Many Men Are Good Judges in Their Own Case: Restorative Justice and the *Nemo Iudex* Principle in Anglo-American Law

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In his *Second Treatise of Civil Government*, John Locke puts the figure of the "known and indifferent judge" at the center of his social contract theory. [1] Equipped with the sobriety of reason by virtue of his dispassionate position, the impartial judge is uniquely able to choose a sentence that fits the crime. In the absence of an impartial judge, men are prone to respond to interpersonal wrongdoing with vengeance, meting out punishments that are disproportionate to the offense. A principle spanning both Roman law and English common law, *nemo iudex in causa sua* ("no man should be a judge in his own case"), provides the rationale for a common political authority whom all subjects must obey. In entering into the Lockean social contract, an individual's natural right of punishment is given up, and the personal justice of the state of nature is replaced by the impersonal justice of the state.

The idea of *nemo iudex in causa sua* did not originate in the *Second Treatise*, nor did that of a social contract, but Locke was one of the first writers to link the logic of the two together. Everything that is familiar about contemporary Anglo-American criminal justice—the notion of "innocent until proven guilty", an adversary process in which a prosecutor must demonstrate guilt, judicial dress emblematizing detached officiality, the symbolic positioning of the judge between the prosecutor's table and the defendant's—can arguably be traced to the *nemo iudex* principle. Justice is a process that is controlled by a third party, the state, removed as far as possible from persons who are presumed to not be good judges in their own case.

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* Many thanks to Andrei Poama, who has been a truly fantastic editor, and to two anonymous reviewers for insightful comments that have helped me tremendously in the revision process.

1 - John Locke, "Second Treatise", In Peter Laslett (ed.), *Two Treatises of Civil Government*, Cambridge: Cambridge University Press, 1988 [Revised Edition], § 125. Hereon section number indicated in the text.

Yet the advent of restorative justice processes in modern criminal justice systems uncritically turns the *nemo iudex* principle on its head. A victim, it is claimed, has a right to have his or her voice heard in a criminal justice procedure. By treating a criminal act as being against the state rather than the person who was robbed, assaulted, or killed, the person who is first-order harmed is abandoned. Indeed, the state *steals* conflicts between victims and perpetrators, as Nils Christie puts it an influential article. [2] But interestingly, what restorative justice promises as an alternative to adversarial criminal procedures is not overly susceptible to the risk that Locke envisions, with belligerent revenge-seekers giving offenders more than is their due. The dialogic method of restorative justice cultivates evenhandedness on the part of crime victims in a way that is unforeseen by authors writing in the *nemo iudex* tradition.

This essay has three parts. In the first section, I use Locke to elucidate the logic of the *nemo iudex* principle and an impartial, state-managed system of criminal justice. Next, I consider state-managed criminal justice in the Anglo-American tradition from the standpoint of the moral psychology of offenders. Finally, I turn to restorative justice and the *nemo iudex* principle. Victims are not naturally retributive, nor are they are naturally forbearing towards persons who have wronged them. In evaluating criminal justice and punishment, we should take into consideration that human beings take their moral cues from the sociopolitical contexts in which they find themselves. This insight applies to both victims and offenders.

I. Lockean criminal justice and *nemo iudex in causa sua*

In the *Second Treatise*, Locke presents a clear and intuitively appealing argument for an impartial system of criminal justice managed by the state, an argument which moreover is central to his social contract theory. According to Locke, deterring future wrongdoing is the justification for punishing criminal wrongdoing from the perspective of the members of civil society (§ 8, 11, 20). Because deterrence is what justifies punishment, individual victims who live in civil society have, or should have, a *general* interest in an offender's being punished in proportion to the crime. A victim's *personal* interest, by contrast, is in receiving reparation (monetary or otherwise) from the offender for the damage that was done. Pre-political society, the Lockean "state of nature", is defined by its lacking an impartial authority to punish the offender on behalf of society: "Men living together according to reason, without a common superior on earth, with authority to judge between them, is properly the state of nature", Locke tells us (§ 19). In the state of nature, individuals have a natural, immediate right to self-preservation, and to protect property necessary to their self-preservation (§ 18, 19, 87). This is associated with a natural right to "judge of, and punish the breaches of that law in others (...) even with death itself" (§ 87).

2 - Nils Christie, "Conflicts as property", *British Journal of Criminology*, vol. 17, 1977, pp. 1-15.

As in civil society, punishment in the state of nature derives from the logic of deterrence—and by extension, incapacitation, or in Lockean language, "restraint" (§ 8, 11). The rules of proportionality similarly apply: "each transgression may be punished to that degree, and with so much severity, as will suffice to make it an ill bargain to the offender, give him cause to repent, and terrify others from doing the like" (§ 12). Like in civil society, moreover, the right of punishment is not a victim's right. In the state of nature, crime is a "trespass against the whole species", thus for:

> the peace and safety of it (...) *every man* upon this score, by the right he hath to preserve mankind in general, may restrain, or where it is necessary, destroy things noxious to them, and *so may bring such evil on any one, who hath transgressed that law*, as may make him repent the doing of it, and thereby deter him, and by his example others, from doing the like mischief (§ 8; emphases added).

Though morally, the natural right of punishment does not inhere in victims in any special way, there are cases in which victims are more likely than others to destroy a noxious aggressor. A victim has no guarantee that a person who has stolen his horse or his coat will not go further and "take away every thing else" (§ 11, 18). He may thus kill a thief whom he suspects intends to rob him of his life—and be within his right if the thief actually poses a lethal threat. This is very clearly for Locke an exercise of the victim's right of self-defense, not his right of punishment. Still, on Locke's account, men will fail or exercise too much leniency in punishment in cases that are not their own: "negligence, and unconcernedness, to make them too remiss in other men's [cases]", writes Locke (§ 125). In effect, then, it is victims who punish on their own behalf in the state of nature. And, as Locke acknowledges in an important passage, this has problematic implications:

> To this strange doctrine, viz. That in the state of nature every one has the executive power of the law of nature, I doubt not but it will be objected, that it is unreasonable for men to be judges in their own cases, that self-love will make men partial to themselves and their friends: and on the other side, that ill nature, passion and revenge will carry them too far in punishing others... (§ 13).

Locke's response is that, indeed, it is a great inconvenience of the state of nature that men are made to be judges, and that "passion and revenge is very apt to carry them too far, and with too much heat, in their own cases", as he puts it later on in the *Second Treatise* (§ 125). An individual's falling prey to "passionate heats, or boundless extravagancy of his own will" is considered by Locke to be no less than a form of "absolute or arbitrary power" (§ 13). [3]

On Locke's theory, the instability of criminal justice in the state of nature is precisely why we need civil government: the "end of civil society", is to "avoid, and remedy those inconveniencies of the state of nature, which

3 - Thus we do not need just any kind of civil government, but a kind that offers a remedy for the inconveniences of the state of nature, i.e., not absolute monarchy.

necessarily follow from every man's being judge in his own case" (§ 90). The *nemo iudex* principle, with its core assumption that human beings tend to take wrongdoing personally, plays a central role in Locke's argument, underpinning the idea of a social contract:

> [W]e seldom find any number of men live any time together in this state. The inconveniencies that they are therein exposed to, by the irregular and uncertain exercise of the power every man has of punishing the transgressions of others, make them take sanctuary under the established laws of government, and therein seek the preservation of their property. It is this makes them so willingly give up every one his single power of punishing... And in this we have the original right and rise of both the legislative and executive power, as well as of the governments and societies themselves (§ 127).

> And thus all private judgment of every particular member being excluded, the community comes to be umpire, by settled standing rules, indifferent, and the same to all parties; and by men having authority from the community, for the execution of those rules, decides all the differences that may happen between any members of that society concerning any matter of right; and punishes those offences which any member hath committed against the society, with such penalties as the law has established (...) (§ 87).

According to the Lockean understanding of civil government, the state is an impartial party endowed with authority by those over whom it is exercised. The *nemo iudex* principle, and the vision of the community as umpire, assigning proportionate punishments according to settled standing rules, offers a powerful rationale—though surely not the only rationale available—for an impartial system of criminal justice managed by the state. [4]

The value of impartiality is not assumed, but rather is deduced from Locke's theory of punishment: a given punishment should be proportional to the crime that was committed, and oriented towards deterring both the punished person and others from future criminal acts. Unlike victims who are inclined to punish too severely, and non-implicated parties who couldn't be bothered to punish at all, a representative of the state specifically assigned the job of dispensing punishment is naturally impartial, and moreover has an interest, by virtue of representing society's interests, in deterrence and proportionality.

Interestingly, however, proportionality is usually associated with the theory of punishment that Locke does not seem to be endorsing, that of retribution. What seems to motivate the passion-driven victims in the state of nature is a retributive interest in punishing, and Locke is unequivocal on the point that

4 - N.B. The *nemo iudex* principle is broader than a prohibition on victims' choosing punishments for persons who have criminally wronged them, and can potentially apply to any situation where individuals are to make judgments on matters in which they have personal stakes. See Adrian Vermeule, "Contra *Nemo Iudex in Sua Causa*: The limits of impartiality", *Yale Law Journal*, vol. 122, 2012, pp. 384-420, for an interesting (and critical) discussion of the *nemo iudex* principle in its broader context.

individual victims are not entitled to a personal interest in retribution. Nevertheless, it is possible to distinguish a *personal* interest in retribution from a *societal* interest in retribution. For Gerard Bradley, who defends the latter but not the former, retribution "is not driven by anger, hatred, or any other emotion." [5] Rather, retributive punishment "restrict[s] a criminal's will by depriving him of the right to be the sole author of his own actions. The goal of punishment, in short, is the undoing of the criminal's bold and unjust assertion of his own will." [6] For those who believe that there is a societal interest in retribution, retributive punishments are proportional by definition because proportional punishments are what symbolically "undo" crimes. We might accordingly read the Lockean theory of punishment as endorsing deterrence and a societal, though not personal, interest in proportional, possibly retributive punishments.

Though proportionality and deterrence are not necessarily logically consistent aims, [7] the two have a deeply rooted connection for Locke. A proportional system of punishment is a predictable system of punishment: an offender can know in advance the degree of punishment he or she may expect based on the severity of the crime. Locke's implicit suggestion seems to be that for criminal punishment to actually deter crime, a lawful, orderly system of offenses and punishments must be in place. Though victims sometimes punish too severely in the state of nature, wrongs sometimes go unpunished, thus a system in which everyone is allowed to exercise their natural right of punishment is too erratic to actually have deterrent power.

In this light, is Locke actually advocating anything beyond the rule of law? Is it really so important that criminal sentencing be conducted by an impartial representative of government so long as the rule of law is present? Locke, it seems safe to say, does not consider anything besides a state-managed system of criminal justice, and invokes the *nemo iudex* principle in view of this end. [8] And indeed, in contemporary criminal justice practice, that sentencing should be determined by persons who have no prior connection to crimes is considered a given, and for self-evident reasons. But perhaps we should not be so uncritical. A system built around the value of impartiality, in removing the power of punishment from private individuals, excludes the judgment of persons who may be good judges precisely due to their partiality—namely, victims.

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5 - Gerard V. Bradley, "Retribution: The central aim of punishment", *Harvard Journal of Law & Public Policy*, vol. 27, 2003, pp. 19-31, 21.

6 - *Ibid.*, p. 23.

7 - Not all proportional punishments deter like crimes; sometimes the most effective deterrent may be a radically disproportionate punishment.

8 - But see John Gardner, "Crime: In proportion and in perspective", In Andrew Ashworth and Martin Wasik (eds.), *Fundamentals of Sentencing Theory*, Oxford: Oxford University Press, 1998), pp. 31-52, for state-managed punishment's actually *displacing* the victims' desire for vengeance.

II. "Impartial" criminal justice and the moral psychology of offenders

Put yourself in the position of someone who has committed a serious crime. You are arrested and informed of your rights. You consult with a lawyer. Together you weigh the pros and cons of working out a deal with the prosecutors, or pleading not guilty and going to trial. You opt for the latter route, as is your right, and your lawyer tells you that she does not care if you did the deed or not. Over the course of many meetings, you answer questions that will allow your lawyer to make a case on your behalf. She assesses whether you should testify, what you should say, how you should say it, and even what you should wear. The case goes to trial, and you hear your lawyer argue persuasively on your behalf. But the jury does not buy it. You are convicted and sent to prison with a long sentence. Between your arrest and your conviction, much time elapses.

When a person guilty of a crime is arrested, stands trial, and is convicted and punished, this is a case of an adversarial criminal justice system doing exactly what it was set up to do. By means of an impartial, state-managed process, a fair verdict and sentence are determined. In addition to various courtroom symbols representing that justice is blind—the judge is physically positioned between the prosecution and the defense, uniform judicial dress indicates that judges serve their role in an interchangeable, neutral manner, and so on—there are many formal aspects of the criminal trial in Anglo-American law aimed at rendering impartial judgments and sentences. The procedure of the criminal trial is maintained through impersonal bureaucratic structures and rules. A jury that controls the determination of guilt or innocence, and a judge who oversees the trial, enforces the rules of evidence, and usually determines sentencing, must have no prior connection to the parties involved in the case—and if they do, must recuse themselves. A prosecutor pursues the case against the accused as a representative of the state, not that of the victim. [9] The adversary procedure means that the prosecutor and defense attorney make the best possible case for their own side rather than engaging in a strict pursuit of the truth of what happened, with the rules of evidence and the rights of the accused serving as hedges all along the way. [10]

This last point, the idea that the adversary system aims at rendering impartial verdicts, is controversial. "Impartial" might suggest the state's "indifference" between the prosecution and defense, and the adversary system is hardly indifferent in this sense. Rather, adversarial criminal trials are designed to be

9 - See Bennett L. Gershman, "Prosecutorial ethics and victims' rights: the prosecutor's duty of neutrality", *Lewis and Clark Law Review*, vol. 9, 2005, pp. 559-579, esp. p. 561.

10 - As Gary Goodpaster, "On the theory of american adversary criminal trial", *Journal of Criminal Law and Criminology*, vol. 78, 1987, pp. 118-154, 124, defines the adversary system, "when two advocates vigorously oppose each other in an effort to do their best for their client (...), they inadvertently serve the systemic goal of truth-finding. The respective efforts of the opposing attorneys to maximize the interests of their side lead to the best systemic results even though neither attorney directly tries to achieve these ends."

"difficult tests" marked by a variety of "prosecutorial handicaps". [11] Instead of being made to state, either informally or under sworn oath, the truth of what happened, thus advantaging the prosecutor, the accused has a right against self-incrimination. The "unilateral discovery rule" means that the prosecutor must disclose the state's case before the trial, while not requiring the same of the defense, allowing "the defense to tailor and manipulate facts to its advantage". [12] The presumption of innocence is the accused's singular greatest advantage; by its very nature, this advantage is one-sided. The idea, though, is that the adversary system creates *overall* impartiality. With what we might call "formal" indifference between the prosecution and defense, with no unique defense privileges and no prosecutorial handicaps, the prosecution, by virtue of representing the state, is a repeat, seasoned player with deep pockets. The idea of the adversarial criminal trial naturally arises from the combination of the accused's presumption of innocence and right against self-incrimination, which are necessary counterbalances to the state's superior resources and power if overall impartiality is the goal. [13]

However, consider such a method of criminal justice from the standpoint of moral psychology. As the case of a person who has in fact committed a crime is prepared and heard, he has ample time to become accustomed to thinking of himself as a person whose non-guilt deserves to be vigorously defended. His lawyer wants a verdict of not guilty as well, because this means she has won her case, something that the offender senses. When the jury hands down a guilty verdict, what is the offender supposed to think? Is he supposed to switch to a new mentality of accepting or even deserving his punishment? Standing trial seems to cultivate a disposition wherein the goal of the offender is to escape punishment rather than, say, begin a process by which he undergoes a change of heart.

To be fair, not all criminal cases go to trial. This is due to the practice of plea bargaining, the "nontrial procedure" by which most arrested persons are assigned a sentence in Anglo-American law (though this has not always been the case historically). [14] Some defend plea bargaining's fairness based on the idea that prosecutors and defendants have the information necessary to calculate the probability of a conviction in trial and what the sentence would be. [15]

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11 - *Ibid*., p. 142.

12 - *Ibid*., p. 123.

13 - *Ibid*., p. 126.

14 - John H. Langbein, "Understanding the short history of plea bargaining", *Law & Society*, vol. 13, 1979, pp. 261-272, 268: In medieval times, "[w]hen an accused refused to elect jury trial, he would be pressed to death without trial; accordingly, few accused placed much value on the right to decline. But the theory lived on, ready for an opposite usage in a later day. When jury trial had undergone its great transformation, the authorities would cease coercing the accused to elect jury trial and instead—by more polite means—they would coerce him to waive it." Cf. John H. Langbein, "Land without plea bargaining: How the Germans do it", *Michigan Law Review*, vol. 78, 1979, pp. 204-225.

15 - For a critical discussion of this defense of plea bargaining, see Stephanos Bibas, "Plea bargaining outside the shadow of trial", *Harvard Law Review*, vol. 117, 2004, pp. 2463-2547.

Multiply the probability of a conviction by the number of years in jail, and you have a reduced sentence that accords with basic notions of proportionality, efficiency, and justice. In reality, however, most plea bargaining processes are far from this ideal. A prosecutor is incentivized to offer a deal because the guilty verdict is a certain gain from the standpoint of her win/loss ratio, and because going to trial is incredibly time- and resource-consuming. Often this incentive structure results in the prosecutor using the advantages that inhere in her position to do whatever it takes to get a guilty or no contest plea. A prosecutor is a repeat player who knows how to leverage legal technicalities in view of getting an accused person to accept the deal, even if he wants to stand trial. Further, as Albert Alschuler describes, prosecutors have a tendency to "respond to a likelihood of acquittal by magnifying the pressures to plead guilty", thus exhibiting "a remarkable disregard for the danger of false conviction". [16]

But most importantly for our present purposes, from the standpoint of moral psychology, plea bargaining produces many of the same effects as a criminal trial. Again put yourself in the position of someone who has committed a serious crime. To take an example from the plea bargaining literature, say that you have robbed someone at gunpoint, and that you did so in the state of California. In California, there is a strange law which says that are you technically "kidnapping" someone during an armed robbery if you force them to back up. [17] The prosecutor informs you that the robbery victim claims that you made him back into an alley and lay on the ground, at which point you took his wallet. It is true that you may have made the victim back up, though you can't quite remember. It seems equally plausible that you made him turn around and walk forward to the alley. Regardless, you never entertained the thought of actually *kidnapping* the victim. But the prosecutor is forceful in his argument that a jury will be willing to convict on the kidnapping charge, something that will add a significant amount of time to your robbery sentence. Though you think that this is completely unfair, and that the legal understanding of kidnapping in the context of armed robbery is idiotic, your lawyer says that the prosecutor is right that the jury will probably buy the charge. The prosecutor might be bluffing, but if the victim is willing to say on the witness stand that he backed up, then you'll be old and gray upon release. It makes you incredibly angry to not fight the kidnapping charge in court, but the safest bet is to take the prosecutor's "generous" offer of dropping the kidnapping charge, plead guilty, and accept jail time based on the robbery alone. [18] Throughout your time in prison, when you are alone with your

16 - Albert Alschuler, "The Prosecutor's role in plea bargaining", *University of Chicago Law* Review, vol. 36, 1968, pp. 50-112, 61-62. For a philosophical perspective on plea bargaining, see Kenneth Kipnis, "Criminal justice and the negotiated plea", *Ethics*, vol. 86, 1976, pp. 93-106.

17 - Albert Alschuler, "The Prosecutor's role in plea bargaining", *op. cit.*, p. 88.

18 - Richard Lippke aims to separate "charge bargaining" from the idea of offenders being "granted modest and fixed sentence discounts" in exchange for pleading guilty. Richard L. Lippke, *The Ethics of Plea Bargaining*, Oxford: Oxford University Press, 2011, p. 2.

thoughts, which is often, you fume over the California legal system's unfair conception of kidnapping.

Thus in a system in which plea bargaining is the norm, the moral psychology of the adversarial criminal trial obtains, and without the benefits of there being a process in which there is no self-incrimination and which guards against innocent persons' being unjustly convicted. If one's understanding of the purpose of punishment is pure retribution, then an offender's moral psychology probably does not matter much. But if punishment has aims beyond pure retribution, we might want to consider the following: how a conviction and punishment are determined play a tremendously important role in the offender's relationship to the fact of his punishment, and what his punishment means to him. Regardless of the formal procedures of Anglo-American criminal justice aiming at impartiality, it is a system in which the culpable criminal offender is likely to lament losing, and think his sentence unfair.

III. Restorative justice and the *nemo iudex* principle

Anglo-American criminal justice is built on a strong belief that the impersonal justice of the state is fairer—indeed, more *civilized*—than the private resolution of criminal wrongdoing. According to advocates of restorative justice, however, state-controlled punishment neglects the victim. As Nils Christie puts it, "It is the Crown that comes into the spotlight, not the victim. It is the Crown that describes the losses, not the victim... It is the Crown that gets a chance to talk to the offender, and neither the Crown nor the offender are particularly interested in carrying on that conversation". [19]

There are many forms of restorative justice. "Therapeutic" restorative justice is initiated by the victim, takes place while an offender is incarcerated, and exists for the purpose of the victim's healing and benefit. [20] "Diversionary" restorative justice is more radical, stemming from the idea that it is wrong for the state to have a monopoly on the resolution of disputes between private parties. [21] At one extreme end of a continuum, this kind of restorative justice is simultaneously libertarian and communitarian: a transgression is a conflict rather than a crime, the state should stay out of the conflict entirely, and the victim and offender, together with their "communities of care", should collectively determine how the conflict is to be resolved. [22] But "diversionary" more

19 - Nils Christie, "Conflicts as property", *op. cit.*, pp. 7-8. Cf. Antony Duff *et al.*, *Towards a Normative Theory of the Criminal Trial*, Oxford: Hart Publishing, 2007, pp. 214-215.

20 - For diversionary vs. therapeutic restorative justice, see Susan Miller, *After the Crime: The Power of Restorative Justice Dialogues Between Victims and Violent Offenders*, New York: New York University Press, 2011, esp. pp. 14-16, 203-207.

21 - For some, this is nowhere near radical enough: restorative justice should replace present criminal justice systems in their entirety rather than merely supplement them.

22 - "Communities of care" is John Braithwaite's phrase. See, e.g., John Braithwaite, "Survey article: Repentance rituals and restorative justice", *Journal of Political Philosophy*, vol. 8, 2000, pp. 115-131, 120.

commonly suggests a form of restorative justice that fits in with adversarial criminal justice, offering an alternative track in which the state cedes some of its control to victims, allowing them to meet offenders face-to-face in a sentencing circle or conference. In what we might call "weak" diversionary restorative justice, victims are allowed to give their input on the offender's sentence to a judge, or else a judge may take the offender's participation in a restorative justice conference into account in assigning a sentence. In "strong" diversionary restorative justice, victims are the primary drivers of sentencing. This is the form of restorative justice that excites many of its proponents, who think it appropriate for juvenile first-timers and "serious repeat criminal offenders" alike. [23]

As Kathleen Daly has pointed out, advocates of restorative justice often simplify the contrast between restorative justice and mainstream Anglo-American criminal justice by placing the two into a Manichean framework. But the dichotomous story of compassionate, "emotionally intelligent" restorative justice, and punitive, heartless adversarial criminal justice fails when we move "from the metaphors and slogans to the hard work of establishing the philosophical, legal and organizational bases of this idea". [24] As Daly argues, one cannot defend restorative justice simply by asserting its goodness as compared to the alternative.

Nor does it seem particularly compelling to say that diversionary restorative justice is justified by the *right* of victims to determine whether and how their offenders should be punished. Christie explicitly references Locke in discussing a "property right" in the conflict following a criminal offense. [25] But Christie's position is unusual. Locke himself admitted that the natural right of punishment was a "strange doctrine" (§ 13)—and again, he did not think that it inhered in victims any more than in anyone else. Mainstream discussions of "victim's rights" usually focus on the right for harms to be compensated (something that Locke did not say was strange), and the right to be treated with respect by law enforcement and criminal justice officials. Most who favor diversionary restorative justice seem to do so because it shows that the victim's voice is valued, in addition to it being "good".

What is the rationale for diversionary restorative justice, if not its innate goodness or the victim's special right of punishment? My argument is that we are too quick and too uncritical in accepting the value of impartiality as a given, and that the institutional setup of Anglo-American criminal justice

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23 - John Braithwaite, *Crime, Shame, and Reintegration*, Cambridge: Cambridge University Press, 1989, p. 36 *et passim*; see also Chris Cunneen and Carolyn Hoyle, *Debating Restorative Justice*, Oxford: Hart Publishing, 2010, esp. pp. 48-49, 72-74.

24 - Kathleen Daly, "Restorative justice: The real story", *Punishment & Society*, vol. 4, 2002, pp. 55-79, 72; I borrow the characterization of restorative justice as "emotionally intelligent" from Meredith Rossner, *Just Emotions: Rituals of Restorative Justice*, Oxford: Oxford University Press, 2013, p. 21.

25 - As per Nils Christie, "Conflicts as property", *op. cit.*, p. 9, n. 2: A property right in a conflict is akin to "John Locke on property rights to one's own life — one has no right to give it away".

system goes too far in trying to espouse it. Systems of criminal punishment are, after all, historically contingent and evolve over time. The inhabitants of Locke's society were much closer to an age of private vendetta justice than we are today; it is easy to see how a person might want to rationalize the prevailing state-managed system of criminal justice as being fairer and more expedient than the blood feud. But if impartiality in criminal justice is of less central importance than it was once thought to be, then we might want to consider other kinds of criminal justice processes in order that our own institutions evolve in a promising direction. Diversionary restorative justice is attractive precisely because it is not impartial. When given the opportunity to meaningfully participate in sentencing, men and women are good judges in their own cases, and in ways that the state cannot replicate.

Why is this the case? It is hardly novel to say that human moral psychology does not operate in a vacuum, and is rather shaped by its sociopolitical context. When an individual is a victim of a serious crime, there is no such thing as a response that can be understood as representing something "about" human nature in a raw. People are victims of crime in societies, and societies are complex webs of laws, norms, systems of belief, and traditions. There is reason to think that in societies in which adversary contestation and harsh sentencing practices are the norm, individuals internalize beliefs about crime that fit in with and rationalize this system of criminal justice. For Locke, again, the point of punishment is deterring other would-be offenders, as well as deterring the punished person from reoffending. As he perceives, it is very hard for a victim to take a personal interest in deterrence; this is why we need the impersonal justice of the state. But what, then, is the victim to *feel* as an adversarial criminal justice procedure (whether a trial or a plea deal) takes place? Hearing the offender claim his non-guilt, or being informed of negotiations in which the offender is a strategic actor trying to minimize his jail time, the prosecutor is not necessarily going to be seen as someone who is trying to get a conviction or a guilty plea for a punishment undertaken for deterrence's sake. Though in Anglo-American law, the prosecutor unequivocally represents the state, a victim might come to view him or her as their own representative.[26] The victim-representing prosecutor aims at doing justice, with "justice" meaning a punishment that the offender deserves by virtue of his having committed the crime. The assumption that victims, when left to their own devices, are motivated by retribution may in fact go hand-in-hand with the system in which they are prone to developing a retributive interest in punishment.

An entire subfield of sociology is devoted to theorizing the concepts of "scripts" and "roles"; the insights from this research are conducive to explaining the contrasting moral psychology of restorative justice.[27] The "rituals of

26 - Bennett L. Gershman, "Prosecutorial ethics and victims' rights...", *op. cit.*

27 - In sociology, "role theory" has been pioneered by authors like Pierre Bourdieu, *Outline of a Theory of Practice*, Cambridge: Cambridge University Press, 1977, and developed by authors like Robert Abelson, "Psychological status of the script concept", *American Psychologist*, vol. 36, 1981, pp. 715-729.

restorative justice", to use John Braithwaite's phrase, provide the opportunity for victims and offenders to voluntarily adopt the roles and scripts of the fair suffering person and the responsibility-taking wrongdoer. [28] These scripts lend themselves to the disclosure of information that can bring about understanding, inspiring a forbearing attitude on the part of the victim toward the offender. As moral sentimentalists like Adam Smith have argued, learning another person's perspective and putting oneself in their shoes leads to moral emotions and actions. [29] Restorative justice helps victims understand the offender's background and why he was led to selfishly harming innocents, which in turn allows the victim to adopt a perspective on crime and punishment that is *morally better* than the point of view of the impartial state. At its best, the procedural impartiality of the state has little to do with the moral impartiality of Smithean sympathy. In less than ideal cases, punishment-seeking prosecutors are interested parties who exercise a great influence on the practice of criminal justice. Whereas prosecutors are naturally hardened against sympathy by repeatedly engaging in bargaining with persons who are willing to plead guilty to—and many who are guilty of—serious crimes, victims are usually one-timers who feel and show emotion, speak from the heart, and have personal rather than strategic interests driving their interaction with the offender. Often they are able to act in a manner that brings out the offender's humanity, and are good judges in their own case.

On the side of the offender, adversarial criminal justice is incapable of producing a genuine sense of shame. But with restorative justice:

> Shaming happens naturally through the process of the victim and their supporters simply describing the consequences of the crime for them personally and for their loved ones. Often offenders are surprised to learn of the consequences. What they thought was a minor act of theft of $50 from a home turns out to be something that leaves an elderly woman (and her next-door neighbor) feeling insecure in their own homes. [30]

Whereas victim impact statements in a criminal trial are "one way emotional traffic", to use Carolyn Hoyle's phrase, there is much to be gained on both sides from the offender's being given a chance to voice his shame in response to the victim's description of what happened and how she felt. [31] Of course, not every offender will sincerely want to take responsibility and express shame as a result of the dialogic back-and-forth of restorative justice. [32] Not every victim will want to say things conducive to an offender's meaningfully

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28 - John Braithwaite, "Repentance rituals and restorative justice", *op. cit.*

29 - Adam Smith, *The Theory of Moral Sentiments*, D.D. Raphael and A. L. Macfie (eds.), Indianapolis: Liberty Fund, 1982.

30 - John Braithwaite, "Repentance rituals and restorative justice", *op. cit.*, p. 120.

31 - Chris Cunneen and Carolyn Hoyle, *Debating Restorative Justice*, *op. cit.*, p. 64.

32 - For the "dialogic" method of restorative justice, see *ibid.*, p. 14. For two starkly different restorative justice processes, one successful and one not, see Meredith Rossner, *Just Emotions...*, *op. cit.*, chap. 1. Lode Walgrave, *Restorative Justice, Self-Interest, and Responsible Citi-*

regretting his actions and their consequences. But from the perspective of an offender who has committed a serious crime, facing the victim, being made to feel the weight of responsibility and shame, and then undergoing imprisonment seems clearly different from understanding that it is one's right to strategize to avoid or minimize punishment, hearing one's lawyer again and again insist upon a kindly and exculpating version of the events in question, and then being sent to prison. The interaction that takes place in restorative justice is quite simply better moral material for the offender to dwell on over the course of his punishment than what happened in the adversarial criminal justice process that led to the sentence. It seems entirely more likely that the punishment arising from the restorative justice process will lead to his eventual reintegration into society. [33]

I have stated, perhaps controversially, that adversarial criminal justice may facilitate the development of a retributive interest in punishment. However, this is not to say that in diversionary restorative justice, victims eschew retribution entirely in voicing their punishment preferences. Recall the insistence of retributionists that they are not advocating punishment-as-vengeance, but punishment-as-just-deserts. Someone who has gone through the restorative justice process may understand the offender better and feel a sense of release, while still maintaining that an offender "deserves" to be punished. [34] However, this is not necessarily an indication that such a person is a bad judge in his or her own case. Notwithstanding Locke's views to the contrary, I want to suggest that taking the view that *society* should have a retributive interest in punishment is not actually morally better than an individual victim's having *private* retributive interests. In a culture in which the media all but neglects crime victims who are young, black, and male, it is worth remembering that criminal offenders and crime victims often reside in close geographic proximity and share demographic characteristics like age, sex, race, and socioeconomic background. [35] Is it really so terrible for, say, a mother from Chicago's South Side whose son was killed to participate in the restorative justice process, with sincere emotions expressed on both sides and her feeling that the process has enabled her to get on with her life, while still having a retributive interest in

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zenship, London: Routledge, 2008, p. 154, argues that we will "probably fall back on traditional punitive principles to be applied to serious offenders who are unwilling to participate in deliberation, and who are likely to reoffend seriously".

33 - For more on the idea of reintegration, see John Braithwaite, "Repentance rituals and restorative justice", *op. cit.*; and his classic work, *Crime, Shame, and Reintegration*. Cf. Lode Walgrave's claim in *Restorative Justice, Self-Interest, and Responsible Citizenship*, *op. cit.*, p. 105: "Restorative justice interventions are not a new treatment programme. They express another paradigm, in which repairing the harm is the primary objective."

34 - For restorative justice scholars who hold that restorative justice and retribution are not at odds, see Kathleen Daly, "Restorative justice: The real story", *op. cit.*, p. 60.

35 - Paula Wilcox, "Beauty and the beast: Gendered and raced discourse in the news", *Social & Legal Studies*, vol. 14, 2005, pp. 515-532; Erika Harrell, "Black victims of violent crime", *Bureau of Justice Statistics Special Report*, August 2007, NCJRS Publication no. 214258, http://webarchive.library.unt.edu/eot2008/20080923163123/http://www.ojp.usdoj.gov/bjs/pub/pdf/bvvc.pdf.

her son's killer undergoing some form of punishment? Though surely not all restorative justice advocates would agree, my own sense is that it is not. Morally, her expressing the just deserts view seems less problematic than the (racialized) opinion of a person who has never been victimized that, as a matter of principle, all "thugs" should be locked up. The insights of sociologists who have shown how unemployment, poverty, and racial marginalization creates cycles of crime and imprisonment, and how crime policy is heavily biased in favor of "white white-collar" criminals are by now widely known. [36] The idea that retribution is what justifies societal punishment presupposes a concept of desert that callously disregards the privileges of those who do not live in a place where visible forms of illegal activity are common.

My claim has been that the ability of human beings to be good judges in their own case provides a philosophical foundation for challenging adversarial criminal justice and defending restorative justice, and that the expression of retributive emotions during a restorative justice conference does not pose a threat to this thesis. The most significant objections that remain are the following: (1) diversionary restorative justice threatens consistency in sentencing; (2) the accused's right against self-incrimination are neglected in restorative justice; and (3) mainstream criminal justice outside the Anglo-American world avoids many of the pathologies of the adversary system, thus we should not rush to adopt restorative justice as an alternative to the latter. I will respond to each of these issues briefly.

First, the consistency objection. One may picture a system in which restorative justice is an extremely common way of determining sentencing. Would this mean that the victim's own judgment routinely replaces codified sentencing guidelines and the expert knowledge of the judge? In cases of serious crimes especially, this would seem problematic. It is a complete matter of chance as to whether the victim is forbearing or harsh—the victim may lack the requisite information to know whether he or she is being forbearing or harsh. As Carolyn Hoyle argues, however, proportional, uniform sentencing and restorative justice are not necessarily at odds; it is possible, even desirable, to give victims guidelines as to upper and lower bounds for compensation, community service, or in the case of serious crimes, prison sentences. [37] The upper and lower bound approach may not, of course, satisfy the person who wants restorative justice to replace criminal justice entirely. [38] Victims are not given real power, and since the state does not cede complete control over sentencing, trust is not placed in their being good judges.

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36 - Generally, see John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice*, Oxford: Clarendon Press, 1990, chap. 9.

37 - Cunneen and Hoyle, *Debating Restorative Justice*, pp. 64-65.

38 - And as an anonymous reviewer points out, for restorative justice to take the place of mainstream criminal justice, victims would have to determine guilt and innocence, and not just sentencing.

My account, however, does not choose between Hoyle and her more radical critic. My point is rather that, contra Locke, a good judge is not defined by the extent to which he can choose the perfect sentence that fits the severity of the crime. Restorative justice expands the concept of good judging in the criminal justice context by showing how a judge might engage personally with the offender, exhibit and feel emotion, and impress upon the offender a lasting awareness that his or her actions caused harm, conveying "in painful detail the full measure of the injury he caused (...) [so that] the guilt he formally acknowledged before the restorative process began hits home". [39]

This brings us to the objection that diversionary restorative justice requires an offender to admit guilt. [40] This is at odds with the offender's presumption of innocence and right to a trial in which guilt must be demonstrated. I want to suggest, however, that the requirement that a restorative justice diversion occurs after the admission of guilt is not the real problem. In Anglo-American criminal justice practice, offenders already admit their guilt and waive their right to a trial in the vast majority of cases as a result of the widespread practice of plea bargaining. We might even imagine a system in which diversionary restorative justice replaces plea bargaining whenever possible, while still allowing offenders to exercise their right to a trial if they wish it. [41] The real problem, and one that I cannot deal with adequately here, is that the apparent benefits of restorative justice may be explained in part through self-selection, since only those who acknowledge their guilt participate. [42]

Finally, much ado has been made about the defects of the adversary system, but this does not mean that we must necessarily accept restorative justice. If one believes that Anglo-American criminal justice goes too far in institutionalizing the value of impartiality, one might instead prefer the "inquisitorial" system, in which the judge has prosecutorial duties. [43] This system is remarkably efficient, thus the need for plea bargaining is diminished or eliminated. [44] As Erin Blondel summarizes the differences between the inquisitorial and adversary systems:

> Judges in inquisitorial systems initiate proceedings, collect evidence, and determine how to construct and resolve the legal and factual issues in the case. In contrast, parties in the adversary system manage their own cases. They initiate proceedings, develop the evidence, and choose the best way to argue their position before the court. Judges in adversary systems act primarily as neutral "umpires." Rather than undertaking

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39 - Stephen Garvey, "Restorative justice, punishment, and atonement", *Utah Law Review*, 2003, pp. 303-317, 314.

40 - See Chris Cunneen and Carolyn Hoyle, *Debating Restorative Justice*, *op. cit.*, pp. 44, 133.

41 - David A. Sklansky and Stephen C. Yeazell, "Comparative law without leaving home: What civil procedure can teach criminal procedure, and vice versa", *Georgetown Law Review*, vol. 94, 2005, pp. 683-738, 702.

42 - Meredith Rossner, *Just Emotions...*, *op. cit.*, pp. 15-27.

43 - I thank an anonymous reviewer for raising this point.

44 - John H. Langbein, "Land without plea bargaining...", *op. cit.* Cf. Richard L. Lippke, *The Ethics of Plea Bargaining*, *op. cit.*, pp. 236-237.

> independent investigations, they look at the evidence the parties bring before the court and rule on the law based on the facts and arguments before them. [45]

We need not choose between an inquisitorial system and restorative justice, however. Both rely on a similar institutional logic and moral psychology. Neither considers it exceedingly important that the accused not incriminate himself so that the case against him is built from scratch; the ready admission of guilt is emotionally productive. "People do not like to be caught lying, even people who have already been caught committing serious crimes. It is ordinary human nature not to deny the obvious when the truth is certain to come out anyway", as John Langbein writes. "Only the Anglo-American lawyer, mired in his uniquely deficient criminal procedure system, can regard such unbargained-for statements as unnatural.' [46] If one thinks that there should be a state-managed criminal justice system alongside restorative justice, then the inquisitorial system may be a more logical complement than the adversary system.

Conclusion

In claiming that victims should control sentencing, restorative justice advocates may be hasty, even naïve, in their implicit rejection of the age-old principle of *nemo iudex in causa sua*. Despite this, restorative justice does provide a process by which individuals are likely to become good judges in their own case. Accordingly, people living in countries in which criminal justice uses the adversary method may be too uncritical with regard to the goals and values underlying this method. Impartiality in criminal justice may not be as essential as authors like John Locke would have us believe.

Of course, challenging the impartial character of Anglo-American criminal justice is one thing, and challenging the idea that impartiality demands criminal justice's being managed by the state is quite another. Whether paired with the adversary or inquisitorial system, the type of restorative justice that has been the focus of the present essay is still ultimately under state control. Some have questioned the idea that the formal legal system should form "bookends" around restorative justice. [47] One's position on this subject determines how far the disagreement with Locke goes.

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45 - Erin C. Blondel, "Victims' rights in an adversary system", *Duke Law Journal*, vol. 58, 2008, pp. 237-274, 241. See also Antony Duff et al., *Towards a Normative Theory of the Criminal Trial*, *op. cit.*, pp. 217-223.

46 - John H. Langbein, "Land without plea bargaining...", *op. cit.*, pp. 219-220.

47 - I use the expression of Stephen Garvey, "Restorative justice, punishment, and atonement", p. 216.

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Abstract

Many Men Are Good Judges in Their Own Case: Restorative Justice and the *Nemo Iudex* Principle in Anglo-American Law

The principle of *nemo iudex in causa sua* ("no man should be a judge in his own case") is central to John Locke's social contract theory: the state is justified largely due to the human need for an impartial system of criminal justice. In contemporary Anglo-American legal practice, the value of impartiality in criminal justice is accepted uncritically. At the same time, advocates of restorative justice frequently make reference to a crime victim's right to have his or her voice heard in the criminal justice process without regard for impartiality as potentially being morally valuable. In this article, I challenge the central place of impartiality in criminal justice on the grounds that it leads to a setup ill-suited to moral psychology. Though restorative justice advocates are not principled in their implicit rejection of impartiality and the *nemo iudex* principle, their preferred method of criminal justice conduces to crime victims' being good judges in their own case.

Résumé

Beaucoup de gens sont des bons juges en leur propre cause: la justice restaurative et le principe du *nemo iudex* dans le droit anglo-américain

Le principe du *nemo iudex in causa sua* (« nul n'est juge en sa propre cause ») occupe un rôle central dans la théorie contractualiste de John Locke : l'État est pénalement justifié en grande partie à cause du besoin humain pour l'existence d'un système pénal impartial. Dans la pratique judiciaire anglo-américaine, la valeur de l'impartialité est acceptée de manière non critique. Par ailleurs, ceux qui soutiennent la justice restaurative font souvent référence au droit qu'a la victime d'avoir sa voix entendue dans le procès pénal, sans prendre en compte la pertinence morale de l'impartialité. Cet article conteste la centralité de l'impartialité en matière de justice pénale et affirme que cette dernière conduit à un cadre institutionnel non adéquat depuis une perspective de psychologie morale. Bien que les partisans de la justice restaurative ne prennent pas une position principielle lorsqu'il s'agit de rejeter la valeur de l'impartialité et le principe du *nemo iudex*, les pratiques de justice qu'ils encouragent supposent que la victime soit juge en sa propre cause.

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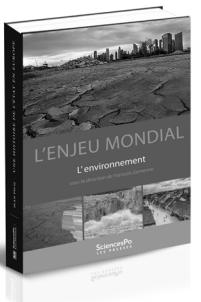

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