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NOTES

A METHOD FOR THE MADNESS: RESTORATIVE JUSTICE AS A VALID MODE OF PUNISHMENT AND AN ADVANCEMENT OF CATHOLIC SOCIAL THOUGHT

PATRICK J. SMITH†

[F]or punishment not to be . . . an act of violence of . . . many against a private citizen, it must be . . . prompt, necessary, the least possible in the given circumstances, proportionate to the crime, and dictated by the laws.¹

INTRODUCTION

The problem of how to most justly punish those individuals who break society's rules is as old as the organization of societies itself. In some sense, it is the most important question humans have asked of themselves in that punishment involves the purposeful infliction of pain—in some degree—to one's fellow human. Often the discussion revolves around the "how" and the "why" of punishment. That is, society often seeks to find the most effective means of punishment while taking into account other competing notions, such as justice, equality, mercy, and benevolence. The first question society must address, however, is what justifies society's ability to punish? This is the first question because without a solid justification undergirding a

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¹ CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 9 (Henry Paolucci trans., 1963).

society's system of addressing wrongs, punishment would be little more than torture. To inflict pain without reason would violate any rational sense of justice however one understands that concept.

It is important to bear in mind the distinction between the justifications for why a society punishes (theories of punishment) and the methods that a society uses when it punishes (modes of punishment). The empirical reasons a society punishes and the justifications offered can be quite distinct. A society may adopt justifications that fail to satisfy any rigorous intellectual standard while the punishments the society inflicts nonetheless fit squarely within that (albeit unjustified) framework. For instance, the Nazi society of Hitler's Germany may well have had, and indeed did possess, a consistent and effective mode of punishment that was rationalized by the philosophy upon which the society was based. The justifications underlying the punishment of millions of Jews and countless others, however, are intellectually and morally inadequate to any objective third party. Moreover, we can imagine the opposite situation taking place; an intellectually adequate justification for a certain punishment may exist and yet the society chooses to take no legal action. For example, a society may have a framework that provides a reasonable rationale for punishing those that attempt suicide, yet still adopt a policy wherein prosecution or legislation is not pursued for valid reasons, such as not wanting to place the stress of possible legal sanction on an already emotionally disturbed individual. The critical philosophical inquiry then is not a search for the empirical, sociological, or criminological motives behind why the society punishes wrongdoers, but more importantly a search for the justifications that allow society to justly do so.

In order to be considered just punishment, the society must then satisfy two criteria. First, there must be an adequate justification of punishment that takes seriously the attributes of human beings as a distinct species. Second, the punishments inflicted by the society must be rationalized by that justification such that the modes of punishment do not amount to mere torture. This bifurcated concept, therefore, views appropriate, rationalized methods of punishment merely as policy alternatives. So long as a particular mode is justified by a rational theory of punishment, the society can be morally

justified in making policy choices that comport with that method. Once rationalized, however, a mode of punishment does not necessarily have to be accepted in whole or in part, but rather is added to the range of penal options available to the society. The reasons why a society might choose a particular mode over another may reflect other norms deemed fundamental to that society (e.g., mercy or security), but should rightly be understood as mere policy preferences. The distinction between theories of punishment and modes that reflect a particular theory will be carried throughout this article.

It is undeniable that the inquiry begins amid controversy. American society is one where, arguably, most citizens obey the announced laws. However, there are those who, for a variety of reasons, choose not to follow the law. Furthermore, the society is committed to the notion that those who have stepped outside of the law deserve to suffer some negative consequence. Accordingly, the large majority of this, and perhaps every, society is actively and purposefully seeking to inflict pain on some of their fellow citizens. On the other hand, concepts of justice, equality, and fairness are also essential characteristics, or at least aspirations, of this country. At bottom, the American system of government, with its insistence on due process and commitment to individual liberty, demands that there be an explanation as to why and how the majority will punish a discrete minority of lawbreakers. Part I of this article will discuss the traditional justifications of punishment and their comparative strengths and weaknesses. Part II will then explore a relatively new approach to punishment known as restorative justice, analyze to what extent it is justified by traditional concepts of punishment, and examine its compatibility with principles of Catholic Social Thought.

I. THEORIES OF PUNISHMENT

There are two major theories that attempt to justify why we punish—utilitarianism and retributivism. Utilitarianism is forward-looking and seeks to view punishment in terms of exacting the greatest prospective good to the collective. Pain is inflicted as a means of either (or both) deterring the commission of crimes or ensuring that repeat offenses do not occur. Retributivism, on the other hand, attempts to understand punishment as a response to a singular past event that involves a

wrong to the victim but is primarily an injury to the state. The wrongdoer is punished not as a means of what will produce the most good, but rather what is deserved as a consequence of the choice to commit a crime.

A. *Utilitarian Theories of Punishment*

All utilitarian theories of punishment find their bases in a concern for the consequences of the sanction. The fundamental interest here is the social good that the punishment will produce. Like all laws in a utilitarian scheme, the object of punishment “is to augment the total happiness of the community.”² Jeremy Bentham, one of utilitarianism’s earliest and most influential theorists, asserted that punishment in and of itself is an evil, and should, therefore, only be applied “in as far as it promises to exclude some greater evil.”³ The commission of other and more severe crimes, for instance, might be an evil greater than punishment, so society can choose the lesser of these two evils (punishment) to increase the community’s aggregate happiness. To foster some sort of good out of a particular punishment, the utilitarians offer two principal aims: deterrence and rehabilitation.⁴ In criminological discourse, incapacitation may also be understood as a utilitarian punishment.⁵ However, though such a course of action may indeed be vastly beneficial to society, the main objective is removal from society based on the crime committed, rather than its prospective utility. That a

² Jeremy Bentham, *A Utilitarian Theory of Punishment*, in SOCIAL AND POLITICAL PHILOSOPHY 844 (Baruch A. Brody & George Sher eds., 1999).

³ *Id.*

⁴ *Id.* It is important to note the theory-mode dichotomy in this context. Although specific methods of punishing may advance the cause of deterrence and/or rehabilitation, they are treated here as theories of punishment within the larger utilitarian framework as a commitment to either one may take different forms. For instance, within the theory of deterrence, hard labor or capital punishment may represent specific policy alternatives for meeting the theory’s aims.

⁵ See HUGO ADAM BEDAU, STANFORD ENCYCLOPEDIA OF PHIL., PUNISHMENT (Edward N. Zalta ed., 2005), available at <http://plato.stanford.edu/archives/fall2005/entries/punishment> (noting that societies were uncomfortable with indeterminate sentencing and “[t]hus was born the doctrine of ‘just deserts’ in sentencing . . . [and b]y this route the goals of incapacitation and retribution came to dominate, and in some quarters completely supersede, the goals of rehabilitation and deterrence in the minds of politicians and social theorists”). In support of the notion that incapacitation is rightly viewed as a mode of punishment, sociologists note that a generation ago “enthusiasm for incarceration and incapacitation was growing as the preferred methods of punishment . . .” *Id.*

particular punishment might be viewed as socially advantageous is not reason enough to declare it a true utilitarian approach. Indeed, retribution is equally understood to entail some social benefit, but its aim finds an altogether different justification. Incapacitation, then, is more rightly viewed as a mode of punishment that may be justified by one or either of the theories of punishment.

While both utilitarian approaches obviously try to improve society to an extent, rehabilitation is the more ambitious as it additionally attempts to make the criminal a productive citizen again. The focus of utilitarian punishment is set clearly on the future. Utilitarians punish, not necessarily to address the crime that has been committed, but rather to prevent that crime from happening again.⁶ This can be accomplished by either reforming the wrongdoer so he will not repeat the offense or punishing him in such a way that the seeming benefit of the crime is diminished by the potential punishment that will be inflicted. As one of the founders of utilitarianism, Bentham clearly provides the *mantra* for this theory of punishment. He states, "The first object . . . is to prevent, in as far as it is worth while, all sorts of offenses; therefore, [t]he value of the punishment must not be less in any case than that what is sufficient to outweigh that of the profit of the offense."⁷ It is important to note that Bentham is referring more to a justification of how we can rightly threaten certain punishments, rather than how we can punish as such. In other words, "we can sense Jeremy Bentham's sneer, for any utilitarian will admit that it is not the actual punishment that deters but rather its threat."⁸ Despite this qualification, we can clearly see the utilitarian contention that punishment is and should be justified by its prospective goal of discouraging the commission of crimes.

The prospective good that punishment can advance leads the utilitarian to two separate approaches to its goals. These are deterrence and rehabilitation and it is important to view them distinctly.⁹ For advocates of deterrence, the justification for

⁶ See Richard B. Brandt, *The Utilitarian Theory of Criminal Punishment*, in READINGS IN THE PHILOSOPHY OF LAW 250, 252 (John Arthur & William H. Shaw eds., 2001).

⁷ Bentham, *supra* note 2, at 848 (emphasis omitted).

⁸ Paul Gaffney, *The Morality of Legal Retribution*, CONTEMP. PHIL., Sept.-Oct. 1994, at 11, 11.

⁹ See Brandt, *supra* note 6, at 252.

punishment is such that the suffering inflicted would be inexcusable if it were not outweighed by resulting benefits.¹⁰ We can see this idea very clearly in discussions about capital punishment.¹¹ The controversy among deterrence theorists revolves around whether or not the threat of the death penalty deters individuals from committing capital crimes. The entire deterrence debate is resolved, more or less, by empirical data.¹² The strength of this particular utilitarian view is that punishment, and other social endeavors, can be calculated to determine whether or not the society is justified in continuing a particular practice. If the punishment is responsible for deterring the commission of a crime, it is justified. However, if the punishment of an individual does not deter that individual or any other from breaking the law, then it is unjustified torture, as it serves no positive end.

In this view, the criminal can see himself and his action as having some purpose, that is, good will come from the bad they have committed. We can maintain a less callous view of humanity this way by saying to the criminal, as Oliver Wendell Holmes did, "I don't doubt that your act was inevitable for you but to make it more avoidable by others we propose to sacrifice you to the common good. You may regard yourself as a soldier [being punished] for your country if you like. But the law must keep its promises."¹³ Deterrence, however, need not be accomplished merely by injuring one to set an example for others. Richard Brandt, a contemporary defender of the theory, argues that traditional utilitarianism takes as a given that "[p]eople who are tempted to misbehave, to trample on the rights of others, to sacrifice public welfare for personal gain, can usually be deterred from misconduct by *fear* of punishment, such as death, imprisonment, or fine."¹⁴ This deterrence theory, assuming it is correct, is appealing as it may be the only one that serves the greatest good in that not only is the crime prevented, but the evil of punishment is avoided altogether. It is worth mentioning

¹⁰ See *id.*

¹¹ See Robert P. Gritton, Comment, *Capital Punishment: New Weapons in the Sentencing Process*, 24 GA. L. REV. 423, 440-41 (1990) (discussing whether the death penalty contributes to the goal of deterrence).

¹² See *id.*

¹³ Letter from Oliver Wendell Holmes to Harold J. Laski (Dec. 17, 1925), in HOLMES-LASKI LETTERS 806 (Mark DeWolfe Howe ed., 1953).

¹⁴ Brandt, *supra* note 6, at 252 (emphasis added).

here, however, that it is clear that individuals still choose to commit crimes despite the known consequences of their acts.

The other predominant utilitarian approach is rehabilitation.¹⁵ The benefit sought by this program belongs most directly to the offender.¹⁶ Of course, the society would profit from the moral conversion of the offender in an indirect way; that is, he would not seek to commit crime again. Nevertheless, the focus here is not so much on the criminal act, but on the drive in the individual that led to its commission.¹⁷ The general theory is that if the criminal justice system were to cure this drive, that individual could return to the society that he acted out against and be a productive citizen once again.¹⁸ This is clearly the most ambitious of all punishments. It asserts that “[t]he functional equivalent to the treatment of a disease is the rehabilitation of an offender, and it is a rehabilitative system . . . that we ought to have if we are to respond, even to criminals, in anything like a decent, morally defensible fashion.”¹⁹ Here, punishment is clearly not designed as suffering, although it may consist of some pain. Rather, it is a systematic treatment tailored for the needs of the offender.²⁰ The implementation of a successful “cure” depends on assessing appropriate modes of punishment. The criminal’s treatment may be mere probation, skills training, or therapy.²¹ Of the many diagnoses that may serve the criminal, the one producing the greatest good is of course preferable.

Operating in a utilitarian framework—which both this theory of justice and the preponderance of American political and legal ideals do—the ultimate goal is naturally the greatest net good for the society. The logic of the theory rests on the accurate notion that the majority of offenders return to the society after having served their sentence. The rehabilitationist is asking the crucial question, “How do we want to send the wrongdoer back?” Between the two major answers—having been merely

¹⁵ See *id.*

¹⁶ See *id.*

¹⁷ See Richard Wasserstrom, *Punishment v. Rehabilitation*, in *PHILOSOPHY OF PUNISHMENT* 57, 58–60 (Robert M. Baird & Stuart E. Rosenbaum eds., 1988).

¹⁸ See *id.* at 57. It is worth noting that true rehabilitation could potentially impose upon a criminal incarceration for an amount of time determined not by the act itself but rather by his individual rehabilitative needs.

¹⁹ *Id.*

²⁰ See *id.*

²¹ See *id.*

incarcerated or having been sentenced to rehabilitation—the latter seems more desirable as it protects the society from a repeat offense and also puts to best use the time the offender spent outside of the society. The utilitarian argument gains its strength when the public realizes that it has an interest in delivering back unto itself a former wrongdoer who has been reformed through rehabilitation rather than a hardened offender who has only had his criminality exacerbated by incarceration. (One can imagine the utilitarian gloat when asking which of these two would produce the greater good for the society.) At bottom, the rehabilitationist will argue that once the criminal justice system has captured and convicted the offender, the only appropriate way to *use* his incarceration effectively is to *treat* his particular *ill* and return him safely to the community when he is *cured*.²²

Utilitarian theories of justice have as their distinguishing factor a look towards the future. Punishment is clearly designed only to have some sort of prospective aim, most notably to either deter others from choosing to commit crime or morally reform those who already have.²³ In either case, there are to be beneficial outcomes to a particular crime. Thus, there is a good deal of compassion present in the utilitarian argument in that it refuses to accept that the wrongdoer is someone deserving only of suffering, and views the potential and actual offender as a member of the community with a stake in both his and society's own happiness. Additionally, in dealing with the difficult problem of not only justifying why a society can inflict punishment on a citizen, but also the form that punishment will take, one can at least find solace in the utilitarian claim that this justice system is promoting good.

B. The Retributive Theory of Punishment

The retributive theory of punishment is unlike utilitarian theories in that it is drawn from a moral imperative, rather than calculations of social good. The concept is drawn from the moral philosophy of Immanuel Kant that humans are to be treated as

²² The language of rehabilitation theories has become more and more medical in its terminology since the focus of the punishment is not on the act but on the underlying problem. This twist on the "medical" model of treatment states: The punisher must find the cause of the crime and remedy it.

²³ See Brandt, *supra* note 6, at 252.

ends in themselves and not merely a means to some other aim. At bottom, the retributive bent is simply that good deeds should not result in punishment as much as bad deeds should not result in pleasure.²⁴ Utilitarian goals may be achieved through retributive punishment, but these goals are not the aim of, or the justification for, this theory.²⁵ It is to this end, one may recall, that incapacitation is not philosophically understood as utilitarian.

In his influential ethical work, *The Foundations of the Metaphysics of Morals*, Kant discusses, at considerable length, the notion of respecting people as autonomous moral agents. To this point he writes:

[E]very rational being exists as an end in himself and not merely as a means to be arbitrarily used by this or that will. In all his actions, whether they are directed to himself or to other rational beings, he must always be regarded at the same time as an end.²⁶

This is an extremely powerful claim by Kant, and one that must be taken seriously in any discussion involving how people are to be treated. To the extent that we understand members of society to be rational agents, we are forced, perhaps against our will, to treat them always as ends. The upshot of this idea is that even the worst members of our society demand equal consideration and are entitled to be regarded in such a way that we are not justified in using them for our, or even their own, benefit. Kant's fundamental philosophical justification for retributive justice grows out of this recognition of individual autonomy.²⁷ This is not the only way, however, that retributivism is differentiated from utilitarianism.

The retributivist recognizes that punishment takes place in a social context, but does not seek the greatest net happiness of the

²⁴ See *id.* at 255.

²⁵ See MARK TUNICK, PUNISHMENT: THEORY AND PRACTICE 95 (1992) (stating that deontologists punish because it is right to do so not because of the consequences of punishment, and suggesting that punishment grounded on deontological principles may still serve utilitarian ends).

²⁶ IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 52 (Lewis White Beck trans., 1969).

²⁷ See Herbert Morris, *Persons and Punishment*, in READINGS IN THE PHILOSOPHY OF LAW, *supra* note 6, at 256, 261 (discussing how punishment pays "deference to an individual's free choice by connecting punishment to a freely chosen act violative of the rules").

society. Rather, because of the moral equality of individuals, the benefits and burdens in society ought to be roughly equalized.²⁸ That is, one person should not be saddled with greater burdens than another because to do so fails to recognize that individual as an end unto himself. To that end, punishment is required to be inflicted upon those who assume an unfair advantage in society by rejecting the burden of restraint from wrongdoing.²⁹ Individuals in society all bear the burden of restraining themselves from violating the rules the collective has set up.³⁰ The shared benefit of this restraint is that each member is free from interferences with his liberty and safety. The wrongdoer, thus, has enjoyed the benefit of noninterference without undertaking the burden of restraint.³¹ Through punishment, however, the law and society can settle the score. "Justice—that is punishing such individuals—restores the equilibrium of benefits and burdens by taking from the individual what he owes, that is, exacting the debt."³² Respect for each member of society as equal in dignity to one another ("ends" for Kant) requires, among other things, that this equilibrium be maintained. Thus, retributivism justifies punishment along lines of fairness and equality of obligations.

Beyond the call for moral desert, there are other key points about retributive justice. Retributivism is retrospective; it deals solely with the crime that has been committed and the application of a deserved punishment for that particular wrongdoing.³³ The sole justification for retribution is that the punishment is deserved by the criminal because of the action he chose to pursue.³⁴ Although the notion of just deserts is explored in various ways by various retributivists, the central precept that an individual be morally culpable (as one who freely chose to commit an illegal act) remains a necessary condition of just punishment³⁵ since retributive justice recognizes the moral worth of an individual and the ethical gravity of choosing criminal

²⁸ See *id.* at 257–58.

²⁹ See *id.* at 258.

³⁰ See *id.* at 257–58.

³¹ See *id.* at 257.

³² *Id.* at 258.

³³ See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 16 (3d ed. 2001).

³⁴ See DRESSLER, *supra* note 33, at 17.

³⁵ See *id.*

conduct.³⁶ The offender must be both actually guilty of the crime (a retributivist can find no excuse for convicting the innocent), as well as morally guilty of the crime.³⁷ The retributivist theory, then, takes seriously both the *actus reus* (outward damage) and the *mens rea* (mental element) of a particular crime.

As the relationship between offender and punishment is strictly an ethical one,³⁸ retributive punishment should never be visited on an individual who is not both legally and morally deserving of it. One formulation of the basic retributive principle is that “[i]t is prima facie obligatory for society to cause pain or loss to every person who commits a morally objectionable act to an extent corresponding with the moral gravity of his offense.”³⁹ The demand that the punishment fit the crime is essential to the theory as it recognizes individuals as ends in themselves. The retributivist insists that to be subjected to any more punishment than one deserves would be both to torture the criminal unjustifiably and to treat the individual with less respect than he is owed by virtue of his status as a human being capable of free and rational choice.⁴⁰

Retribution theorist Herbert Morris argues not only for the right to a system of punishment, but further, that the wrongdoer himself has a right to be punished for his crimes. We can observe strongly here the retributivist’s moral argument. At root, the argument is that the punishment is the natural completion of the crime. The punishment is quite literally chosen by the free citizen in his very act of criminality. Morris writes:

In our system of punishment an attempt was made to maximize each individual’s freedom of choice by first of all delimiting by rules certain spheres of conduct immune from

³⁶ It does this by respecting the criminal’s right to choose to break the rules, and then giving him the punishment that he freely chose in deciding to break those rules. See *supra* note 27 and accompanying text.

³⁷ These ideas are both implicit in the idea that the wrongdoer chooses to be punished by choosing to break society’s rules. If he does not make this choice freely and rationally, then he cannot be punished. See *supra* note 27 and accompanying text.

³⁸ As opposed to the view that a society has obligations to its criminals other than to punish them (e.g., to rehabilitate them).

³⁹ Brandt, *supra* note 6, at 255.

⁴⁰ See TUNICK, *supra* note 25, at 98 (discussing Kant’s view that the wrongdoer wills that what he does to his victim be turned back on him in a just manner). Respecting the offender’s will demands turning his action back on him, if not directly (e.g., an eye for an eye), then in a way that is proportionate to the offense. See *id.*

interference by others. The punishment associated with these primary rules paid deference to . . . a freely chosen act violative of the rules, thus giving some plausibility to the claim . . . that what a person received by way of punishment he himself had chosen. . . .

. . . [W]e [can] see . . . that a person has a right to be punished There is the inestimable value to each of us of having the responses of others to us determined . . . by what we choose rather than by what they choose. A person has a right to institutions that respect his choices.⁴¹

Here, Morris reemphasizes the central tenet of retributivism, namely that respecting the essential dignity of each individual in society demands that each person be allowed to choose his own fate, choose what the society and its members will do to him. Other theories and modes of justice and punishment potentially place each individual at the whim of the collective. The criminal is either being used as an example to others or is held in custody until cured of his social illness. Under retributivism, its adherents would assert that when one chooses to break the law knowing its consequences, he also chooses those consequences. To permit less would deny the wrongdoer his humanity.

II. RESTORATIVE JUSTICE: A NEW MODE OF PUNISHMENT

A. *An Overview of Restorative Justice*

Restorative justice has been described as both a new theory of punishment as well as a new method of approaching how criminals should be punished.⁴² Although, as will be discussed, this concept shifts the focus of current aims of punishment, restorative justice may lack a sufficient philosophical grounding to make it a distinct new justice paradigm. Additionally, much that is written about the movement tends to offer policy prescriptions for effectively implementing a restorative punishment program, and does not seek to describe a concept of persons and society that would theoretically undergird other modes of punishment. For present purposes, therefore,

⁴¹ Morris, *supra* note 27, at 261.

⁴² See generally CTR. FOR JUSTICE & RECONCILIATION AT PRISON FELLOWSHIP INT'L, RESTORATIVE JUSTICE BRIEFING PAPER: WHAT IS RESTORATIVE JUSTICE? 1 (2005), available at <http://www.pfcjr.org/Resources/documents/briefings/whatis/download> [hereinafter BRIEFING PAPER].

restorative justice will be treated as a *mode* of punishing rather than a *justification* for punishment.

Restorative justice is a relatively new movement in the field of criminology.⁴³ The approach can be described as a process whereby parties with a stake in a specific offense resolve collectively how to deal with the aftermath of the offense and its implications for the future.⁴⁴ Rather than simply focusing on either the net good of the community or redressing the crime committed, restorative justice seeks in some sense to do both, and perhaps even more. The approach rejects the view that crime is primarily an offense against the state, though it recognizes that a community is harmed when one violates the rules. First and foremost the movement asserts that crime is more than lawbreaking. “[O]ffenders harm victims, communities, and even themselves.”⁴⁵ Restorative justice shifts the focus of who is primarily aggrieved by the commission of a crime to perhaps its most obvious place—the victim. Beyond the immediate injured party, it also recognizes that a community—both the family of the victim and the larger society—is injured as well. To the list of individuals harmed by crime, restorative justice adds the perpetrator. “Restorative justice [also] says crime is a violation of people and relationships.”⁴⁶ Repairing these fractured relationships is a primary goal of restorative justice.⁴⁷

Restorative justice does more, however, than simply recognize those parties that have been injured. It also urges that a more complete concept of justice means allowing those same injured parties, rather than just the state and the wrongdoer, to participate in the response to the crime. Restorative justice attempts to repair the damage done to both the individuals most affected, and society as a whole.⁴⁸ The victim, the offender, and affected members of the community thus

⁴³ *See id.*

⁴⁴ *See id.* at 1–2.

⁴⁵ *Id.* at 1.

⁴⁶ Elizabeth Linehan, *Retribution and Restoration: The Two Paths*, BLUEPRINT FOR SOC. JUST., Jan. 2003, at 6, available at www.loyno.edu/twomey/blueprint/vol_lvi/No-05_Jan_2003.html.

⁴⁷ *Id.*

⁴⁸ *See* BRIEFING PAPER, *supra* note 43, at 1; *see also* HOWARD ZEHR & HARRY MIKA, MENNONITE CENTRAL COMMITTEE, FUNDAMENTAL CONCEPTS OF RESTORATIVE JUSTICE 1 (1997), <http://2ssw.che.umn.edu/rjp/Resources/Documents/>

become central to the criminal justice process, with governmental and legal professionals serving as facilitators of a system that aims at offender accountability, reparation to the victim and full participation by the victim, offender, and community. The restorative *process* of involving all parties . . . is a powerful way of addressing not only the material and physical injuries caused by crime, but the social, psychological and relational injuries as well.⁴⁹

This new method of punishing recognizes that when a crime has been committed, the after-effects of that crime require a healing process that incarceration alone cannot effectuate.⁵⁰ It may be of little comfort to a victim to know that her perpetrator is behind bars when she continues to suffer as a result of the crime, whether it be physically, financially, or emotionally. Also, in certain communities there is a tremendous stigma attached to being victimized. It can sometimes be too difficult for members of the community to adequately address a victim's needs, or the community may shun the victim as much as it does the offender. These are all aspects of the criminal act that current modes of punishment fail to address, and in fact may help perpetuate. Restorative justice encourages the full participation of every party affected and incorporates the community into the punishment and restorative process. The method insists that "[t]he community has a responsibility to support and help victims of crime to meet their needs."⁵¹ Additionally, it is not enough for an offender to serve his time. Rather, "[o]bligations that follow from the harm inflicted by crime should be related to making things right."⁵²

Most importantly, the victim of the offense is placed at the forefront of the offender's punishment. Victims are encouraged to be involved in the criminal proceedings even before the offender has been found guilty by being given access to information regarding the offender's trial, plea bargaining, and sentencing.⁵³ Any fines required by the state are subordinated to the restitution of the victim.⁵⁴ In addition, victims are given a

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⁴⁹ BRIEFING PAPER, *supra* note 43, at 1.

⁵⁰ See ZEHR & MIKA, *supra* note 49, at 1.

⁵¹ ZEHR & MIKA, *supra* note 49, at 1.

⁵² ZEHR & MIKA, *supra* note 49, at 1.

⁵³ See Linehan, *supra* note 47, at 6.

⁵⁴ See ZEHR & MIKA, *supra* note 49, at 1.

primary role in assessing how they would like the reparative process to proceed—whether, for instance, by one-on-one encounters with their offenders or through group counseling sessions.⁵⁵ Restorative justice demands that the healing of the individuals and social bonds most damaged by the crime is to be given priority over other justice considerations.

The victim, however, is not the sole focus of the restorative justice project. The movement also views the offender as a human being worthy of taking part in a healing process and deserving of reintegration into the community he has affected, though it may not necessarily take the form of physical reintegration.⁵⁶ This part of the restorative process provides “the potential [for] bringing about real change in the offender”⁵⁷ and “[r]ecognize[s] that offenders themselves have often been harmed”⁵⁸ The punishment here does not seek to let the offender off the hook and remains mindful of his role in bringing about the harm that has occurred. However, it “avoid[s] the trap of imagining the two parties as isolated individuals. Instead, they are engaged as members of families and larger networks of support.”⁵⁹ The offender himself, through mediations with the victim, may be given some control in determining his deserved punishment.⁶⁰ All of the offender outreach is designed primarily to help the victim overcome the harm done to her, and to facilitate a forgiveness process that is viewed as helpful to both parties. But it also may pave the way for the offender’s reintegration into society, ideally as an improved individual who understands more fully the consequences of his actions.⁶¹

Restorative justice offers several techniques for achieving its central goals. One method is through the use of mediation between the victim and the offender. In these sessions, the parties can discuss what they feel is an appropriate punishment for the offender. The offender is encouraged to make gains toward understanding the impact of his crime on the victim and the community, and may be given the opportunity to explain his

⁵⁵ See BRIEFING PAPER, *supra* note 43, at 1; ZEHR & MIKA, *supra* note 49, at 2.

⁵⁶ See Linehan, *supra* note 47, at 6; BRIEFING PAPER, *supra* note 43, at 1; ZEHR & MIKA, *supra* note 49, at 1–2.

⁵⁷ Linehan, *supra* note 47, at 6.

⁵⁸ ZEHR & MIKA, *supra* note 49, at 2.

⁵⁹ Linehan, *supra* note 47, at 6.

⁶⁰ See *id.*

⁶¹ See *id.*

actions and learn how he can right his wrong. Similarly, through personal contact with the offender, the victim may heal more quickly by gaining a fuller understanding of the person who has injured her. The goal here is that by meeting with the victim, the offender may become truly responsible for his actions.⁶²

Another method of restorative justice is family or community conferencing. These conferences seek to achieve many of the same goals as the victim-offender mediation, but allow the community and those connected to the victim to explain the harm done to them by the offender. They also encourage participation by the support groups of both the victim and the offender in an effort to deal with the pain felt by both sides, and determine strategies for healing the damage and preventing its recurrence.⁶³ Another popular method of restorative justice is peacemaking and sentencing circles. Again, the focus is on involving the larger community, in addition to the victim and offender, in developing appropriate strategies for making amends and repairing harm. State and legal officials may also take part and learn more about the individuals with whom they interact when working within the criminal justice system.⁶⁴

As a method of punishment, restorative justice seeks to redefine current conceptions of crime to more adequately address the needs of the victim, the community, and the offender. Moreover, it attempts to achieve goals different than those currently emphasized by encouraging reconciliation, community involvement, and ownership of the process by those most affected. Finally, restorative justice takes seriously the fact that crime is more complex and its harm more comprehensive than presently recognized. A proper justice system should address head-on the totality of crime and use its power to punish in ways that make sense and achieve lasting and worthwhile goals.

B. Justifying Restorative Justice

As discussed above, a society must have valid theories for its punishments, and those punishments must meet whatever criteria are established by that justification. The two main

⁶² See Linehan, *supra* note 47, at 6; BRIEFING PAPER, *supra* note 43, at 2; ZEHR & MIKA, *supra* note 49, at 2.

⁶³ See Linehan, *supra* note 47, at 6; BRIEFING PAPER, *supra* note 43, at 2-3; ZEHR & MIKA, *supra* note 49, at 1.

⁶⁴ See Linehan, *supra* note 47, at 6; BRIEFING PAPER, *supra* note 43, at 2.

theories of punishment have been explored, as has one method of punishment. Now, it is important to assess whether that mode of punishment is rationalized by a defensible theory of punishment. As will be explained, despite their many differences and divergent concepts, both utilitarianism and retributivism can justify most of the proposals of restorative justice. This is not to assert that the whole program ought, therefore, to be adopted. Indeed, other legal concerns and policy choices may make restorative justice a method not worth employing in whole or in part. But, other failings notwithstanding, restorative justice appears to fit within the two competing justifications for punishment as described above.

The utilitarian goals of punishment are largely met by restorative justice in that this mode of punishment appears almost entirely aimed at creating greater net happiness for society. Restorative justice's view of punishment also seems to be forward-looking, in typical utilitarian fashion. The prescriptions outlined above demonstrate restorative justice's commitment to more fully integrating those individuals most affected by crime, as well as their communities, into the criminal justice process in an effort to repair the harm done and restore the parties' sense of community and worth. If punishment is to be viewed as a necessary evil, certainly that evil is lessened if the goals of the punishment are "restoration, healing, responsibility and prevention."⁶⁵

It is not entirely clear that restorative justice would meet utilitarianism's deterrence goals. At least as to individual deterrence, restorative justice seems designed to discourage the offender from repeating his offense. It is not necessarily the case, however, that others would be deterred from crime after observing the process of punishment undertaken in the restorative justice model. Such a process is undoubtedly easier than a long prison sentence and may lead to lighter sanctions than are necessary to deter would-be criminals. This is especially problematic when one recalls Bentham's desire to merely threaten a potential wrongdoer with such unpleasantness as will effectively deter his misconduct.⁶⁶ On the other hand, restorative justice coupled with other justified punishments may

⁶⁵ ZEHR & MIKA, *supra* note 49, at 1.

⁶⁶ See Brandt, *supra* note 6, at 252.

achieve the utilitarian goal of deterrence. Restorative justice seems to value utilitarianism's rehabilitative ambitions. Indeed, the entire design and aim of restorative justice is to mend the injury done to the victim, community, and the criminal in the hopes of, among other things, improving the offender.

Although it may seem like a contradiction, it appears that restorative justice also squares with retributive principles of justice. Though it may have novel methods, the restorative justice movement is primarily concerned with addressing the harm that has been committed.⁶⁷ In this way, it is retrospective in retributive fashion. Additionally, restorative justice fully encourages criminals to make right the wrongs they have committed. In a sense, this aim can be said to achieve retribution's goal of equalizing the benefits and burdens in society. When one has received an unfair advantage by committing a crime, restorative justice demands restitution and allows the victim and community to help determine how an offender can best make amends. Also, though retribution demands that the offender's full debt be repaid—out of respect for the state and the offender—retributivists have argued that forgiveness, as is encouraged by restorative justice, may discharge the debt owed because the victim or the society has considered the equilibrium restored.⁶⁸

Retributivism also seeks to recognize the moral worth of individuals in that those punished must be actually and morally guilty of a crime, and be seen as being owed their punishment.⁶⁹ Assuming that those who would take part in the restorative process are sufficiently guilty of the crimes for which they have been sentenced, the methods employed actually encourage an offender to personally recognize that he is owed his punishment. The retributive goal is not only achieved by the state punishing the offender, but by the criminal himself realizing his debt to society and fully recognizing that he is deserving of punishment.⁷⁰ Moreover, since the victim is not the only focus of the restorative justice program, the offender is treated as the independent moral agent that he is.

⁶⁷ ZEHR & MIKA, *supra* note 49, at 1.

⁶⁸ See Morris, *supra* note 27, at 258.

⁶⁹ See *id.* at 257, 262.

⁷⁰ See *id.* at 260.

Despite the lack of consensus between the two traditional justifications for punishment, it at least appears that, at first blush, restorative justice is rationalized by either theory. As a mode of punishment, society may choose to accept or reject, in whole or in part, the restorative project. Nevertheless, should some of its prescriptions find their way into the American criminal justice system, they would be well justified by either the utilitarian or retributive theories of punishment.

C. Catholic Social Thought and Restorative Justice

In recent years crime has escalated. Murder, street violence, sexual assault, burglary, theft, domestic violence, car conversion, and white collar crime have become more widespread. Yet the traditional means of dealing with such crime seem unable to bring about reconciliation and healing. Reoffending rates remain high. The prison industry is expanding. Fear of crime dominates too many lives.

It is time to re-evaluate what it is we need for true justice to flow throughout this land.⁷¹

Any attempts that society makes to achieve a more just and effective system of punishment must be evaluated from a variety of different perspectives. Recall that once a particular mode of punishment is deemed to be rationalized by a defensible theory of punishment, the decision to adopt, in part or in whole, the prescriptions of that particular mode is essentially one of public policy. Catholic Social Thought (“CST”) is one lens through which certain policy alternatives can be assessed.⁷² It has been stated that:

By looking at what is both old and new, the Church’s social tradition engages the world and its specific issues and problems. Pope John Paul II explain[ed] that the Church “formulates a genuine doctrine for these situations, a corpus which enables her to analyze social realities, to make judgments about them and to indicate directions to be taken for the just resolution of the problems involved.” Rather than merely reacting to modern situations and attempting to “reinvent the wheel” when it comes

⁷¹ Bishops’ Statements, Catholic Church in N.Z., *Creating New Hearts* (Aug. 30, 1995), http://catholic.org.nz/statements/9508_hearts.php.

⁷² Catholic Social Thought, of course, is not the sole method by which various social issues and policy choices can be scrutinized. Rather, like Critical Race Theory, Feminism, or any other system of social critique, CST offers its own set of values and concerns that ought to be taken seriously in any policy discussion.

to social problems of today, the Church sees “the ‘old’ and the ‘new’ . . . always closely interwoven. The ‘new’ grows out of the ‘old,’ and the ‘old’ finds a fuller expression in the ‘new.’” The social tradition of the Church is critical to contemporary culture because it helps us to mediate the profound meaning of our living tradition in our present-day society and avoid the all-too-common dichotomies between faith and work, contemplation and action, and private and public experience.⁷³

It is this understanding of the relevance of CST as a method of informing the kinds of choices a society may prefer that makes it a valuable tool in evaluating the merits of restorative justice. Although it may be the case that the Church offers insight into the traditional theories of punishment, it may well be “reinventing the wheel” to press CST into the service of critiquing utilitarianism and retributivism as philosophies. Rather, the greater value lies in analyzing restorative justice as a potential modern solution to the age-old problem of providing just and meaningful punishment. Having seen that the restorative movement meets the baseline criteria of both major theories of punishment, it is important to uncover the extent to which this penal scheme comports with principles of CST.

Not surprisingly, many Catholic social thinkers and church leaders endorse the restorative mode of punishment as a way of more humanely treating both victims and offenders. The church has made as part of its official teaching the belief that “[p]unishment . . . , in addition to defending public order and protecting people’s safety, has a medicinal purpose: as far as possible, it must contribute to the correction of the guilty party.”⁷⁴ This correction also takes on the moral value of expiation when the guilty party voluntarily accepts his punishment.⁷⁵ From the outset, it is easy to see that restoration

⁷³ John A. Ryan Inst. for Catholic Soc. Thought, Purpose of the Institute, <http://www.stthomas.edu/cathstudies/cst/purpose.htm> (last visited Oct. 20, 2005). Pope John Paul II had also noted that, “[t]he Church does not have technical solutions to offer . . . [b]ut [being] an ‘expert in humanity,’ . . . the church has something to say . . . about the nature, conditions, requirements, and aims of authentic development, and also about the obstacles which stand in its way.” JOHN PAUL II, ENCYCLICAL LETTER *SOLLICITUDO REI SOCIALIS* ¶ 41 (1987) [hereinafter *SOLLICITUDO REI SOCIALIS*] (emphasis omitted). It is in this vein that restorative justice becomes one of the many areas in which the Church may have something to say.

⁷⁴ CATECHISM OF THE CATHOLIC CHURCH ¶ 2266 (2d ed. 1997).

⁷⁵ See *id.*

achieves this goal by requiring that very acceptance, and more, by the criminal. As will be shown, the movement also meets other principles of CST.

The essential dignity of the human person is a hallmark of CST.⁷⁶ Although specifically addressing the death penalty as a mode of punishment, Pope John Paul II offered a view of a just system of punishment by asserting that, “[these] problem[s] must be viewed in the context of a system of penal justice ever more in line with human dignity and thus, in the end, with God’s plan for man and society.”⁷⁷ This dignity is not, in the opinion of Church leaders, a concept that is earned or gained, but rather something everyone possesses by virtue of being a child of God.⁷⁸ This is so because, as the Church teaches, human persons are willed by God in that “God has imprinted his own image and likeness on man [and] . . . [i]n effect . . . there exist rights which do not correspond to any work he performs, but which flow from his essential dignity as a person.”⁷⁹ In the context of punishment, “[a] Catholic approach begins with the recognition that the dignity of the human person applies to both the victim and the offender.”⁸⁰ Restorative justice takes as its chief aim this very recognition. The dignity of the victim is reinforced in ways that current conceptions of punishment fail to address by permitting greater involvement in the criminal process and placing the victim at the forefront of the restorative program. The offender is especially encouraged to recognize the dignity of the very individual whom he has wronged by making amends and tailoring his punishment to the healing needs of the victim.

The restorative process also recognizes the dignity of the offender and meets head-on the Catholic challenge that “great care must be taken to respect every life, even that of criminals and unjust aggressors”⁸¹ Here, the wrongdoer is viewed not as merely the inflictor of harm, but as an essential part of the

⁷⁶ See UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *Responsibility, Rehabilitation, and Restoration: A Catholic Perspective on Crime and Criminal Justice* (2000) [hereinafter USCCB, *Responsibility*], available at <http://www.usccb.org/sdwp/criminal.htm>.

⁷⁷ JOHN PAUL II, ENCYCLICAL LETTER *EVANGELIUM VITAE* ¶ 56.1 (1995) [hereinafter *EVANGELIUM VITAE*].

⁷⁸ See USCCB, *Responsibility*, *supra* note 76.

⁷⁹ JOHN PAUL II, ENCYCLICAL LETTER *CENTESIMUS ANNUS* ¶ 11 (1991).

⁸⁰ USCCB, *Responsibility*, *supra* note 76.

⁸¹ *EVANGELIUM VITAE*, *supra* note 77, ¶ 57.1.

repair that is necessary following victimization. Moreover, the offender is likewise aided in his own healing, and it is further encouraged that the victim and the community gain a better sense both of who the criminal is as a fellow human and what motivates his actions. As the United States Conference of Catholic Bishops ("USCCB") has urged, "Just as God never abandons us, so too we must be in covenant with one another. We are all sinners, and our response to sin and failure should not be abandonment and despair, but rather justice, contrition, reparation, and return or reintegration of all into the community."⁸² Restorative justice seeks these very goals and can be utilized as a means to greater understanding, mercy, and communion. The faith community is called in ways similar to those urged by restorative justice as well. In appreciating the human dignity of all people, a community of faith is called to provide comfort to the hurt and victimized and help their fellow humans to heal.⁸³ The New Testament also calls the faithful to recognize the dignity of criminals, specifically in Christ's charge that his followers visit the imprisoned.⁸⁴ These challenges to comfort the injured and the injurer as members of a shared community parallel the very process restorative justice urges.

⁸² USCCB, *Responsibility*, supra note 76.

⁸³ See *id.* at 11.

⁸⁴ See *Matthew* 25:31-40 (New American). Matthew recounts Jesus' Judgment of the Nations, writing:

When the Son of Man comes in his glory, and all the angels with him, he will sit upon his glorious throne, and all the nations will be assembled before him. And he will separate them one from another, as a shepherd separates the sheep from the goats. He will place the sheep on his right and the goats on his left. Then the king will say to those on his right, "Come, you who are blessed by my Father. Inherit the kingdom prepared for you from the foundation of the world. For I was hungry and you gave me food, I was thirsty and you gave me drink, a stranger and you welcomed me, naked and you clothed me, ill and you cared for me, *in prison and you visited me.*" Then the righteous will answer him and say, "Lord, when did we see you hungry and feed you, or thirsty and give you drink? When did we see you a stranger and welcome you, or naked and clothe you? When did we see you ill or in prison, and visit you?" And the king will say to them in reply, "Amen, I say to you, whatever you did for one of these least brothers of mine, you did for me."

Id. (verse numbers omitted) (emphasis added).

The CST notion of securing the common good is also met by restorative justice's prescriptions.⁸⁵ As a general matter, the Church has instructed that,

the common good is chiefly guaranteed when personal rights and duties are maintained. The chief concern of civil authorities must therefore be to ensure that these rights are acknowledged, respected, coordinated with other rights, defended and promoted, so that in this way each one may more easily carry out his duties.⁸⁶

In the context of punishment, restorative justice serves these ends by urging those in positions to shape policy to establish a mode of punishment that more fully integrates the rights and obligations of all involved in the offense—be it victim, offender, or society.

As a matter of social justice, the late Holy Father reminded all that in the context of punishment, “values such as the dignity of every human person, respect for inviolable and inalienable human rights, and the adoption of the ‘common good’ as the end and criterion regulating political life are certainly fundamental and not to be ignored.”⁸⁷ Further, the USCCB noted that a concern for the common good must be at the heart of any just criminal system⁸⁸ and stated that:

The concept of “redress,” or repair of the harm done to the victims and to society by the criminal activity, is also important to restoring the common good. This often neglected dimension of punishment allows victims to move from a place of pain and anger to one of healing and resolution. In our tradition, restoring the balance of rights through restitution is an important element of justice.⁸⁹

Again, it is easy to see the similarities between the aims of restorative justice and the goals endorsed by Catholic social teaching. Particularly striking is the restorative movement's call for community involvement in the reparation of the harm, as well as establishing connections between the support groups of both

⁸⁵ The Church has noted that, “the common good embraces the sum of those conditions of social life by which individuals, families, and groups can achieve their own fulfillment in a relatively thorough and ready way.” SECOND VATICAN COUNCIL, PASTORAL CONSTITUTION *GAUDIUM ET SPES* ¶ 74 (1965).

⁸⁶ JOHN XXIII, ENCYCLICAL LETTER *PACEM IN TERRIS* ¶ 60 (1963).

⁸⁷ *EVANGELIUM VITAE*, *supra* note 77, ¶ 70.4.

⁸⁸ See USCCB, *Responsibility*, *supra* note 76.

⁸⁹ *Id.*

the victim and the offender. By bringing together those communities most closely affected by the criminal act, as well as members of the community at large, society may not only be employing methods that will help them heal and grow safer, but also foster a shared faith community that serves the common good.

Another CST principle that finds a close parallel in restorative justice is the option for the poor and vulnerable.⁹⁰ “This principle of Catholic social teaching recognizes that every public policy must be assessed by how it will affect the poorest and most vulnerable people in our society.”⁹¹ It is well understood that poverty and desperate circumstances are influential factors in whether or not one chooses to commit a crime, or even whether that individual feels they have a choice not to.⁹² A concern for the vulnerable in the criminal justice setting can express itself as a focus on both those victimized by crime as well as those whose situations make them more likely to commit crimes in the future. Obviously enough, a restorative justice focus on the victim meets the Catholic call to reach out to the vulnerable. In a similar vein, the vulnerability and poverty that may have led one to commit a crime is likely still present in the offender. Restorative justice seeks to address those needs as well by providing a forum for the offender to explain and redeem himself.

As restorative justice shifts the focus of the criminal act to those closest to it, the program also meets the CST concept of subsidiarity. This notion holds that problem-solving should take place at the lowest effective level and encourages community involvement and, perhaps even one-on-one solutions to be the first attempted in meeting social needs.⁹³ The Church has urged that:

⁹⁰ The Church has taught that, “[i]n teaching us charity, the Gospel instructs us in the preferential respect due to the poor and the special situation they have in society” PAUL VI, APOSTOLIC LETTER *OCTOGESIMA ADVENIENS* ¶ 23 (1971). Pope John Paul II continued this mantra in stating that, a consistent theme of Catholic social teaching is “the option or love of preference for the poor.” *SOLLICITUDO REI SOCIALIS*, *supra* note 73, ¶ 42 (emphasis omitted).

⁹¹ USCCB, *Responsibility*, *supra* note 76.

⁹² See, Susan J. Stabile, *Subsidiarity and the Use of Faith-Based Organizations in the Fight Against Poverty*, 2 VILL. J. CATHOLIC SOC. THOUGHT 31, 41 (2005) (noting, “[t]here is ample support for the proposition that poverty influences crime”).

⁹³ See USCCB, *Responsibility*, *supra* note 76.

[O]ne should not withdraw from individuals and commit to the community what they can accomplish by their own enterprise and industry. So, too, it is an injustice and at the same time a grave evil and a disturbance of right order, to transfer to the larger and higher collectivity functions which can be performed and provided for by lesser and subordinate bodies. Inasmuch as every social activity should, by its very nature, prove a help to members of the body social, it should destroy or absorb them.⁹⁴

Restorative justice calls for this very kind of problem-solving through the use of victim-offender mediation, community and family conferences, and sentencing or peacemaking circles. In these processes, the community that has also been made a victim takes an active role in what its response to the damage will be and shares in the reparative process with both the victim and the offender. A social system that takes principles of subsidiarity seriously would naturally reject the kind of strict sentencing guidelines and unwavering mandatory punishments that the American penal system currently embraces.⁹⁵ Restorative justice is a move away from such methods of punishment as they are imposed upon communities by distant governmental authorities rather than those closest to the offense. By relying on principles of subsidiarity, both CST and restorative justice assert that the best and most effective answers to social problems will likely come from the society affected by them, whose members are the causes, influences, solutions, and victims of whatever ill is being addressed.

Finally, CST also calls for a principle of solidarity. This principle of Catholic social teaching

is not a feeling of vague compassion or shallow distress at the misfortunes of so many people On the contrary, it is a firm and persevering determination to commit oneself to the common good; . . . to the good of all and of each individual, because we are all really responsible for all.⁹⁶

As the USCCB has said:

Not only are we responsible for the safety and well-being of our family and our next-door neighbor, but Christian solidarity demands that we work for justice beyond our boundaries.

⁹⁴ JOHN XXIII, ENCYCLICAL LETTER *MATER ET MAGISTRA* ¶ 53 (1961).

⁹⁵ See USCCB, *Responsibility*, *supra* note 76 (noting the Conference's rejection of simplistic solutions such as "three strikes and you're out" and rigid mandatory sentencing).

⁹⁶ *SOLLICITUDO REI SOCIALIS*, *supra* note 73, ¶ 38 (emphases omitted).

Christians are asked to see Jesus in the face of everyone, including both victims and offenders. Through the lens of solidarity, those who commit crimes and are hurt by crime are not issues or problems; they are sisters and brothers, members of one human family. Solidarity calls us to insist on responsibility and seek alternatives that do not simply punish, but rehabilitate, heal, and restore.⁹⁷

It is here that the restorative justice movement is brought into full communion with CST. The baseline principle of solidarity provides the rationale for why victims are encouraged to seek out and understand their offenders. Many of restorative justice's other goals might be equally met through a societal commitment to provide counseling for victims and family, or to encourage community outreach programs that address the needs of victims and offenders separately. But it is the recognition that there is, through their basic humanness, no real difference in the status of the individuals urged to restore and repair the broken relationship that makes the restorative project such an important and worthwhile one. Moreover, the entire community's recognition that its members are interconnected through a principle of solidarity should compel the society to create an environment that nurtures the injured and the victimized, but stands ready to welcome back the sinner.

CONCLUSION

It is indeed promising that restorative justice meets several of the goals of the two prevailing theories of punishment and that it comports with many of the principles of Catholic Social Thought. To be sure however, there may be many deficiencies to the movement and its prescriptions that society and those in positions of power and influence must take seriously. Significant countervailing policies may militate against adopting certain restorative suggestions. For instance, maintaining the integrity of the criminal justice system, including its presumption of innocence of the accused and the constitutional protections afforded criminal defendants, may make the restorative goal of victim-offender plea bargaining conferences a concept not worth pursuing. The risk of compromising the judicial process in this manner may simply be too great to permit society to so radically

⁹⁷ USCCB, *Responsibility*, *supra* note 76.

alter the extent to which suspected offenders are subordinated to the interests of the victims. This might at least be the case as to issues affecting the criminal proceedings before and during trial though, while other prescriptions that more directly impact on sentencing or how an offender's incarceration will be best served could be worth pursuing. The upshot is that, at the very least, restorative justice offers alternatives that should be included in any thoughtful discussion of social justice within the penal system. Whatever faults may inhere in the principles of restorative justice, be they constitutional, political, social, or otherwise, they are most assuredly not philosophical or theological. As such, it is time that this mode of punishment receives the serious consideration it deserves.

