



Critically Analyzing Restitution and Restorative Justice Through an Ethics of Care Lens

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Abstract

In chapter five of “The Problem of Punishment,” David Boonin (2008) describes a moral problem with punishment. He proposes relying more heavily on victim restitution within our current criminal justice system. Similarly, Jon'a Meyer (1998) explores the restorative justice framework rooted in Indigenous traditions in her article “History Repeats Itself: Restorative Justice in Native American Communities.” Both make convincing arguments for alternatives to our punishment system. However, their claims are controversial because many believe that punishment is vital for a society to function (Boonin, 2008, p. 214). I will introduce the ethics of care perspective to bolster Boonin and Meyer's ideas that support restitution and restorative justice over punishment. I will argue that we should incorporate restitution and restorative justice as a gentler approach to altering our existing criminal justice system.

Keywords: Applied Ethics, Restitution, Restorative Justice, Ethics of Care

DAVID BOONIN'S "THE Problem of Punishment" (2008) describes the moral problem with punishment—that it is wrong to intentionally harm others, even as a form of retribution—and proposes relying more heavily on victim restitution within our current Canadian criminal justice system (pp. 213–216). Similarly, Jon'a Meyer's article: "History Repeats Itself: Restorative Justice in Native American Communities" (1998) explores a framework of restorative justice rooted in Indigenous traditions. Both pieces of literature make convincing arguments for possible alternatives to our punishment system. However, given the current state of the criminal justice system, Boonin and Meyer's claims are controversial because people may still believe that punishment is vital for a society to function (Boonin, 2008, p. 214).

In what follows, I will introduce the problem of punishment and briefly discuss Boonin's proposed solution. Next, I will describe a system of restitution and compare it with restorative justice, demonstrating that when used together, they create a more effective and morally superior system to punishment. After, I will introduce the normative ethical theory *ethics of care* to bolster support for Boonin and Meyer's position for restitution and restorative justice over punishment. Based on this, I will argue that we should incorporate restitution and restorative justice elements as a gentler approach to altering our existing criminal justice system rather than entirely replacing it. Looking through an ethics of care lens can help us understand why it is essential to have both restitution and restorative justice in the toolkit of the criminal justice system because no single theory works for every situation nor solves every problem.

The Problem with Punishment

It may seem intuitive that punishing a transgression is a justified form of committing harm. It is hard to imagine a system of justice without punishment. Even the Kantian standard for just deserts, *lex talionis*,

exemplifies a purely retributivist approach (Kant, 1797). However, while punishment, or retribution, may seem required for an effective system of justice, it is not mandatory. The problem with punishment is that it challenges our moral intuition that it is impermissible to intentionally harm another person (Boonin, 2008, p. 213). Boonin asserts that we should not punish offenders because “in no other realm of human interaction would we allow one group of people to intentionally inflict serious harm on another if no satisfactory justification for the moral permissibility of this practice was available” (p. 213). In other words, Boonin is skeptical of punishment because it subjects offenders to intentionally harmful treatment. He proposes two ways to do without it: replace punishment with something like treatment and therapy or rely more heavily on victim restitution (pp. 214-215). Boonin opts for the latter option and defends a theory of *pure restitution* as morally superior to punishment. Restitution, unlike retribution, focuses on making the victim better off rather than making the offender worse. Even if we deem punishment immoral but excusable, that will not change the fact that it is superfluous, especially considering other viable options exist. Now that I have explained the problem with punishment, I move to give an account of other forms of justice, namely restitution and restorative justice.

An Explanation of Restitution and Restorative Justice

A system of restitution strongly emphasizes compensating the victim of a crime after it has been committed to restore them to the level of well-being they previously enjoyed before being wrongfully harmed (Boonin, 2008, p. 224). Compensation can include various options, including financial and non-financial compensation, such as spending the time to repair a victim's house. The theory of pure restitution maintains that it is morally appropriate to force offenders to compensate their victims. Furthermore, it must be noted that sometimes similar

activities can be used for both restitution and punishment, even though the underlying purpose of the action in each circumstance is distinct. From a restitutive perspective, a fine is designed to restore a victim's position before the transgression. In contrast, a punitive fine is designed to punish a transgressor and deter other would-be transgressors (recidivism). In short, victim restitution does not raise the same complex moral problems as punishment because it avoids intentionally harming anyone. It is evident that restitution is morally superior because sometimes individuals are compelled to make restitution to others when they do something wrong but not illegal, like breaching a contract. In this case, it is common for the individual to be morally compelled to right their wrong through restitution and not punishment. Restitution parallels *torts* rather than punishment and should be used alongside or to shape punishment instead of entirely replacing the current system (Boonin, 2008, pp. 214–215).

Restorative justice and restitution go hand in hand. Meyer (1998) states that restorative justice is an old practice with roots in Indigenous communities (p. 42). Examples of contemporary restorative justice practices include family group conferencing and circle sentencing (Chatterjee & Elliott, 2003, p. 350). Restorative justice is concerned with framing the process in terms of harmony and disharmony (rather than adversarial) and seeking consensus from the community (Meyer, 1998, p. 43). Moreover, Canadian studies have demonstrated that restorative justice is more successful and effective in decreasing recidivism than retributive justice (Chatterjee & Elliott, 2003, p. 347, 350). In a publication by the Research and Statistics Division of the Canadian Department of Justice, Latimer, Dowden, and Muise (2001) found that:

“Generally, compared to traditional non-restorative approaches, restorative justice was found to be more successful at achieving each of its four major goals. In other words, based on the findings of this meta-analysis, restorative justice programs are a more effective method of improving victim/offender satisfaction, increasing offender compliance with restitution, and decreasing the recidivism of offenders when

compared to more traditional criminal justice responses (i.e. incarceration, probation, court-ordered restitution). In fact, restorative programs were significantly more effective than these approaches in all four outcomes (with the exclusion of the offender satisfaction outlier)” (p. 17).

Restorative justice is distinct from our current retributive justice system because it views crime as a violation of people and relationships instead of the conventional understanding of crime as a violation of the law. Likewise, Indigenous restorative justice practices focus primarily on restoring the balance in individuals and their communities through conflict resolution, extending to justice approaches like circle sentencing. In circle sentencing, the accused, the victim(s), the court officers, and other community members sit in a circle, usually outside of a formal courtroom, while listening to each other speak on the accused's actions and agreeing on a sentencing decision together (Chatterjee & Elliott, 2003, p. 349). The circle is a metaphor for the values of restorative justice—love, empathy, honesty, trust, humility, sharing, and forgiveness. Circle sentencing also encourages the coming to agreements and the healing of all parties (Chatterjee & Elliott, 2003, p. 350). In the case of a fine, compensation is not intended to be equivalent to what was lost but is supposed to lead to forgiveness from the victim and the victim's family (Meyer, 1998, p. 44).

Next, I will briefly sketch considerations in favour of restitution and restorative justice. The main reason why people find these systems appealing is that they are more effective than punishment, which is evident in how restitution and restorative justice decrease recidivism rates (Chatterjee & Elliott, 2003). Additionally, restitution and restorative justice actually address the harm done to victims. In contrast, our current punishment system primarily focuses on deterring or incapacitating offenders without formally addressing the harm done to victims. According to Boonin (2008), systems of restitution and restorative justice altogether avoid the moral problems associated with punishment (p. 224). Boonin explicitly contends that he only supports restitution because the

alternative (punishment) is unideal and any good reason to reject restitution is an excellent reason to reject punishment. Furthermore, he argues that whether we accept or reject restitution, we must ultimately reject the practice of punishment (Boonin, 2008, p. 224).

Nevertheless, Boonin's claim is incredibly controversial, and many still have significant concerns about restitutive justice. Some challenges facing restitution and restorative justice are the potential burdens on victims. For example, some victims want nothing to do with their offender(s) since any form of contact following the incident may be traumatic, especially for someone trying to heal. Another concern is that the victim may be deceased or unavailable, not to mention that compensation may be virtually impossible due to the seriousness or scale of the crimes committed. Lastly, there are cases where compelling an offender to provide compensation might not involve much harm to the offender or produce much incentive not to re-offend, especially in cases where the offender is exceptionally wealthy and can easily repay the financial debt to their victim. Therefore, I want to propose additional support for a restitution and restorative justice system using an ethics of care perspective. Boonin's and Meyer's ideas may be effectively bolstered by looking at them through an ethics of care lens.

The Ethics of Care Perspective

Ethics of care theorists use a maternal model to define "care." Care is more than an attitude; it describes a pattern of thinking, feeling, and behaving (Noddings, 1984, pp. 79-81). Ethics of care theorists argue that interpersonal relationships and the specific context of cases are significant when making decisions. In a way, ethics of care resurrect things typically stereotyped as female and codifies them into a moral theory (Gilligan, 1982, p. 30). Some examples are emotions and an emphasis on cooperation over competition. Ethics of care values caring relations, loyalty, and moral emotions such as sensitivity, sympathy, empathy, and

responsiveness because they give us cues about who needs what and how we ought to care for one another (Held, 2006, p. 10).

Ethics of care takes partiality very seriously because our individual outlook and existence in interpersonal relationships define the view (Noddings, 1984, p. 83). While most normative ethical theories are impartial because they value fairness, equality, or utility, interpersonal relationships are not impartial since they require consideration of an individual's unique, context-sensitive perspective. Furthermore, ethics of care is a highly *particularist* theory because, unlike Utilitarianism or Deontology, no tractable set of principles can explain morality (Noddings, 1984, pp. 84-85). Additionally, ethics of care is *anti-abstractionist* because the specific case matters when making moral decisions. There is no universal moral principle that everyone should follow. Noddings (1984) writes: "The decision for or against abortion must be made by those directly involved in the concrete situation, but it need not be made alone. The one-caring cannot require everyone to behave as she would in a particular situation" (p. 89). Noddings continues, "there is no way to disregard the self, or to remain impartial, or to adopt the stance of a disinterested observer" (p. 100).

What Can We Learn from Ethics of Care?

An ethics of care perspective provides positive reasons why people ought to commit to restitution and restorative justice, as opposed to Boonin, who primarily argues that the only reason to accept restitution is that the alternative (punishment) is worse. Our current punishment system is closely aligned with an ethics of justice perspective, which focuses on "questions of fairness, equality, individual rights, abstract principles, and the consistent application of them" (Held, 2006, p. 15). In contrast, an ethics of care perspective focuses on cultivating caring relations, attentiveness, and trust by fostering social bonds and cooperation among individuals. In other words, ethics of care does not consider

justice the paramount determinant. Instead, it examines how caring relations and moral emotions, like sensitivity and empathy, affect how we ought to treat offenders within the criminal justice system. When we look at restitution and restorative justice through an ethics of care lens, trust, mutual concern, and empathetic responsiveness take priority, especially since we are concerned with making the victim better off rather than harming the offender. Using Indigenous-based restorative justice practices, such as circle sentencing, we can demonstrate sensitivity, cultivate relationships, and better respond to the victims' and offenders' needs. It is much more than simply lowering recidivism rates, even though that is one of the many reasons for favouring a restorative justice system.

Another positive reason to adopt the value of care is its practice of healing people and relationships. The philosophy of restorative justice is a lesson in the ethics of care because it turns away from intentionally harming people and instead focuses on practicing what it preaches: facilitating healing (Chatterjee & Elliott, 2003, p. 350). A system of restitution and restorative justice can be seen as a delicate balance between ethics of justice and ethics of care. However, when integrating these two distinct concepts, care should always have priority, even though the primary considerations of justice should also be met (Held, 2006, p.17). Care is more fundamental because there can be care without justice. For example, some people live under an unjust authoritarian regime, but they still experience care because they possess loving interdependent relationships. In contrast, the world would cease to function without care since love, caring relations, and interpersonal relationships are necessities. It follows that there would be no justice without care, primarily because the world would not function in ways that would allow us to achieve justice or do much of anything without care. It should be clear why an ethics of care perspective strongly encourages and promotes the move toward restitution and restorative justice. In the next section, I will apply the ethics of care perspective to explain how to practically approach restitution and restorative justice in the case of lawbreakers and offenders.

The Practical Application of the Ethics of Care

While Boonin argues for the moral rejection of punishment, his claims are still controversial and lack practical insight. How can ethics of care influence the practical application of restitution and restorative justice? First, ethics of care is characterized by anti-unification. The moral theory does not provide a universal moral principle or tractable set of principles to follow. Second, ethics of care is also distinguished by anti-abstractionism because the specific context of a situation is significant when making a moral decision. Similar cases are not and should not be treated the same. Therefore, we should not have a system that relies solely on punishment, nor should we replace our current system with restitution and restorative justice. Ethics of care teaches us that individual cases matter, and we cannot apply one universal moral principle when holding offenders accountable. The solution is to combine punishment, restitution and restorative justice in a nuanced way because, given the values of the ethics of care, it would be a mistake to say there is only one framework that works for every situation and solves every problem. Since individual cases are highly context-sensitive, restitution or restorative justice cannot be the only solution. Nonetheless, restitution and restorative justice are essential in the toolkit of the criminal justice system for scenarios where care is an appropriate response.

We can incorporate elements of both restitution and restoration into our current criminal justice system as a gentler approach rather than completely replacing our current punishment practices. As previously mentioned, this could include relying on traditional Indigenous sentencing methods, such as family group conferencing and circle sentencing. The reason for combining punishment and restorative justice is that there will be cases that involve inherently bad and violent offenders. While we can use lessons in care to shape our justice practices and societal norms, there may be serial rapists or killers beyond rehabilitation or re-education. What do we do then? Here, we should rely on components

from our current justice practices because handling inherently violent offenders with care will not work. Noddings (1984) argues that we should commit such offenders to a mental institution because they do not have the capacity to experience care or maintain caring relations (pp. 81-87). As we are not only justified but morally obligated to do what is required to maintain and enhance care, the right thing to do in this situation is to intentionally harm the inherently bad offender through punishment to ensure that others can preserve their interpersonal relationships (Noddings, 1984, p. 95). Held (2006) expresses that there is nothing soft about care, evident in how a good mother knows how and when to discipline her children (pp. 15-17). Recognizing and using punishment when restitution or restorative justice will not work exhibits the same characteristics of care that a good mother displays when she effectively and rightly disciplines her children.

Though Boonin states that he only accepts restitution because the alternative is worse, ethics of care provides us with additional considerations in favour of restitution and restorative justice. These novel ideas should excite us because they bolster Boonin and Meyer's claims while encouraging us only partially to reject punishment since no single framework works for all. By observing through an ethics of care lens, we can see why cultivating relationships and relying on values of trust, mutual concern, and empathetic responsiveness is a beneficial strategy for the criminal justice system. The practical application of restorative justice already exists in Indigenous-based sentencing options, like circle sentencing. Therefore, we should continue incorporating restitution and restorative justice alongside our current punishment practices to lower recidivism rates and establish a morally superior and more capable criminal justice system.

Conclusion

In this article, I have addressed the moral problem of punishment, that it is impermissible to intentionally harm others, even as a form of retribution, and proposed a system that incorporates elements of both restitution and restorative justice as a soft approach rather than fully replacing our current criminal justice system. This was accomplished in multiple steps. First, I explained what restitution and restorative justice systems are. Second, I introduced the normative ethical theory ethics of care and fleshed out the main assumptions from the theory that are relevant to this particular discussion. Third, I clarified how ethics of care can provide additional support for restitution and restorative justice over punishment. Last, I analyzed how we should approach taking ethics of care from the theoretical and applying it practically to our current justice system. I conclude that we should adopt restitution and restorative justice alongside punishment because it would establish a well-rounded and morally superior criminal justice system.

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