The Three Rs: Retribution, Revenge, and Reparation

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Abstract: Nearly all retributive theories of punishment adopt the following model. Punishments are justified when the wrongdoers receive the punishment they deserve. A deserved punishment is one that is proportionate to the offender’s culpability. Culpability has two components: (1) the severity of the wrong, and (2) the offender's blameworthiness. The broader aim of this article is to outline an alternative retributivist model that directly involves the victim in the determination of the appropriate and just punishment. The narrower aim is to show that the methodology employed by Michael Moore (1997) in support of the standard retributive model in fact better supports this alternative model. Moore himself explicitly rejects the idea that victims can play a role in determining just punishments, because this would entail assigning different punishments to equally culpable offenders. When properly applied, however, Moore’s method for justifying retributivism results in an approach that directly involves the victim in the punishment process.

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1 The Standard Retributive Model

On a popular reddit website called “Justice Porn,” members can post videos of people getting their just-deserts. The site describes itself as “[a] place to see bullies getting their comeuppance” and indeed the most popular videos feature bullies getting beaten up by their intended victims. These videos have several features that make them especially satisfying. First, the bully suffers the same treatment that he (or very occasionally she) was intending to inflict. So their suffering is proportionate to the harm they intended to cause and have almost certainly caused in the past. Second, the bullies also learn how it feels to be one of their victims, and can
learn their lesson, maybe even be “morally educated” as a result. Third, we get to watch victims stand up to their tormenter. We see the victims exhibit courage. We watch them gain self-respect, the respect of onlookers and (in some cases) even the bully in the process. Any one of these features can arouse our justice intuitions but when you put them all together, you get what is aptly described as justice porn.

The first and second feature are captured by existing retributive theories of punishment, but the third is not. This is because nearly all retributive theories conform to what I’ll call the standard model. On the standard model, punishments are justified when the wrongdoers receive the punishment they deserve. A deserved punishment is one that is proportionate to the offender’s culpability. And culpability has two components: (1) the severity of the wrong, and (2) the offender's blameworthiness. So for example, imagine that Joshua commits an act of armed robbery and assault. According to the standard model, his deserved punishment would take into account (a) the severity of the crime (were his victims harmed, how much money did Josh steal, what kind of weapon did he use) and (b) the offender's blameworthiness (his state of mind, circumstances, and other agentic factors). The victims’ attitudes, desires, and behavior are considered irrelevant, except insofar as they provide information about either (a) or (b). For this reason, the standard model cannot capture the third aspect of our feelings about justice, which places the victim at center stage.

This paper attempts to accomplish two things. The broader aim is to defend an alternative model that incorporates retributive ideas but also involves the victim in the determination of the appropriate and just punishment. This model has a lot in common with what Moore calls “corrective models” and what is often referred to today as “restorative justice.” The narrower aim is to show that the methodology employed by Michael Moore (1997) in support of the
standard retributive model in fact better supports my alternative model. Moore himself explicitly rejects the idea that victims can play a role in determining just punishments, because this would entail assigning different punishments to equally culpable offenders. As I will show, however, his method for justifying retributivism yields a theory that directly involves the victim in the punishment process.

2. Moore's Way of Justifying Retributivism

The challenge for retributivists is to explain why offenders deserve to suffer when the punishment has no benefit to overall well-being. Rationalist justifications for retributive punishment have met with little success. Moore’s remark about utilitarian justifications—“bad reasons for what we believe on instinct anyway” (1997, p. 99)—is even more true of the rationalist accounts of Kant, Hegel, and more recently Herbert Morris. Moore chooses a more promising approach for justifying retributivism: an inference to the best explanation argument. According to Moore, the retributivist principle--the principle that offenders ought to suffer for wrongdoing in proportion to their culpability—best accounts for our particular judgments about cases of wrongdoing. Unlike his rationalist counterparts, Moore does not find the emotional nature of our retributive judgments to be a problem. On the contrary, Moore regards our emotions as fallible but necessary guides for identifying moral truth. He writes:

We need our emotions to know about the injustice of racial discrimination, the unfairness of depriving another of a favorite possession, the immorality of punishing the

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1 For the purposes of this paper, I will simply assume that these rationalist versions of retributivism have failed. For an excellent overview and critique see Burgh (1982)
innocent...emotions are our main heuristic guide to finding out what is morally right."

(pp. 115-116)

Critics are often tempted to dismiss Moore’s way of defending retributivism because of his commitment to an implausible form of metaethical objectivism. Although I share their skepticism about Moore’s metaethics, I believe that we must still reckon with Moore’s arguments. The reason is that Moore’s approach, lightly revised, is compatible with a variety of more plausible metaethical views. Although Moore himself rejects a sentimentalist or constructivist account of moral judgment, his approach lends itself easily to these views because of its focus on the emotional basis of our retributive judgments. In this section, I’ll defend describe Moore’s methodological defense of retributivism and defend it from an evolutionary debunking argument that has been leveled against it. The debunking objection, I’ll argue, is only successful if we couple Moore’s approach with his robust metaethical objectivism. If we reject his objectivism (as we should), Moore’s methodology is no longer vulnerable to this objection.

Philosophers since Plato have taken a skeptical view of our emotions as guides to moral truth. More recently, opponents have appealed to evolutionary theory to show that our emotions are unreliable.² The challenge can be sketched as follows. Evidence from evolutionary biology suggests that retributive emotions were selected for because they motivated behavior in our hominid ancestors that made cooperation and social coordination possible. These emotions lead us to make retributive judgments (as Moore himself concedes), and so we have no legitimate grounds for thinking these judgments true. As Peter Singer writes: “there is little point in constructing a moral theory designed to match considered moral judgments that themselves stem

from our evolved responses to situations in which we and our ancestors lived during our period of evolution...” (Singer, 2005, p. 348)

Moore addresses an earlier version of this objection developed by J.L. Mackie:3

There is undoubtedly much truth in Mackie's explanation of our retributive reactions to culpable wrongdoing. Yet as thus far stated there is nothing in Mackie's explanation that excludes an explanatory role for an objective moral property of desert. After all, a good survival-related evolutionary explanation can be given for our belief in the physical sciences, yet such explanation of those beliefs does not exclude a supplemental explanation in terms of the reality of physical objects and their properties. (Moore, 1997, p. 178)

Moore's point here is that having an explanation for why we have a belief does nothing to impugn the truth of that belief. "Genetic explanations of belief as such do not compete with realist explanations," Moore writes, "Indeed, we give the thought that they do compete a special name, the genetic fallacy." (Moore, 1992, p. 2513)

Moore is right that the mere fact that a class of judgments is the result of evolutionary processes does not establish that the judgments are false or implausible. But the challenge does not rely on this mere fact. The crucial question is whether the judgments or beliefs would have been adaptive even if they were not tracking the truth. Most of our perceptual judgments, for example, would have had little adaptive value if they were not accurate reflections of our environment. There are few fitness advantages to perceiving the physical world inaccurately, and plenty of fitness costs. By contrast, the importance of our retributive emotions for

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3 See Mackie (1982)
motivating cooperative behavior suggests that we would have these dispositions whether or not they were accurate reflections of moral reality. So although both moral and perceptual judgments are both the result of evolutionary processes, we have more reason to trust our perceptual judgments as accurate. As Street (2006) among others points out, it would be an unlikely coincidence if moral reality happened to reflect what it was adaptive for our ancestors to feel and believe. To see this, imagine (for the sake of argument) that utilitarians have the morally correct view of punishment, and punishment is unjustified unless it leads to a net benefit in utility. If this were our moral reality, our emotions would be systematically misleading us about its nature. Because of the adaptive value of retributive feelings, we would still have evolved them and arrived at the corresponding particular judgments.

So the evolutionary challenge does seem to raise doubts about Moore’s moral epistemology, because there is no reliable connection between true moral judgments and adaptive attitudes and emotions. As Richard Joyce writes:

I contend that on no epistemological theory worth its salt should the justificatory status of a belief remain unaffected by the discovery of an empirically supported theory that provides a complete explanation of why we have that belief while nowhere presupposing its truth (Joyce 2006, 219)

Moore resists an easy (and in my view plausible) way out of this challenge which is to embrace a form of constructivism about morality. If our emotions, practices, and norms constitute, at least in part, the truth of our judgments, then the evolutionary challenge loses its force. Once we abandon the idea that there is a moral reality independent of our emotions, we can no longer dismiss our retributive judgments that arise from our emotions.
It may be helpful to consider an analogous judgment produced by feelings: for example, my judgment that I love my daughter Eliza. If am asked to justify the belief, I would point to my deep feelings of affection and attachment for her. Now imagine that Richard Joyce challenged the truth of my judgment by appealing to the evolutionary advantages of loving your offspring. Joyce might point out that according to most kin selection theories, I would have these feelings of affection and attachment whether or not I truly loved her. So we have a complete explanation for my judgment that does not presuppose its truth. Therefore, my judgment about loving Eliza is unreliable. This debunking strategy would be completely misguided. Why? Because it misunderstands the nature of our beliefs and judgments about love. Our feelings of attachment and affection constitute the truth of our beliefs about love. The evolutionary history of such feelings is irrelevant.

Moore, of course, cannot avail himself of this reply because of his objectivist commitments. Instead, he offers a way of distinguishing between emotions that lead to reliable judgments, and emotions that distort our judgments. Moore agrees that not every emotion offers genuine epistemic insight into moral reality; it is only the virtuous emotions that offer this insight. It might well be that we have evolved emotions that motivate racist judgments. But we reject these judgments not because they are evolved, but because they are not virtuous. By evaluating the virtuousness of an emotion, Moore claims, we can determine whether it is an accurate reflection of moral reality. But this reply only pushes the problem back one step. For we have to consider why we regard some emotions as virtuous and others as non-virtuous. When we do, we’ll find that the norms that we use to distinguish virtuous emotions from vicious emotions are the result of the same evolutionary processes that produce our emotional
dispositions. We do not seem to be able to step outside our evolved moral psychology in order to evaluate how well it reflects an independent moral reality.

For those of us who are not wed to the idea of an independent moral reality, however, Moore’s distinction can be helpful. A crude (yet common) objection to Humean sentimentalism is that it amounts to an “anything goes” account of morality. Armed with Moore’s distinction between virtuous and non-virtuous emotions, we can subject our emotions and attitudes to critical scrutiny while at the same time recognizing that they are an essential basis for grounding our moral judgments. To be clear: my overarching argument against Moore’s form of retributivism will still apply if we accept his objectivist commitments. My goal in this section was only to show that we cannot dismiss his approach on these grounds. There will be readers who reject the idea of the emotions can justify our retributive judgments no matter what metaethical view one adopts. For those people, this paper will only serve only the narrow aim of showing that anyone who does employ the methodology should arrive at a theory of punishment that involves the victim in the sentencing process.

3. Are the Retributive Emotions Virtuous?

Although he rejects the argument of the evolutionary debunkers, Moore concedes that the most serious objection to retributivism lies in its emotional basis. For the objection to pose a real challenge, however, it must do more than point out the emotional origins of our retributive judgments. Rather, it must try to discredit the judgments due to the non-virtuousness of the

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4 One anonymous referee for this paper appears to be in this category, distrusting any theory of punishment that appeals to intuitions and feelings for support. Elsewhere (Sommers 2012) I have argued that virtually all theories of moral responsibility and desert appeal to intuition for justification whether they admit it or not.
emotions that cause them. By Moore’s own lights, if the emotions that cause our retributivist judgments are pathological or non-virtuous, then we no longer have reason to think them reliable. Moore, then, devotes the heart of his argument to defending the virtuousness of retributive emotions.

Moore’s entire argument can be sketched out as follows.

1. If a particular moral judgment is motivated by a virtuous emotion, then it is likely (though not certain) that the judgment is true.
2. The emotions that motivate our retributive judgments are virtuous.
3. So, it is likely that our particular retributive judgments are true.
4. The retributive principle—offenders ought to suffer in proportion to their culpability—offers the best explanations for the truth of our particular retributive judgments.
5. So, it is likely that the retributivist principle is true.

As I’ve noted, Moore believes that the most effective way to defeat this argument is to attack premise 2 of this argument. And according to Moore, the best challenge to the retributive emotions comes from Nietzsche. For Nietzsche, Moore writes, these emotions were “truly a witches’ brew: resentment, fear, anger, cowardice, hostility, aggression, cruelty, sadism, envy jealousy, guilty, self-loathing, hypocrisy, and self-deception—those ‘reactive affects’ that Nietzsche sometimes lumped under the French term ressentiment.” (Moore, 1997, p. 120). If these are the emotions behind our retributive judgments, then we should regard the judgments with deep suspicion, or perhaps reject them entirely.

Moore begins his reply by conceding that our retributive judgments are (at times) driven by the non-virtuous emotion of envy. Weakness prevents us from retaliating directly and so “our
perceived helplessness transforms the anger into the brooding resentment of those who lack power.” (p. 121) Moore agrees that this form of resentment is ugly and harmful. Retributive emotions can also be cowardly, herdlike, and weak. It is no accident, Moore writes, that the retributive urge calls up images of mobs who need overwhelming numbers to torment their helpless enemy. Finally, Moore concedes that the retributive emotions can be linked with cruelty, sadistic pleasure at the suffering of others. Moore writes:

Surely, one of the uglier spectacles of our times are the parties by fraternity boys outside the gates of prisons where an execution is taking place…Such people feel entitled to let go of the normal constraints on expressing such unsavory emotions because the legitimacy of retribution licenses it. (122)

At this point things are looking pretty bleak for the retributive emotions. But Moore now turns to some consideration in their favor. First, he points out that anti-retributive emotions can also be non-virtuous. A tendency to forgive criminals too easily, according to Moore, can indicate a lack of compassion for victims of wrongdoing. As Moore writes, it is only virtuous for me to turn my cheek if it is my own cheek that was slapped. Moore also claims that easy forgiveness may indicate cowardice as well, an unwillingness to face the reality of human cruelty. According to Moore, we invent excusing conditions for wrongdoers that we would never tolerate for ourselves because “we cannot stand to acknowledge that there is such a thing as evil in the world—and, worst of all, that it is not ‘inhuman’ but a part of creatures not so different from ourselves.” (p.142) Since self-deception, indifference to others, and cowardice are not virtues. To the extent that they motivate anti-retributive judgments, they “make such judgments suspect.” (p. 143)
Moore’s second argument is that some of the emotions that motivate our retributive judgments are indeed virtuous: in particular, moral outrage, fellow feeling, and guilt. Moore contrasts the ugly emotions of ressentiment with the emotion of “retributive hatred” (Jeffrie Murphy’s term). Retributive hatred or moral outrage is primarily an expression of fellow-feeling for the people who suffered the wrong. Such revulsion, Moore writes, “is the only tolerable response of one who cares about other people and who cares about the morality that binds us together (144). Moore’s claims bring to mind the holocaust survivor Elie Wiesel’s story about the American soldiers who liberated Buchenwald, the concentration camp where he was prisoner. Wiesel wrote that when the soldiers marched in, the look of hatred, anger, and moral outrage on their faces was the first thing that restored the humanity to the prisoners. He said in a speech that he’ll always be grateful for that rage.\(^5\) Moral outrage can be also virtuous when we ourselves are the victims of wrongdoing. As Jeffrie Murphy (2003) and others have pointed out, moral outrage against our offender can be an expression of self-respect, an assertion that we won’t tolerate violations of our own rights.

Moore’s most plausible defense of the virtue retributive emotions involves the emotion of guilt. Forgiving others too easily may be non-virtuous, but forgiving ourselves too easily seems especially despicable. When we have wronged someone, we feel guilty. According to Moore, this feeling “causes the judgment that we are guilty, in the sense that we are morally responsible,” and “typically engender the judgment that we deserve punishment…in the strong sense that we ought to be punished.” (pp. 147-148) Moore tells the story of a man named Richard Herrin who was convicted who in a fit of rage brutally hammered his girlfriend Bonnie Garland to death. Moore claims that if he himself had done such a thing, he would feel “guilty unto death” and that this is the way one ought to feel. (p. 145). A deep sense of guilt is, Moore

\(^5\) Nussbaum (1994) brought Wiesel’s story about the soldiers to my attention.
writes, “the only tolerable response of moral being” and will seem especially virtuous when
compared to “shallow, easily obtained self-absolution for the horrible violation of another.” (p. 147) So guilt is a virtuous emotion. Applying Moore’s methodology, if guilt produces the
judgment that wrongdoers deserve punishment, then we have reason to deem that judgment
reliable.

Moore’s argument on the retributive and anti-retributive emotions is a mixed-bag. I’m
skeptical that our dread of confronting evil is a significant motivator for the anti-retributive
tendency. But I agree with Moore that easy forgiveness of wrongdoing may in some cases
suggest a lack of sufficient compassion and fellow feeling for the victims. However, Moore does
not consider a variation on such cases: what if the victims themselves have forgiven their
offenders? In such cases, forgiveness by a third party no longer indicates a lack of compassion
or fellow-feeling. On the contrary, a stubborn insistence that the offender should suffer against
the victims’ wishes can indicate an ugly sort of self-righteousness, an unwillingness to mind
one’s own business, and a lack of sufficient respect for the victim. The strongest part of
Moore’s argument concerns the virtue of guilt. In Sommers (2012), I offered the example of
Tomas, the protagonist of Milan Kundera’s novel The Unbearable Lightness of Being. Tomas
condemns his Czech countrymen for absolving themselves of responsibility for the evils of the
communist regime simply because they had no knowledge of the atrocities being committed. “As
a result of your ‘not knowing,’ Tomas says, “this country has lost its freedom, lost it for
centuries, perhaps, and you shout that you feel no guilt?” He compares his countrymen
(unfavorably) to Oedipus: “How can you stand the sight of what you’ve done? How is it that
you aren’t horrified? Have you no eyes to see? If you had eyes, you would have to put them out
and wander away from Thebes. (Kundera, 1999, p. 177). The example complements Moore’s claims about the non-virtuousness of letting oneself off the hook too easily.


Having conceded the strength of at least certain portions of Moore’s argument, I maintain that Moore's method of justification does not support the standard retributivist model that Moore favors. Rather, as I will argue for the remainder of this paper, it supports a theory of punishment that bears more resemblance to restorative or corrective theories of punishment.

Moore employs an inference to the best explanation argument to support the retributive principle. Yet he considers an exceptionally narrow range of particular judgments of wrongdoing and punishment. All of his cases involve either murder or rape, and often both. Quoting from a newspaper column, Moore relates the story of a man who finds a woman and her children on the side of the road with a flat tire. He then rapes her, beats her to death with a tire iron, and drowns her three small children. He later claims he "hasn't been losing sleep over his crimes." (p. 98) In another of Moore's examples, a military man and his companion picked up a woman in Anchorage, Alaska. They proceeded to beat and rob the women and then rape her four times. The military man "forced her to perform fellatio" on his companion. The judge inexplicably gave the man the minimum sentence and added that he would have no problem if the defendant was paroled on the first day of his sentence. In his quest to find gruesome cases Moore also turns to fiction: he relates Dostoevsky's story in The Brother's Karamozov of a nobleman who releases his dogs to tear apart a small boy in front of the boy's mother's eyes.

Moore claims that when we hear about such cases we judge that the offenders should
suffer for their crimes, and not for consequentialist reasons. That is certainly true. It is also plausible that the emotions that lead to these judgments can be virtuous. The problem, however, is that Moore cherry-picks examples that are uncommonly suitable for his purposes. His cases are at the extreme end of the spectrum of brutality and cruelty. He also selects cases in which the offenders show no remorse. They often state explicitly that they should be released with little or no punishment. For these examples, yes, the retributive principle offers a plausible explanation for our particular judgments.

Fortunately, such cases are the exception rather than rule. Most crimes and offenses do not involve anything close to the evil brutality of Moore’s examples. Moore’s cases are also unusual in that there are few opportunities for restitution or reparation. Thieves can return their stolen goods. Vandals can work to repair the damage they've caused. But murderers cannot bring back their victims. This feature works to Moore's advantage because he wants to rule out what he calls "corrective" theories of punishment that focus on restitution. Corrective theories pose a serious threat to Moore's defense of the standard retributivist model because the emotions that approve of restitution—making things right--are at least as virtuous as the ones that support retributivism. “Non-neurotic feelings of guilt” do not only make us want to suffer. They make us want to make amends, to repair as best we can the damage we have done.

Moore, however, claims that the restorative or corrective view “puts too nice a face on our guilt feelings.” These feelings, he writes,

do not only generate a judgment that we ought to make amends in this compensatory way. Rather…and this is what troubles many critics of guilt as an emotion--to feel guilty is to judge that we must suffer.” (p. 148).
As evidence for this (empirical) claim, he again refers to the case Bonnie Garland who was hammerered to death by her boyfriend Richard Herrin. Moore writes that we can see "plainly" how inadequate the reparative impulse would be "if we imagine ourselves having made provisions for Bonnie’s family, comforting them in any way possible, and feeling that our debt for killing her had been paid. (p. 148)

It’s true that comforting Bonnie’s family would not make up for this type of crime. But it doesn’t follow that the urge for restitution is a minor or unimportant part of the virtuousness of guilt feelings. Murder is the paradigmatic example of a wrong for which it is difficult or impossible to compensate the victims. But again, hammering someone to death is not the most common kind of wrongdoing. For most types of wrongdoing, the desire to make amends seems more virtuous than an unproductive form of self-flagellation. For example, imagine that college student gets drunk while at home for thanksgiving and throws rocks through his high school physics teacher's windows. The next day Peter feels remorseful, apologizes, and confesses his crime. Rather than turn Peter over to the police, the physics teacher asks him to repair his windows and pay some money for the extra heating cost. But Peter refuses because "that would put too nice a face on his guilt feelings.” Instead, he allows the teacher to pay for her own repairs and then turns himself into the police. Peter serves thirty days in prison and then feels confident that the debt is paid. In this case, the retributive judgment seems less just, and the emotion that led to it less virtuous.

Perhaps this crime is too mild to count as much of an objection to Moore's view. So consider some examples of more serious wrongdoing. Braithwaite (2002) describes a case of

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6 Although in many cultures, “blood money” is considered a legitimate form of compensation.
assault and attempted robbery in New Zealand in which the offender, Mr. Clotworthy, inflicted six stab wounds and a collapsed lung on the victim. The victim and offender agreed to have a "restorative justice conference" as an alternative to a traditional trial to see if the two could work out a satisfactory resolution. During the conference, the two parties and the presiding judge agreed upon the following sentence. Mr. Clotworthy would pay a compensation order of $15,000 to pay for cosmetic surgery for the victim. He would also do two hundred hours of community work and serve a two-year prison term that might be suspended if Clotworthy performed the work and paid the compensation. The sentence then went to the Court of Appeal. The judges there questioned the victim about the leniency of the sentence. The victim "reiterated his previous stance, emphasizing his wish to obtain funds for the necessary cosmetic surgery and his view that imprisonment would achieve nothing either for himself or Mr. Clotworthy." (Braithwaite, 2002, p.347) The Court of Appeal was not convinced. They quashed the compensation order as well as the community service and instead sentenced Mr. Clotworthy to four years in prison. The victim "got neither his act of grace nor the money for his surgery. Subsequently, for reasons unknown, the victim committed suicide." (347).

Here, I would wager that our particular judgments favor the corrective or restorative outcome over the retributive one. The appeals verdict which ignores the victims' wishes and the agreed-upon resolution seems less just than the original sentence. If I am right about this particular judgment, this case would count against the principle of pure retributivism and in favor of principles that take into account the wishes of the victim.

Even in the most problematic example of homicide, our particular judgments may side with a restorative model. Consider the case of Conor McBride, described in a recent New York Times Magazine article by Paul Tullis:
At 2:15 in the afternoon on March 28, 2010, Conor McBride, a tall, sandy-haired 19-year-old wearing jeans, a T-shirt and New Balance sneakers, walked into the Tallahassee Police Department and approached the desk in the main lobby. Gina Maddox, the officer on duty, noticed that he looked upset and asked him how she could help. “You need to arrest me,” McBride answered. “I just shot my fiancée in the head.” When Maddox, taken aback, didn’t respond right away, McBride added, “This is not a joke.”

It was not a joke. About an hour earlier, at his parents’ house, McBride shot Ann Margaret Grosmaire, his girlfriend of three years. Ann was a tall 19-year-old with long blond hair. Like McBride, she was a student at Tallahassee Community College. The couple had been fighting for 38 straight hours--in person, by text message and over the phone. They fought about the mundane things that many couples might fight about. Instead of resolving their differences or shaking them off, they kept it up for two nights and two mornings, and it culminated in the moment that McBride shot Grosmaire.

Ann Grosmaire died in the hospital four days later. According to Florida State law, the crime of first degree murder typically carries a life sentence or the death penalty. However, the prosecutor can also charge the victim with a lesser crime such as manslaughter which carries a much lighter sentence. In the weeks following the crime, Ann’s parents and Connor’s parents had become close. (They had met in the hospital by Ann’s beside.) As the trial drew near, the Grosmaires learned about the restorative justice movement and asked the prosecutor, Jack Campbell, if they could do a restorative conference with Conor McBride and his parents. In addition, they asked Campbell to base his decision on the plea offer on the outcome of the conference. Restorative justice was a relatively foreign notion in Florida and had never been
even considered for such a serious crime. But the request came from the victim’s parents so Jack
Campbell, the prosecuting attorney, agreed.

During a restorative conference everyone has an opportunity to speak without
interruptions. The victims may ask the offender questions and offender can answer them if he
chooses. Afterwards, each member of the conference gives their opinion about what the
sentence should be. The Grossmaires spoke first. They described their love for Ann and the
tremendous suffering they had experienced since the crime. According to Sujatha Baliga, the
mediator of the conference, Anne’s mother “did not spare [Conor] in any way the cost of what he
did. There were no kid gloves, none. It was really, really tough. Way tougher than anything a
judge could say.” Then it was Conor’s turn to speak. He described the crime and surrounding
circumstances in harrowing detail. He did not shirk responsibility in any way. On the contrary,
Connor gave an account that was even worse than the Grossmaires imagined. He disclosed that
Anne had been on her knees and pleading with him not to shoot when he pulled the trigger.
Tullis writes:

As Conor told the story, Andy’s [Anne's father] whole body began to shake. “Let me get
this right,” he said, and asked Conor again about Ann being on her knees....Conor
answered, clarifying precisely how helpless Ann was at the moment he took her life.

After each member had spoken, the time came to suggest a punishment. Before the conference
the Grossmaires had indicated that they would ask for a light sentence of five years. But after
hearing Conor's story, they asked for more prison time. Kate Grosmaire suggested five to fifteen
years. Andy Grosmaire suggested ten to fifteen years. Conor’s parents agreed with Andy about
the higher sentence. Conor did not suggest a sentence because "he did not think he should have a say."

In most restorative justice proceedings, a judge will issue a decision that reflects the consensus of the relevant parties. But since this was the first restorative justice case in Florida for such a serious crime, Jack Campbell only promised that he would take the opinions into account in determining the plea offer. Campbell honored his promise, offering a plea of twenty years in prison with five years probation. The sentence was considerably lighter than the norm for homicides in Florida.

Like the original Clotworthy sentence, this outcome in this case is incompatible with the standard retributive model that Moore defends. Moore opposes giving any special voice to crime victims because this would entail assigning different punishments to equally culpable offenders. Doing so would violate a principle of ordinal proportionality, which requires that equally culpable offenders receive the same sentence. Restorative justice, almost by definition, must reject the ordinal proportionality principle. Since each set of victims and offenders have different temperaments and personalities, sentences can vary accordingly. To Moore, this disqualifies restorative or corrective approaches. As he puts it:

In a truly victim-oriented system, if a wrongdoer has the good luck to injure one of those new testament types, instead of one of the old testament types, then that wrongdoer is going to receive less punishment—because he is always going to get the turn-your-other-cheek forgiveness response from his victim. (Moore, 1999, p. 77).

Moore finds it intuitively unjust for an offender with the ‘new-testament type’ victim to receive lesser sentences than equally culpable offenders with an ‘old-testament type’ victim. But this
intuition derives from Moore’s depiction of victims as caricatured ‘types.’ As we see above, if we are presented with the attitudes of real victims and offenders in all their complexity, our intuitions become conflicted and often oppose ignoring the victims' wishes. In the Conor McBride case, it seems not only appropriate but also just for Campbell to take the wishes of the members of the restorative conference in determining the sentence. The possibility that an equally culpable homicide offender could receive a more severe sentence (because of the wishes of a more vindictive family) does not undermine this intuition in the least.

The claim here is not that ordinal proportionality should play no role in the eventual outcome. If the families had asked for a suspended sentence, or even a 2-5 year sentence, the judge might justly reject this as to lenient in light of the sentences for other homicides of this kind. Restorative approaches merely entail that ordinal proportionality is not an overriding consideration. Rather, it is just one consideration of many.

Recall that Moore's theory is based on the claim that the pure retributivist principle (which requires ordinal proportionality) offers the best explanation for our particular judgments about justice. If I am right that our particular judgments often favor restorative outcomes, then Moore's own methodology would require that we account for them. And as we have seen, when we examine our particular judgments across a wide range of cases, the retributive principle often comes up short.

Moore does have one available response, however. He can claim that the emotions driving our judgments favoring restorative outcomes are not virtuous. According to Moore’s methodology, this would give us reason to discount those judgments. In the next section, I’ll
show that the truth is just the opposite. The emotions that drive our judgments for restorative outcomes are responding to the virtuous behavior of the parties involved in the conflicts.

5. Self-Respect and Courage

Crime victims often suffer a feeling of powerlessness and a loss of self-respect. This is especially true for violent crimes like assault or rape. But it can also happen after non-violent crimes like theft or fraud. Defenders of the standard retributive model often assume that punishing wrongdoers automatically restores the self-respect of victims. The offender’s punishment, according to this view, sends a message to the offender that the victim is a person (or ‘Person’) whose rights cannot be violated. This is a rationalist fantasy that has no basis in real human psychology. The psychologist Dale Miller has shown that the way victims respond to insults and offenses affects their self-image and their image in the eyes of others. Many cultures actively shun third-party punishment for precisely this reason. Third party punishment can further entrench the victim’s reputation of weakness. Recall that in the “justice porn” videos, the bully’s comeuppance usually comes at the hand of their intended victim. When victims fight back, our emotions applaud their courage and sense of self-respect. It is much less satisfying if the victim reports the bully to the school principle and then takes satisfaction in the bully's punishment. If anything, this smacks of *ressentiment*, weakness, and cowardice.

Of course the ethics of the schoolyard offers only so much insight into the nature of justice. But it’s a helpful illustration of the virtue of standing up for yourself when you’re not sure that you’ll come out on top. Our particular judgments favor courageous action. Naturally,

7 See Miller (2001)
the risk of retaliation has to be within reasonable limits. If fighting back can lead to serious injury or death, then in most cases it’s better to seek other courses of action. But if the risk is relatively minor, the best and most honorable course of action is often for victims to handle their own business rather than turn to others to fight their battles. The retributive principle, with its exclusive focus on the offenders and their punishment cannot capture this set of particular judgments.

One might object that victim retaliation is precisely what the criminal justice system is designed to prevent. After all, isn’t the main reason we cede the role of punisher to the state to prevent vigilantism? The answer is yes, but the reason has little to do with justice and fairness. The reasons are more practical in nature. For one thing, personal retaliation can be impossible because of an imbalance in power. It can also lead to escalating feuds and considerable collateral damage. Nobody wants a city full of Bernard Goetzes or Hatfield and McCoy style blood feuds. In many schools, strict rules against fighting back might be the right policy. If Sam the bully beats up Andy in the cafeteria, it may be best, all things considered, to let the school principle determine the proper punishment for the bully. Nevertheless, this policy comes at a cost to Andy. By not striking back himself, he loses a golden opportunity to regain his self-respect and the respect of his classmates.

Crime victims suffer similar costs when their cases are handled entirely by the state. A maximally just approach to criminal punishment would consider the interests of crime victims while at the same time retaining a commitment to proportionate punishments, societal order, and the rule of law. By rejecting any special voice for victims, the standard retributive model fails to do this. It is true that a few retributivists such as Jeffrey Murphy have departed slightly from the
standard model by supporting the use of victim impact statements in sentencing.\(^9\) They believe it may empower victims to involve them in the sentencing process. This is a step in the right direction, but only a baby step. Reading a statement aloud in the courthouse does not give the victim much opportunity for courageous action. It provides no opportunity for victim/offender interaction, no means for restitution or conflict resolution, all of which is importantly connected to restoring self-respect for victims.

The restorative justice model, on the other hand, has the resources to provide this opportunity. The Norweigian criminologist Nils Christie authored the foundational document of the modern restorative justice movement, an article called “Conflicts as Property” (Christie, 1977). Christie’s deep point in this essay is that conflicts are a fundamentally important part of life. How we behave in conflicts, both as victims and offenders, reveals a lot about who we are and what we’re made of. A criminal justice system in which impartial third parties punish offenders as they deem fit "steals the conflict" from the parties who are directly involved.

Christie writes:

The victim is a particularly heavy loser in this situation. Not only has he suffered, lost materially or become hurt, physically or otherwise. And not only does the state take the compensation. But above all he has lost participation in his own Case. It is the Crown that appears in the newspaper, very seldom the victim. It is the Crown that gets a chance to talk to the offender, and neither the Crown nor the offender are particularly interested in carrying on that conversation. The prosecutor is fed-up long since. The victim would not have been. *He might have been scared to death, panic-stricken, or furious. But he*

\(^9\) See Murphy (2003)
would not have been uninvolved. It would have been one of the important days in his life.

[My italics]

The last part of this passage illuminates the problems with the standard retributive model. Active participation in conflicts can be scary, panic-inducing, infuriating, and emotionally charged. As victims, we may have to overcome fear or blind fury to face our victimizers and look them in the eye. We learn about ourselves in these situations. I have no idea how I would react if I was a victim of, say, a violent crime and I had to face my offender in some sort of mediation process. Perhaps I would lack the courage to do so. But I want to know. Not enough to make it worth suffering a violent assault. But it would be a significant silver lining to learn about my character. When victims actively participate in their own conflicts, they go a long way toward recovering their self-respect—not just in theory but in practice.\textsuperscript{10}

There are plenty of other benefits to participating in our own conflicts as well. The victim/offender interaction in restorative justice models offers opportunities for both parties to express empathy, to recognize the humanity in one another. Offenders often get a more genuine sense of the real suffering they’ve caused by their actions. And victims may come to better understand the causes of the offender’s actions, which may lead to partial forgiveness. Or they may still hate the person who wronged them. And the offenders may feel the same contempt for their victims. Either way, they are be compelled to deal with human beings in a way that is well beyond the standard means of determining culpability in our legal system.

So how do restorative models work in practice? There are many varieties, but I favor those that would incorporate the attractive elements of the standard retributivist model: namely,

\textsuperscript{10} See e.g. Van Camp et al (2013).
the protection of the offender's rights and an insistence on a roughly proportionate punishment in accord with the offender’s culpability. In this model, the judge or mediator would set upper and lower limits on the outcome of the restorative process. (The Connor McBride case—with the limits enforced by the District Attorney—is one example.) Like most restorative theorists, I believe the upper limit should be more strictly enforced than the lower one. A victim’s decision to forgive should be respected as much as possible, and a lenient decision does not violate anyone’s rights. However, in order for the punishment to be just, there does have to be some sort of lower limit. But the restorative model offers a tremendous amount of flexibility within a broad range of acceptable punishments. There are opportunities for offender to compensate the victim with restitution, for example. After all, restitution is a form of punishment. It involves sacrifice and suffering, and of a more redemptive kind than prison time.

My empirical prediction is that in real life, our particular judgments favor the outcomes of this restorative model considerably more than the outcomes endorsed by the standard retributive model. Moreover, there is not a trace of ressentiment in the emotions producing these particular judgments. Our emotions are responding to virtues such as courage, empathy, remorse, and a desire to make amends. If this prediction is correct, then Moore’s methodology—arguably the most plausible way of defending retributivism—would result in a form of retributivism that incorporates restorative elements.

Of course, Moore can retain his commitment to the standard retributive model by abandoning his inference to the best explanation methodology. He might insist that any theory that incorporates considerations other than those related to the offender’s culpability is, by
definition, no longer retributivist and should therefore be rejected.11 How Moore wishes to define retributivism is his business. But he does not have principled reason for rejecting the outcome of his own methodology. The distinctive feature of his account is that he provides a non-circular justification for retributivism that does not rely on the defective rationalist arguments of Kant, Hegel, and Morris. Without this feature, it is not clear that he has an account at all. Moreover, Moore’s broader moral epistemology in general regards the emotions as providing insight into moral truth. Is the cost of incorporating restorative elements so high to make it worth discarding “our main heuristic guide to finding out what is morally right?” Clearly not, for then his defense of retributivism would be pure dogmatism.

Let me conclude with a brief illustration from the great Western novel *Shane.* In the story, a cattle rancher named Fletcher is trying to strong arm the resident homesteaders to sell their fertile land to him. When the homesteaders refuse, Fletcher hires a notorious gunman named Wilson to intimidate them. Joe Starrett, the inspirational leader of the homesteaders, has been able to keep the others from selling. But their courage is waning. Meanwhile Shane, a former gunman himself, has been staying at the Starrett household as their guest. In the final pages of the novel, the situation comes to a head and Joe decides to face Wilson in a gunfight. Shane, however, realizes that Joe is outmatched and offers to face him himself. Joe thanks him but refuses. “It’s my stand,” Joe says, “Fletcher is making a play against me. It’s my business.” Shane replies that gun-fighting is his kind of business and not Joe’s. Joe replies: “And where will it leave me? I couldn’t hold my head up around here anymore. They’d say I ducked and they’d be right.”

11 Thanks to an anonymous referee for alluding to this possible response from Moore.
Joe’s point is that if Shane fights this battle for him, people will rightly think he is a coward. For Joe, having the reputation of a coward is much worse than risking his life. He may die in the gunfight with Wilson, but he’ll die with courage and honor. Shane recognizes the dilemma but he has a solution. He provokes Joe into a fight and cold-cocks him with a gun. Shane then ties an unconscious Joe up and goes off to kill Wilson himself. Why does Shane tie Joe up? Because it is the only way for Joe to keep his self-respect in spite of the fact that Shane has fought the final battle. Now the homesteaders will know that Joe was unable to fight the battle himself. Shane recognizes this is not from the ideal outcome, but he believes the alternative—Joe’s certain death—is even worse.

For some crimes, the state can and should play the role of Shane, stealing the conflict and taking the punishment entirely out of the hands of the victim. For the majority of crimes, however, the state can play the more valuable role of mediator, offering victims the opportunity to display real courage and fortitude in resolving their own conflicts with their offenders.

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