, Hart found that his account of retributivism was not sufficient, and he needed to write a postscript on retributivism for the book. Thus, in this postscript, Hart begins by stating,

In the first of these essays, I made some attempts to clarify the idea of retribution by distinguishing what I there called Retribution as a General Justifying Aim from retribution in the distribution of punishment. But it is plain enough that I have not done justice to the variety and complexity of this notion, and some rather unrewarding disputes about the morality of punishment continue to flourish, in part at least because some of its ambiguities are still undetected. So in an effort to bring them to light, I shall explore here some further reaches of the subject.¹⁰⁹

¹⁰⁹ Hart, H.L.A., and John Gardner, *Punishment and Responsibility: Essays in the Philosophy of Law*. Oxford University Press, 2009, pp. 234-235.

Thus, in addition to distinguishing retribution as a general justifying aim and retribution in distribution of punishment, Hart in this postscript will introduce a ‘crude’ version of retributivism and describe its elements. Although academics rarely defend this crude version, it is a view common among people, and elements of this crude version may be a part of actual legal systems. Hart then introduces three modifications to this crude version of retributivism, /*/modifications that aim at overcoming weaknesses in the crude version. Thus, the modified version of retributivism more accurately represents more contemporary versions of retributivism that academics find more defensible.

My goal in this chapter is not to critically evaluate all versions of retributivism, but to explain in what sense Braithwaite’s version of restorative justice is opposed to retributivism and how it may acknowledge and even incorporate some elements of retributivism. I will also appeal to Hart’s distinction between defining punishment and justifying punishment to show how this distinction is problematic since definitions of punishment can and often do incorporate moral values and even retributivist elements. As a result, I will argue that whether restorative justice processes are opposed to punishment, depends on how punishment is construed.

In the first section (2.1), I will explain some of Hart’s key distinctions and its implications for understanding retributivism. I will also provide an analysis of his distinction between defining punishment and justifying it. In the second section (2.2), I will explain his distinction between crude retributivism and a modified version of retributivism. In the third and final section of this chapter (2.3), I will apply Hart’s account of the different versions of retributivism to Braithwaite’s account of restorative justice.

2.1 Hart's Main Distinctions and their Implications for Understanding Retributivism

The concept of punishment is central to the philosophy of law. Theorists raise questions about the efficacy and justification of punishment. Some of these questions are: Is punishment unjust? What could justify the infliction of punishment on people? The pursuit of answers to these questions among theories of legal punishment has led to differences in views. H.L.A. Hart, in his book *Punishment and Responsibility*, attempts to provide a framework to answer the previously stated questions. He introduced three questions: “Questions of definition, general justifying aim,

and distribution.”¹¹⁰ The question of distribution is divided into questions of the amount and issues of who the law should punish.

The question of defining punishment is the first question Hart presents. Hart explains that the question of the definition must be separated from that of the general justifying aim in order to avoid confusion.¹¹¹ Hart presents this question of definition more like a road map to enable him identify what it is that needs to be justified. Hart points out that the standard cases of punishment entail offenses committed against legal rules, while the substandard cases involve punishment for breach of non-legal rules. For instance, a man that murders, for Hart, would categorize as a standard case, and a child who steals his father's box filled with money and is asked to stay away from visiting friends for a month is a substandard case of punishment. Hart explains: "I shall define the standard or central case of punishment in terms of five elements:

1. It must involve pain or other consequences normally considered unpleasant.
2. It must be an offense against legal rules.
3. It must be of an actual or supposed offender for his offense.
4. It must be intentionally administered by human beings other than the offender.
5. It must be imposed and administered by an authority constituted by a legal system against which the offense is committed.¹¹²

Standard cases of punishment mainly entail the intentional administration of pain to an offender; it involves an act against legal orders like the case of manslaughter. Punishment has to be administered by a legal institution not to any other person but the actual or supposed offender for an offense committed by a legal institution. For instance, consider the case where a judge sentences a woman who pleads guilty and is convicted for killing her husband to 20 years imprisonment with hard labor. Here we have the standard case of punishment because the punishment entails pain, it is intentional, and it is administered to the actual offender by legal personnel, the judge.

Hart also explains that there are secondary or nonstandard cases of punishment. For him, they include but are not restricted to the following cases. A nonstandard case would be punishments for breaches of legal rules imposed or administered otherwise than by officials

¹¹⁰ Ibid., p.4

¹¹¹ Ibid.

¹¹² Ibid., p.5

(decentralized sanctions). Another nonstandard example would be punishment for breaches of non-legal rules or orders (punishment in a family or school). Vicarious or collective punishment of some members of a social group for actions done by others without the former's authorization, encouragement, control, or permission is also a nonstandard case. Finally, Hart provides the case of punishment of persons (otherwise than under (c)) who neither are in fact nor supposed to be offenders as a nonstandard case of punishment.¹¹³

Hart well understood that, aside from the standard case of punishment, there are other cases of punishment that do not have all the features of the standard or central case. The instances of substandard punishment, for Hart, occur mostly in social groups due to breaches of rules that are not necessarily legal and do not require the involvement of judicial bodies. These are found in families, schools, social groups, and schools.¹¹⁴ In substandard cases, unlike the standard cases, punishment may apply to a group of people in a particular group, even if every other person except one person is innocent. In other words, punishment may apply to persons other than the offender. To exemplify, consider the substandard case of theft involving a member of a basketball team where the actual offender is unknown, the whole team gets punished for one member's wrongdoing.

Hart distinguishes a standard case of punishment from substandard cases to prevent what he calls the “definitional stop.”¹¹⁵ According to Hart, if one simply stipulates a definition and asserts that this is the “essence” of punishment, then this might rule out consideration of the justifiability of substandard cases without any argument (since they would not be, strictly speaking, “punishment” by definition). For example, Duff provides a definition of punishment that can be in danger of this definitional stop. He argues that legal punishment involves the “...the intentional imposition of something that is intended to be both burdensome and reprobative on a supposed offender for a supposed crime by a person or authority who has the power to do so.”¹¹⁶ Duff also adds that punishment deprives people of things they value and do things that they would not do voluntarily. The definition comes off as simple, but yet ambiguous as he does not fully explain what punishment means by defining the terms “reprobative” and “burden”. Terms like

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Duff, Antony, and Zachary Hoskins. “Legal Punishment.” Stanford Encyclopedia of Philosophy, Stanford University, 18 July 2017, plato.stanford.edu/entries/legal-punishment/.

‘reprobation’ are especially problematic since it seems to bring in elements associated with a retributivist justification of punishment, like the expression of moral condemnation that is a part of modified versions of retributivism (as we will see in section 2.2).

Since Duff’s definition does not also acknowledge substandard cases of punishment, his definition might also entail a “definitional stop.”¹¹⁷ It represents a definitional limit that prevents us from considering other kinds of punishments that might be justifiable in a criminal law context. Hart says, “it prevents us from investigating the rational and moral status of a system of punishment.”¹¹⁸ For example, Duff’s definition of punishment stipulates that punishment must be imposed on supposed offenders for a supposed crime. It fails to consider whether vicarious punishments are punishments and whether vicarious punishments are justifiable. Further, Duff’s definition focuses on punishments intended to be both burdensome and reprobative, so this raises questions about “punishments” not intended to be reprobative, but rehabilitative. Such a substandard case of punishment is ruled out from consideration by definition. Hart’s account of punishment in terms of standard and substandard cases allows him to have the flexibility of considering nonstandard cases and their justifiability within a system of criminal law.

The second distinction Hart makes as part of his framework is to distinguish questions concerning the general justifying aim of a system of punishment from the justification of distributions of punishment. He applies this distinction to the notion of retributivism explicitly. Hart argues:

Here I shall merely insist that it is one thing to use the word Retribution at this point in an account of the principle of punishment to designate the General Justifying Aim of the system, and quite another to use it to secure that to the question ‘To whom may punishment be applied?’¹¹⁹

The point in the above quotation is that, for Hart, the question of general justifying aim, which is more like a question of the purpose for the entire system of punishment differs from the questions of who should receive punishment and how much punishment a particular offender receives. The main difference is that the general justifying aim tends to justify the system of

¹¹⁷ Hart, H.L.A., and John Gardner. *Punishment and Responsibility: Essays in the Philosophy of Law*. Oxford University Press, 2009. p.5

¹¹⁸ Ibid.

¹¹⁹ Hart, H.L.A. and John Gardner. *Punishment and Responsibility: Essays in the Philosophy of Law*. Oxford University Press, 2009. p.9.

punishment as a whole. The general justifying purpose will focus on the effects or consequences of a system of punishment if one is a consequentialist. The forward-looking theory or consequentialist theory, for Hart, holds the view that “its beneficial consequences justify the practice of a system of punishment.”¹²⁰ Thus, consequentialists will point to the main consequentialist aims of a system of punishment (like deterrence, reducing crime, or protecting the public). However, the general justifying aim of the system for a retributivist cannot be found in the consequences or results of a system of punishment (or cannot be found in that alone). Thus, retributivists must explain some intrinsic value in a system of punishment (whether in terms of some intrinsic moral good in meting out punishments for offenses or some intrinsic good in expressing moral condemnations through this system of punishments).

Whether one accepts a consequentialist account of the general justifying aim or a retributivist explanation of the general justifying aim, the question of who should be punished and how much is a separate question. Questions of distribution can be determined independently of the general justifying aim and provide limits on how the system of punishment may pursue its general aims. Hart explains that for the retributivist, “the main justification of the practice lies in the fact that when a breach of the law involves moral guilt, the application to the offender of the pain of punishment is itself a thing of value.”¹²¹ The point here is that, for the retributivists, the question of distribution (i.e., who should be punished) is determined by appeal to the moral desert of the offender. Thus, the act of punishment is justifiable for a person because the person deserves the punishment that ‘fits’ the crime. A retributivist will justify this act of punishment by stating that to commit a crime implies that the punishment is morally deserved. This is what Hart calls the “backward-looking approach.”¹²²

Consequentialists can also hold that the pursuit of the general justifying aim of the system of punishment can and should be limited to punishing only offenders for crimes. However, they will argue that this qualification on the pursuit of the general aims in the system is justified for independent consequentialist reasons. In other words, it is a mistake to think that just because one is a consequentialist with respect to the general justifying aim, this means that consequentialists cannot restrict punishments to offenders for offenses (a question of distribution). Further, it is a

¹²⁰ Ibid., p.8

¹²¹ Ibid., p.8

¹²² Ibid., p.2

mistake to think that because one is a retributivist regarding distribution, this must commit one to retributivism as a general justifying aim. The question of general justifying aim is distinct from questions of distribution. Thus Hart maintains that:

Much confusing shadow fighting between utilitarians and their opponents may be avoided if it is recognized that it is perfectly consistent to assert both that the general justifying aim of the practice of punishment is its beneficial consequences and that the pursuit of this general aim should be qualified or restricted out of the deference to principles of distribution which require that punishment should be only of an offender for an offense.¹²³

Hart's view is that the consequentialist view of punishment serves as a better justificatory aim for a system of punishment than retributivism. He believes that the appeal to retribution or even reprobation as the general justifying aim of the system of punishment either avoids "...the question of justification altogether or are in spite of their protestations disguised forms of Utilitarianism".¹²⁴ He will reiterate this point in his postscript when he notes the appeal to retributivism as a general justifying aim "...appears to be a mysterious piece of moral alchemy in which the combination of the two evils of moral wickedness and suffering are transmuted into good" or such an appeal represents "...an abandonment of any serious attempt to provide a moral justification for punishment".¹²⁵ Thus, Hart believes that the general justifying aim of a system of punishment is more plausibly understood in consequentialist terms (for example, that it fosters public good for the offender and society, avoiding reoffence and protecting the community). But this question is independent of questions of distribution (i.e. the question of who should receive punishment and to what extent) and this must always be kept in mind.

I would argue that although Hart's distinction between retributivism as a general justifying aim for the system versus retributivism in distribution is a crucial distinction to keep in mind when characterizing retributivism, I would also argue that his opening distinction between the definition of punishment and its justification is not as straightforward as Hart suggests. I would agree with

¹²³ Ibid., p.9

¹²⁴ Ibid.

¹²⁵ Ibid., p.235

McPherson who argues that the definition and justification of punishment are hard to keep apart.¹²⁶ The questions; “what is punishment?” and “why do we punish?” are questions that could separate without any “logical priority of the first over the second.”¹²⁷ The term punishment is a word that entails value.¹²⁸ It is because to ask whether punishment can be justified is to ask if it is the best way of achieving an end or whether it has a purpose.

Distinguishing defining punishment from its justification equals separating the fact of a thing from its value. For instance, to say Canada is one of the coldest countries in the world is a fact. Giving reasons why we say Canada is one of the coldest countries in the world are questions of justification. However, a total value-neutral account or a distinction of the definition of punishment from its justification would not provide an adequate account of what punishment entails.¹²⁹ For example, with Duff’s definition of punishment, he incorporated the notion of “reprobation” into his definition of punishment. It is difficult to see how incorporating the notion of condemnation or reprobation could be value-neutral. And even with Hart’s definition of punishment, by restricting the standard case to supposed offenders for supposed crimes, he is already introducing a retributive element, that only offenders deserve punishment, into the definition of punishment itself. Thus, it is difficult to provide a definition of punishment that is not inherently retributive, at least in some senses of the word retributive.

Although Hart’s main distinction between retributivism as a general justifying aim and retributivism in distribution is sound, Hart acknowledges that this does not take into account the varieties of retributivism. Thus, in the next section, I will example Hart’s postscript and his distinction between crude versions of retributivism and the modified version, before turning towards a consideration of these distinctions for Braithwaite.

¹²⁶ McPherson, Thomas. “Thomas McPherson, Punishment: Definition and Justification.” Phil Papers, 1 Jan. 1967, Philpapers.org/recMCPDA. p.21.

¹²⁷ Ibid. p.25

¹²⁸ Ibid. p.26

¹²⁹ Ibid. The point for McPherson is that, to call an act punishment is to have taken up an attitude towards it. In other words, to define punishment implies its justification. Hart’s definition of punishment for instance, implicitly tends towards a retributive standpoint in the explanation of the standard definition of punishment provided by Hart. This is because Hart’s definition looks at the past and the present. Hart defines punishment based on what the offender has done and how he would be punished but does not state the future impact of this punishment on the offender and others in his attempt to define punishment.

2.2 Hart's Distinction Between Crude Retributivism and Modified Retributivism

In the Postscript, Hart states, “it is I think helpful to start with a simple, indeed crude, model of a retributive theory which would satisfy this stricter usage”¹³⁰. Hart begins by providing an account of a crude version of retributivism and then builds upon this crude version a more plausible version of retributivism (which he describes as “modifications of the model”). The retributivist's view in its crude form, for Hart, asserts three things.¹³¹

First that a person may be punished if, and only if, he has voluntarily done something morally wrong; secondly, that his punishment must in some way match, or be the equivalent of, the wickedness of the offense; and thirdly, that the justification for punishing men under such condition is that the return of suffering for moral evil voluntarily done, is itself just or morally good.¹³²

The point here is that for this crude version, an offender must be punished if he has done something wrong out of his own choice and willingness devoid of any form of external influence. According to Hart, this involves an answer to the question, what sort of conduct may be punished? Moreover, the gravity of an offender's crime must, in some sense, match or be equal to the gravity of punishment given to the offender. This involves an answer to the question: How severely should a person be punished? Finally, the act of punishing a person who goes against the law is morally justifiable in itself, and not with reference to some results of consequence. It is more like what I will call an input-output transaction (offense =punishment). For Hart, this involves an answer to the question, “what is the justification for the punishment?”¹³³

An example of a crude version of retributivism is the old testament passage of an eye concerning an eye. The bible makes attempts to answer the three questions: What sort of conduct

¹³⁰ Hart, H.L.A., and John Gardner. *Punishment and Responsibility: Essays in the Philosophy of Law*. Oxford University Press, 2009. p. 231.

¹³¹ Ibid.

¹³² Ibid.

¹³³ Ibid.

may be punished? How severely? And what is the justification for the punishment? To answer the first question. It is explained in the bible.

Therefore, whoever resists the authorities resists what God has appointed, and those who resist will incur judgment. For rulers are not a terror to good conduct, but to bad. Would you have no fear of the one who is in authority? Then do what is good, and you will receive his approval, for he is God's servant for your good. But if you do wrong, be afraid, for he does not bear the sword in vain. For he is the servant of God, an avenger who carries out God's wrath.¹³⁴

According to the above quotation, anyone who disobeys the authority is liable to punishment. It explains that the duty of the ruler is to correct bad conduct and punish offenders unsparingly. To answer the question of amount and justifying aim, it is written:

Ye have heard that it hath been said, An eye for an eye, and a tooth for a tooth: But I say unto you, That ye resist not evil: but whosoever shall smite thee on thy right cheek, turn to him the other also.¹³⁵

Futhermore, in Leviticus 24:17-20:

Anyone who takes the life of a human being is to be put to death. Anyone who takes the life of someone's animal must make restitution for life. Anyone who injures the neighbor is to be injured in the same manner: fracture for fracture, eye for an eye, tooth for a tooth. The one who has inflicted the injury must suffer the same injury.

¹³⁴ King James version, Bible Gateway, 1993, www.biblegateway.com/kjv/

¹³⁵ Ibid.

‘An eye for an eye’ is the view that a person who has hurt another should be punished to a similar degree.¹³⁶ Another example of a crude version of retributivism is a way of interpreting Kant’s account in the *Groundwork of the Metaphysics of Morals*. Here, Kant holds the view that offenders are punished not for any consequence, such as deterring future crimes or to reform the criminal, but rather for the sake of punishing because punishment is right in itself. It is attained from Kant's view that anyone who does that which is wrong deserves to suffer.¹³⁷ Interestingly, Kant holds the view that punishing those who break the law would count as a moral act.

Kant also argues that:

This fitting of punishment to the crime, which can occur only by a judge imposing the death sentence in accordance with the strict law of retribution, is shown by the fact that only by this is a sentence of death pronounced on every criminal in proportion to his inner wickedness (even when the crime is not murder but another crime against the state that can be paid for only by death).¹³⁸

Here Kant explicitly states that when considering the appropriate amount of punishment to give an offender, taking into account the inner intention of the offenders is an essential step to show that justice is done. For instance, if a man is convicted for arson, Kant would suggest that the punishment should, in some sense, match the crime committed and that the intention of the criminal who committed this act should also be taken into account when deciding the type of punishment that suits the crime. If the offender's act is found to be intentional, the more it attracts grave punishment.

For Hart, “The simple equivalencies of an eye for an eye or a death for death seem either repugnant or inapplicable to most offenses, and even if a refined version of equivalence in demanding a degree of suffering equivalent to the degree of the offender’s wickedness is

¹³⁶ Ibid.

¹³⁷ Mark Tunick. “Is Kant a retributivist? History of Political Thought, Vol. 17, No.1 (Published by: Imprint Academic Ltd. Spring 1996. Pp. 60 – 78. <https://www.jstor.org/stable/26217122>. Accessed 26-04-2020.

¹³⁸ Kant, Immanuel, Mary J. Gregor *Groundwork of the Metaphysics of Morals*. Cambridge, U.K: Cambridge University Press, 1998. P[6:334]

intelligible, there seems to be no way of determining these degrees.”¹³⁹ Hart’s point here is that the crude version of revenge is mostly inapplicable and inefficient to offenses. If, for instance, the punishment for damaging a person's eye is to treat the offender the same way, then more harm will be caused than good in the society and consequently lead to further ills in society. Also, that there is no way of deciding or measuring the gravity of an offense concerning punishment for particular crimes, this is because offenses differ on a case by case basis and there are different factors to consider like the mental capacity, physical capacity, and the intention of the supposed offender.

Since there are some clear problems with the crude version of retributivism, Hart argues that contemporary versions of retributivism typically involve three kinds of modifications or changes to the crude version.

First, Hart explains that modern retributivism represents a shift towards proportionality. Thus, modern versions of retributivism explain how punishments should ‘match’ the crime, not in terms of a simple equivalence between kinds of acts (like a literal taking of an eye for taking of an eye) or amounts of suffering (providing the same suffering in punishment that what caused by the offense), but in terms of proportionality between punishment and moral gravity of the offense. In other words, he describes the first modification in the following way; “punishment proportionate to the gravity of the offense”.¹⁴⁰ Although Hart believes that determining the moral gravity of different kinds of offenses is far from simple, he already discussed some of the difficulties and complexities involved in proportionality in earlier essays in the book (see essay 5 and 7 in particular). He adds in the postscript that the moral gravity of a crime is not just determined by the subjective wickedness or the person or intention, but also by the harm done by the action to deal with these two disparate elements (subjective intention and harm done by action) into a determination of the “gravity” of the crime complicates the matter even further.

I agree that there are difficulties in providing an adequate account of the proportion between punishment and gravity of offenses. Some problems with this view on proportionate retribution are: How do we measure this proportion? Is it bound to change over time? If yes, can it be enforced as law without being subject to constant change? Is it fair to give a person who murders out of negligence a severer punishment than one who intentionally breaks the leg of

¹³⁹ Ibid.

¹⁴⁰ Ibid. p.234

another? Again, are all criminal justice institutions justified in their procedures for meting out punishment? Are they free and fair? These are unanswered questions that need answers.

The first point to note is that, due to the nature of some offenses, it might be challenging to apportion punishment that depends on the gravity of harms caused and the subjective wickedness of the person. The reason is that some crimes are intentional, while others take place unintentionally and even non-voluntarily. It is also the case that some unintentional actions have devastating consequences, while some intentional acts (like attempted murder) may not produce any harmful consequences. There are also cases where offenders deceive the judge and claim to have certain excusing conditions concerning an offense with a high level of harm like murder. How can a judge discern when a deceitful offender claims that his violent action that resulted in his child going blind is as a result of schizophrenia? In this case, the offender may receive less punishment than usual. In the case of another offender who is honest about the same crime (blinding his child) and is mentally stable, he will attract a more severe punishment than the deceptive individual. So even if we assume that only harm of the offense determines the gravity of the offense, things are complicated. But if we also add subjective wickedness of the person or intention as a part of the “gravity” of the offense, the calculation of a proportionate punishment becomes even more arbitrary.

It is important to note that, according to Hart, the issue of proportionality is an issue of distribution and, thus, concerns justifications for amounts of punishment for given offenses. As such, one can believe in a retributivist justification for proportionate punishments and still be a consequentialist in terms of the general justifying aim of the system of punishment. Further, Hart believes that one can provide a consequentialist justification for some forms of proportionality in distribution. In other words, one need not be a retributivist to accept that punishments must be proportionate to the offense, in some sense of the word. But generally, any justifications of proportionality (whether consequentialist or retributivist in nature) concern matters of distribution.

The second modification on crude retributivism concerns retribution considered as a general justifying aim for the system. Here there is a shift from crude versions account of the general justifying aim for the system of punishment (an account that some criticize for being the “mysterious piece of moral alchemy in which the combination of the two evils of wickedness and suffering are transmuted into good”) to an emphasis on public expressions of moral condemnation. Thus, Hart explains that:

Modern retributive theory has shifted the emphasis, from the alleged justice or intrinsic goodness of the return of suffering for moral evil done to the value of the authoritative expression, in the form of punishment, of moral condemnation for the moral wickedness involved in an offense.¹⁴¹

Here the public expression of condemnation or reprobation is part of the justification of a system of punishments, whether or not it makes sense to define punishment in terms of an expression of reprobation (as Duff did, see section 2.1) However, more to the point, Hart argues that sometimes the public expression of condemnation is represented as something valuable in itself for the system of punishment. In contrast, other contemporary retributivists have represented this public expression of reprobation as tending towards certain results (i.e., a powerful deterrent, for example). Thus he writes:

The public expression of condemning the offender may be conceived as something valuable in itself; in the other, it is valuable only because it tends to certain valuable results, such as the voluntary reform of the offender, his recognition of his moral error or the maintenance, reinforcement or ‘vindication’ of the morality of the society against which the person punished has offended.¹⁴²

Hart finds the former case irrelevant to the practical purposes of systems of punishment, while the later “trembles on the margin of a Utilitarian theory.”¹⁴³ Clearly, Hart is questioning whether this modification on retributivism can maintain its retributivism while also providing adequate justification for the system of punishment as a whole.

¹⁴¹ Hart, H.L.A. and John Gardner. *Punishment and Responsibility: Essays in the Philosophy of Law*, Oxford University Press, 2009. p.235. There is a shift from viewing punishment as an intrinsically good act which emphasizes pay back for settlement caused by an offender’s wrongdoing to the view of punishment as a means of expression to portray crime as a morally condemnable act. Punishment serves like a language.

¹⁴² Ibid.

¹⁴³ Ibid.

The third and final modification on crude versions of retributivism is the fact that "...most contemporary forms of retributive theory recognize that any theory of punishment purporting to be relevant to a modern system of criminal law must allot an important place to the Utilitarian conception..."¹⁴⁴ Hart explains that for contemporary retributivism to avoid abstraction and be relevant to modern systems of criminal law there has been a shift towards allowing space for utilitarian considerations. Thus, some contemporary proponents of retributivism restrict the scope for retributivist justifications of punishment to that area of criminal law that overlaps most with moral wrongs. In this way, contemporary retributivists can allow for utilitarian considerations in other areas (areas that relate to social and economic policy, for example). Similarly, other contemporary retributivists soften their assertion that offenders must be punished (and must receive a punishment proportionate to the offense) to say that offenders *may* be punished proportionately (i.e., that retributivism merely asserts that the state is permitted in punishing offenders proportionately).

Thus, in terms of questions that involve the severity of punishment, Hart explains that modern retributivists treat the "appropriateness to the crime as setting a maximum within which penalties, judged most likely to prevent the repetition of the crime by the offender or others, are to be chosen."¹⁴⁵ Here the requirements of retributivism become mere upper limits on what is allowed; consequentialist considerations are needed to help determine what should be done within these limits. In all these ways, retributivism limits its scope and softens its stance in order to allow for the commonsense consequentialist considerations that often are a part of a judge's deliberations in sentencing offenders.

2.3 Applying Hart's Distinction to Clarify Braithwaite's Version of Restorative Justice and its Opposition to Retributivism

Hart's distinctions are essential when we consider what restorative justice is opposed to, and in what sense restorative justice is opposed to retributivism. Correctional Services of Canada website explains restorative justice as a "non-adversarial, non-retributive approach to justice."¹⁴⁶

¹⁴⁴ Ibid.

¹⁴⁵ Ibid., p.237.

¹⁴⁶ Correctional Service of Canada, Communications. "About Restorative Justice." *Government of Canada, Correctional Service of Canada, Communications and Citizen Engagement Sector, Restorative Justice*, 13 Jan. 2014, www.csc-scc.gc.ca/restorative-justice/003005-0007-eng.shtml.

Braithwaite indeed represents restorative justice as opposed to retributivism. However, for Braithwaite, both approaches are entailed in all cultures. One then asks the question: In what sense is restorative justice opposed to “retributivism”?

First, it is essential to note that this question depends on what is meant by retributivism. Hart, for example, gives us a distinction between a crude version of retributivism and a modified one, which I have explained in the previous chapter. The crude version is expressed in the biblical refrain of an “eye for an eye” or some version of an equal amount of suffering for suffering caused. The modified version introduces proportionality, among other things, into the picture. It also brings in mixed elements (backward and forward-looking elements), as well as elements that are a part of a communicative theory/expressive theory of punishment (i.e., emphasizing the importance of public expressions of moral condemnation and moral reprobation). Thus, when Braithwaite describes “where criminals want to hurt victims again and victim want to hurt criminals back; hurt endlessly begets more hurt.”¹⁴⁷ He is, no doubt, describing our present propensity to institutionalize crude retributivism. Many restorative justice proponents, including Braithwaite, when they express their opposition to retributivism, object to crude retributivism.

But Braithwaite also objects to retributivism as a general justifying aim of a criminal legal system of punishment (crude retributivism or proportionate retributivism). He would no doubt agree with Hart that retribution as a general justifying aim of the whole system amounts to a “mysterious piece of moral alchemy in which the combination of the two evils of moral wickedness and suffering are transmuted into good.”¹⁴⁸

In cases that involve punishment of the offender, the question can be asked: Is Braithwaite’s restorative justice as opposed to punishment per se? The point is that restorative justice itself does not see its agreed-upon remedies as punishments (they are conceived as remedies or redress). In answering the question of distribution, Braithwaite is not objecting to retributivism as a question of “who” should be punished (only the offender deserves punishment for what the offender has done). However, He does believe that if punishment is warranted, then it should be only given for an offense and that it should not be disproportionate to the offense. In terms of the

¹⁴⁷ Eugene McLaughlin, Ross Fergusson, Gordon Hughes and Louise Westmorland (eds). *Restorative Justice, Critical Issues*. Sage Publications, 2003. p.162.

¹⁴⁸ Hart, H. L. A., and John Gardner. *Punishment and Responsibility: Essays in the Philosophy of Law*. Oxford University Press, 2009.p. 234-235.

amount of punishment given, Hart, in his modified view, holds that the greater the hurt caused by crime, the higher the punishment.¹⁴⁹ In the same vein, Braithwaite's account tolerates some aspects of the traditional criminal legal system with its sanctions, in the cases where the crime committed is severe as the case of murder. It also sees a vital role in protecting individual rights and the application of punishment through the criminal justice as providing a remedy when restorative justice does not work. It is exemplified in cases when the victim or the offender chooses not to participate. It is also shown in cases where the offender later decides not to abide by the agreements made during the restorative justice process. So, in this sense, Braithwaite would accept some proportionate retributivism as justified as a way of dealing with the limitations of restorative justice approaches.

Braithwaite proposes a middle way between the two extremes of radicalism in his restorative justice theory. There is a similarity between both Hart and Braithwaite in terms of acknowledging the interdependence that exists between the criminal justice system and other justice systems like restorative justice. This is exemplified in their emphasis on deterrence, a forward-looking approach to crime that aims to prevent the reoccurrence of crime. It also aims to protect society from the effects of the crime.¹⁵⁰

Conclusion

In this chapter, I have shown how there are different accounts of retributivism, which depends on the question retributivism seeks to answer. Retributivism that seeks to justify the system of punishment is significantly different and independent from retributivism in distribution. Further, the crude "eye for an eye" retributivism of the old testament is very different from contemporary versions of retributivism that seek to overcome some of the weaknesses in the crude version. By distinguishing these different kinds of retributivism, it is clear that explaining how restorative justice stands in relation to retributivism is complicated. With these distinctions from Hart, I hope that I have made some headway in clarifying how Braithwaite's version of restorative

¹⁴⁹ Ibid., p.236

¹⁵⁰ Braithwaite resonates with Hart in terms of recognizing the crucial importance of deterrence in the justice system. For Hart in "punishment and responsibility", the question whether a person should be punished is a question to be answered in relation to the effects which punishment is likely to have on the offender and that in modern retributivism penalties are judged based on their ability to prevent repetition of crime by the offenders and others. For Braithwaite, deterrence involves healing of all the parties involved in a conflict. By restoring the security, by providing empowerment, social support and by restoring the harmony between parties involved in a conflict, in other to control the future recurrence and protect society from crime.

justice is opposed to some versions (like the crude version of retributivism), but not opposed to the use of proportionate retributivism as a check on the deficiencies of restorative justice processes. However, we still need to consider the criticisms of restorative justice by people like Acorn and Geeraets. By considering and responding to these criticisms, I intend to defend a modified version of Braithwaite's restorative justice theory, a version that incorporates some Kantian notions of dignity and freedom.

CHAPTER THREE

DEFENDING BRAITHWAITE'S VERSION OF RESTORATIVE JUSTICE AGAINST THE STRONGEST OBJECTIONS BY ACORN AND GEERAETS

3.0 Introduction

Vincent Geeraets, in his article, “Fictions of restorative justice” and Annalise Acorn, in her book *Compulsory Compassion: A Critique of Restorative Justice*, expressed their criticisms of restorative justice theories. There are some similarities in how they view restorative justice and what they find problematic in accounts of restorative justice processes. No doubt, Braithwaite’s story of Sam, as well as other accounts of restorative justice practice by people like Christie, becomes a focus for criticizing restorative justice. One similarity that they share in their opinions on restorative justice is their view that restorative justice practice is dominated by an emotional appeal (compulsory compassion and emotional manipulation). They also share the view that restorative justice is not based on the active or voluntary participation of the parties. Finally, both believe that restorative justice represents an unrealistic and illusory view of resolving conflicts in criminal justice; for Geeraets, restorative justice is fictitious, while Acorn argues that it has relevance as a fantasy or illusion (utopian).¹⁵¹

In the first two sections of this chapter, I will explain these criticisms by Acorn and Geeraets. In the third section of this chapter, I will provide a defense of Braithwaite’s version of restorative justice against these criticisms. I will show that restorative justice does not rely on compassion or the forced emotions of the victim and offender involved in a conflict. I will show that restorative justice necessarily requires the voluntary consent of the parties involved for a meeting to commence. In the same vein, the participation or empowerment of both parties as stakeholders in the conflict is essential. Both parties express themselves in terms of their experiences and are actively engaged in the resolution process. Employing the idea of respect for

¹⁵¹ Acorn, A.E. *Compulsory Compassion: A critique of restorative justice*. (Vancouver. UBC Press, 2004),p.9.

another's opinions through active listening naturally allows for the possibility of forgiveness and apology.

Braithwaite's idea of freedom as nondomination is important, but it needs development to address the criticisms by Acorn and Geeraets fully. I will argue that a Kantian understanding of concepts like freedom and dignity are consistent with Braithwaite's views on restorative justice and can be incorporated in such a way as to make Braithwaite's version of restorative justice more defensible. Kantian concepts of freedom and dignity emphasize our rational nature and the importance of treating others as ends in themselves. Both notions are crucial to supporting a defensible view of restorative justice that can highlight the role that reason plays in restorative justice processes, while also emphasizing the importance of respecting the dignity of all people in restorative practice. For Kant, all rational beings have inherent and absolute worth and dignity, and this dignity must be respected in all our actions. As a result, a Kantian approach to restorative justice must firmly support the voluntary choices of all people and encourage rational deliberation in all people involved. Kant does not deny that we have emotions and that emotions may help or make it more difficult to perform our duty. However, he is firmly opposed to the view that emotions determine our moral responsibility, and he would be opposed to any process that works to emotionally manipulate people to achieve certain ends (this would treat people as a mere means to these ends). I will argue that this Kantian modification on Braithwaite's views of freedom and dignity will help defend Braithwaite's version of restorative justice against criticisms by Acorn and Geeraets.

3.1 Acorn's Criticisms

Acorn reflects on why she abandoned a restorative justice approach. Acorn in her book states "in as much as I was drawn to this project of trying to find a nicer way of doing justice, as much as I tried to affect the necessary new coupling of justice and right relation, I couldn't quite do it."¹⁵² She describes her experience as an advocate for restorative justice as one which was not favorable or positive. The more Acorn sought to defend restorative justice, the more she encountered problems.

¹⁵² Acorn, Annalise E. *Compulsory Compassion: A Critique of Restorative Justice*. Vancouver: UBC Press, 2004.p.6

One of Acorn's first problems that she encountered when she was an advocate for restorative justice was the difficulty to "walk the walk."¹⁵³ Acorn argues that:

Restorative Justice seemed just fine for other people, for harms I had not suffered, but when it came to me, restorative justice was not what I wanted. I did not feel competent as an advocate for restorative justice because I doubted both my ability to repair relationships marred by wrongdoing and my commitments to doing so.¹⁵⁴

Although Acorn could 'talk the talk' of restorative justice, she found it difficult to 'walk the walk' herself. Acorn thought that restorative justice sounded right and practicable when she listened to the story of restorative justice being applied to others. But when she put herself in the shoes of victims or people that were harmed by crime and wrongdoing, she found it much more difficult to do or even to want to do. Acorn explains that if she considered cases where she was a victim, for instance, she is in doubt if she would be able to forgive wrongdoers or even want to try to forgive them.

Acorn adds another feature to her criticism of restorative justice by arguing that the practice anchors on or depends on the right relationship between (or being in right relations with) the parties involved in a conflict. Acorn explains that in our day to day lives, there are right and wrong relations or relationships.¹⁵⁵ The right ones are easy to maintain as they characterize, "spontaneous affinity, shared purpose..."¹⁵⁶ The wrong relations were "marred by resentment, bitterness, small-mindedness..."¹⁵⁷ There is also a difference between reconciliation between those we have relationships with (whether in right or wrong relations) and those that we have only relations with as a result of a crime. Acorn explains:

I was far less cheery about the possibility for recompense, reconciliation, forgiveness, and healing in the context of these than I

¹⁵³ Ibid.,p.7.

¹⁵⁴ Ibid,

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

was in the context of relations between murderers, burglars, sexual abusers, even the most heinous of war criminals and their victims.¹⁵⁸

The idea here is that even with wrong-doing that is less serious than crimes (for instance, two friends having a little quarrel), wrongdoing is not easy to forgive. How much more difficult would it be to reconcile when the relationship is problematic (like the case of domestic partners involved in an abusive relationship)? Furthermore, how can one expect forgiveness and restoration when we are dealing with assault, theft, and even murder by a stranger? Acorn believes that the rhetoric of restorative justice was evoking the fantasy of idealized harmony in the relationship between victims and perpetrators of crime before the wrongdoing. However, often the ‘relationship’ between victim and offender is purely injury-generated, and any further development of a relationship is not even remotely desired by either party, least of all by the victim.¹⁵⁹

According to Acorn, restorative justice’s appeal to harmony between both parties is not attainable or even desirable; it is an illusion. For instance, consider the case where an offender kills the child of a victim and is asked to attend a conference willingly. Even if the victim attends voluntarily, in what sense could the victim be said to seek to be in harmony with the killer of his or her child? Acorn would say that this is not a realistic expectation for any defensible response to crime. Is it even a morally acceptable thing to ask of victims that they should seek harmony with the killer of their child? She asks, “Can we in good conscience support a system that would encourage the subjection of victims to this kind of intense intimacy with those who have harmed them?”¹⁶⁰

Acorn does seem to acknowledge that restorative justice processes seem more plausible in dealing with young offenders. For example, Acorn argues that in terms of juvenile crime, “...we are more willing to see the wrongdoing of the youth as attributable to lack of maturity rather than to actual malevolence or viciousness..., and give the young every reasonable chance to redeem themselves.”¹⁶¹ Thus, when it comes to juvenile crime as opposed to adult offenders, there is a reluctance to pass punitive judgments and an openness to try restorative approaches. There is the hope that the young offender acted out of ignorance and that young people can change their ways

¹⁵⁸ Ibid., p.8.

¹⁵⁹ Ibid., p.9.

¹⁶⁰ Ibid., p.14.

¹⁶¹ Ibid., p.17.

“...through better education and socialization.”¹⁶² She further argues that “youth puts us in the optimistic mood for restorative justice.”¹⁶³

However, despite this optimism, she is also concerned that the possibility of emotional manipulation and emotional coercion is even greater in young people. Restorative justice processes need offenders to be in the right frame of mind for restorative justice to work plausibly. Acorn states:

Restorative justice is possibly the perfect solution to crime where the offenders have the capacity for serious critical self-reflection, the resources and ability to repair the damage caused, and the Bonafide desire along with sufficient self-command to behave respectfully in their relations with their victims and community in future.¹⁶⁴

Acorn is questioning whether most offenders are in this right frame of mind and whether it is reasonable to expect most offenders to have the capacity for severe critical self-reflection. Since Acorn holds that, “...at the end of the day, the primary control over the success or failure of restorative justice seems to lie in the hand of the offender,”¹⁶⁵ the chances for success for most restorative justice processes seem slim at best.

3.2 Geeraets’ Criticism of Restorative Justice

According to Geeraets, the arguments by restorative justice scholars like Braithwaite and Walgrave show that restorative justice is rooted or grounded in the foundations of harmony, respect, and empowerment.¹⁶⁶ He argues that these ideas proceed from several claims which are fictitious. But he also argues that these fictions are not merely a mistake; they serve an essential function in restorative justice practice. The point he makes is that the participants need to believe

¹⁶² Ibid.

¹⁶³ Ibid., p. 18.

¹⁶⁴ Ibid., p.19.

¹⁶⁵ Ibid.

¹⁶⁶Geeraets, V. Criminal Law and Philosophy. Springerpub.com, 2019. www.researchgate.net/publication/271741109_Fictions_of_Restorative_Justice_Vincent_Geeraets. Accessed 25th April 2020.

in these fictions for the conflict resolution process to come to a proper conclusion.¹⁶⁷ Geeraets presents the following three central claims that he unmasks as fictions:

The offender and victim in the restorative justice conference participate voluntarily, the offender and the victim take on active responsibility and that the preparatory tasks in which the parties agree are not meant to harm the offender.¹⁶⁸

Geeraets sums up these three fictitious claims under the headings of “voluntariness, active responsibility, and no infliction of harm.”¹⁶⁹ These three fictitious elements are the focus of his criticisms of restorative justice. The first point Geeraets raises is a concern that all the parties that attend restorative justice conferences should do so voluntarily. Secondly that all parties involved should be able to take ‘active responsibility’ at all stages of a restorative justice process. Finally, the resolution of restorative justice process and the agreements reached should involve no infliction of harm (or punishment) on the offender.

First, what is Geeraets’ concern about the notion of ‘voluntariness’ in restorative justice approaches? Geeraets argues that “within the ideal of restorative justice, there is an aspiration to secure the voluntary participation of the various parties, but this aspiration cannot be fully accomplished in practice.”¹⁷⁰ The point he tries to make here is that the voluntary participation argument has more grounding when it relates to the offender, and is unattainable in practice. Concerning the offender, he explains that the restorative justice conference is “akin to the example of a forced marriage.”¹⁷¹ Here, the offender mandatorily partakes in the meeting as he faces a choice of either attending a criminal justice sentencing trial or the conference. Geeraets expresses that the ability to make choices for the offender is limited.¹⁷² The two provided options make him pick the conference over the traditional system of judicial sentencing mostly because the latter entails more harsh treatment and coercion.

¹⁶⁷ Ibid., p.266.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid. p.267.

¹⁷⁰ Ibid., p.269.

¹⁷¹ Ibid.

¹⁷² Ibid.

In terms of the victim, Geeraets explains that “traditionally the role of the victim in the formal arena of the criminal law has been minimal.”¹⁷³ It means that the victim (in practice) cannot decide whether the offender should be prosecuted, let alone be convicted. Traditionally, the victim also has little influence over the sentencing, except to provide victim impact statements. By rightly quoting Christie, he also argues that “he is not the owner of the conflict.”¹⁷⁴ Geeraets agrees that for restorative justice practice to be right, the participation of the victim is necessary.¹⁷⁵ Geeraets’ view is such that with restorative justice as an alternative, the “picture is fictitious.”¹⁷⁶ Both victim and offender are forced directly or indirectly to participate in a “positive and reasonable manner.”¹⁷⁷ He gives an example of a young offender. The point for him is that the facilitator can easily convince a person in such cases because it is easier to manipulate a young person to make certain decisions.

Second, what is Geeraets’ concern about the notion of ‘active responsibility’ in restorative justice accounts? On his active responsibility argument, Geeraets explains that participants in the conference are depicted in restorative justice conferences as stakeholders because they are considered to be in control of the restorative justice process and can determine its outcome.¹⁷⁸ The point here is that restorative justice processes are geared towards the feature of empowerment as it relates to the parties involved. The victim and offender are said to be in active control of the process. It means that “...the restorative justice conference invites the parties to behave like virtuous agents...virtue in this context entails a willingness to participate in the conference, to be proactive and positive, and to attempt to reach an agreement that is both reasonable and just.”¹⁷⁹

It is in this context that Geeraets refers to the “fictional example provided by Braithwaite.”¹⁸⁰ Geeraets rightly explains that for the offender, Sam to be actively responsible, “...it will ideally have been his choice to participate, to apologize and to make reparations, which entail him having sufficient scope in which to operate independently.”¹⁸¹ The point is that Sam did

¹⁷³ Ibid., p.270.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid., p.271.

¹⁷⁹ Ibid., p.272.

¹⁸⁰ See Eugene McLaughlin, Ross Fergusson, Gordon Hughes and Louise Westmorland (eds). “*Restorative Justice, Critical Issues*”. (Sage Publications, 2003) pp.54-55.

¹⁸¹ Geeraets, V. Criminal Law and Philosophy. Springerpub.com, 2019. www.researchgate.net/publication/271741109_Fictions_of_Restorative_Justice_Vincent_Geeraets. Accessed 25th April 2020, p.273.

not have to succumb to the emotional appeal of his sister to participate in the conference. One can say Sam's choice is based on his free choice of action; only without this emotional coercion would Sam be actively responsible for his choice of being engaged in the conference. Geeraets argues that the offender, Sam, is brought into "a state of vulnerability so that his choice to apologize and his agreement to make reparations seem genuine."¹⁸² In other words, Sam is not an autonomous agent since he was convinced and coerced emotionally by his sister.

As stated earlier in the first chapter, there are two ways of interpreting the appeal to emotion as it relates to Sam in this case. Firstly, the appeal to emotion can be based on mere manipulation. In such a scenario, emotion is devoid of one's application of reason. This is because emotion devoid of reason does not portray one as an individual actively involved in making informed decisions. My concern lies in emotion as a mere tool of manipulation. On the other hand, emotional responses backed up by reason helps one to be more rational. For instance in the case of Sam, the emotional response from his sister could result in a spur of guilt in Sam. This awakens his ability to see that his actions were wrong. Not wanting to be such a person, he is aided by this emotion to see how to act better in the future.

Further, this depiction of a restorative justice process implied that this emotional vulnerability is necessary for a genuine apology and agreement to occur. On the part of the victim, Geeraets explains that the emotional exchange also coerced Sam into connecting with his sister. However, this also undermines Sam's active responsibility in his choice to connect with his sister.

Third, and finally, what is Geeraets concern about the notion of not inflicting harm in restorative justice accounts? Geeraets explains that restorative scholars generally state that "...these tasks should not be understood in terms of intentional infliction of harm. Reparation, therefore, is not punishment."¹⁸³ In other words, most scholars of restorative justice hold that the tasks undertaken by the offender should not be viewed as punishment, but instead should be viewed as restorative. Geeraets argues that since it is compulsory to partake in the conference, then the reparatory task constitutes harm.¹⁸⁴ For Geeraets, the offender is being harmed because either party do not determine participation in the conference to a conflict and so the reparatory tasks

¹⁸² Ibid.

¹⁸³ Ibid.,p.275.

¹⁸⁴ Ibid.

provided to the offender is the harm in itself. Geeraets' argument is that the making of a distinction between intentional infliction of punishment and the deliberate infliction of a reparative or restorative task is overly subtle. If there is a distinction, it is questionable whether it is morally relevant. Consequently, the claim that restorative justice can proceed without inflicting harm or punishment is fiction. I disagree with this view because as an equally rational being, the offender's decision is as a result of free choice and not manipulation, as Geeraets proposes. I will challenge this view that Geeraet presents in the next subchapter.

3.3 Defending Braithwaite's Version against Geeraets and Acorn's Criticisms With a Kantian Modification of Dignity and Freedom

Even though Immanuel Kant is explicitly a retributivist, I will argue that the Kantian concepts of dignity and freedom are helpful in explaining and defending the idea of restorative justice. The importance of the concept of freedom as it relates to human dignity is helpful in understanding the philosophical grounds for restorative justice and for defending Braithwaite's version of restorative justice against the main criticisms by Acorn and Geeraets.

According to Kant,

[Punishment by a court] must always be inflicted upon [the criminal] only because he has committed a crime...He must previously have been found punishable (*strafbar*) before any thought can be given to drawing from his punishment something of use for himself or his fellow citizens.¹⁸⁵

As we saw in section 2.2 of my thesis, Kant can be interpreted as a crude retributivist. He holds the view that offenders are punished not for any consequence, such as deterring future crimes or to reform the criminal but rather for the sake of punishing because punishment is right in itself. It is derivable from Kant's view that anyone who does that which is wrong deserves to suffer.¹⁸⁶ Interestingly, Kant holds the view that punishing those who break the law is not just allowable but

¹⁸⁵ Kant, I. *Metaphysics of Morals*. M.J Gregor, Trans. New-York: (Cambridge University Press, 1996),pp. 140-1;331-2.

¹⁸⁶ Mark Tunick. "Is Kant a retributivist? History of political thought, Vol 17, No.1 (Published by: Imprint Academic Ltd. Spring 1996),pp.60-78.<https://www.jstor.org/stable/26217122>. Accessed:26-04-2020.

morally required. However, these views are expressed as part of Kant's political position, which assumes a social contract approach to matters of justice. Kant's ethical views can be interpreted independently of his explicit views on punishment and retribution.

Kant, in his ethics, explains that for an action to be morally worthy, it must be done from respect for the moral law. The moral law is rational, capable of being conceived and willed by rational beings. A rational human being is, for Kant, a being capable of acting and willing universal laws. In this way, a rational being is an autonomous or free being. According to Kant,

The will is thought of as a faculty of determining itself to act following the representation of certain laws, as such a faculty can be found only in rational beings and that only a rational being has the power to act according to his conception of laws, i.e., according to principles and thereby he has a will. Since the derivation of actions from laws requires a reason, the will is nothing but practical reason, and the will is a faculty of choosing only that which reason, independently of inclination, recognizes as being practically necessary, i.e., as good.¹⁸⁷

In this quotation, Kant explains how our choice in terms of actions works. He explains that a rational being has the power to act based on his conception of what is right or wrong. Our ability to employ reason practically enables us to originate from our actions from within ourselves. We dictate the rules of behavior for ourselves, and we should never treat ourselves or others as a mere means to achieve some result.

Kant holds the view that "Autonomy is the property of the will by which it is a law to itself independently of any property of the objects of the violation."¹⁸⁸ He is expressing the idea that autonomy is self-law giving and is possessed by the rational being who has the free will to make his own choices devoid of any external influence. Moral freedom "entails the capacity to give oneself the moral law, rather than merely heeding to the injunction of others."¹⁸⁹ The point here is that rationality is that which enables a person to be an autonomous moral agent; in situations where autonomy does not function as an ideal, agents who do not meet specific criteria of being rational

¹⁸⁷ Kant, I. *Metaphysics of Morals*. M.J Gregor, Trans. New-York: (Cambridge University Press, 1996), p.127.

¹⁸⁸ *Ibid.*, p.440.

¹⁸⁹ Jane Dryden, "Autonomy", *Internet encyclopedia of Philosophy*. <https://www.iep.utm.edu/autonomy/>

are not autonomous. For instance, people with a significant cognitive disability or little children who cannot think clearly, make decisions, and act autonomously are not rational beings. Kant expresses that “moral autonomy entails having authority over one’s actions rather than letting the principles by which we make others determine our decisions.”¹⁹⁰ In Kant’s essay on enlightenment, he describes enlightenment as the human beings’ emergence from his self-incurred immaturity.

Kant views dignity (*Wurde*) as an end in itself. This concept of dignity for Kant involves “A two-level model of being an end in itself.”¹⁹¹ In the first sense, dignity means that every human has intrinsic value because every human being has goodwill and, therefore, the capacity to be moral. Because of this, every human being is an end in itself and has to be respected. Thus, Kant’s view is that every human being has dignity and that dignity ought to be acknowledged in all our actions. In the second sense, Kant talks about the dignity of “the way of thinking.”¹⁹² In this same regard, Kant often explains that humans are superior to animals because of the quality they possess that entails a particular “absolute value.”¹⁹³ Thus, if we accept a Kantian approach to respecting the dignity of all people within a restorative justice process, then we must oppose the appeal to mere emotions as a way of compelling agreements or even apologies.

If we understand Braithwaite’s appeal to dignity and freedom in restorative justice processes as involving these Kantian notions, then I believe that we can have a view of restorative justice that can better emphasize the role that emotion, backed up by reason, plays within restorative justice processes and the importance of voluntary choice for all participants. Although Kant believed that emotions should be cultivated in such a way that can help us perform our moral duty (rather than cultivating emotions that hinder us), emotions do not determine our moral duty. Thus, if we accept a Kantian approach to respecting the dignity of all people within a restorative justice process, then we must oppose the appeal to mere emotion as a way of compelling agreements or even apologies. Further, we should encourage participants to rationally deliberate about their actions and what they ought to do; only by acting for the right reasons can people behave morally. Finally, we should firmly maintain that voluntary participation in the process is necessary. Any account of restorative justice that forces offenders into participating in restorative

¹⁹⁰ Ibid.

¹⁹¹ Schonecker, D. Schmidt, E. *Kant’s Ground thesis on Dignity and Value* in the Ground work. Value inquiry .pp. 81-95. <https://doi.org/10.1007/S10790-0179603-z>

¹⁹² Kant, I. *Metaphysics of Morals*. M.J Gregor, Trans. New-York: (Cambridge University Press, 1996),p.439.

¹⁹³ Schonecker, D. Schmidt, E. *Kant’s Ground thesis on Dignity and Value* in the Ground work. Value inquiry .pp. 81-95. <https://doi.org/10.1007/S10790-0179603-z>

justice processes (like that of Christie's account) undermines the values that are central to restorative justice, values that respect the dignity and freedom of all people.

How can this Kantian modification of Braithwaite's version of restorative justice help respond to criticisms by Geeraets and Acorn? I will group Geeraets and Acorn's criticisms into three main parts. First, I will respond to the criticisms challenging the voluntary nature of participation in restorative justice processes. Second, I will respond to criticisms regarding the role of emotions (i.e., the claim that the victims and offenders in restorative justice processes are emotionally manipulated or coerced). Third, I will respond to the criticism that restorative justice processes are over-idealized or illusory. These are the common points shared by both critiques.

First, in terms of voluntary consent in Restorative justice conferences, there is the view that "restorative processes should be used only with the free and voluntary consent of the parties. The parties should be able to withdraw such consent at any time during the process. Agreements should be arrived at voluntarily by the parties..."¹⁹⁴ Geeraets argues that "within the ideal of restorative justice, there is an aspiration to secure the voluntary participation of the various parties, but that this aspiration cannot be fully accomplished in practice."¹⁹⁵ Geeraets explains that the offender is left to choose between the criminal law system or the restorative justice conference. For him, it is easier for the offender to go for the conference since the criminal justice system is coercive. He also expresses that restorative justice exerts pressure on the victim to participate positively and reasonably; as a result, restorative justice is fictitious.¹⁹⁶ Acorn holds a similar view that offenders feel forced to participate in restorative justice practices, while victims are forced to confront those that have victimized them.

In response to this first criticism, I would argue that only a radical version of restorative justice, a version that calls for the complete replacement of the Western criminal legal system with restorative justice would 'force' all offenders and victims into participating in a restorative justice process. Since Braithwaite's version does provide a system that includes both kinds of processes, there is no need to force either the offender or the victim into a restorative justice process. Further, just because the choice for an offender is limited between two options does not mean that the offender lacks free choice. All choices that we face in life are limited. The limitations of options

¹⁹⁴Geeraets, V. Criminal Law and Philosophy. Springerpub.com, 2019. www.researchgate.net/publication/271741109_Fictions_of_Restorative_Justice_Vincent_Geeraets. Accessed 25th April 2020

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

for our choices do not undermine our ability to choose freely. Finally, although, restorative justice practices often lead victims to sympathize with offenders, no responsible advocate of restorative justice requires forgiveness from the victim as a necessary part of restorative justice. A coerced or mandatory “compassion” or “forgiveness” undermines the genuine nature of compassion and forgiveness. Thus, Braithwaite explains that

Virtual, yet subsidiary restorative justice values like forgiveness and apology are not values we actively seek people to manifest in the way we do seek to actively persuade respectful listening. Forgiveness and apology are gifts; that only have meaning and power if they are freely chosen by those who give them in response to an injustice yet the theory of restorative justice is that by creating safe spaces where people listen respectfully to the stories of others about the injustices they believe they have suffered, forgiveness and apology are more likely to issue.¹⁹⁷

The point here is that active listening and communication by both parties would naturally result in both parties showing sympathy for each other. The victim and offender, through respectful and effective listening and respect for each other's dignity, can make their choices independently of how they might be feeling. This act of active listening is supported by what Braithwaite calls freedom non-domination.¹⁹⁸ Here the parties involved in a crime are heard without any of their voices being dominated and have their views respected in terms of their narration of how crime made them feel and what is to be done to heal the hurt. This restorative justice element reinstates Kant's view on human dignity, which states that humans have dignity and that dignity should be respected.

In terms of the second kind of criticism, pertaining to the potentially coercive or manipulative role of emotions in restorative justice processes, I would argue that this criticism is based upon the problematic story of Sam given by Braithwaite (see section 1.3). As I did in my earlier analysis of this story, I would like to point out first that the example presented by Braithwaite does not portray restorative justice in its strongest light. This is because, in order to

¹⁹⁷ Braithwaite, J. *Crime, Shame and Reintegration*, Cambridge, Cambridge University Press. 1995.

¹⁹⁸ Braithwaite, J. “*Restorative justice and a better future*”, in Eugene McLaughlin et al. (Sage Publications, 2003)

be effective, the restorative justice process must be voluntary and not compulsory. With a Kantian understanding of Braithwaite's views on freedom and dignity, I can maintain that restorative justice processes ought to emphasize that human beings are rational beings who possess the ability to make decisions and choose their mode of actions. I believe even in the story of Sam, who happens to be a teenager, he could have employed his rationality to choose whether to engage in the conference.

Consequently, Sam could have been responsible for his offense and could reach an agreement with the victim. His decisions need not be compelled or invoked by emotions. Sam could have recognized reasons to be engaged in the conference after engaging his thought process. One does not need to be brought into a state of emotional vulnerability to rationally deliberate and to make decisions. The point is that in restorative justice, the parties involved in a conflict are autonomous persons who own the conflict and can reach an agreement based on reason; it does not necessarily have to involve the mere emotions on the part of either party.

This is not to deny that emotions are a part of restorative justice processes. They undeniably will be a part of the restorative justice process because emotions are an undeniable part of human life. And when it comes to cases of crime, where someone has been seriously harmed, often conflicting and intense emotions will undoubtedly arise. The presence of strong emotions will be a part of any process dealing with responses to crime. However, restorative justice acknowledges these strong emotions and provides ways to deal with them. A young person who is robbed on the street and a young offender who is arrested for stealing in a bank will feel all sorts of emotions (sadness, anger, resentment, shame, etc.). Managing these strong feelings, especially feelings of shame and powerlessness, are part of the concerns of a restorative justice process. But when emotions are recognized and managed, they can help us in doing what is right. In this way, reason and emotion can work hand in hand to help people come to the right decision. The mere presence of emotions does not make one's choices or decisions less autonomous; the important thing is not to let emotions alone dictate your decisions.

The third and final criticism by Acorn and Geeraets deals with the overly idealized or illusory nature of restorative justice processes. On Acorn's view of restorative justice practice anchored on the idealized harmony of right relations between victim and offenders of crime. She explains that "the seductive vision of restorative justice is: right relation, Reciprocity, Healing, and

repair.”¹⁹⁹ For Geeraets, “...the restorative justice conference invites the parties to behave like virtuous agents...virtue in this context entails a willingness to participate in the conference, to be proactive and positive, and to attempt to reach an agreement that is both reasonable and just.”²⁰⁰ Both Acorn and Geeraets see a highly idealized process involved in restorative justice, expecting all participants to be capable of morally exemplary behavior. Is restorative justice expecting far too much from offenders and victims of crime? How realistic are the goals of restorative justice?

Like any other theory, some overly enthusiastic scholars make unrealistic claims about restorative justice practice. Sometimes they make excessive claims that result in false expectations: With this in mind, it is easy to understand a cynical response to restorative justice.²⁰¹ The point is that restorative justice practice, like any other theory of justice, is prone to theoretical illusions. As Braithwaite rightly points out that some restorative justice advocates do not even believe that restorative justice is merely an improvement; they think their program is perfect.²⁰² The idea of advocating for a theory by describing it as ideal, or as processes without flaws and a high level of success is very tempting. But this temptation should be avoided since it makes restorative justice easy to ridicule and criticize. Restorative justice should be described with all its flaws and limitations. All responses to crime, whether we are talking about proposals made by proportionate retributivists or restorative justice advocates, will have weaknesses and limitations.

Further, since any response to crime takes place in a social context, the problems with society have an impact on any proposed process for dealing with crimes. In other words, there are social justice issues that affect the restorative justice practice as they would impact on any other practice. Restorative justice practice should not be characterized as a process devoid of dishonesty, greed, and discrimination (racism, sexism, or colonialism). All the biases that are found within society at large may be a part of any process within society, and work must be done to ensure that justice is done within the restorative justice process. To his credit, Braithwaite acknowledges many of the limitations of restorative justice processes (especially more so than Christie). He also is more aware of the limitations of restorative justice, especially when it comes to dealing with social injustice.

¹⁹⁹ Acorn, Annalise E. *Compulsory Compassion: A Critique of Restorative Justice*. Vancouver: UBC Press, 2004,p.9.

²⁰⁰ Geeraets, V. Criminal Law and Philosophy. Springerpub.com, 2019. www.researchgate.net/publication/271741109_Fictions_of_Restorative_Justice_Vincent_Geeraets. Accessed 25th April 2020

²⁰¹ Braithwaite, *Restorative justice and a better future*”, in Eugene McLaughlin et al. (Sage Publications, 2003)

²⁰¹ Ibid.

²⁰² Ibid.

In an article dealing specifically with restorative justice and social injustice, Braithwaite writes, "...restorative justice cannot resolve the deep structural injustices that cause problems...but we must demand two things here. First, it must not make structural injustice worse. Second, "restorative justice should restore harmony with a remedy grounded in dialogue which takes account of underlying injustices"²⁰³ Thus, Braithwaite is acknowledging that restorative justice cannot solve the deep structural injustices (like the growing gap between the wealthy and the poor, systemic racism and sexism, and colonialism). But it can try not to make things worse in this regard.

For example, restorative justice processes must be aware of these power dynamics and biases within its operations, and not let restorative justice processes be used to widen the gap between the wealthy and the poor or between the white majority and visible minorities. Braithwaite also believes that restorative justice can contribute to a part of the issue of social injustice by advocating for alternative resolutions besides incarceration for responses to crime. Since visible minorities and indigenous people are disproportionately incarcerated in places like Canada, restorative justice practices have the potential to address a part of this problem by supporting an approach that seeks alternative kinds of responses to crime than imprisonment. But Braithwaite adds that by promoting the discussion of crime within the community and community groups (like schools or churches), Braithwaite sees the potential of promoting dialogue about social injustice within the community. Again, restorative justice processes cannot be expected to solve all that is wrong with society and should not be represented as if it can; however, restorative justice has the potential to provide some indirect forms of support for those fighting social injustice.

Interestingly, Acorn and Geeraets give examples using young offenders to show that they can be more easily emotionally manipulated to participate and arrive at an agreement at a conference. Geeraets expresses:

If, for example, the offender is a minor, the facilitator can appeal, implicit or otherwise, to the victim that it is his social duty to help young

²⁰³ Ibid.,p.57.

people. The victim may also be that it is in his best interest to attend the conference.²⁰⁴

Acorn, in the same vein, argues:

We are more willing to see the Wrongdoing of the youth as attributable to lack of maturity rather than to actual malevolence or viciousness of the juvenile criminal whose life stretches out before him. We are reluctant to abandon hope either for the possibility of spontaneous change of young offender's ways or for their improvement through better education and socialization. To presume that a youthful offender does not deserve a chance to make amends seems culpably cynical just as it seems culpably naive to give adult offenders the benefits of the same set of doubts.²⁰⁵

Acorn is right in her view that “the youth puts us in the optimistic mood necessary for restorative justice.”²⁰⁶ So, on the one hand, it seems that the age of young people makes one feel more optimistic about the effectiveness and use of restorative justice processes. On the other hand, it appears that the age of young people can also be a source of problems for restorative justice since one could argue that young people are more easily manipulated or more prone to emotional “vulnerability” as Geeraets puts it. However, I would argue that youth does not make young offenders any less rational, easily deceived, or unable to make decisions. After all, the act of committing the crime was based on free choice. There was the option to do or not to do it, and young offenders are still considered responsible for their actions. If so, they also can be accountable for their decisions and choices in restorative justice conferences. They may have strong emotions, but this does not mean that emotions must rule them. This process aims to cultivate circles of support around offenders and victims.

In as much as young people should be held accountable for the crimes they commit, they are still in their developing years and are most likely to make mistakes than adult offenders. Most of these young adults are still in the care of a guardian or parent. As such, it makes it easier to

²⁰⁴ Geeraets, V. Criminal Law and Philosophy. Springerpub.com, 2019. www.researchgate.net/publication/271741109_Fictions_of_Restorative_Justice_Vincent_Geeraets

²⁰⁵ Acorn, Annalise E. *Compulsory Compassion: A Critique of Restorative Justice*. Vancouver: UBC Press, 2004,

²⁰⁶ *Ibid.*, p.17

restore such people who can even be supported by the parent and family, based on an agreement reached in the conference. In the early learning stage of a person, it is easier to assist a person in desisting from wrong ways of doing things than when the person gets older. Young offenders are less likely to commit crimes that require punitive treatment by the criminal justice system.

CONCLUSION

In this thesis, I have explained the difference between Christie's radical versions of restorative justice in comparison to that of Braithwaite. I have shown that Braithwaite's more moderate version, one which acknowledges a role for some aspects of the criminal legal system, represents a better picture of restorative justice practice. However, Braithwaite's version of restorative justice has two main kinds of deficiencies that require remedy.

First, Braithwaite's version of restorative justice does not fully explain its opposition to "retributivism" since it fails to acknowledge different kinds or senses of what retributivism entails. Thus, in this thesis, I appealed to Hart's account of the different kinds of retributivism to provide a sense of how Braithwaite's version of restorative justice is, no doubt, opposed to crude retributivism, but has a role of a modified version of proportionate retributivism in distribution to act as a check on restorative processes. I have also shown that Braithwaite is opposed to all versions of retributivism conceived as a justification of the general justifying aim of the system, but not completely opposed to a modified version of proportionate retributivism in distribution.

Second, Braithwaite's story of Sam provides a distorted view of restorative justice practice and makes it more easily subject to criticisms by Acorn and Geeraets. However, with a Kantian understanding of dignity and freedom, I defended the criticism of restorative justice being an overly idealistic theory grounded in emotional appeal. Thus, I am advocating the Kantian modification of Braithwaite's view on freedom (as nondomination) and dignity, and, hence, a Kantian modification of Braithwaite's version of restorative justice. I have shown that rational beings are responsible for the choices they make and this enables them to carry out their choice of action freely through reason and not based solely on emotional appeal per se. Also, emotions cannot fully be taken out of the picture because healing, hurt, justice, and restoration are concepts of restorative justice practices that directly or indirectly entail emotional responses; the same applies in the criminal justice system.

Importantly, there are still questions that require answers but are beyond the scope of this study. Restorative justice scholars, including Braithwaite, do not adequately explain punishment and its application in restorative justice practice. As we saw in Chapter 2 of this thesis, it is difficult to characterize punishment in a value-neutral or morally neutral fashion. As a result, restorative justice proponents cannot easily answer the question of whether restorative justice practice is

opposed to punishments or opposed to punitive responses to crime unless it can first explain what is meant by punishment.

There are also issues involving the criticisms of restorative justice as it relates to social justice issues that have not been adequately pursued in this thesis. Social injustice and crime are connected in many troubling ways, and so is social injustice and responses to crime. The biases and discriminations facing historically disadvantaged groups within our society also impact on responses to crime, including restorative justice processes. Braithwaite was explicitly aware of this possibility, and thus he emphasized a notion of freedom as non-domination involving respectful listening, as well as the importance of respecting diversity in organizing restorative justice processes. Although he argued that awareness of the larger power dynamics within society is crucial for the organization of restorative justice processes, eliminating biases and discrimination is easier said than done. The actual extent to which restorative justice processes have or have not addressed the biases and discriminations common within society is an important empirical question that needs to be addressed. It is my hope that the arguments in this thesis will provide some of the theoretical framework needed before considering these important empirical questions.

Finally, there was much discussion in Christie and Braithwaite on the role of community. To adequately pursue this topic would take me far beyond the scope of this thesis. However, this is not to say that this topic is not important. The fragmentation of modern society and the undermining of social groups like the family, churches, and other social groups is a concern and a concern related to crime. How restorative justice can contribute to a restoration of communities requires careful consideration of the nature of the community and its value, as well as connected considerations of the nature of family and other social groups. Humans are not only individuals but also social beings that need a sense of belonging. They are members of a relational network that can be extended into a family, which is the bedrock of society. I believe that a community-powered view of restorative justice, one that also acknowledges the importance of the strong supports of families, would produce less delinquent children. I believe that the family is the bedrock of every kind of society that exists today. However, more research is needed for me to support these claims.

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