

Theorizing a Restorative Response to Homicide

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This paper argues: (1) retributive theories of punishment fail to account for salient dimensions of homicide; (2) retributive theories must be supplemented by restorative justice principles in order to account for the phenomenon of homicide; and (3) in order to robustly account for the phenomenon of homicide in this way, retributive theories must relinquish their claim to justifying capital punishment. It begins by examining the values animating retributive theories of punishment and demonstrating how they conceal salient dimensions of murder and criminal justice, such as the basically interpersonal nature of crime and the psychological harm that stems from it. In order to account for these aspects of homicide, which escape consideration under retributivist values alone, this paper looks beyond those theories to the insights and values animating restorative justice. It argues that retributivism should be supplemented by a relational view of crime in order to bring into view the constellation of psychological harms that are associated with homicide. In order to more comprehensively theorize homicide and a just response to it by adopting the insights and values of restorative justice, retributive theory must sacrifice any claim to justifying capital punishment. The infliction of the death penalty is so fundamentally toxic to the aims and values animating restorative justice that capital punishment must be given up for the sake of an honest, comprehensive theory. This paper conceives in broad outline how punishment for murder could be tailored in light of restorative values in order to create the conditions for contrition, remorse, and genuine apology.

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INTRODUCTION

The American criminal legal system could respond to homicides with humanity, justice, and empathy for each of the many people impacted by murder. Instead, the government stokes the retributive wrath felt towards the offender by some impacted individuals and focuses its response on punishing the offender. As far as the criminal legal system is concerned, the matter is resolved when the offender is punished. This paper aims to expose this hollow resolution as a harmful fiction. The better angels of our nature implore us to recognize homicide as a complex social phenomenon and rise to the task of tailoring a thoughtful response to its messy, devastating reality. Left to their own devices, retributivist theories of punishment—though deeply ingrained in the American psyche—are inadequate for the task. Fortunately, the humane values of restorative justice can supplement them. Both types of theories share a common concern with restoring equilibrium after a crime occurs, though it is a common misconception that restorative justice processes are an all-or-nothing alternative to punishment. In fact, restorative justice offers a more humane, empathic species of punishment that is harmonious with a softened retributivism. Nonetheless, retributivism must be our starting point, for it is undeniably fundamental to the American discourse about responding to crime.

Formally, this paper argues: (1) retributive theories of punishment fail to account for salient dimensions of homicide; (2) retributive theories therefore must be supplemented by restorative justice principles in order to account for the phenomenon of homicide; and (3) in order to robustly account for the phenomenon of homicide in this way, retributive theories must relin-

quish their claim to justifying capital punishment.² It begins by examining the values animating retributive theories of punishment and homes in on two: (1) physicality (both of offenses and punishments) and (2) universal morality. It then demonstrates how theorizing through the lens of those values conceals salient dimensions of murder and criminal justice from the retributivists' view. Specifically, the interpersonal nature of crime, the extent to which state notions of justice are non-universal and contested by marginalized groups, and the psychological harm experienced by many parties impacted by homicide are each unaccounted for by the retributive fixation on physically sanctioning individuals who engage in moral violations. In order to account for the dimensions of homicide that escape consideration under the retributivists' narrow set of values, this paper looks beyond those theories to the insights and values animating restorative justice. It argues that the retributivists' focus on individual moral deserts should be supplemented by a relational view of crime in order to bring into view the constellation of psychological harms that are associated with homicide.

In order to more comprehensively theorize homicide and a just response to it by adopting the insights and values of restorative justice, retributive theory must sacrifice any claim to justifying capital punishment. Other retributive punishments for homicide, such as incarceration, may be legitimate under this view. However, the infliction of the death penalty is so fundamentally toxic to the aims and values animating restorative justice that capital punishment must be given up for the sake of an honest theory. By leaving room for other forms of punishment, this paper conceives in broad outline how those punishments could be tailored in light of restorative values in order to create the conditions for contrition, remorse, and genuine apology. The psychological healing that stands to unfold for the family members and friends of both victims and offenders under such a newly tailored response to homicide is enormous. Meanwhile, the government stands to enhance its representation of the people and cultivate bonds between citizens by broadening its tent of concern to include groups traditionally left out of a purely retributivist response—especially when that response takes the form of capital punishment.

I. RETRIBUTIVISM AND RESTORATION

Retributive theories of punishment—like all theories—give expression to a set of values. This section aims to tease out the central values animating theories of retributive justice. There is no tidy entry point into a world of theory that is as sprawling and old as retributivism. Since we are trying to get a wide lens view of the values landscape undergirding this body of the-

² This paper uses the terms “execution,” “capital punishment,” and “the death penalty” interchangeably to refer to the same phenomenon: the conviction and subsequent judicial killing of an individual for the crime of first-degree murder.

ory, the inquiry will begin at a high level of generality. This part of the article moves roughly from general values to their specific implications in order to expose deficiencies in the system of values undergirding retributive theories of justice. The aim here is not to discredit retributive theories but to get a sense for their primary values in order to examine where they fall short. This limited aim is meant to account for the fact that retributive theories are undeniably a fundamental element of the American criminal legal system, whether one is compelled by them or not. One paper could not completely dispel these theories' talon-like hold on the American moral imagination in the realm of criminal justice. Thus, the aim is to engage with our moral imagination where it stands, in order to discern a more just way forward.

A. *Big Picture Retributivism: Hegel's PHILOSOPHY OF RIGHT*

A fulsome engagement with retributive theory can be found in G.W.F. Hegel's *Philosophy of Right*, and his classic, robust account will serve as a helpful representative of retributive theories in general.³ Hegel's genealogy of criminal law therein is animated by two primary values: physical autonomy and universal morality. In giving voice to those values, Hegel offers a genealogy of crime and punishment with a controversial origin in revenge.⁴ According to Hegel, part of the problem with victims (or their survivors) taking revenge upon a wrongdoer—which he assumes to have been the original state of affairs⁵—is that the response to wrongdoing is then indistinguishable from wrongdoing itself. Revenge undertaken by the wronged party is perceived as a new transgression by the original wrongdoer and her associates.⁶ Revenge-taking itself is basically just,⁷ but when private parties take revenge upon each other, the response to crime looks exactly like the crime itself.⁸ As a result, every act of revenge taken is a new transgression. Private party revenge-taking thus risks an infinite regress of transgression for transgression.

American history furnishes a handy, familiar example of this infinite regression problem: the 28-year feud between the Hatfield and McCoy families along the Kentucky-West Virginia border.⁹ In a famous and ongoing tit-

³ See, e.g., G.W.F. HEGEL, *Philosophy of Right* §102 (T.M. Knox trans., Oxford U.P.1967) (1821).

⁴ See *id.* As will be discussed *infra* Section I(c)(1), restorative justice theorists take issue with this revenge origin.

⁵ See *id.* (“The annulling of crime in this sphere where right is immediate is principally revenge”).

⁶ See *id.*

⁷ See *id.* (“[R]evenge. . . is just in its content in so far as it is retributive”).

⁸ See, e.g., *id.* at § 101 (“The annulment of the crime is retribution in so far as (a) retribution in conception is an ‘injury of the injury,’ and (b) since as existent a crime is something determinate in its scope both qualitatively and quantitatively, its negation as existent is similarly determinate”).

⁹ See generally Ken Sullivan, *The Hatfield-McCoy Feud*, THE WEST VIRGINIA ENCYCLOPEDIA (March 14, 2023), wvencyclopedia.org/articles/314.

for-tat, once a Hatfield took revenge on a McCoy for the McCoy's previous attack on a Hatfield, the McCoy took revenge on a Hatfield for that Hatfield's revenge on a McCoy—and so the infinitely regressing feud continued, on and on, for almost three decades. As a convenient shorthand, this infinite-regress problem will be termed the “Hatfields and McCoy's Problem” in this paper.

In order to solve the Hatfields and McCoy's Problem, Hegel posits a need for justice “freed from subjective interest and a subjective form and no longer contingent on might.”¹⁰ His concern is that justice in the form of private party revenge-taking is too haphazard—it depends upon the whim of those who are impacted by wrongdoing (“subjective interest”) and occurs by means of whatever aptitudes or instrumentalities the wronged party happens to possess (“subjective form. . . contingent on might”).¹¹ On the one hand, Hegel is concerned about a timid victim devoid of any means to exact his revenge. Although revenge is natural and justified in his view, the diverse frailties of mankind will prevent revenge from being taken with regularity.¹² On the other hand, it will not do to simply allow stout-hearted and strong (or wealthy) victims to exact revenge either, for such revenge-taking will be difficult to distinguish from the original wrong itself, and then we are back at the Hatfields and McCoy's Problem. This new, perceived wrong may be avenged or not—it turns on the mere contingency of what sort of person has been the target of the revenge taken. For example, if unusually strong McCoy₁ manages to kill Hatfield₁, who is survived only by a comparatively weaker Hatfield₂, then Hatfield₂ may be incapable of taking revenge upon the comparatively stronger McCoy₁. For Hegel, this unacceptable contingency of justice on the comparative strength of victims, perpetrators, and potential revenge-takers demands instead “justice not as revenge but as *punishment*.”¹³ This distinction between revenge and punishment is about *who* responds to wrongdoing.¹⁴ Recall that revenge-taking under this account is the natural and formally just state of affairs. Punishment differs from revenge insofar as it is inflicted from a universal standpoint.¹⁵ For Hegel, this universal standpoint is embodied by the state, which promulgates laws that determinately and universally establish the boundaries of permissible conduct.¹⁶

¹⁰ HEGEL], *supra* note 2, at § 103.

¹¹ *Id.*

¹² Woodson v. North Carolina, 482 U.S. 280, 304 (1976).

¹³ *Id.* (emphasis added).

¹⁴ *See id.* at § 220 (“When the right against crime has the form of revenge, it is only right implicit, not right in the form of right, i.e., no individual act of revenge is justified”).

¹⁵ *See id.* at § 103 (“[T]his implies the demand for a will which. . . wills the universal as such”).

¹⁶ *See id.* at § 211 (“The principle of rightness becomes the law when, in its objective existence, it is posited, i.e. when thinking makes it determinate for consciousness and makes it known as what is right and valid; and in acquiring this determinate character, the right becomes positive law in general”).

This is a major and controversial assumption within Hegelian theory: the modern state has emerged as the ultimate universal entity at the end of a long course of historical development.¹⁷ Without getting too metaphysical and far afield from the focus of our current inquiry—namely the value of universality that partially animates retributive theories of punishment—it is important to understand that Hegel’s system cognizes the emergence of positive law as the coming-to-consciousness of universal right for the very first time in human history. The argument goes that before positive law enumerated universal standards of conduct, we only became aware of what is right when it was infringed by wrongdoing. This was a haphazard way of understanding what is right,¹⁸ so the advent of positive law was a tectonic shift in our ability to cognize what is right—not merely negatively through the subjective experience of being wronged, but positively through the objective knowledge of what is permissible. More concretely, once the German state started writing down what actions constitute a crime *before* those actions happened, Germans started to *know* that some actions were *always* bad by means of the written laws. Before the laws were written, Germans on occasion saw, experienced, or perpetrated bad actions, without knowing with clarity *ex ante* that this category of actions was *always* bad. This *ex ante* knowledge of what was always bad, in turn, helped Germans to understand, by negative implication, what is right.

At this point in the genealogy, wrongdoing became “an infringement not merely of what is subjectively infinite, but of the universal thing which is existent with inherent stability and strength.”¹⁹ Behind Hegel’s unwieldy language (by “what is subjectively infinite,”²⁰ he basically means personal autonomy), his point is that in a modern state governed by positive law, wrongdoing is not only an infringement upon personal autonomy but also upon the universal right that is embodied by the achievement of positive law. Positive law is enforced by the state—a thing of “inherent stability and strength.” No longer do Germans just subjectively experience invasions of their personal autonomy as wrongs; now they know that their person is autonomous in a stable way, because the strength of the state reinforces that autonomy.

Let’s take a more concrete example. Now that we know what is permissible and forbidden, thanks to the state’s enumeration of positive laws, when the hypothetical Sandy stabs the hypothetical Charisse, Sandy has not merely infringed Charisse’s autonomy; Sandy has violated a universal rule of conduct which proscribes the infringement of autonomy by stabbing. And

¹⁷ See Liat Levanon, *Criminal Punishment as a Restorative Practice*, 18 *NEW CRIM. L. REV.* 537, 539 (2015).

¹⁸ Note Hegel’s discomfort with indeterminacy when it comes to morality; if our morals are to be universal, they cannot at the same time be contingent on anything that is not universal. This is one of the great dualities that Hegel is negotiating in his *Philosophy of Right*.

¹⁹ See HEGEL, *supra* note 2, at § 218.

²⁰ *Id.*

now that modern states have emerged, it will not merely be Charisse's infirm uncle who confronts Sandy—it will be the state wielding the overwhelming power of a sovereign. When the state inhabits this universal standpoint in order to uniformly inflict *punishment* (not mere revenge) upon Sandy, it does so in order to vindicate the universal right (the one which, among other things, proscribes the infringement of autonomy by stabbing). Since the overwhelming power of sovereignty makes the state a more reliable revenge-taker than Charisse's infirm uncle, we can rest assured that punishment will be inflicted both here and in every like case.

This transition from revenge to punishment influences the nature of wrongdoing itself. Hegel writes, “a new attitude arises: the [wrongdoing] is seen as a *danger to society* and thereby *the magnitude of the wrongdoing is increased*.”²¹ The stakes of pivoting to this universal standpoint are high for the would-be wrongdoer; wrongdoing becomes an infringement not only upon the autonomy of the wronged, but also upon the universal standards of conduct embodied by positive law. When the state punishes, it does so in order to vindicate those universal standards. So when the state punishes Sandy, that punishment serves a more abstract purpose than Charisse's uncle would have served in taking revenge. The purpose of the state punishing Sandy is to vindicate the right, which is represented by positive law. By contrast, Charisse's uncle would have been vindicating Charisse. Notably, the state's abstract purpose has a reciprocal effect on the character of wrongdoing itself. Wrongdoing's character as a discrete harm to a discrete victim recedes behind its character as an offense to the right itself—an offense to morality. Physical transgressions are thereby conceived as moral wrongs; discourse around crime and punishment becomes dominated by the duality of physicality and morality.

Hegel's account intimately binds physicality with moral transgression. Recall that it is by means of physical transgressions that we first became acquainted—albeit negatively and haphazardly—with the universal right.²² This point is key: actual, embodied wrongdoers and actual, embodied victims are inextricably bound up with the abstract moral right. They are two faces of the same moral phenomenon. Hegel writes: “It is only the will existent in an object that can suffer injury.”²³ So even though *punishment* is ultimately intended to vindicate the universal right, *wrongdoing* happens physically. Only a body can do wrong.²⁴ As a result, when responding to Sandy's transgression, the state must point to the fleshy thing called Sandy that transgressed, towards which it will channel its response. Hegel writes, “[t]he sole positive existence which the injury possesses is that it is the particular will of the criminal. Hence to injure this particular will . . . is to

²¹ *Id.* (emphasis added).

²² See HEGEL, *supra* note 2, at § 211.

²³ *Id.* at § 96.

²⁴ This insight is familiar to law students and lawyers: there is no crime without an *actus reus*.

annul the crime, which otherwise would have been held valid, and to restore the right.”²⁵ The right, in other words, cannot be maintained in the abstract as a merely theoretical insight—rather, it is restored by injuring the people, like Sandy, who have violated it. Failure to do so would implicitly ratify the transgression and impugn the state’s claim of standing for universal morality.

The intimate connection that Hegel’s theory weaves between physical punishments and universal morality helps to unlock the meaning of this oft-quoted passage from Immanuel Kant:

Even if a Civil Society resolved to dissolve itself with the consent of all its members—as might be supposed in the case of a People inhabiting an island resolving to separate and scatter themselves throughout the whole world—the last Murderer lying in the prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realize the desert of his deeds, and that blood-guiltiness may not remain upon the people; for otherwise they might all be regarded as participators in the murder as a public violation of Justice.²⁶

This passage represents the deontological extreme: no material benefit could accrue from execution either to a society on the eve of dissolution or to any individual citizen after each goes their separate way. The sole justification for executing the erstwhile society’s last murderer is that it is right to punish individuals who violate universal moral principles. Since the exclusive way to repudiate the violation is by physically sanctioning the body of the offender, the only way to uphold the right is to sanction the murderer’s body. Failure to do so would be an implicit ratification of the violation—a failure to do what is right. Insofar as any civil association purports to claim the universal standpoint of the punisher, it must uniformly punish the bodies of wrongdoers to the bitter end. If it fails to deploy the only vindication of morality available to it—namely a sanction of the offender’s body—then both the state and its citizens become participants in the ongoing injury to universal morality.

This line of thinking about criminal law purports to transform revenge into something higher: “the genuine reconciliation of right with itself, i.e. into punishment.”²⁷ In order to understand this transformation, it is important to flag another controversial assumption within Hegelian theory: the modern state “is an organic whole that constitutes individual subjects rather than an aggregation of individual subjects that exist prior to it.”²⁸ The state therefore has the responsibility to respond to wrongdoing among its citizenry such that the law-abiding do not become participants in wrongdoing. Private

²⁵ *Id.* at § 99.

²⁶ IMMANUEL KANT, *THE PHILOSOPHY OF LAW* 198 (W. Hastie trans., 1887).

²⁷ HEGEL, *supra* note 2, at § 220.

²⁸ Levanon, *supra* note 16, at 539.

party revenge-taking can thus be viewed as a primitive form of criminal justice, opening the door to developing positive law. Once positive law emerges, the stakes of criminal justice metastasize from vindicating victims through revenge to vindicating the universal right through punishment. Given the physical nature of wrongdoing, the latter vindication maintains its character as a physical response to wrongdoing through sanctions against the body. This interplay between morality and physicality is woven into the fabric of retributive thinking, as demonstrated in the following section by two variations of retributive thinking.

B. The Physical and the Moral in Retributivist Accounts: The Same Blind Spots with Differences of Emphasis

There are many variations of the retributive theory of punishment, and this section does not comprehensively account for them all. Instead, it focuses on two variations to elucidate the central status of physicality and morality in the retributive approach. Those two variations have been labeled in the scholarship as (1) the Self-Indulgence Theory of Retributivism and (2) Vindictory Retributivism. The former emphasizes the physical dimension of retributive theory in the first instance, whereas the latter emphasizes the moral dimension. Despite these different emphases, each variation ends up justifying the same set of physical sanctions for basically the same reasons.

1. Physicality: The Self-Indulgence Theory of Retributivism

The Self-Indulgence Theory of Retributivism characterizes criminal activity in intensely physical terms. In this version of retributivism, a criminal is conceived as one who:

uses his body and other objects or persons in ways that are legally proscribed. His manoeuvring of his body and other objects or persons through regions of space is such as to be eschewed[.] . . . By going ahead with such manoeuvring . . . a criminal gains . . . an advantage over all law-abiding citizens.²⁹

This highly physical characterization of crime presupposes a legal code that has proscribed certain physical maneuvers. To continue with our prior hypothetical, Sandy's maneuvering of a knife into Charisse is criminally problematic under this theory because it is a proscribed maneuver through space. Most citizens refrain from that maneuver, so Sandy has gained an unfair advantage over her fellow citizens by engaging in it. Attempting to characterize the nature of the wrong objectively, the Self-Indulgence Theory specifically excludes from consideration any subjective gains made by the

²⁹ MATTHEW KRAMER, *THE ETHICS OF CAPITAL PUNISHMENT* 93 (2011).

criminal.³⁰ The point is decidedly not why Sandy stabbed Charisse but that she did, and the extent of Sandy's gain is interpreted objectively: "the value of a criminal's unfair gain is to be gauged from a societal perspective rather than from the perspective of the criminal."³¹ So the stabbing is criminal insofar as it violates objectively held moral norms about permissible maneuvers through space, not because of the harm suffered by Charisse nor Sandy's reason(s) for the maneuver.

By construing the gravity of the violation objectively, the Self-Indulgence Theory indexes criminal wrongdoing to society-wide standards instead of indexing it to the participants in the crime. Here, we see a retributive theory that focuses on the physical leapfrogs over the participants in the crime to arrive at a rules-based, moral perspective. This is one weak spot of retributive accounts generally: they emphasize the duality of physical transgressions and universal moral principles, papering over the dimensions of crime that fail to fit neatly within that duality. For example, under the Self-Indulgence Theory, it is irrelevant whether Sandy stabbed Charisse for no reason other than to sadistically revel in Charisse's pain or, alternatively, to steal Charisse's wallet to buy medicine for her ill child. These are psychologically distinguishable motivations that are not cognizable by the theory. While they are irrelevant to the Self-Indulgence Theory, they are highly relevant to a psychological understanding of Sandy and to the type of harm suffered by Charisse.³² When we turn squarely towards restorative theories in Part II, we will try to discern the significance of that psychological understanding and how it might be incorporated into a more comprehensive account of crime. For the time being, the point is simply to identify how far the Self-Indulgence Theory goes to characterize the nature of wrongdoing in physical terms.

Having evoked the physical nature of the offense, the Self-Indulgence Theory skips over any psychological account of crime in order to describe the punishment in moral terms:

The injustice rectified . . . is that which has been committed against the whole community whose normative protection of the victimized individual(s) has been flouted. When a criminal em-

³⁰ See *id.* at 93 ("His manipulation of his body and other objects or persons through regions of space is valuable not because he relishes it (though, of course, many criminals do relish what they have done), but precisely because that manipulation of his body and other objects or persons is legally forbidden").

³¹ *Id.* at 94.

³² For example, Charisse is likely to process harm inflicted upon her by a sadist distinctly from how she would process the same physical harm inflicted upon her by an individual acting out of understandable desperation. Though the physical harm could be identical in both instances, the psychological impact of physically indistinguishable harms can be distinct. It is beyond the scope of this paper to critique the sentencing phases of capital trials, but it is worth pointing out that the aggravating and mitigating circumstances framework imposes a rigid binary upon this complex set of psychological dynamics in order to cram those dynamics into an evaluation limited to considering the severity of the sanction.

ploys his own body and certain other objects or persons through regions of space in furtherance of his nefarious purposes, he contravenes that normative protection and thus perpetrates an injury against the community as a whole.³³

Here, crime is construed as both a physical injury to the body of the victim and a moral injury to the whole community, the latter forming the basis for punishment of the offender. Punishment under this view is conceived as restoration of the proper distribution of advantages among all members of society, since the criminal's arrogation of extra advantages by undertaking prohibited maneuvers unsettled the proper distribution.³⁴ Punishment redresses the unfair distribution by "imposing on the wrongdoer a disadvantage . . . that counterbalances the valuable advantage which he has gained simply by dint of pursuing his criminal purposes."³⁵ By disadvantaging the offender, the gain is thought to be off-set or annulled.

Thus, the Self-Indulgence Theory demonstrates how rapidly a focus on physical autonomy pivots to abstract moral reasoning about the proper distribution of social advantages to justify physical sanctions. Now, we turn to a variety of retributivism that travels in the other direction, so to speak.

2. *Morality: Vindictory Retributivism*

Instead of emphasizing how the offender's engagement in prohibited physical maneuvers threatens the proper distribution of advantages within a community, Vindictory Retributivism centers around the inherent moral worth of the individual. It concentrates in the first instance on the deprivation undergone by the victim and conceives of punishment as publicly reaffirming the victim's inherent dignity.³⁶ The criminal's wrong is understood to communicate an immoral message about the inherent moral worth of their victim. Sandy's stab communicates that Charisse is not worthy of personal autonomy, so punishing Sandy counteracts that dangerous message.³⁷ The purpose of punishment under this variation of retributivism is "to convey to an offender the priority of a community's moral principles over his own nefarious inclinations."³⁸

Although both fall under the broad umbrella of retributivism, Vindictory Retributivism serves as a foil to the Self-Indulgence Theory. The latter theory conceives of criminal wrongdoing in objective, physical terms at the outset. It then pivots to moral reasoning about the "community's normative protection of victims" in order to proceed from prohibited maneuvers to

³³ KRAMER, *supra* note 28, at 95.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 97–98.

³⁷ *Id.* at 99 ("[A] punitive measure counteracts the message communicated by a criminal's own conduct").

³⁸ *Id.*

moral justifications for punishment. By contrast, Vindictory Retributivism conceives of criminal wrongdoing in moral terms in the first place—i.e., as the communication of a dangerous moral message about the victim’s dignitary value. Punishment, under this view, sends a message to both the offender and the community that the offender’s message was wrong. Punishment communicates this message “by demonstrating that the victims enjoy the backing of their society’s governing institutions.”³⁹ But the communication of messages generally does not involve imprisonment and execution; communication generally happens through words.⁴⁰ So the Vindictory Retributivist must find a way to pivot from talk of moral messages to talk of physical sanctions. And the Vindictory Retributivist finds refuge not in metaphysical speculation but in necessity. Words are simply too weak:⁴¹

“If someone asks why these messages cannot be conveyed by letter or over the telephone rather than through punishment, the response may be that the offender has already shown by his conduct that he has not internalized the message in any of its conventionally communicated forms, and we now have to abandon words and try to show him why such acts are wrong, in the most direct and powerful way, by getting him to experience them at the sharp end, so to speak.”⁴²

This justification for physical sanctions demonstrates how rapidly the vindictory retributivist pivots from her conception of crime and punishment as a matter of moral messaging to a matter of physical sanctions, making assumptions about the psychology of the offender along the way. The unstated assumption about offenders is that they have been exposed to moral messaging in the past and are incapable of internalizing it. The evidence of this assumed incapability is the fact of their offense. Just as the Self-Indulgence theorist leapfrogs over any psychological account of crime by first evaluating the transgression in strictly physical terms and then formulating the response in abstract moral terms, so does the vindictory retributivist leapfrog a psychological account but in the other direction. Specifically, the latter species of retributivist evaluates the transgression in moral terms (as the communication of an immoral message) and then formulates the response as *necessarily* physical insofar as the messaging to which the offender has presumably been exposed has been insufficient. This conjures imagery of the

³⁹ *Id.* at 101.

⁴⁰ *Id.* at 102 (quoting Russ Shafer-Landau, *Retributivism and Desert*, 81 PAC. PHIL. Q. 189, 196 (2000)) (“[I]t remains unclear why the deliberate infliction of hard treatment on an offender is necessary to explain away the relevant message of inferiority . . . Why couldn’t a very forcefully worded, publicly promulgated message from the bench be sufficient to do this? . . . What needs explaining is why a convict must be intentionally made to suffer”).

⁴¹ *Id.* (“A merely verbal response to a serious crime would convey to the wrongdoer the message that he can grossly violate somebody else’s rights with virtually no untoward consequences”).

⁴² *Id.* at 103–04 (quoting Jeremy Waldron, *Lex Talionis*, 34 ARIZ. L. REV. 25, 30 (1992)).

hardened offender, capable of understanding only violence—a harmful stereotype that papers over the diversity of offenders, the various backgrounds from which they come, and the complexity of motivations and psychological dynamics that lead one to engage in any criminalized activity.

The point of placing these two theories side-by-side has been to demonstrate how the two central values animating retributive theories of punishment pre-determine what those theories are able to take into account. Although the Self-Indulgence Theory and Vindictory Retributivism start from opposite ends of the retributive spectrum by emphasizing physicality and morality respectively, they merely pivot between the same two, tired values and miss the many insights into crime that other values can draw into focus. In other words, the dual values of physicality and universal morality are the furniture that retributive theories are constantly rearranging, and it's time to buy a new rug that will tie the whole room together. The following section draws into focus some insights into homicide that are concealed by the retributivist's narrow set of values. It begins to describe the restorative "rug" that might tie those insights into a more robust theory for responding to homicide.

C. *Revealing Weak Points in the Retributive Account*

1. *An Alternative Genealogy*

Restorative justice theorists challenge Hegel's retributivist assumption that private party revenge-taking was the standard response to wrongdoing in ancient societies.⁴³ Instead, they maintain that ancient societies generally aimed to make peace between conflicting parties through a combination of compensation and repentance.⁴⁴ As opposed to being the default version of criminal justice, revenge-taking was a disfavored response of last resort after all other efforts at restoration failed.⁴⁵ By viewing crime as an interpersonal harm to be redressed through compensation and repentance, ancient societies

⁴³ GERRY JOHNSTONE, *Restorative Justice: Ideas, Values, Debates* 40 (2002); Stephen Garvey, *Restorative Justice, Punishment, and Atonement*, 2003 UTAH L. REV. 303, 304 (2003) (citing John Braithwaite, *Restorative Justice and Responsive Regulation* 3 (2002)) (citing Elmar G.M. Weitekamp, *The History of Restorative Justice*, RESTORATIVE JUVENILE JUSTICE: REPAIRING THE HARM OF YOUTH CRIME 75, 93 (Gordon Bazemore & Lode Walgrave eds., 1999)) ("Although restorative justice is put forth as a new philosophy for modern societies, its proponents trace its roots to older traditions and nonmodern societies. Signs of restorative justice have, for example been detected in the practices of 'ancient Arab, Greek, and Roman civilizations,' of the 'Germanic peoples who swept across Europe,' not to mention 'Indian Hindus as ancient as the Vedic civilization . . . and ancient Buddhist, Taoist, and Confucian traditions.' Likewise, restorative justice has been discovered in the practices of the 'Aboriginals, the Inuit, and the native Indians of North and South America.' Restorative justice declined with the rise of the modern nation state, which 'stole' for itself conflicts that previously belonged to, and were resolved by, the people involved in them").

⁴⁴ JOHNSTONE, *supra* note 42, at 12.

⁴⁵ *Id.* at 40.

kept their eyes squarely on precisely what has become obscured to us: that crime ‘is at its core a violation of a person by another person’ and that the priority of the community should be . . . to make peace and even things out by persuading offenders to acknowledge and meet their liability to repair the harm they caused.⁴⁶

When the interpersonal dimension of crime becomes obscured behind grand moral talk, the resulting moral indignation stymies efforts to persuade offenders to face their harms and redress them. This is bad for victims, who now only get to gratify the short-term urge to see their offender suffer instead of reaping the long-term, restorative benefits of compensation and reconciliation.⁴⁷ And it is bad for offenders, who are motivated at every turn to deny their guilt and are thereby disincentivized from taking responsibility and working to make amends.⁴⁸ In other words, by centralizing the abstract, moral dimension of crime, the particular, discrete harms stemming from every individual criminal act recede to the detriment of victims and offenders.

The shift that Hegel describes towards viewing crime as the violation of universal rules need not be cloaked in metaphysical gravity. Restorative justice theorists trace the centralization of state control over criminal law to the twelfth century, when feudal barons, clergy, and the king took control of local restorative practices in England to claim the fines paid by offenders to victims.⁴⁹ Bluntly put, punishment was centralized to enrich powerful elements of English society. At the same time, elsewhere in Europe, princes engaged in public displays of punitive power to demonstrate their political power by “str[iking] terror in the hearts of the people, and . . . inspir[ing] awe for the power of the king and state.”⁵⁰ According to this genealogy, the theoretical account of ‘crime’ as denoting a distinctive set of moral wrongs emerged *after*—and in an effort to rationalize—the state takeover of criminal punishment.⁵¹ The point is not to argue that this account is either more or less faithful to the historical record than the Hegelian one—instead, the purpose of this genealogy is only to indicate a plausible alternative and start down the path to problematizing and de-naturalizing Hegel’s account.

2. *Adjusting Our Focus: The Problem According to Levanon*

Liat Levanon, a contemporary British theorist of criminal law, modifies the Hegelian account in order to shift its emphasis to the individuals directly

⁴⁶ *Id.* at 40 (quoting HOWARD ZEHR, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* 182 (1990)).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 41.

⁵⁰ *Id.* at 41 (quoting Randy Barnett, *Restitution: A New Paradigm of Criminal Justice*, *ETHICS*, 285–6 (1977)).

⁵¹ *See id.* at 41.

involved in an instance of wrongdoing. By refocusing on the concrete players in a criminal transaction, Levanon's theory helps to re-center offenders and victims within a Hegelian framework that tends to obscure them.

The first step of this re-centering involves grappling with Hegel's theory of mutual recognition. Levanon writes: "[m]utual recognition takes place upon encounter between two wills. The human will is, for Hegel, the universal rational will that determines itself through contingencies (that is, through the particular characteristics of every individual)."⁵² This is another example of Hegel's physicality-morality dualism. On this view, humans are distinctive insofar as they have both bodies (what Levanon terms "contingencies") and free will. With free will, we can choose to do with our bodies those universally good things which the positive law makes known to us. We have seen how this duality spins out in the context of crime and punishment by the state, but the concept of mutual recognition, as Levanon describes it, is more focused on the encounter between two human beings:

Upon an encounter between two wills, each will's universality is reflected back to it from the other will. Each will thus looks back to itself—or returns to itself—thereby acknowledging that (1) the Other cannot be me despite her universality, because her universality is otherwise determined; (2) the Other cannot be mine despite her contingent existence, because her contingent existence is a determination of universality, and universality makes her unpossessable, or free, like me. This coordinated acknowledgement of the Other as a subject that possesses universality and contingency is mutual recognition.⁵³

When two human beings mutually recognize one another, they each recognize the other as that distinctive combination of physicality and universality, which is the peculiar province of humans. This recognition implies that the 'Other' human being has fundamental physical boundaries—their body—within which their will is exclusively their own. Each person's experience of their own will's dominion over their own body allows us to recognize that same dominion in the Other. Healthy mutual recognition leads each person to respect the fundamental physical boundaries of the Other by refusing to impose their own will beyond the physical boundaries of their own body.

By contrast, crime is an instance of *misrecognition*: "the offender who encounters the victim fails to identify himself in the victim; he does not acknowledge the humanity or universality of the victim, which they both have in common."⁵⁴ This misrecognition twists the relationship between offender and victim. Instead of refusing to impose his will beyond the physical boundaries set by his own body, the offender uses force to impose his will

⁵² Levanon, *supra* note 16, at 541–42.

⁵³ *Id.* (citing G. W. F. Hegel, *Phenomenology of Spirit*, OXFORD UNIV. PRESS (1977)).

⁵⁴ *Id.* at 545.

beyond that natural boundary. He uses his body to push away the victim's natural boundaries, thereby violating both the victim's body and the will it houses.⁵⁵ Now that the offender's will has intruded upon the victim's body, the parties' boundaries are unequal.⁵⁶ To return to our previous example: when Sandy stabs Charisse, Charisse's body has become subjected to Sandy's will instead of her own. Sandy has misrecognized Charisse's physical body as an appropriate arena for the expression of her will and imposed her will upon it, thereby treating Charisse as an object and destroying the conditions for mutual recognition between two equal subjects endowed with free wills. Charisse "becomes . . . an extension of [Sandy], or [Sandy's] tool, rather than a subject motivated by reasons."⁵⁷

This modified Hegelian account of wrongdoing centers the victim and offender instead of the offender and the state. By de-emphasizing the extent to which a wrongdoer has misunderstood the dictates of a universal positive law, Levanon suggests that the central feature of crime is the wrongdoer's failure to recognize their victim as a subject just like them.⁵⁸ This shift of emphasis implicates the purpose of punishment, which according to Levanon is to restore the parties' status as two free and equal subjects.⁵⁹ By transgressing the offender's fundamental boundaries "in symmetrical relation to the offender's original transgression of the victim's boundaries," the state restores the conditions for mutual recognition.⁶⁰

This is consistent with the other retributive accounts of punishment we have examined, which contend in their own ways that the state's physical violation of the offender restores a moral equilibrium. However, moral equilibrium on this view does not reside in the vindication of universal morality through positive law—instead it resides in restoration to health for the relationship between victim and offender. This paper will argue that genuine apologies are a central condition of that restoration to health, with benefits extending beyond the victim-offender relationship itself. For the moment, it merely highlights that retributive theory contains the seeds for what Huigens calls "a fundamental shift in perspective . . . to consider[ing] the question [of criminal law enforcement] at the level of individual justice and case adjudication. . . [and] surrender[ing] the society-wide perspective of the legislator."⁶¹ The normative argument in favor of adopting this 'fundamental shift' will be made in Part II.

⁵⁵ *See id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 546.

⁵⁸ *See id.* at 55.

⁵⁹ *Id.* at 548. The author acknowledges that speaking of restoring parties' boundaries seems inapposite when speaking of murder, since the victim is gone and apparently has no boundaries to be restored. In this section, we are dealing with theories of punishment writ large—the implications for punishing murder will be directly considered in Part II.

⁶⁰ *Id.* at 548-49.

⁶¹ Kyron Huigens, *Virtue and Inculcation*, 108 HARV. L. REV. 1423, 1438 (1995).

3. *Disrupting Hegelian Universality through Simonson's "The Place of the People in Criminal Procedure"*

The Hegelian assumption that the modern state stands at the end of human historical development and embodies a universal standpoint fails to take account of salient features of American criminal justice. Since any theory ought to be judged against its ability to explain phenomena, the theory's weight is diminished by exposing dimensions of criminal justice that the Hegelian assumption conceals.

Jocelyn Simonson, a former public defender and current professor of criminal law at Brooklyn Law School, undermines the neat picture of a modern state and its prosecution of criminal offenses as embodying a standpoint of universality. Jurisdictions like California, Illinois, Michigan, and New York caption criminal cases as "The People of X v. Defendant," thereby invoking the universality of the state.⁶² Such a caption is deceptive, since

acts of popular intervention on the side of defendants happen every day: A community bail fund posts bail for a stranger; activists surround a police car in which officers have detained a fourteen-year-old black boy whom the activists have never met; a participatory defense team creates a biographical video about a defendant; a group of courtwatchers . . . demonstrate support for the accused.⁶³

These examples help to demonstrate the fallibility of an assumption that the state embodies a universal perspective on morality and justice, for the people engaged in these acts of popular intervention also conceive of themselves as seeking justice.⁶⁴

One committed to the idea of state universality might respond that there is an appropriate avenue for folks who are not content with the criminal justice system to express their malcontent: they can give input into systemic laws and policies through the democratic process.⁶⁵ However, this response talks past the activists Simonson identifies instead of squarely addressing them. The aforementioned acts of popular intervention intercede at the level of individual cases, but this 'democratic processes' response discourages that mode of activism; it encourages activists to build consensus at a policy level instead.⁶⁶ By prioritizing public consensus, this response attempts to channel dissent among the people into the familiar retributive category of the universal positive law. Recall that the positive law under Hegel's retributive view

⁶² Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 249–50 (2019).

⁶³ *Id.* at 251.

⁶⁴ *See id.* at 251–52.

⁶⁵ *See id.* at 262.

⁶⁶ *See id.*

is supposed to represent knowledge of the universal right.⁶⁷ These popular acts of intervention—often undertaken by marginalized groups—operate at the level of the individual case and therefore undermine the putatively ‘universal’ character of the right that is ‘known’ through positive law. Mariame Kaba explains the problem this way: “[p]etitioning the state which is set up to kill us for help and protection can be untenable and therefore forces us to consider new ways of seeking some justice.”⁶⁸ Acts of popular intervention are made necessary, in other words, because the ‘universal’ morality of the state fails to account for contestations by marginalized groups at the level of individual cases.⁶⁹ Since the tactics adopted are not aimed at generating public consensus about shifts in policy but instead aim to contest the machinery of the state in individual cases, they are rarely recognized to be a legitimate part of the criminal justice system.⁷⁰ By relegating such tactics to “the status of problematic interference, rather than productive public participation, the ideology of criminal procedure facilitates the exclusion of marginalized communities from everyday criminal adjudication.”⁷¹ Thus, the Hegelian invocation of ‘universality’ on behalf of the government in individual cases tends to delegitimize popular contestation of how those individual cases unfold. At best, a retributivist theory deeply committed to universality overlooks those contestations; at worst, it suppresses them. Either way, it fails to meaningfully account for them.

Simonson proposes an alternative, more inclusive picture of democratic criminal justice with room to accommodate acts of popular intervention. Specifically, adversarial stances towards state policy can be cognized as legitimate insofar as we cultivate “a pluralist conception of the demos.”⁷² This view aims to debunk the myth of ‘the people’ as a punitive monolith represented by the police and prosecution.⁷³ Alternatively, it posits that the American people consists of “multiple publics with contrasting ideas about justice that cannot be easily reconciled.”⁷⁴ Simonson pairs this pluralistic re-conception of the people with a *non*-consensus-oriented view of public participation in the criminal process, which she labels “agonism.”⁷⁵ In the absence of consensus, the view of law as knowledge of a universal right can be displaced by a perpetual pluralist process of discerning the good, which might lead to a more nuanced grasp of a plural people’s good.⁷⁶

⁶⁷ See HEGEL, *supra* note 2, at § 211.

⁶⁸ Simonson, *supra* note 61, at 252 (quoting Mariame Kaba, *Free Us All: Participatory Defense Campaigns as Abolitions Organizing*, NEW INQUIRY (May 8, 2017), <https://thenewinquiry.com/free-us-all/> [<https://perma.cc/LR2Y-7U47>]).

⁶⁹ See *id.* at 251–52.

⁷⁰ *Id.* at 252.

⁷¹ *Id.*

⁷² *Id.* at 287–88.

⁷³ See *id.* at 253–54.

⁷⁴ *Id.* at 289.

⁷⁵ *Id.* at 265.

⁷⁶ *Id.* at 265 (“An agonistic stance toward public participation in criminal legal institutions would allow groups to participate in the processes of those institutions while still remaining

For our purposes, the point to grasp is that acts of popular intervention on behalf of defendants undermine the retributive position that the state embodies a universal moral perspective. By seeking the death penalty, for example, the prosecutor claims to speak for the community, but capital punishment itself is a site of popular contestation.⁷⁷ A theory that thoughtfully engages with popular acts of intervention instead of labeling them illegitimate is one which more faithfully describes the phenomenon of contemporary American criminal justice and therefore ought to be cultivated.

A skeptic is likely to point out that a pluralist society will also have publics with ideas of justice that are profoundly punitive, retributive, and even hateful. They will object that a theory which legitimizes acts of popular intervention sweeps in too much—that Jim Crow, lynchings, and massive resistance to school integration in the South were also undertaken by “publics with contrasting ideas about justice that cannot be easily reconciled.”⁷⁸ While this is a serious objection to Simonson’s theory, it does not bear on the limited purpose for which her theory is here invoked, namely to point out that endowing the state with the feature of universality is dubious. The retributive theory of punishment, which is predicated on the state’s ability to speak for the people with one voice, is severely undermined by identifying voices that speak out against the state’s punishments. For the present, we are merely exposing the deficiency of a theory that essentializes the people into a punitive monolith. The next section continues in kind.

4. *Who Else is Missing?*

Building on the recognition that some contestations of criminal justice are not cognized when the state is conceived as universal, this section reveals sets of individuals who are both impacted by murder and not cognized by the purely retributive response of execution. It prods the retributivist to consider those who are not included in the picture of a moral

opposed to the dominant priorities of the state actors in charge of them. If we can open up our institutions to the flow of agonistic contestation, we might arrive at a more nuanced account of what is in the best interests of the People”) (internal quotation marks omitted).

⁷⁷ See, e.g., Ruth Graham, *Days After Setting an Execution Date, a Texas Prosecutor Reverses Course*, NY TIMES (Apr. 16, 2022), <https://www.nytimes.com/2022/04/16/us/texas-execution-john-henry-ramirez.html> [<https://perma.cc/433Z-UXFP>] (describing District Attorney’s motion to withdraw the death warrant days after his office requested it); Laura Wagner, *Pfizer to Stop Selling Drugs For Use in Lethal Injection*, NPR (May 13, 2016), <https://www.npr.org/sections/thetwo-way/2016/05/13/478000084/pharmaceutical-company-pfizer-to-stop-selling-drugs-for-use-in-lethal-injections> [<https://perma.cc/LS6E-SXK3>] (discussing Pfizer’s strong objection to its products being used for execution); see also *Gallup Poll: Public Support for the Death Penalty Lowest in a Half Century*, DEATH PENALTY INFORMATION CENTER (Nov. 24, 2020), <https://deathpenaltyinfo.org/news/gallup-poll-public-support-for-the-death-penalty-lowest-in-a-half-century> [<https://perma.cc/JS8F-DXNW>] (noting that, in May 2020, 54% of Americans believed the death penalty to be “morally acceptable” and, in October 2018, 49% believed it was “applied fairly”).

⁷⁸ Simonson, *supra* note 61, at 289.

community represented by an ostensibly universal state. This section is overtly restorative in orientation: it begins from the recognition that crime harms the social fabric of a community by disrupting relationships.⁷⁹ In an effort to build out a holistic view of the harms that accompany murder, this section asks whose stories are not included in the retributive account. Given the centrality of storytelling to restorative justice,⁸⁰ this section attempts to render these harms vivid through storytelling as opposed to abstract argument alone.

Murder impacts many different people in many different ways. Homicide impacts a huge number of people in the United States: the Virginia Mason Medical Center estimates that homicidal deaths produce between 120,000 and 240,000 surviving family members and close friends each year.⁸¹ Survivor reactions linger for years, can be hard to treat, and include difficulty finding meaning, distress that does not decrease over time, and a dramatically increased risk of developing Post-Traumatic Stress Disorder, or PTSD.⁸² While the anguish of surviving family members and close friends of victims is well-known and rightfully lamented, the suffering of the family members and close friends of offenders is often dismissed as somehow ‘de-served’ for association with an offender.⁸³ This treatment of those close to offenders is both lamentable and understandable. Armour explains: “[b]ecause murder and the death penalty bring up raw emotions, the perspectives of the offenders’ family members are often overshadowed, and their pain has been lost in traditional discussions of capital punishment.”⁸⁴ However, the family members and friends of offenders have experiences similar to the family members and friends of victims, “including shared grief over the loss of the victim, isolation, trauma, depression, and frustration with the criminal justice system.”⁸⁵ Whether or not we turn our attention and concern towards the suffering of offenders’ family members and friends, that suffering exists. We can either embrace the status quo, ignore it, and allow it to fester, or we can attempt to include it in our theory of homicide-response. Because an earnest account of homicide should not close its eyes to dimensions of murder that fall outside the retributive framework of concern, the latter is the superior course.

⁷⁹ ARLENE ANDREWS, ELIZABETH BECK, & SARAH BRITTO, *IN THE SHADOW OF DEATH* 20 (2007).

⁸⁰ *Id.* at 49 (“A critical component of restorative justice is storytelling. To understand crime, its causes, and its consequences, it is necessary to allow those who have been affected—stakeholders—to speak in their own words”).

⁸¹ Marilyn Peterson Armour & Mark S. Umbreit, *Exploring “Closure” and the Ultimate Penal Sanction for Survivors of Homicide Victims*, 19 *FED. SENT’G REP.* 105, 105 (2006).

⁸² *Id.*

⁸³ *See* ANDREWS, *supra* note 78, at 4 (“[T]here may be readers who believe that it is appropriate for the family members to feel condemned. Some might think that the offender’s family is complicit in the crime because they raised a criminal, and others may lack sympathy for parents who raised children in abusive conditions”).

⁸⁴ *Id.* at 5.

⁸⁵ *Id.* at 4.

In order to make the case for considering the suffering of offenders' families more vivid, we now turn our attention to two different stories:

Consider Sarah. Throughout her children's lives, this mother of three worked in the kitchen of her local nursing home. In 1998, her son Marcus killed the owner of the convenience store where she often bought a thing or two after work. When she fell short of money, the shopkeeper would front her what she needed; she considered him a friend. She mourned his loss and was devastated that it was her son who took his life. "He was my friend!" she incredulously repeated as she tried to grasp the magnitude of the situation. Still, she said of her son, "You don't stop loving him. You can't; that's not what a mother does." She blamed Marcus, and she blamed herself . . . Following Marcus's arrest, Sarah had to negotiate many feelings toward her son: concern, love, anger for his actions, confusion about mental illness, and her own feelings of torment on hearing his death sentence.⁸⁶

Nineteen-year-old Eliot was tried in a death penalty case in 1998. He and his younger brother, Brad, had always been very close. They supported each other through their father's abuse and tried to shield their mother from his violence. When Eliot received a death sentence, Brad, who was attending and doing well in college, was devastated. His mother, paralyzed by her own grief and confusion, was unable to support him. Brad attempted suicide. His mother saw Brad's suicide attempts as a wake-up call, but admitted that she remained too wrapped up in her own trauma to effectively reach out to him.⁸⁷

An adequate response to murder should not merely take account of Marcus, Eliot, and their victims—it should grapple with Sarah's complex emotions, Brad's self-harm, and Eliot's mother's trauma, too. Otherwise, it is a theory with blinders on that fails to grasp the phenomenon of murder.

Broadening the tent of concern to include the family members and friends of offenders need not diminish concern for the families and friends of victims. In fact, by broadening the tent and gaining a more solid understanding of the web of harms associated with murder, the family members and friends of victims can benefit from the more nuanced understanding of homicide that will emerge. The retributivist's narrow focus on affixing the proper physical sanction for a moral transgression explains their failure to grapple with the complex emotional needs of survivors. According to Lula

⁸⁶ *Id.* at 5.

⁸⁷ *Id.* at 6.

Redmond, a therapist who works with victims' families, "[t]aking a life doesn't fill the void, but it's generally not until after the execution [that the families] realize this. Not too many people will honestly [say] publicly that it didn't do much, though, because they've spent most of their lives trying to get someone to the death chamber."⁸⁸ Of course, victims' families are not monolithic in their efforts to push for execution: one survivor who did not push for execution said, "I get sick when death-penalty advocates self-righteously prescribe execution to treat the wounds we live with after homicide. . . . Those who hold out an event—execution—as the solution to pain have no understanding of healing. Healing is a process, not an event."⁸⁹

The point is not to criticize survivors who push for execution and extol those who don't; the point is that a narrow focus on satisfying the retributive impulse of victims' survivors oversimplifies their complex psychological needs in the wake of their loved one's murder.⁹⁰ Although executing the offender may satisfy the emotional desire for revenge, it fails to demonstrate that survivors' complex, durable suffering is a "matter of deep social concern."⁹¹ The state simply pours energy and resources into getting an execution and then moves on. The retributive account bolsters the fiction that the job is done by promulgating an unverifiable story, namely that moral equilibrium has been restored because the person deemed responsible for the murder is dead. That story leaves everyone wrapped up in the web of harms associated with the murder to go it alone. It is an impoverished response to murder that communicates the state's indifference to profound psychological suffering. If that psychologically complex suffering is a concern, then something must be done to help survivors heal.⁹² And the solution cannot include execution, for this merely compounds psychological harms and stymies efforts to repair them. The death penalty, in other words, is a toxic response to homicide that is hurtful to the complex process of psychological healing.

D. *Beneficial Retributivism?*

A hardline retributivist like Immanuel Kant might argue that forward-looking language about benefits and healing misses the retributivist's point entirely. Recall Kant's exhortation to his hypothetical island community to

⁸⁸ Armour, *supra* note 80, at 106.

⁸⁹ *Id.* at 108.

⁹⁰ Accord Stephanos Bibas & Richard Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L. J. 85, 137–38 (2004) (arguing that victims are more interested in participation beyond testimony during trial than they are in vengeance); Erin O'Hara, *Using Criminal Punishment to Serve Both Victim and Social Needs*, 72 L. & CONTEMP. PROBS. 199, 215 (2009) (arguing that in cases where the victim is deceased, rights to determine whether offender should complete the last 10–20% of their prison term—the policy proposal of the paper—ought to be passed along to families, who need tools to “cope with their own pain and suffering”).

⁹¹ JOHNSTONE, *supra* note 42, at 69.

⁹² *See id.*

execute the last murderer before dissolving. The passage emphasized that the duty to execute murderers must be carried out regardless of the fact that absolutely no benefit could accrue to anyone as a result of the execution. In other words, regardless of the good consequences that can flow from foregoing an execution and responding to murder otherwise, the hardline retributivist will insist that the execution proceed because it is right to execute murderers. By contrast, this paper critiques execution partly on the basis of its deleterious effect on survivors and their prospects for healing. As such, the skeptic might caution that it does not actually seek to “supplement” retributive theories of punishment—it seeks to supplant them.

To a limited extent, the skeptic would be right. Insofar as a strictly retributive theory apports moral guilt at the individual level and resists looking beyond an individual transgressor’s moral desert in order to determine which physical sanction the state ought to inflict, the theory needs to be supplanted. The reason is simple: individuals are not islands. Insofar as the hardline retributivist conceives of them as such, he intolerably misrepresents what human beings are. Kant’s preoccupation with individual rationality notwithstanding, real people have parents, siblings, communities, and relationships in which they are embedded, and one does not become an island simply by virtue of committing a crime—even murder. Though Kant’s categorical imperative impels him to maintain that the murderer has willed his own demise through the act of life-taking, human experience teaches that the murderer’s demise doubles down on human suffering. The state can deploy its overwhelming power in order to isolate murderers and inflict death upon them, but as Sandy’s children know, Sandy did not cease to be their mother upon stabbing Charisse. As Sarah knows, Marcus did not cease to be her son when he killed her friend, the store clerk. And as Brad knows, Eliot did not cease to be his brother when the death sentence came down. The hardline retributivist’s steely indifference in the face of human connection should be rejected because it bespeaks a misunderstanding of the type of thing that human beings are: social, connected beings with psychological attachments to one another. Insofar as hardline retributivism turns a blind eye to those attachments and focuses with tunnel vision upon individual moral desert and appropriate physical punishments, it must be supplanted by the warmer, humanistic tenets of restorative justice.

However, supplanting a theory in its most extreme form is not equivalent to supplanting it altogether. Taking heed of restorative justice does not entail the wholesale abandonment of punishing offenders for perpetrating moral wrongs.⁹³ In order to respond adequately to a moral failing as weighty as life-taking, the community’s moral condemnation must be expressed through some form of punishment, but “[e]xpression is a one-way process: it does not of its nature seek any specific response from the person

⁹³ See Garvey, *supra* note 42, at 306–08 (distinguishing between material “harms” and moral “wrongs” to argue that punishment is necessary to repair the latter).

... to whom it is made.”⁹⁴ Since human beings are relational, this one-way expression of moral condemnation at the offender by inflicting punishment upon her is not a sufficient response to murder. Alone, such one-sided expression denigrates the reality of our interconnectedness. We can instead heed that reality “by seeing criminal punishment as an enterprise in *communication*, which is intended not merely to express our condemnation to the offender, but also to elicit an appropriate response (recognition, remorse, and apologetic reparation) from her.”⁹⁵ By tailoring punishments to elicit relationship-deepening responses from offenders, we can choose to exalt the reality of interconnectedness.

Insofar as punishments can grow to accommodate our basically relational existence, the rationale behind punishing must widen, too. Instead of clinging to a vision of individualized moral desert that brackets aside human connection and doubles down on human suffering by perpetrating a further relational harm through execution, punishment can be tailored towards the *cultivation* of human connections—even after murder has profoundly damaged them. This may appear to the tunnel-visioned retributivist—with his eye fixed upon individual moral desert—as supplanting the deontological ‘right’ with a teleological ‘good.’ However, this only appears to be the case because the hardline retributivist has already decided to divvy up moral desert to discrete individuals based on the degree of their compliance with the ‘right,’ which we know through positive law.⁹⁶ However, this decision neglects to keep in mind the relational basis out of which our knowledge of the ‘right’ emerged. Recall that the antecedent of our knowledge of what is ‘right’ was the *experience of being subjectively wronged by another*.⁹⁷ Such patently human experiences of being wronged—centuries of Sandys and Charisses perpetrating and suffering interpersonal wrongs like stabbings—are the genealogical forebear of our contemporary knowledge of what is ‘right.’ By attempting to shake off that genealogy, the hardline retributivist fails to cognize a fundamental feature of the ‘right’: it emerged from the soil of human relationships. By uprooting it from that soil, the hardline retributivist robs the ‘right’ of its vitality and twists it into something inhuman. By cultivating that soil, the restorativist can usher the ‘right’ into full bloom.

II. PSYCHOLOGICAL HEALING

This section aims to reveal how retributive theories of punishment can be buttressed by restorative justice in order to formulate a more robust response to murder—one that *never* includes execution. It does not aim to wholly discredit retributive theories of punishment, which remain a powerful

⁹⁴ Antony Duff, *Penal Coercion and the Apology Ritual*, 31 *TEOREMA: REVISTA INTERNACIONAL DE FILOSOFÍA* 109, 115 (2012).

⁹⁵ *Id.* (emphasis added).

⁹⁶ See HEGEL, *supra* note 2, at § 211.

⁹⁷ *See id.*

account of the physical and moral dimensions of crime and punishment. Instead, having identified deficiencies in retributivist theory, the remainder of this paper aims to examine the implications for capital punishment of ameliorating those deficiencies.

Retributive theories need to be supplemented in order to account for the psychological harm that occurs as a result of crime. Joel Feinberg's expressivist theory of punishment will serve as a bridge between retributive theories, which are preoccupied with physical autonomy and morality, and restorative theories, which are concerned with addressing the harms that stem from crime, including psychological ones. This paper has argued that there is a major blind spot in the set of theories grouped under the retributive heading—the relational blind spot. Specifically, retributivism does not grapple with the complex web of psychological harms that extend outward from murder. Its preoccupation with restoring an abstract moral order is detrimental to the restoration of psychological health, and when that abstract moral order is sought to be restored by means of capital punishment, the detriment reaches its zenith.

A. *Retributive Restoration*

Retributive theories of punishment are concerned with a certain mode of restoration: moral restoration. They are centered on the moral disequilibrium that occurs when an individual wrongs another individual. For Hegel, the relevant disequilibrium that occurs as a result of criminal wrongdoing is between the state, its citizens, and the universal moral truths embodied in positive law. For Self-Indulgence Theory retributivists, the disequilibrium resides in the unfair advantage that a wrongdoer has appropriated for themselves by maneuvering through space in a forbidden way. For Vindictory Retributivists, the disequilibrium occurs as a result of the perverse moral message sent by the criminal through their infraction. To be clear, this is not a comprehensive account of every retributive variation—it is merely a sample meant to demonstrate how retributive theories address moral disequilibrium by means of physical punishments. In both of these variations, if the wrongdoer remains unpunished, then the state's claim to a universal moral standpoint is impugned. By punishing the offender, the state vindicates the universality of its moral code and restores the moral equilibrium that the offender's wrongdoing disrupted.

It is more than a merely semantic observation to point out that retributive theories are concerned with restoration. Crime disrupts the order of things—be it physical, moral, or psychological—and the retributivist sets about to restore his view of order. Restorative justice theory adds to the picture, acting not as an all-or-nothing alternative to punishment, but a spe-

cies of punishment.⁹⁸ Arguing that these processes ought to be burdensome and even painful for the offender, Duff writes, “restorative justice processes are not alternatives to punitive ‘pain delivery’: they are themselves ways of trying to induce the appropriate kind of pain.”⁹⁹ The types of pain that Duff has in mind are those that accompany criticism, remorse, and the effort to both apologize and make reparation.¹⁰⁰ That type of pain will be referred to as “psychological pain” as opposed to physical pain,¹⁰¹ which is typical of incarceration and execution.¹⁰²

Joel Feinberg, an American philosopher, has developed an expressivist theory of punishment that serves as a helpful bridge between retributive and restorative theories of justice. He argues that hard treatment and reprobation are the twin aspects of legal punishment.¹⁰³ Hard treatment engenders the traditional physical pain that accompanies purely retributive punishments. Reprobation engenders the type of psychological pain that Duff considers appropriate from a restorative justice perspective. We will come to see that reprobation in the form of shame has an important role to play in cultivating the conditions for psychological healing.

Feinberg distinguishes between penalties and punishments in order to cultivate a picture of the latter’s expressive function.¹⁰⁴ As examples of penalties, Feinberg lists “parking tickets, offside penalties, sackings, flunkings, and disqualifications.”¹⁰⁵ Such penalties are not accompanied by the significant disapproval of one’s peers.¹⁰⁶ By contrast, Feinberg gives the example of imprisonment under hard labor as a paradigmatic punishment,¹⁰⁷ under which heading execution would also fall. The basis for the distinction between a penalty and a punishment is that the latter “is a conventional device for the expression of attitudes of resentment and indignation, and of judg-

⁹⁸ R.A. Duff, *Restorative Punishment and Punitive Restoration*, in *RESTORATIVE JUSTICE AND THE LAW* 82, 97 (Lode Walgrave ed., 2002).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ “Physical pain” is used in a broad way here. Although incarceration does not generally involve the state’s intentional infliction of pain on a prisoner, confinement involves a pretty high level of physical discomfort as compared to a free citizen’s living conditions. This discomfort is included under the heading “physical pain” here.

¹⁰² This is not to suggest that no psychological pain is inflicted upon imprisoned people under the current regime. However, the type of psychological pain inflicted upon incarcerated folks is typically a *byproduct* of unjust conditions of confinement. In other words, the psychological pain suffered by imprisoned people is an *effect* of the type of physical pain the criminal legal system is designed to level against them. By contrast, Duff is suggesting that the criminal legal system could craft a response to homicide that is *designed* to apply healthy psychological pain that can produce psychological healing. *Id.*

¹⁰³ Joel Feinberg, *The Expressive Function of Punishment*, 49 *THE MONIST* 397, 400 (1965).

¹⁰⁴ *Id.* at 397–98.

¹⁰⁵ *Id.* at 398.

¹⁰⁶ *Id.*

¹⁰⁷ *See id.*

ments of disapproval and reprobation.”¹⁰⁸ Feinberg’s observation that punishment has symbolic significance over and above mere pain delivery indicates that a physical sanction in the absence of reprobation would be something other than legal punishment.¹⁰⁹ Today, certain types of pain delivery—namely incarceration and execution—“have become conventional symbols of public reprobation.”¹¹⁰ In Duff’s terminology, these types of pain delivery *express* moral condemnation *at* the offender. Restorative justice aims to *communicate with* the offender about his moral wrong.

Feinberg’s theory serves as a bridge because it identifies within physical sanctions constituting legal punishments the symbol of shame, which restorative justice theorists take to be an important ingredient in fomenting restoration. Shame can be a productive element of punishment by helping to engender the conditions for remorse and apology, which can have extraordinary psychological healing power for those affected by murder.¹¹¹ A certain type of skeptic might acknowledge the need for penalties while questioning whether condemnation really needs to be added to them,¹¹² but this position operates under an impoverished view of human connection. Shame is not merely a gratuitous addition to physical penalties; it is an integral dimension of punishment that can draw the offender into a deeper psychological relationship with his community. While it is true that public reprobation magnifies the suffering caused by physical sanctions by imposing psychological pain upon the offender,¹¹³ it magnifies punishment in a qualitatively different way from additional physical sanctions. To endure shame is not the same as enduring some other enhancement to a physical penalty, like a decrease in recreational time or a relocation to the Special Housing Unit. It is different in part because the power of shame can be harnessed by restorative processes in order to build the conditions for psychological healing.

By executing defendants, we destroy the conditions for psychological healing. We respond to the complex phenomenon of murder as though it were a simple nail to be hammered via execution. Hammering that nail—and by extension the looming specter of that nail being hammered during years of post-conviction litigation—shuts the door to psychological healing on the family members and friends of victims and offenders, on other community members impacted by a murder, and on the offender himself. By foregoing execution and tailoring punishment to create psychological conditions conducive to generating genuine remorse and apology, we can keep the door open and encourage the offender to walk through it.

¹⁰⁸ *Id.* at 400. This notion is also highly resonant with Vindictory Retributivism, for which punishment represents a moral message about the dignity of the victim. *See* KRAMER, *supra* note 28, at 99.

¹⁰⁹ Feinberg, *supra* note 102, at 400.

¹¹⁰ *Id.* at 402.

¹¹¹ *See* Bibas & Bierschbach, *supra* note 89, at 113.

¹¹² Feinberg, *supra* note 102, at 419.

¹¹³ *Id.* at 418.

B. *Restorative Justice: A Relational Account of Murder*

1. *The Stakes of Ignoring the Relational Reality of Homicide*

Punishment, public reprobation, shame, and apology are all relational. Members of the public—represented by the jury in the case of a murder trial¹¹⁴—condemn the actions of another. In passing judgment on another, a relationship is formed. As Feinberg suggests, such reprobation (and the relationship formed thereby) attaches to all legal punishments, which can plausibly be seen as both expressive and potentially communicative. Punishment itself is relational, then, for it expresses the public's view of what the offender has done.¹¹⁵

Shame and apology are relational, too. One who buries their head in their hands for shame does so because the relationship between them and their peers has become psychologically painful to perceive. This is why shame is something that we feel in the presence of others more potently than we feel it alone. Apologies are efforts at reconciliation given by one person to another; a “quintessentially social, that is, a *relational* symbolic gesture occurring in a complex interpersonal field.”¹¹⁶

These relational practices hold profound potential for healing, but their convalescent power remains largely untapped by American criminal justice. Our criminal procedure does a poor job of considering the complex, interpersonal field within which remorse and apology arise: “[a]t most, [remorse and apology] creep in interstitially, as indicators that individual defendants are less bad and so need less deterrence, incapacitation, or retribution.”¹¹⁷ This “individual badness model”—which views expressions of remorse as data points indicating that the remorseful offender is less bad than the non-remorseful one—fails to account for the import of remorse and apology to non-offenders who are nonetheless impacted by an offense.¹¹⁸

This failure results from a thin view of crime as an instance of individual wrongdoing which can be adequately addressed by punishing the individual who did wrong. Insofar as the criminal justice system focuses on how to punish the offender, the needs of victims and their survivors are conceived as outside the purview of that system. Such a system leaves the impacts of both murder and execution upon family members unexamined. Recall Sarah

¹¹⁴ See Huigens, *supra* note 60, at 1462–63.

¹¹⁵ See *id.* at 1463.

¹¹⁶ Bibas & Bierschbach, *supra* note 89, at 113 (quoting NICHOLAS TAVUCHIS, *MEA CULPA* 14 (1991)).

¹¹⁷ *Id.* at 87. The following vignette demonstrates just such an interstitial creeping (which is the exception and not the norm): “[w]hen victims’ relatives confronted serial killer Gary Leon Ridgway at sentencing, they sobbed and poured out their anger and loss. The judge expressed the community’s moral condemnation and spoke of bringing peace and closure. In return, Ridgway expressed sorrow and apologized, and at least one victim’s relative forgave him and expressed a feeling of peace.” *Id.* at 87–88.

¹¹⁸ *Id.* at 94.

and Brad from the discussion in Part I of offenders' families.¹¹⁹ Sarah's son killed the store clerk whom she considered a friend, and Brad's brother committed a killing for which he was sentenced to death. Both reeled psychologically from the experience, and neither fit into the range of values that a retributive response to murder aims to vindicate. Their suffering was simply left to languish unexamined and unsupported by the criminal justice system. As Simonson's work on agonism helps to demonstrate, the community's plurality of dispositions towards the criminal justice system is also left unexamined. It is difficult to understand exactly how the prosecutor seeking the death penalty represents Sarah, Brad, the courtwatchers showing support for the offender, victims' survivors who contest the propriety of execution, and future iterations of victims' survivors who may want to restore their psychological health by engaging with the offender. Instead of dealing in sweeping moral talk that tidies up the complex interpersonal field within which murder occurs, a more robust engagement with murder would wade into that complexity.

Just as public reprobation, shame, and apology are relational, so is murder relational. Levanon's account of the breakdown of mutual recognition makes clear that wrongdoing produces unhealthy relationships; misrecognition perverts relationships. The relationship between offender and victim has been impoverished by the offender's violation of the victim's boundaries. By zooming out, we start to see that other relationships are implicated. Consider Sarah again, whose son killed the store clerk. Sarah is wading through a complex field of relationships while grappling with the aftermath of this crime. Her relationship with her son is physically disrupted by his imprisonment and psychologically disrupted by the knowledge that he committed a murder. The fact that she knew the victim adds another layer to the messy field, for she is grieving the death of a friend at the same time that she is grappling with the impending loss of her son. These complex dynamics have implications for Sarah's bonds to the community, with her other children, and to her death-sentenced son—and this is just a preliminary consideration of one stakeholder's position. When we consider the shop owner's family, the other customers with whom he had built relationships, and the ways in which the community's orientation towards Sarah and her two other kids might shift, we start to get a very preliminary picture of the web of complex relational dynamics that can be expected to extend out from this murder. While Marcus is certainly *one* of the concerns that arises—and a central one insofar as it is legitimate to call individuals to account for engaging in immoral behavior like homicide—it is simply not enough to evaluate the 'badness' of one individual and move on. A thick picture of the harms associated with murder requires a thicker, more nuanced response. In contrast to the individual badness model, Bibas and Bierschbach conceptualize crime as relational to develop an account which "recognizes that crime and punishment

¹¹⁹ See Part I(C)(4), *supra* text accompanying notes 78-91.

are as much about social norms, social influence, and relations between persons as about individual blame and state-imposed suffering.”¹²⁰ Although the latter two concerns are within the province of retributive legal punishments, the deleterious impact of murder on social norms, social influences, and relationships is left completely unaddressed by a hardline retributive response to murder—and capital punishment only makes sense insofar as those deleterious impacts are ignored.¹²¹ The relational concept of crime itself is a threat to the continued viability of capital punishment, for grappling with the inevitable and complex web of psychological pain and suffering that extends out from a murder would eventually require the honest thinker to grapple a similar web extending from an execution as well.

All the weighty talk among retributivists about the moral universality of the state causes them to avert their gaze from the messy pain that is a structural feature of human beings dying, whether by private or public hands. As Johnstone writes: “[o]nce we view crime not as an offense against society, but as an offense by one person against another person, it is much less obvious that what is required to restore the balance is punishment of the offender.”¹²² The reason that punishment seems ill-equipped to restore balance when murder is viewed as relational is that it forces us to recognize the tenuousness of our capital fiction: that imposing another relational harm through execution is restorative. In less academic terms, the idea that execution restores moral equilibrium is just kind of mysterious. By contrast, consider three observations about execution: (1) execution irrevocably forecloses the possibility that the offender will feel shame and apologize thereafter, which could be restorative to the psychological health of a victims’ survivors in the future; (2) execution brings further anguish to the family and friends of the offender; and (3) execution is invoked in the name of a plural public that is deeply divided over whether capital punishment is legitimate, both as a policy and in individual cases. In deciding between the unverifiable, metaphysical restoration of moral equilibrium and avoiding the infliction of concrete psychological harms in the name of a divided people, the latter seems a more judicious approach.

The skeptic will object that the relational character of crime is sufficiently accounted for by the fact that a jury has passed judgment upon the offender. In a death penalty case, both the guilt of the defendant as well as the appropriate punishment are outsourced from the affected parties to the jury. While the jury more closely approximates the affected community than the prosecutor seeking death would, individuals directly or even secondarily impacted by the homicide would not be on the jury. In other words, the jury is not meant to be composed of the community literally impacted by the

¹²⁰ Bibas & Bierschbach, *supra* note 89, at 109–10.

¹²¹ See Feinberg, *supra* note 102, at 421 (“The innocent presumably deserve *not* to suffer just as the guilty are supposed to deserve to suffer; yet it is impossible to hurt an evil man without imposing suffering on those who love or depend on him.”)

¹²² JOHNSTONE, *supra* note 42, at 75.

discrete crime at issue—it is meant to comprise the more abstract moral community of retributive theory whose normative protection has been threatened by a homicide. Where the consequences for being convicted are extraordinarily high, and those consequences can be avoided by staging a convincing denial to this abstractly impacted moral community, even “[t]hose who regret their behavior and might be inclined to ‘put things right’ are unlikely to own up to their crime and hence leave themselves open to punishment.”¹²³ In other words, the structure of our response to murder actively undermines the opportunity for defendants to show contrition. As a result, capital defendants understandably fight tooth and nail to deny and minimize their culpability in the hopes of avoiding death.¹²⁴

It follows from this shift towards viewing crime as relational that the criminal process should search for ways to include impacted parties in responding to crime. Restorative justice processes are committed to including stakeholders in argument, fact-finding, and the expression of emotions about crime—what Johnstone calls “an active, participatory role.”¹²⁵ By contrast, in a normal trial, decisions are “imposed from above, by a neutral [judge]” as victims, offenders, and the community take on the passive role of onlookers who are represented by specialist lawyers with confusing expertise.¹²⁶ The problem with this air of neutrality and objectivity is that it alienates people from the processes that are designed to respond to an offense against *them*. This alienation from the legal process forces those affected parties to grapple with their psychological injuries alone, without any formal, institutional support. “We’ll deal with the offender,” says the criminal justice system, “you deal with everything else.” This decision to home in on individual culpability in the justice system and to crowd out all of the other complex, interpersonal dimensions of a murder ignores the fact that the culpable individual is inextricably embedded in the complex, interpersonal dimensions of his homicide, too. By seeking to violently extract him from that web, the criminal justice system purports to have taken care of the individual, bad offender. It ignores the fact, however, that new harms have been at best neglected and at worst exacerbated by this limited response. Moreover, as the next section examines, undue emphasis on individual moral deserts signals the wrong notion to citizens about how to live well.

¹²³ *Id.* at 69.

¹²⁴ *But cf.* Andrew Ashworth, *Responsibilities, Rights and Restorative Justice*, 42 *BRIT. J. OF CRIMINOLOGY* 578 (2002) (highlighting the concern that procedural safeguards afforded to criminal defendants are not given enough emphasis by restorative justice theorists and practitioners).

¹²⁵ JOHNSTONE, *supra* note 42, at 139.

¹²⁶ *Id.* at 137.

2. *Learning to Live Relationally*

Not only does a retributive response to murder in the form of execution ignore the harms it perpetrates, it also produces bad citizens—ones who have a hard time apologizing. Since murderers are held morally responsible through physical punishment alone, and retributivists conceive of that punishment as a sufficient condition for vindicating the state's commitment to morality, there need be no contrition, remorse, and apology in order to meet the retributivist's narrow goals. The status quo system that concerns itself with instances of individual badness cognizes remorse merely as a factor mitigating one individual's badness.¹²⁷ This is a mistake, for shame, contrition, apology, and remorse have healing power with respect to the harms that our current system of criminal justice ignores. As two legal academics, Stephanos Bibas and Richard Bierschbach, have written, “[a]pology, expressions of remorse, and other mea culpas are secular remedial rituals. They both teach and reconcile by reaffirming societal norms and vindicating victims. As such, they are concerned not just with individual dispositions but also with membership in a particular moral community.”¹²⁸ Retributivists' haste to vindicate the abstract, universal morality of the state by bringing down the heavy hand of physical punishment upon the offender thus forsakes a traditional and potent tool for vindicating community morals: apologies. The solution to that oversight is to instead respond to murder by creating the conditions for genuine apology to flourish. The closing section of Part II will outline the contours of those conditions.

Lurking in the background of this search for conditions that will facilitate genuine apology is a normative vision of living well that is Aristotelian in orientation. As law professor Kyron Huigens points out, Aristotle draws a direct connection between personal autonomy and the robustness of one's community: in defining the “self-sufficient” person, Aristotle writes, “we do not mean a man who lives his life in isolation, but a man who also lives with parents, children, a wife, and friends and fellow citizens generally, since man is by nature a social and political being.”¹²⁹ Aristotle's definition of self-sufficiency strikes modern ears as wrongheaded, because we tend to view the self as “the individual of liberal theory: the person supported from the inside . . . an autonomous being, possessed of a will by which he determines his relations to the world around him.”¹³⁰ Along with Huigens, this paper operates under the assumption that these two views of the self—the

¹²⁷ See, e.g., Bibas & Bierschbach, *supra* note 89, at 95 (quoting *U.S. v. Beserra*, 967 F.2d 254, 256 (7th Cir. 1992) (Posner, J.)) (“A person who is conscious of having done wrong, and who feels genuine remorse for his wrong, . . . is on the way to developing those internal checks that would keep many people from committing crimes even if the expected costs of criminal punishment were lower than they are.”).

¹²⁸ *Id.* at 113.

¹²⁹ Huigens, *supra* note 60, at 1451 (quoting ARISTOTLE, *NICOMACHEAN ETHICS* bk. I.7.1097b (M. Ostwald trans., Indianapolis: Bobbs-Merrill rev. ed. 1962) (c. 340 B.C.E.)).

¹³⁰ *Id.* at 1460.

Aristotelian one, in which “[o]ne’s identity is not an irreducible core of being, but a function of one’s relations to the outside world and to others,”¹³¹ and the self of modern liberal theory, in which one “has the capacity for free choice . . . and for the definition of his own identity”¹³²—both express something true about the human condition.¹³³ The point is not to elevate one version of the self over the other but to theorize with both in mind.

Our current criminal justice system emphasizes the self of liberal theory to such an extent that it is difficult for us to conceive of our fundamental interdependence within the criminal justice system. The phenomenon of murder affects a lot of people—not only the offender and the victim, but also many interconnected members of our pluralistic communities. Our blindness to the reality of our interconnectedness causes us to recoil at the prospect of meeting face-to-face with one who has inflicted a profound wrong against us. The irony is that whether we meet with them face-to-face or not, their wrongdoing has harmed us in an ongoing way; their wrongdoing has brought us into a relationship with them whether we choose to turn towards that fact or not. Returning to our example: in addition to Charisse, Sandy has also harmed Charisse’s uncle. The loss of his niece will likely engender profound grief. Someday in the lifetime of that grief, Charisse’s uncle may find himself in search of Sandy’s contrition in order to heal. This paper is by no means advocating for the state to force Charisse’s uncle to meet with Sandy in order to generate genuine remorse in Sandy; it is advocating for the cultivation of a new sort of ethic in response to profound wrongdoing—one which operates under the supposition that “we present each other with the opportunity for more complete lives.”¹³⁴ Insofar as our response to murder entails isolating a ‘bad’ individual, exiling them from the community for decades on death row, and executing them, we cultivate a dangerous ethic that covers up the extent to which those who profoundly wrong us are related to us. Such an ethic endorses division, blame, condemnation, and isolation, while eschewing unity, understanding, forgiveness, and community. By instead creating the conditions to engage in the weighty task of communing with those who have wronged us and those we love, our criminal law could cultivate more complete lives among the citizenry instead of condoning further harm. It would, however, be callous to maintain that homicide is a mere learning opportunity for the citizenry. Thus, the next section grapples with what restoration can mean in light of the solemn fact that a murder victim is irrevocably dead.

¹³¹ *Id.* at 1461.

¹³² *Id.* at 1460.

¹³³ *See id.* at 1461.

¹³⁴ *Id.* at 1452.

C. The Elephant in the Room: The Dead Victim

Broadly speaking, restorative justice is characterized by a re-centering of the needs of the victim as opposed to a preoccupation with what needs to be done with an offender.¹³⁵ In a murder, the victim is deceased, so it may appear at first glance that the restorative justice framework simply does not apply. This section argues that such a dismissal of the restorative justice framework in the context of murder is wrongheaded. It tackles the question of how to think about accounting for a deceased victim in the restorative justice context.

As an initial matter, nothing about cultivating a relational view of crime or the conditions for genuine contrition precludes punishment per se. The scope of this argument's quarrel with retributivism is limited to its endorsement of capital punishment, which is incommensurate with psychological healing insofar as it inevitably inflicts further psychological harm. This paper rejects the position that punishment should be abandoned wholesale in favor of creating the conditions for genuine apology.¹³⁶ Instead, it focuses on re-calibrating punishment towards psychologically restorative ends, as opposed to exclusively moral ones which are sufficiently satisfied by the physical punishment of offenders. Restorative justice is a helpful tool in the project of de-centering physical punishments and re-centering productive forms of public reprobation—it offers a restorative version of the reprobation which Feinberg argues always accompanies legal punishments.¹³⁷ Punishment in the form of incarceration for a murder is acceptable under this view, so long as incarceration is not conceived as an end in itself. As Charles Villa-Vicencio observes, “[p]unishment has a telos: not to inflict punishment, but rather to restore good order.”¹³⁸ Although *moral* order has been the watchword of retributivist theory for centuries, restorative justice principles help to reveal that the restoration of *psychological* order in the wake of a

¹³⁵ JOHNSTONE, *supra* note 42, at 12.

¹³⁶ See Bibas & Bierschbach, *supra* note 89, at 122–23 (“We do not embrace this dichotomy between apology and punishment because it guts the solemn force of the criminal sanction. At least where the offender has significantly wronged an identifiable victim, excusing him from punishment belittles the crime and the harm.”).

¹³⁷ See Feinberg, *supra* note 102, at 397–98; see also John Braithwaite, Eliza Ahmed & Valerie Braithwaite, *Shame, Restorative Justice, and Crime*, in TAKING STOCK: THE STATUS OF CRIMINOLOGICAL THEORY 397, 398 (Francis Cullen, John Wright & Kristie Blevins eds., 2005) (“Restorative justice theorists are actually not preoccupied with either shame or guilt punishments, but with decentering punishment in regulatory institutions, while acknowledging the significant place that punishment will always have within them.”)

¹³⁸ Charles Villa-Vicencio, *The Reek of Cruelty and the Quest for Healing: Where Retributive and Restorative Justice Meet*, 14 J. OF L. & REL. 165, 174 (1999); see also *id.* at 185 (“The demand for retribution, the defense of righteous anger and the need for a healthy refusal to settle for less than what it takes to immediately transform the perpetrator makes a lot of sense. It involves upholding moral and legal norms. It affirms the dignity of the victim and sometimes survivors. It requires the perpetrator to take responsibility as a moral agent. At the same time, it creates space for the possibility of mercy and forgiveness—recognizing that its telos is restoration, not punishment per se.”)

murder should also be seen as a purpose of punishment. Since capital punishment is antithetical to that purpose, it should be abolished.

One objection is that murder is in a category of its own: it has irrevocably changed the social order by removing someone—the victim—from it entirely. So when Duff writes, “[w]hat needs to be restored . . . is the offender’s normative relationship with his victim as a fellow citizen, and with his fellow citizens more generally,”¹³⁹ an opponent of restorative justice in the homicide context will point out that there is no normative relationship with the victim to be restored. The victim is gone. And this objection can be taken further: in a slightly more subtle way, the social order has irrevocably shifted, too. The entire web of relationships has changed: “[t]he original situation, disturbed by the crime, can never be simply reproduced (or ‘restored’): ‘The Wrongdoing has made *some* difference—nothing can alter that’.”¹⁴⁰ But recognizing that a murder has caused profound, irrevocable pain need not entail a response that cuts off the opportunity for *any* restoration by condemning the offender to death. Although the status quo ante cannot be restored, it does not ineluctably follow from that fact that the community must respond by further entrenching its departure from the status quo—in which, of course, the offender was also alive.

Levanon helps to reveal why such a response is unwarranted. As Levanon’s account of crime as misrecognition helps to reveal, murder inextricably binds the victim and offender. Writing from the retributivist’s lens of physicality, Levanon writes that the victim becomes “an extension of the offender, or the offender’s tool, rather than a subject motivated by reasons.”¹⁴¹ When the victim dies as a result of the offender’s intrusion, Levanon argues that “the relationship between the victim and the offender still has existence and actuality through the offender.”¹⁴² To be clear, this is not an argument for some occult position that the soul of the victim becomes bound to that of his killer upon the victim’s death. Levanon’s point is much more modest; it is that the conditions for an instance of misrecognition like the one that led to this murder still exist in the psyche of the offender. In order to comprehensively respond to the murder, it is unacceptable to allow these conditions to persist in the mind of the offender. Simply destroying the offender’s subjectivity by killing him fails to take the affected parties’ complex psychological suffering seriously, for they have been drawn into a relationship with the offender by means of his transgression.

The way to honor the victim is to seek punishment that “recreates *the conditions* for the victim’s actual subjective existence. Recreation of these conditions restores the victim’s subjectivity in the relationship without actu-

¹³⁹ Duff, *supra* note 93, at 93.

¹⁴⁰ JOHNSTONE, *supra* note 42, at 104 (quoting SIR WALTER MOBERLY, *THE ETHICS OF PUNISHMENT* 191 (1968)).

¹⁴¹ Levanon, *supra* note 16, at 546.

¹⁴² *Id.* at 555.

alizing it through the living victim.”¹⁴³ Since the victims’ survivors have been drawn into relationships with the offender, the health of those relationships depends upon the extent to which the offender can healthily engage in an instance of mutual recognition with them. Tailoring punishment to restore the psychological health of the offender is thus intimately connected to the prospects for psychological healing of both victims’ survivors and offenders’ living connections, who remain in relationships with the offender after their offense. Those prospects are enhanced by creating the conditions for offenders to genuinely apologize, which requires the proper application of psychological pain. In order to genuinely apologize, the offender’s victim must be humanized to the offender; the conditions for cognizing the victim’s subjectivity must be cultivated in the mind of the offender. The way to achieve this, in part, is to confront them with their wrongs by bringing them face-to-face with the people they have harmed.¹⁴⁴ As the final section of this paper will explore more deeply, invoking the relationships that were harmed by taking another’s life can help to build the conditions for shame, contrition, and genuine apology. All impacted parties stand to psychologically benefit from that outcome.

To be clear, remorse and apology are not a panacea for addressing murder¹⁴⁵—they are two elements of a comprehensive response to murder, which will simultaneously maintain the features of retributive theory that call offenders to account for their moral offense through physical punishments. The form of that punishment may be incarceration but not execution, since the former creates the possibility of inflicting the right type of restorative, psychological pain to someday produce a genuine apology, which can help those impacted by murder to heal.

This brings the argument to a more fundamental point: restorative justice theory conceives of criminal justice as a *response* to murder.¹⁴⁶ The contemporary preoccupation with deterrence and the death penalty, which is not yet a reliable way to think about capital punishment,¹⁴⁷ misses part of the role that restorative justice conceives criminal justice as fulfilling. Though it is beyond the scope of this paper to engage in a sociological analysis of the factors that make murder more or less likely, it is within its scope to urge the reader to reflect on the fact that murder is a lamentable social reality. Capital punishment may be related to the incidence of murder, and it may not be, but whether or not a jurisdiction has capital punishment, murder will at least occasionally occur. The criminal justice system should be designed to re-

¹⁴³ *Id.*

¹⁴⁴ See, e.g., Bibas & Bierschbach, *supra* note 89, at 114 (“many commentators view face-to-face interaction between offender and offended as essential to effective expressions of remorse and apology”).

¹⁴⁵ See *id.* at 118.

¹⁴⁶ See Garvey, *supra* note 42, at 303.

¹⁴⁷ See generally NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, DETERRENCE AND THE DEATH PENALTY (Daniel S. Nagin & John V. Pepper eds., 2012).

spond thoughtfully to murder when it happens. And it can choose to respond with the *longue durée* in mind—out of a recognition that the thirst for vengeance may someday recede and give way to a thirst for genuine contrition, apology, and restoration. The opportunity for that restorative process should be maintained, in large part (though not exclusively) for the victims' survivors' sake. Although the status quo *ex ante* cannot be restored, genuine contrition can “reverse the moral decay of the offender and arrest and turn round the lowering of the moral tone resulting from the crime.”¹⁴⁸ Restorative justice shifts the emphasis of this quotation, from a fixation on the ‘moral tone’ to a healthy acknowledgment of the decline in psychological health that emanates from murder. No restorative process can bring back the state of affairs that existed before the murder, but punishment can be tailored to counteract the negative operation of psychological harms. Part of the shift involves disabusing ourselves of the notion that physical punishment annuls crime.¹⁴⁹ Physical punishment must be supplemented by those features of punishment that cultivate remorse and genuine apology—not in order to ‘annul’ crime, which is a mysterious, unverifiable concept, but in order to counteract the real psychological harms that can ripple out from murder indefinitely. In other words, the response to murder can, unmysteriously and verifiably, cultivate the conditions for psychological healing among the concrete individuals who have been harmed by it.

D. *Some Conditions of Restoration*

1. *Shame*

The prospect of shaming people makes modern people uncomfortable—a fact reflected in the decline of ‘shaming penalties,’ such as requiring folks with drunk driving convictions to put a sign on their car identifying themselves as such.¹⁵⁰ Whether or not that’s a good development is beside the point here, which is simply that modern people feel uncomfortable shaming others. The dichotomy between physicality and morality, which weaves its way through retributive theory, addresses itself exclusively to the morality of physical actions and the proper physical response to them on behalf of the state. Recall the vindictory retributivist’s complaint that offenders simply have not gotten the message that their actions are wrong through conventional means (including conventional social shaming), so the message needs

¹⁴⁸ JOHNSTONE, *supra* note 42, at 104 (quoting SIR WALTER MOBERLY, *THE ETHICS OF PUNISHMENT* 191 (1968)).

¹⁴⁹ *See id.* (“[F]orced punishment of the offender cannot in itself annul a crime. The idea that a crime is wiped out by punishment is a social convention which has much the same status today as duelling had in the eighteenth century and which, like duelling for us, might appear artificial and even ridiculous to future generations”).

¹⁵⁰ Ahmed & Braithwaite, *supra* note 135, at 398.

to be communicated at “the sharp end, so to speak.”¹⁵¹ When a crime occurs, we deal with it based on the ‘individual badness model’—by conceiving of offenders as individual bad apples who need to be punished for their infractions. It’s nice if they feel ashamed and are moved to apologize—this might even indicate that they aren’t as bad an apple as we thought—but whether or not they feel ashamed and apologize is really neither here nor there. They need to be punished, nonetheless. We saw this same discomfort with shame in another context above as well—recall the skeptic of Feinberg’s theory who questioned why we needed to add reprobation on top of physical sanctions. Our thinking about responding to crime is replete with discomfort in the face of shaming offenders. We are much more comfortable physically sanctioning them.

Our discomfort with shame is related to our preoccupation with what Huigens called the self of liberal theory—conceived as possessing a free will that is independently self-determining.¹⁵² There is something powerful and true about that version of the self, but there is also something which it conceals about human beings, who are ‘social,’ as Aristotle observed.¹⁵³ Our discomfort with shame is a symptom of the extent to which the self of liberal theory has come to dominate our self-conception: “[s]hame . . . reminds us of the deep mutual involvement we have with one another. . . . Our discomfort with shame reflects our lack of comfort with the reality of our interdependence.”¹⁵⁴ In other words, modern society is uncomfortable with shame precisely because of its basis in relationships. However, this Aristotelian idea that human beings are relational is precisely the perspective that a restorative response to murder aims to revive and cultivate.

Feeling ashamed of what one has done can be a step towards building and expressing genuine contrition for the same. In order to move a wrongdoer to genuinely apologize, the shame to which the wrongdoer is subjected must have a goal beyond itself. However, modern punishment generally—and capital punishment most egregiously—tends to close the door on productive shame: “[t]he rejection and contempt to which offenders are subjected is so complete that they can never regain their honour and the respect of others. Offenders become outcasts and turn into enemies of society.”¹⁵⁵ A man condemned to death, tucked away from the gaze of society on death row, and left to stew over the fact of his impending execution as decades of litigation unfold is perhaps the epitome of a societal outcast. In Texas, inmates on death row are not allowed contact visits—ever.¹⁵⁶ It is worth paus-

¹⁵¹ Waldron, *supra* note 41, at 30.

¹⁵² See Huigens, *supra* note 60, at 1460.

¹⁵³ See ARISTOTLE, *supra* note 128.

¹⁵⁴ JOHNSTONE, *supra* note 42, at 129 (quoting CARL SCHNEIDER, SHAME, EXPOSURE AND PRIVACY 138 (1977)).

¹⁵⁵ *Id.* at 118.

¹⁵⁶ TEX. DEPT. CRIM. J., OFFENDER RULES AND REGULATIONS FOR VISITATION, R. 4.9.1 (2015) (“Death row offenders are not allowed contact visits.”).

ing to reflect on the extent to which that policy severs the physical connection of an inmate to every single person he cares about for the remainder of his life on death row.

Turning offenders into outcasts and severing their ties to the outside world is an extraordinary stigmatization. Such thoroughgoing stigmatization—“shaming where the wrongdoer is treated disrespectfully as an outcast and as a bad person”¹⁵⁷—is unproductive. It would not be surprising for an individual on death row to steel themselves against the profound stigma of their situation—to stew on the heavy-handedness of their own plight, fight the admission of guilt through the appellate and habeas processes vehemently, and studiously avoid the productive shame that could come from being called to account for the harm that they caused another. Ahmed calls this mode of defensive shame-shifting “shame displacement” and distinguishes it from “shame acknowledgment,” which “involves the discharging of shame through accepting responsibility and trying to put things right.”¹⁵⁸ By providing the space for shame acknowledgment, restorative justice practices can encourage offenders to recognize and grapple with the web of harms that spiraled out from their murder instead of digging in their heels and denying responsibility.¹⁵⁹

In order for such practices to make sense, we must think against the atomistic, isolated concept of the self that is the darling of liberal theory and turn towards the hard work of recognizing and cultivating connections with even the most painful elements of our lives. Shaming that is tailored to produce such connections is what Braithwaite called “reintegrative shaming.”¹⁶⁰ As the name suggests, it implies that the subject of shame—the offender—is not a lost cause. Instead of telling offenders, “what you did is bad, but you are also bad, and there’s really nothing you can do . . . You will always be an ex-offender,”¹⁶¹ a restorative practice aimed at reintegrative shaming must operate under conditions that hold out the prospect of reintegration. Ideally, therefore, restorative practices would always maintain the prospect of parole, which would of course require the abolition of life without the possibility of parole. In the meantime, the abolition of the death penalty is a giant leap in the right direction. One destined to be executed is conceptually foreclosed from such reintegration, unless they successfully *contest* the legitimacy of their punishment through the appellate or post-conviction processes, in which case the opportunity to tailor punishment in order to motivate contrition through psychological pain will disappear. In other words, incarceration is an opportunity to create the conditions for reintegrative shame or shame acknowledgment, but the specter of execution poisons the well.

¹⁵⁷ Ahmed & Braithwaite, *supra* note 135, at 402.

¹⁵⁸ *Id.* at 403.

¹⁵⁹ *See id.* at 404.

¹⁶⁰ JOHNSTONE, *supra* note 42, at 118.

¹⁶¹ *Id.* at 119 (quoting DAVID CAYLEY, *THE EXPANDING PRISON: THE CRISIS IN CRIME AND PUNISHMENT AND THE SEARCH FOR ALTERNATIVES* 236 (1998) (interviewing Howard Zehr)).

2. *Apology and Remorse*

Some conditions short of execution do not help genuine apology to flourish. First of all, judicially imposed apologies will always be lethally vulnerable to attack on the basis of insincerity.¹⁶² Nor can we realistically expect the specter of a looming execution to grease the wheels of contrition and produce genuine apologies. While executions in the seventeenth and eighteenth century unfolded on a weeks-long timeline and were thought to focus on repentance,¹⁶³ there are no serious defenders of the view today, as stays on death row unfold on a decades-long timeline and often result in outcomes other than execution.¹⁶⁴ Moreover, genuine apologies are an attempt to “dissociate oneself from one’s wrongful past and make a plea for reconciliation.”¹⁶⁵ Although it is certainly possible to make a genuine apology from death row, it would be extraordinary for a death row inmate to dissociate themselves from a past that has so profoundly structured their future, which is darkly clouded by the specter of execution. In short, the position that the threat of execution facilitates contrition is fanciful, for extensive appellate and post-conviction review keeps the offender’s past clearly in view as a thing to be contested, literally, to the death. There is simply no plausible reason to think that a looming execution will facilitate genuine remorse, and in the event that an execution comes to pass, the door to genuine remorse is closed forever.

By contrast, Bibas and Bierschbach explain some features of a response to crime that *would* facilitate contrition and genuine apology. First among them is direct interaction with the parties who were impacted by the crime.¹⁶⁶ That means involving victims’ families and friends, offenders’ family and friends, offenders themselves, and other individuals impacted by the murder into the process. In reviewing the broad literature exploring the roles that remorse and apology play in repairing breaches caused by wrongdoing, the pair writes:

Because remorse and apology are fundamentally relational, any apologetic discourse must be ‘dyadic,’ reflecting ‘an interaction between the primordial social categories of Offender and Offended.’ Contrite offenders . . . do not just apologize *for* something. They also apologize *to* someone—their victims, their

¹⁶² See generally Nick Smith, *Against Court-Ordered Apologies*, 16 NEW CRIM. L. REV. 1 (2013).

¹⁶³ STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 17 (2002) (“We may remember Samuel Johnson’s comment— ‘when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully’”).

¹⁶⁴ See *Glossip v. Gross*, 576 U.S. 863, 932–33 (2015) (Breyer, J., dissenting) (arguing that length of time between conviction and execution attenuates retributive demand and that “low probability of execution must play some role in any calculation that leads a community to insist on death as retribution”).

¹⁶⁵ Bibas & Bierschbach, *supra* note 89, at 113.

¹⁶⁶ See *id.* at 114.

community, their family and their friends. Only by doing so can the remorseful offender ‘seek[] to re-affirm shared values with the receiver[] and look[] for re-certification of membership in the moral community.’ And only in this way can the victim and others hurt by the wrong experience healing.¹⁶⁷

The authors explain that face-to-face interaction is seen by many theorists as fundamental to the process: face-to-face interaction humanizes offenders, forces offenders to confront the real-world consequences of their crime, and “can break down pride, fear, pain, anxiety, and other barriers to accepting responsibility and thus pave the way for genuine repentance.”¹⁶⁸

3. *Forgiveness*

This brief section is meant to dispel the idea that the survivors of murder victims are expected to forgive offenders in restorative justice processes. There is no forgiveness requirement of restorative justice; in fact, “[g]enuine forgiveness usually does not happen in restorative justice.”¹⁶⁹ While restorative justice processes can cultivate the conditions for forgiveness to occur when it is appropriate, voluntary, and sincere, they also unfold with a recognition that healing can take place anterior to forgiveness. Although “a shift from resentment [of the offender] to forgiveness is required if the justice process is to have positive outcomes,”¹⁷⁰ restorative justice theorists also recognize that there are limits to this dynamic. For example, Murphy cautions that “resentment defends the value of self-respect and a too ready tendency to forgive ‘may be a sign that one lacks respect for oneself.’”¹⁷¹ Within the boundaries of sincerity and self-respect, though, the space for forgiveness can grow or shrink—both in the hearts of individual citizens and in communities drawn into justice systems.¹⁷² The goal of restorative justice is simply to grow that space, not to compel it.

CONCLUSION

This paper suggests that our response to murder can be better. When we submerge our thinking about murder in retributive discourse, our focus on the offender’s moral wrong and how to calibrate the proper physical response to it conceals so much psychological anguish that retributive theory must be supplemented in order to faithfully account for the phenomenon of

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 115.

¹⁶⁹ John Braithwaite, *Redeeming the ‘F’ Word in Restorative Justice*, 5 OXFORD J. OF L. AND RELIGION 79, 79 (2016).

¹⁷⁰ JOHNSTONE, *supra* note 42, at 133.

¹⁷¹ *Id.* at 133–34 (quoting JEFFRIE MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 16–17 (1988)).

¹⁷² Braithwaite, *supra* note 168, at 92–93.

murder. The principles of restorative justice are the supplement. With a more robust account in hand, we can bolster our response by abolishing capital punishment and striving to cultivate the conditions for psychological healing among victims' survivors, offenders' relationships, offenders themselves, and the complex, plural communities impacted whenever a murder takes place. By responding to murder in a way that takes relationships, harms, and psychological restoration seriously, we can cultivate healthier communities and more vigorous bonds between citizens. Instead of inflicting more violence through executions, we can learn to apply the salves of restorative justice to our community's psychological wounds—becoming better healers as the psychologically wounded convalesce.