

## **Retributivism and Outraged Love: A Search for the Heart of Retributive Justice**

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### **1. Introduction**

St. Peter asked Jesus “Lord, how many times shall I forgive my brother when he sins against me? Up to seven times?” Jesus answered, ‘I tell you, not seven times, but seventy times seven times’” (Mt. 18:21-22).

Jesus’ response is striking in itself, but all the more striking when we consider that the number seven in the Bible stands for wholeness or completeness. So it is as if Peter had asked, “Should I forgive a transgressor forever?” and Jesus had answered, ‘No, not forever, but forever and ever and ever!’”

Upon reading this one might well suppose that the New Testament is opposed to retributive punishment. One would be wrong. In the very next passage, beginning with the word “therefore,” Jesus presents a parable of retribution: *Therefore*, says Jesus, the kingdom of heaven is like a master who forgives the debt of a servant only later to learn that the excused servant himself refused to forgive the debt of a fellow servant: “Then the master called the servant in. ‘You wicked servant,’ he said, ‘I canceled all that debt of yours because you begged me to. Shouldn't you have had mercy on your fellow servant just as I had on you?’ In anger his master turned him over to the jailers to be tortured, until he should pay back all he owed” (Mt.18:23-34).

What is the relationship between the imperative to forgive and the demand for retributive justice? That is the question of my essay.

At first brush the two seem at odds. The aim of retributive justice, or so it seems, is to harm the perpetrator, albeit within strict limits. The retributive urge is often associated with vengeful, violent, even hateful emotions. The aim of forgiveness is reconciliation and restoration of relations. The urge to forgive is often linked with feelings of charity, sympathy, and benevolence. Is there any way to conceive a compatibility of these aims and urges? My contention is that a careful analysis of the meaning of retributive justice can show that, in its idea if not always in its application, it can play an important role in forgiveness itself, and in the restoration of just relations.

## **2. Retribution and the Golden Rule**

Let us begin with the observation that the principle of retribution bears a logical relation to the golden rule. It is, indeed, its converse form. Whereas the golden rule tells us that we should do to others as we would have done to us, the principle of retribution says that we should have done to us what we would do to others. This relation, however, is not one of logical implication.<sup>1</sup> The rule of retribution cannot be logically deduced from the golden rule. Indeed, ostensibly at least, it can be shown that the two principles conflict. If Peter treats Paul as Paul would *not* wish to be treated, then Paul, following the golden rule, would be obliged to treat Peter better than Peter has treated him. Thus the golden rule, followed strictly, would seem to forbid strict retribution.

Nevertheless, though we cannot logically derive the rule of retribution from the golden rule, there is a way we can derive the golden rule from the rule of retribution. Suppose, for instance, that it were a law of nature that one would always be treated just as one has treated others. Then to follow the golden rule would be a matter of simple prudence. If one could always count on

being treated just as one has treated others, then self-interest alone would dictate that one treat others as one would wish to be treated.

For this very reason, one's response to the threat of retribution can be used as a gauge to measure one's observance of the golden rule. That is, if you live by the golden rule you would always be happy to be treated as you treat others (i.e., according to the rule of retribution). Likewise, if you fail to live by the golden rule, then (to the exact extent of your failure, no more, no less) you will dread being treated as you treat others. Thus, by making each person subject to her own treatment of others, the rule of retribution has the peculiar characteristic of being able to serve as a system of moral judgment that, unlike other systems, has the ability to single out, all by itself, without need of judge, jury, or trial, right and wrong behavior—at least where the golden rule serves as our standard of right and wrong.

If, for instance, we could create a retribution machine that would mete out retributive treatment to one and all, automatically, exactly, and without interference, we could be assured by this alone, without any other apparatus of justice in place, that the guilty would be convicted in their guilt, the innocent acquitted, and the saintly, who have gone over and beyond the call of duty, duly rewarded—all through the automatic application of retribution itself. This is doubtless the reason this rule has seemed to so many the very embodiment of just desert. Anyone who fears the strict application of retributive justice can know, by that fear alone, that he has done something wrong. Anyone who does not fear it can know, again by this alone, that she has lived a morally sound life. In this respect the rule of retribution is, so to speak, the very concretion of the moral conscience.

### 3. The Disclosive Function of Retributive Justice

It is this aspect of the rule of retribution, as the concretion of conscience, that I now wish to examine further. In an excellent article on retributivism entitled “A Hegelian Theory of Retribution”<sup>2</sup> Daniel Farnham provides an interpretation, and what he calls a “clarification,” of Jean Hampton’s expressive theory of retribution.<sup>3</sup> Hampton, as Farnham writes, argues that “the good retribution achieves is the expression of equality between victim and violator. On her view retribution is a response to the wrongdoer’s assertion that he is of greater value than the victim, such that he may treat the victim in certain ways.”<sup>4</sup>

Farnham’s critique of Hampton’s theory maintains that retributive punishment must do more than merely *express* such equality. If mere expression were the aim there would be no need to do anything; it would suffice for society to merely make a public proclamation. What is needed, according to Farnham, is to “rectify the imbalance” between victim and victimizer, by publically and concretely leveling the relation between the two. As this imbalance is due to the harm and suffering the violator has caused the victim, as well as the personal diminishment entailed in violation itself, it can be rectified only by subjecting the violator to like harm, suffering, and diminishment. This, according to Farnham, is what is achieved through retribution: “In the same way that wrongful action is not just an expression of the victim’s lesser value, but also a realization of it as lower relative to the wrongdoer who effects this realization, punishment should be a realization by a moral authority of the victim’s value as equal to the wrongdoer, correcting the relation of inequality that has been established.”<sup>5</sup>

We might call this the ‘performative’ function of retribution, in contrast with the expressive function emphasized by Hampton. Of course, the efficacy of the performative function is dependent on the expressive. The violator’s suffering alone does not in itself rectify anything. It

is only so far as the punishment *means* something, expresses something about the relations between victim and violator, that its performance achieves its leveling effect.

And yet there remains something dissatisfying about this account that goes to the heart of what many find troubling about retributivism as such. True enough, by causing harm, suffering, and diminishment to the violator, the violator's situation has been made the equal of the violated. But how is this supposed to help? Why have we not simply—as the utilitarian might point out—begotten suffering from suffering and made the world a more miserable place? The implication is that in diminishing the violator we somehow elevate the violated, as if their relations exist on a see-saw such that lowering the one in itself raises the other. If this is how it is supposed to work, then in the end what retribution achieves is not equality but reversal. Power over the other has been wrested from the hands of the violator and placed in the hands of the violated, albeit through the proxy of society. On this account, power relations are at the center of human relations. Morality, on this model, exists merely to regulate such power relations.

I want to suggest that there is another way of understanding the significance of retributive justice that highlights its role as a concretion of conscience. Let us call this its *disclosive* function, in contrast with its expressive and performative functions. My claim is that retributive punishment, both in its threat and its performance (and perhaps more in its threat than in its performance) is intended to disclose something to the violator. The violator is to come to understand something that her transgression suggests she has failed to understand, perhaps refused to understand: namely, the intrinsic worth of the violated, and, hence, the inherent impermissibility of her violating act.

It is this disclosive function of retribution that lies at its core. Where such disclosure is no longer possible because, for instance, the violator has become mentally impaired such that she

cannot understand the meaning of her punishment, we would no longer consider retribution appropriate. Then even its expressive function would be lost, for it is not equality *per se* that is demanded in retribution but the perpetrator's *awareness* of this equality. It is the failure to *honor* the other's equal, intrinsic, worth that lies behind moral transgression, and it is this failure that must be addressed. But to understand why this is so we must penetrate more deeply into what lies at the heart of moral transgression.

#### **4. Moral Transgression, Individualization, and "Egoism"**

To do this, it will be helpful to look briefly at Arthur Schopenhauer's ethic of compassion, as he lays it out in his major ethical work, *On the Basis of Morality*:

"The chief and fundamental incentive in man as in the animal," writes Schopenhauer, "is *egoism*, that is, the craving for existence and well-being...Accordingly, everyone makes himself the center of the world, and refers everything to himself."<sup>6</sup>

Such egoism is not primarily a moral disposition; it is first and foremost a function of the ontological individualization that allows each of us to be a discrete self, separate from others. As Schopenhauer writes, "Everyone is given to himself directly, but the rest are given to him only indirectly."<sup>7</sup> All immorality is dependent on this natural, ontological, individualization whereby one person's "weal and woe" (as Schopenhauer puts it) is isolated from the weal and woe of others, such that it is possible for one person to pursue her interests, her "weal," in complete disregard of the interests of others.

This ontological individualization creates an experiential chasm between one's awareness of self and one's awareness of other, a chasm that grounds the very possibility of immorality; for if we had to experience others' woe as we do our own we would, by that fact alone, be as careful of

others' interests as we are of our own. Of course, this is a simple tautology, for then the interests of the other would be our own.

Virtually all moral systems and principles—whether it be those of Plato's ideal "community of pleasure and pain" in the *Republic*,<sup>8</sup> the two forms of the golden rule in the Gospels,<sup>9</sup> the formula of ends and of universal law in Kant's *Groundwork*, Hume's sentiments of benevolence, or even Bentham's Greatest Happiness Principle—demand a piercing of the egoic veil that isolates us from others and makes possible our disregard of them. We are directed to take an interest in the interests of others, to act *as if* our egoistic isolation were lifted and the other's concerns as immediately present to us as are our own. Schopenhauer writes:

How is it possible for another's weal and woe to move my will immediately, that is to say, in exactly the same way in which it is usually moved only by my own weal and woe? . . . Obviously, only through that other man's becoming *the ultimate object* of my will in the same way as I myself otherwise am, and hence through my directly desiring *his* weal and not *his* woe just as I ordinarily do only my own. But this necessarily presupposes that, in the case of his *woe* as such, I suffer directly with him, I feel *his* woe just as I ordinarily feel only my own . . . this requires that I am some way *identified with him*, in other words, that this entire difference between me and everyone else, which is the very basis of my egoism, is eliminated.<sup>10</sup>

Positively, such identification with the other's "weal and woe" is what Schopenhauer calls "compassion," which he defines as "the immediate participation, independent of all ulterior considerations, primarily in the *suffering* of another."<sup>11</sup> Though Schopenhauer himself does not

speaking of retributive justice, my claim is that, in its disclosive function, its intent is to effect just such a participation. The egoistic violator, whose egoistic isolation made possible her act of violation, is no longer to be permitted such isolation—she is to be forced to *see and feel*, to ‘taste,’ her own act of violation in all its repugnance. The intent is to remove, as far as possible, the veil of individualization that allows us to disregard one another, so that the violator will come to know, in her own person, the wrongful nature of her own violating act. It is just for this reason that retribution, in its purest form, demands an exact replication of the wrong committed. The wrongdoer is to be made to *know* the meaning of her wrong by being made to suffer that wrong herself; a wrong that is not an objective datum, but that has its reality only in the violated *person* of the violated other. In the end, it is not so much the *equality* of the other that the violator is to be made to know as the *inherent worth* of the other, a worth made fully evident only in coming to see the suffering its violation brings.

In this respect, we might note three distinct disclosures that retribution, ideally, accomplishes. The first is that the violator is *like* her victim, both in her vulnerability to harm and her desire not to suffer harm. She and her victim share, if not a common, then at least a parallel, interest in this regard. We might speak of this as the *disclosure of common humanity*. Its aim is to have the violator recognize her ontological commonality with her victim, and, by implication, with others in general.

Next, retribution demonstrates that, by reason of this very commonality, the violator’s action is objectionable by a standard *native* to the person of the violator herself. Thus, the violator’s immorality is disclosed as wrong, not according to some arbitrary, superimposed, principle, but according to valuations intrinsic to her own personhood. In not wishing to suffer the very wrong



she has inflicted, she encounters her own natural objection to that wrong. Let us call this the *disclosure of intrinsic worth*.

Finally, having revealed all this, retributive punishment (ideally) opens the violator's view to the humanity of her victim as someone who inherently deserves respect, care, and protection, just as she does. In this way (again ideally), it induces an empathic identification with the victim, and with others in general. The transgressor comes to see that her victim, in essence, is just another instance of herself. This I would call the disclosure of *solidarity*.

## **5. Solidarity and Moral Desert**

We can elaborate upon this by considering an idea closely associated with the rule of retribution, that of moral desert. The rule of retribution says that one who violates another *deserves*, by reason of that violation, to be violated in just that way herself.

Many commentators stumble over just what the notion of desert can mean in this context. The idea of desert, in general, is intelligible only within the context of some standard or criterion of desert. Thus, a student deserves an A if she meets the standards for that grade set in her school or class; a laborer deserves his wages if he meets the conditions for wages specified in his terms of employment, and so forth. These modes of conventionally established desert are fairly straightforward.

A problem arises when we begin to consider the notion of natural desert, and especially, natural *negative* desert. To say that someone naturally deserves such and such is to say that there is a natural normative standard from which desert follows as an implication. The most common standard appealed to in this regard comes from the natural drive for happiness. As happiness is a natural good universally desired, it is claimed that people naturally deserve to be respected in

their pursuit of it. A strong argument against the very intelligibility of the idea of retributive justice is that it depends upon the notion of a natural *negative* desert, a deserving of something that is neither a natural good nor conducive to a natural good: the infliction of suffering and/or harm. A common question one hears with respect to retribution is: what good does it do? The difficulty of answering this question is itself thought to undermine the legitimacy of the retributivist claim.

My contention is that retribution, in its idea if not in its actual application, does indeed do some natural good, through the very claim it makes concerning desert itself. That is to say, the claim that one deserves to be treated as one treats others is *itself* a good, in that it reveals the moral linkage between person and person. The idea of moral desert connects (in principle) my well-being to my care for the other's well-being. It forces me to see the other *as if* the other were another instance of myself, despite the ontological divide that permits me to disregard him. We might almost say that the idea of moral desert serves as a *token* of solidarity under the conditions of egoic isolation. It is this notion of solidarity, then, that provides the standard by which moral desert is measured: we deserve to be treated *as if* we were united with the ones upon whom we act.

The implication of this is not, as Kant supposed, that society has a moral obligation to impose exact retribution for its own sake, as a "categorical imperative."<sup>12</sup> Its significance, again, lies in what is disclosed. The idea of moral desert discloses the presence of a moral bond between self and other otherwise hidden under the veil of individualization.

## 6. Outraged Love

Of course, we might well ask whether such a natural, normative, bond really exists. Does the retributivist merely posit it, or is there something in our experience that gives testimony to it? I suggest that in the moral outrage we feel at being violated ourselves, or, even more so, at observing the serious violation of another, we touch within ourselves something of the reality of that moral bond.

What lies at the core of such moral outrage? Moral violation often takes the form of subjecting another to physical or material harm, which might lead us to suppose that its negativity consists essentially in the harm done. But reflection reveals that this is not the case; we might suffer the very same harm through nature or accident without feeling morally violated. If I lose my money through a hole in my pocket, I suffer harm but no moral offense. If I am defrauded of the same amount of money by another, I am morally offended. As Oliver Wendell Holmes remarked, “even a dog distinguishes between being stumbled over and being kicked.”<sup>13</sup> Moral violation has to do specifically with suffering mistreatment *from others*. But even the word ‘mistreatment’ is misleading here, for the violation consists not so much in the treatment suffered as in what the treatment betokens—the disregard, the blindness, the callous indifference of the other to our own fundamental worth.

But here we encounter a mystery. Why should we care if the other is indifferent to us? We cannot say it is because we need respect from others for our material support, for this, again, would reduce moral offense to a reaction to material harm. But we have seen that this is not what it is. It must be that we demand acknowledgment from the other *for its own sake*, i.e., that such acknowledgment is itself desired as a primary good. The veil of individualization, that hides us from one another, also *deprives us* of one another. And this deprivation is something felt, in the

desperation of loneliness, the anguish of rejection, the pangs of grief, and, quite sharply, in the outrage that accompanies moral offense. The other, we suppose, owes it to us to *see* us, to *acknowledge* us, to, at very least, be careful of not doing damage to us. A world in which others are entirely indifferent to us would be one in which we suffer a great deprivation. But of what? If we were to look for a word expressive of what we are deprived of in being deprived of the caring regard of others we could, perhaps, find none better than *love*.

In seeking love we seek a solidarity with others that would lift us out of the isolation our individualization otherwise visits upon us. What moral violation damages is just such love itself; it ruptures the agapic solidarity that might—that *should*—exist between person and person. Out of the pain of this rupture comes the call that the violator be made to *see* the pain her violation has caused: The call for retribution is the cry of outraged love.

What is demanded in this cry is that the violator be made—not equal to me in my misery—but *aware* of me in my misery. But how is such awareness to be achieved? As Schopenhauer notes, it is the very nature of our ontological situation that we have immediate awareness only of ourselves. What the *idea* of retribution calls for—perhaps an impossible thing in practice—is that the immediacy of the violated be made the immediacy of the violator; that the violator be made to *share* the pain of the violated. This solidarity in suffering is what the violator *owes* the violated, for having deprived her of solidarity in love.

## **7. Forgiveness and Restoration**

I began by saying that the rule of retribution can play an important role in the restoration of just relations. It is now time to look at this claim directly. Traditionally, to behave justly toward another is to render to the other what is the other's due. If there is a natural, as opposed to merely

a conventional, justice, then there must be something that human beings naturally owe to one another.

In general, we suppose that we owe something to others only when we have received something from them. And yet, as we have seen, morality implies a debt we owe to others, not in virtue of what we have received from them, but in virtue of what we and the others *are*. Morality in general is based in the notion that there is a natural, normative, bond between people to which all people owe allegiance. The other is a person who demands respect, care, and consideration, not simply for the consequences that flow from such regard, but because this relationship of caring regard is *itself* a primary good for which we have a natural need and to which we have a natural obligation. We could ask about the metaphysical underpinnings of this natural obligation, an inquiry that might carry us aloft into extended flights of metaphysical speculation. But there is a shortcut we can take to its recognition. We can reflect upon our own need of others. We can recognize that either the other's demand for caring regard is legitimate, or our own demand for the same is not, for the two demands are on a par. Thus, unless we are willing to accept our own violation *by* others, we cannot deny our moral obligation *to* others. This, perhaps, does not tell us everything we would wish to know about the metaphysical basis of morality, but it does allow us—indeed it all but forces us—to affirm morality's claim upon us, while we await (so to speak) further metaphysical word.

This, then, is the truth that retribution is intended to disclose: that the worth of the other is akin to my own, that the demands it makes are as legitimate as my own, and, that, therefore, I owe it to the other to be as careful of that worth as I am of my own. It discloses this by presenting to us a negative image of the golden rule, by having us experience the shadow cast by

its eclipse. Retribution forces us to observe the shape of the darkness we create when our own egoic self-regard obstructs the light of loving relation.

To ultimately understand the rightful place of retribution, however, we must return to the observation we made at first: that it is, strictly speaking, in *conflict* with the golden rule. The golden rule demands, not that I do to others what they have done to me, but that I do to others *as I would have them* do to me. And, of course, we do not desire violation. Thus, if the rule of retribution expresses moral desert, and the golden rule moral obligation, we are left with the odd consequence that, where someone has violated the golden rule, we are obliged to treat him *better* than he deserves. This is just where Kant's retributive absolutism goes wrong and where Jesus' rule of forgiveness comes in. The aim of retribution is not to harm the violator, but to bring him back into accord with justice. In telling Peter that he must forgive, not up to seven times, but up to seventy times seven times, Jesus is saying that a person's worth is not reducible to his moral desert. The rule of retribution, finally, must be in service to the golden rule. Outraged love, finally, must remain love. The ultimate goal of retribution is not to punish the violator *per se*, but to bring him to an awareness of the nature of his violation, so that true reconciliation can take place.

Forgiveness has as its aim the restoration of loving (agapic) relations. Surely forgiveness cannot mean approval of the violating act. Nor can it mean approval of the moral disposition that led to that act; neither of these can be rightly 'forgiven.' What is forgiven is the *person* of the violator. Forgiveness is made necessary by the fact that the violator has exiled herself from community with the violated. In forgiving, we accept her back into community; we readmit her to agapic solidarity. We can do this within ourselves even if the violator will not repent. But such readmission is only fully accomplished where the violator is no longer *identified* with the

transgression that exiled her. Only then can there be true restoration of relations. Full restoration, thus, requires sincere remorse and repentance on the part of the violator.

The ultimate purpose of retribution, finally, is to *effect* such remorse and repentance. Understood in this way, the application of retributive justice is to serve as an aid to the aim of forgiveness; it is one tool in morality's arsenal for the healing of ruptured relations, one means to the end of *restorative* justice. Through disclosing to us the truth of our wrongdoing, through forcing us to know the pain we inflict, through making clear to us our commonality with the violated, it is to prompt us to amend ourselves and our doings so that we can be restored to healthful relations with others. This, not suffering per se, is the 'payment' (*tributum*) that justice demands of the wrongdoer: that her wrong-doing be acknowledged, repented of, and renounced, so that the rupture in love it has produced can, at last, be healed.

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## Notes

1. In the *Metaphysic of Morals* Kant suggests otherwise, at least with respect to his variant of the golden rule, the formula of universal law. But Kant never fleshes his argument out, seeming to suppose it to be intuitively obvious. Any attempt to flesh it out, however, runs into difficulties. That one should always act so that the maxim of one's action can be willed a universal law says nothing about what should happen to one who fails to do so.

2. Daniel Farnham, "A Hegelian Theory of Retribution," in *Journal of Social Philosophy*, vol. 39, no. 4, Winter 2008, 606-624.

3. Jean Hampton, "An Expressive Theory of Retribution," in *Retribution and Its Critics*, ed. W. Cragg (Stuttgart: Fritz Steiner Verlage, 1992), 1-25.

4. Ibid. Farnham, 607.

5. Ibid., 618.

6. Arthur Schopenhauer, *On the Basis of Morality*, trans. E.F.J. Payne (Indianapolis: Hackett Publishing Company, 1995), 131.

7. Ibid., 132.

8. Plato writes: "Doesn't the community of pleasure and pain bind it [the city] together, when to the greatest extent possible all the citizens alike rejoice and are pained at the same comings into



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being and perishings?" (461b). "That city in which most say 'my own' and 'not my own' about the same thing, and in the same way, [is] the best governed city" (461c). Plato, *The Republic*, tr. Allen Bloom (New York: Basic Books, 1968).

9. "So in everything, do to others what you would have them do to you" (Mt. 7:12), and the broader, "Love your neighbor as yourself" (Mt. 22:39).

10. *Ibid.*, 143-144.

11. *Ibid.*, 144.

12. Kant famously writes that even if a society were about to disband and there remained one last convicted murderer yet to be executed, the society would have a moral responsibility to execute this last prisoner before its dissolution. Otherwise the society itself would be in violation of justice. "The law of punishment is a categorical imperative." Immanuel Kant, *The Metaphysics of Morals*, tr. Mary Gregor (Cambridge: Cambridge University Press, 1996), 105-106.

13. Oliver Wendell Holmes, *The Common Law*, Boston: Little, Brown, and Company, 1909, 3.