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## Restorative Retributivism

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# Restorative Retributivism

BRIAN M. MURRAY\*

*The current criminal justice moment is ripe for discussion of first principles. What the criminal law is, what it should do, and why society punishes is as relevant as ever as communities reconsider the reach of the criminal law and forms of punishment like incarceration. One theory recently put forth—reconstructivism—purports to offer a descriptive and normative theory of the criminal law and punishment while critiquing the ills of the American system. It comprehends the criminal law and punishment as functional endeavors, with the particular goal of restitching or “reconstructing” the social fabric that crime disrupts. In particular, reconstructivism is a social theory of the criminal law, prioritizing solidarity rather than a moral conception of the common good. Drawing from a line of thinkers, from Aristotle to Hegel to Durkheim, reconstructivism claims to be distinctive and uniquely equipped to explain what the criminal law is and what it should do, as opposed to retributivist or utilitarian based theories. It claims to more richly account for the social effects of punishment that plague the current*

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\* Associate Professor of Law, Seton Hall University School of Law. I would like to thank Joshua Kleinfeld for his theory of reconstructivism and challenge to me to think more about it; Peter Koritansky and Andrew Skotnicki, scholars of older versions of retributivist theory, for their exceptional work, which aided the comparisons made in this Article; and the work of countless other jurisprudential scholars of the criminal law to whom I am indebted for my interest in thinking about this topic. All errors in my understanding of these theories are of course my own. I would like to thank The Hon. Stephanos Bibas, Rick Garnett, Andrew Skotnicki, Marah McLeod, Jon Romberg, Ed Hartnett, Angela Carmella, Michael Ambrosio, and participants at the Summer Workshop Series at Seton Hall Law School for comments on drafts of this Article. I would also like to thank my wife, Katherine, for her continuous support, and my children, Elizabeth, Eleanor, George, John, and Lucy for their inspiring curiosity, endless questions, sense of wonder, and zealous love for life.

system, unlike duty-based theories of retribution and the cold instrumentality underlying utilitarian-based punishment that has made criminal justice impersonal and short-sighted.

*This Article critiques reconstructivism's core claims and presents an alternative theory of punishment that contains insights for the current moment. While reconstructivism critiques the failures of common punishment theories to account for the social nature and effects of punishment, it fails to account for forms of retributivism that are not deontological. In particular, teleological retributivism, or more simply phrased, "restorative retributivism," already contains the descriptively and normatively restorative elements present in reconstructivism. Its conception of the common good rests on the inherently social nature of human affairs and accounts for the solidarity prioritized by reconstructivism. Whereas the reconstructivist prioritizes the socially and culturally constituted, the restorative retributivist seeks to emphasize shared moral intuitions, which social realities inform, but not to the exclusion of other considerations.*

*This distinction has implications for how each theory might critique modern criminal law and punishment. For example, restorative retributivism would view the expansion of the criminal law—both in terms of substance and administration—skeptically, and the modern approach to punishment—both in theory and its carceral form—as contrary to human dignity and too focused on controlling risk rather than promoting individual and social flourishing. This critique, like reconstructivism, has much to offer in the era of the carceral state and can help to reorient punishment to the broader good. It shifts the focus away from control and risk management to dignity and flourishing, leaving room for community involvement, humility in judging, and de-criminalization. In sum, reconstructivism and restorative retributivism are relatives, and both helpfully emphasize the social implications and consequences of the criminal law and punishment.*

INTRODUCTION .....	857
I. WHAT IS RECONSTRUCTIVISM?.....	866
II. THE RECONSTRUCTIVE CRITIQUE OF RETRIBUTIVISM.....	872
III. RESTORATIVE RETRIBUTIVISM.....	877
A. <i>The Roots of Restorative Retributivism</i> .....	877
B. <i>Restorative Retributivism and Punishment</i> .....	882
C. <i>Restorative Retributivism and Human Law</i> .....	888
IV. COMPARING RECONSTRUCTIVISM AND RESTORATIVE RETRIBUTIVISM.....	892
V. RESTORATIVE RETRIBUTIVISM AND THE CURRENT CRIMINAL JUSTICE SYSTEM .....	899
CONCLUSION.....	909

## INTRODUCTION

Imagine you are sitting in a courtroom during the sentencing hearing for a criminal defendant who recently pled guilty to possession of a controlled substance. You do not know his name and the judge only saw him for the first time a few weeks ago during a plea hearing that took less than fifteen minutes. You learn that the defendant has a history of substance abuse and has been convicted of previous drug crimes and minor property offenses connected to his condition.<sup>1</sup> While issues relating to the substance of the charge could have been defeated at trial, his peers neither saw his face nor heard the case.<sup>2</sup> The defendant took the plea deal because it was closer to a sure bet, although a bet nevertheless, because now here he is waiting to be sentenced by a judge he's never met or seen in the community and who has seen her courtroom flooded by countless cases like this a week. The judge is no stranger to the epidemic of drug

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<sup>1</sup> Of course, this story is far too common given the social realities relating to substance abuse and the ever-expanding usage of the criminal law to penalize drug use or behavior intertwined with it.

<sup>2</sup> Jury trials almost never happen in lower-level cases, not to mention *any* cases, and defendants are rarely tried by their peers. See LAURA I. APPLEMAN, DEFENDING THE JURY: CRIME, COMMUNITY, AND THE CONSTITUTION 3 (2015); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 39 (2011); John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RSCH. CTR. (June 11, 2019), <https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/>.

use pervading her county and the nation at large.<sup>3</sup> Cookie cutter sentencing has become inevitable, churned out in the machinery of the criminal justice system.<sup>4</sup>

Over the course of a decade, the defendant has cycled in and out of county jails, receiving little treatment and few moments of short and long-term guidance, and some of those programs just seemed to perpetuate stigma. Sadly, the story is all too common,<sup>5</sup> making assembly-line sentencings even more impersonal<sup>6</sup> and reifying some of the judge's instincts about harsh sentencing.<sup>7</sup> The sentencing guidelines in front of the judge suggest a guideline range.<sup>8</sup> They are built from risk assessment instruments<sup>9</sup> that theoretically seek to mitigate potential harm to the community while imprisoning only the most dangerous.<sup>10</sup> Those guidelines quantify the man in front of you and the judge, and the conversation that occurs out loud between the prosecutor, defense attorney, and judge focuses almost entirely on the potential for more harm.<sup>11</sup> It appears that the risk assessment will lead to quite the harsh sentence.<sup>12</sup> After the suggested period of incarceration, a lengthy period of parole awaits, where the funding for transition programs will remain small, the obstacles to reentry significant, and the opportunities for setbacks persistent.<sup>13</sup> The whole process seems desensitized, a world of cold, impersonal

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<sup>3</sup> See *Understanding the Epidemic*, CDC, <https://www.cdc.gov/drugoverdose/epidemic/index.html> (last visited May 15, 2021); NAZGOL GHANDNOOSH & CASEY ANDERSON, OPIOIDS: TREATING AN ILLNESS, ENDING A WAR 7–8, 17 (2017).

<sup>4</sup> See STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 19 (2012).

<sup>5</sup> BIBAS, *supra* note 4, at 19–20.

<sup>6</sup> See *id.* at 19.

<sup>7</sup> See Erin R. Collins, *The Problem of Problem-Solving Courts*, 54 UC DAVIS L. REV. 1573, 1594 (2021).

<sup>8</sup> Collins, *supra* note 7, at 18–19.

<sup>9</sup> Brandon Garrett & John Monahan, *Assessing Risk: The Use of Risk Assessment in Sentencing*, JUDICATURE, Summer 2019, <https://judicature.duke.edu/articles/assessing-risk-the-use-of-risk-assessment-in-sentencing/>. The usage of risk assessment tools during sentencing is frequent. *Id.*

<sup>10</sup> See MODEL PENAL CODE: SENTENCING § 6B.09(3) (AM. L. NST. PROPOSED FINAL DRAFT 2017).

<sup>11</sup> Collins, *supra* note 7, at 1616–17.

<sup>12</sup> *Id.* at 1594.

<sup>13</sup> See Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 295 (2016).

justice, where individuals get lost. And you, as a member of the community, are on the sidelines.

As you watch the judge, questions flood your mind. What is actually happening here? Should the judge seek to keep the community (and the defendant) as safe as possible by preventing future drug use? Exact vengeance on behalf of a community or victims (when they exist), or punish out of a sense of duty?<sup>14</sup> Is communicating that wrongdoing has occurred, and that the social norms underlying the community persist despite that reality, most important?<sup>15</sup> Or should the potential for personal development and flourishing, and its relationship to the common good, drive the decision?<sup>16</sup> Can punishment restore *and* do justice? When deciding whether punishing is appropriate in *these* circumstances for *this* defendant, what *form* should it take and what is the *central* question being considered? What *should* the question be? Is there a way to simultaneously explain the real function of the criminal law and punishment and why they reach where they do? Where should they stop?

When it comes to these questions, which have been addressed by countless legal scholars and philosophical thinkers,<sup>17</sup> there is a newcomer: reconstructivism.<sup>18</sup> This theory purportedly accounts for the function of criminal law by operating as an explanation of what criminal law does and what it should do.<sup>19</sup> Its descriptive plus normative feature is said to offer more than punishment theories linked

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<sup>14</sup> Paul H. Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical*, 67 CAMBRIDGE L. J. 145, 147–48 (2008).

<sup>15</sup> See JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 25 (1988).

<sup>16</sup> See Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1493, 1532 (2016).

<sup>17</sup> See AXEL HONNETH, THE STRUGGLE FOR RECOGNITION 7–13 (Joel Anderson trans., Polity Press 1995) (1992) (discussing varied philosophical opinions on subject). Of course, there is no way to catalogue the entirety of these previous discussions, which have lasted for millennia, in a law review article. *See id.*

<sup>18</sup> See Kleinfeld, *supra* note 16, at 1487. Reconstructivism is the synthesis of decades of thought put forth by plenty of scholars, whether they labeled themselves reconstructivist or not. *Id.* Newcomer, of course, might be misleading in this context.

<sup>19</sup> See Kleinfeld, *supra* note 16, at 1489–90.

to retributivism or utilitarianism.<sup>20</sup> Reconstructivism claims to thread the needle by providing a theoretical rationale for the three big concerns of the criminal law: meting out justice, ensuring public safety,<sup>21</sup> and identifying what is worthy of condemnation.<sup>22</sup> Put simply, in an era where the line between the civil and criminal is graying,<sup>23</sup> it attempts to make sense of why the criminal law is distinctive, and why punishment is necessary and worth it after all.<sup>24</sup>

While reconstructivism has components that resemble retributivism, utilitarianism, and expressivism, it also claims none of these at its core.<sup>25</sup> Instead, reconstructivism is a socially oriented theory of the criminal law and punishment, paying careful attention to prioritizing the “restitching” of the social order in the wake of crime.<sup>26</sup> Its contribution is that it brings a *telos* back into play, but a peculiarly *social* one, that is especially cognizant of the developing social realities that inform culture, which in turn informs law.<sup>27</sup>

This has important social implications for the current criminal justice moment. The reconstructivist claims to simultaneously justify the existence of the criminal law and provide a powerful critique of the American system’s key features and failures, and one that is unique in its emphasis on the social undercurrents of the criminal law and why our system fails.<sup>28</sup> It offers a theory that attempts to make sense of the condemnation that comes with criminal law, and judge that same project, both revealing the good and the warts.<sup>29</sup>

Where, precisely, when compared to previous theories of punishment, does reconstructivism fit? Whereas reconstructivism

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<sup>20</sup> *Id.* at 1534–37. This is in contrast to arguments against a comprehensive theory of the criminal law and punishment. See Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477, 2487–88 (1997); RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 5–12 (1999).

<sup>21</sup> See PETER KARL KORITANSKY, *THOMAS AQUINAS AND THE PHILOSOPHY OF PUNISHMENT* 100 (2012).

<sup>22</sup> See Kleinfeld, *supra* note 16, at 1491–92.

<sup>23</sup> Jenny Roberts, *Gundy and the Civil-Criminal Divide*, 17 OHIO ST. J. CRIM. L. 207, 207–08 (2019).

<sup>24</sup> See Kleinfeld, *supra* note 16, at 1542–47.

<sup>25</sup> *Id.* at 1523–34.

<sup>26</sup> See *id.* at 1500, 1529.

<sup>27</sup> See *id.* at 1490.

<sup>28</sup> See *id.* at 1490, 1494–95.

<sup>29</sup> See *id.* at 1490.

claims “descriptive” and “normative” independence,<sup>30</sup> this Article argues that it closely aligns with earlier versions of retributivism that are not of the Kantian, deontological variety<sup>31</sup> that have been juxtaposed with reconstructivism. Hence, the core of the reconstructivist claim—its connection to teleology and an underlying philosophical system<sup>32</sup>—is timely in that it reintroduces the concept of *telos*, but not one of a kind. Retributivism has a long history before Kant,<sup>33</sup> and that long history contains strands that also contain the core insights of reconstructivism and might even share its critique of modern criminal justice issues. And earlier forms of retributivism actually align relatively well with the findings of modern social science about shared intuitions of justice.<sup>34</sup> The fact that those shared intuitions exist meets Cass Sunstein’s standard for the criminal law, namely that unless a “plausible foundation in widely shared moral commitments”<sup>35</sup> exists, due process might be at issue. Frustration with the current machinery of criminal justice is widespread,<sup>36</sup> and many agree that serious reform is in order.

Put more clearly, while reconstructivism revives the connection between teleology and punishment,<sup>37</sup> it is not the only theory of punishment that connects to the idea of *telos*. Rather, this older form of retributivism does the same, understanding punishment as a function of the relational nature of human reality that supports the moral

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<sup>30</sup> See *id.* at 1490–91.

<sup>31</sup> *Id.* at 1527.

<sup>32</sup> See *id.* at 1490.

<sup>33</sup> See, e.g., Peter Koritansky, *Two Theories of Retributive Punishment: Immanuel Kant and Thomas Aquinas*, 22 HIST. PHIL. Q. 319, 319 (2005).

<sup>34</sup> Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. Cal. L. Rev. 1, 24–32 (2007) (contrasting “empirical desert” with vigilantism). For example, the work of Paul Robinson and John Darley has repeatedly conveyed how shared intuitions relating to punishment in fact exist. *Id.* 66–67 These findings have led to a theory of “empirical desert” to allow desert as a distributive principle to become more practicable than vengeful or deontological theories of desert put forth by thinkers like Kant. See *id.* at 24; Robinson, *supra* note 14, at 145–46.

<sup>35</sup> Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 73 (2003).

<sup>36</sup> See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW* 3–10 (2011); BIBAS, *supra* note 4, at 27; STUNTZ, *supra* note 2, at 31–36.

<sup>37</sup> See Kleinfeld, *supra* note 16, at 1527.



order underlying the criminal law.<sup>38</sup> Just like reconstructivism, that retributivism is about restitching the order that was transgressed by a criminal violation.<sup>39</sup> That order is both moral and social. More accurately, the social *is inherently intertwined with* the moral because a robust notion of human flourishing, where both are interwoven, underlies the idea of punishment.<sup>40</sup> It is a relational retributivism where desert entails the individual and the social, and by definition it is restorative. It is most definitely not the Kantian—or deontological<sup>41</sup>—retributivism that has been harshly criticized for centuries. In a word, it is *personalist*.<sup>42</sup> And it predates modern studies that link default punishment motives held by community members to notions of moral outrage in addition to the reaffirmation of community norms.<sup>43</sup> It is a restorative retributivism.

This Article offers two contributions: a taxonomical critique of reconstructivism and the presentation of an alternative form of retributivism that can help crystallize the purposes of the criminal justice system. It proceeds in four parts. In Part I, it will describe reconstructivism as presented. This Part does not, and cannot, contain all that was presented in Professor Josh Kleinfeld's introduction of reconstructivism in the *Harvard Law Review*;<sup>44</sup> however, it aims to highlight the key components he laid out.<sup>45</sup> Part II pinpoints the classifying label given to reconstructivism, paying careful attention to the particular type of retributivism juxtaposed with reconstructivism. Part III will present a different strand of retributivism that is premised on teleology rather than deontological ethics. This retributivism shares the Aristotelian roots of reconstructivism but finds its development through ancient and medieval philosophers rather than

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<sup>38</sup> See *id.* at 1526–27.

<sup>39</sup> See *id.* at 1538 (acknowledging retributivism's goals include restitching order but concluding reconstructivism accomplishes this goal better).

<sup>40</sup> See *id.* at 1493.

<sup>41</sup> See Koritansky, *supra* note 33, at 319, 323; Kleinfeld, *supra* note 16, at 1527.

<sup>42</sup> See CHRISTIAN SMITH, WHAT IS A PERSON? RETHINKING HUMANITY, SOCIAL LIFE, AND THE MORAL GOOD FROM THE PERSON UP 406–08 (2010).

<sup>43</sup> See John M. Darley et al., *Incapacitation and Just Deserts as Motives for Punishment*, 24 L. & HUM. BEHAV. 659, 677 (2000).

<sup>44</sup> See Kleinfeld, *supra* note 16.

<sup>45</sup> *Id.* Any errors in understanding reconstructivism are, of course, my own.

Hegel.<sup>46</sup> Some of those thinkers were informed by religious faith, but the theory remains philosophical rather than religious.<sup>47</sup> Its influence on well-known components of criminal law has been demonstrated by scholars like James Whitman.<sup>48</sup> Its embers remain, but its light has been dimmed in a political-legal regime with classical liberal premises, although its implications have been discussed by some recent scholars.<sup>49</sup> Most importantly, it is not fundamentally deontological, meaning it contains more flexibility in application to particular criminal justice issues, and is more aware of the social consequences of punishment. That flexibility also makes its practice open to locally, democratic administration, allowing communities to pursue justice from the ground up without destroying relationships forever. These attributes are why it might be called “restorative retributivism,” and why its insights might be helpful given the widespread desire for social justice in the criminal law.

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<sup>46</sup> HONNETH, *supra* note 17, at 7, 11–30.

<sup>47</sup> *See id.* at 7. Teleological retributivism has been developed by religious thinkers, building from Aristotelian premises. *Id.*; *see* Paul Russell, *Hume on Responsibility and Punishment*, 20 CAMBRIDGE U. PRESS 539, 545 (1990).

<sup>48</sup> *See* James Q. Whitman, *The Transition to Modernity*, in THE OXFORD HANDBOOK OF CRIMINAL LAW 84, 85–86 (Markus D. Dubber & Tatjana Horn eds., 2014) (arguing that “modern criminal justice” has historical origins in canon and Church-inspired medieval law); JAMES Q. WHITMAN, THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL 2–7 (2008); *see also* ANDREW SKOTNICKI, CRIMINAL JUSTICE AND THE CATHOLIC CHURCH 11 (2008) (tracing historical understanding of retribution, with restorative and pro-social intentions, as traditional purpose of criminal law); David McIlroy, *Christianity, mens rea and the Boundaries of Criminal Liability*, in CHRISTIANITY AND THE CRIMINAL LAW 117 (2020).

<sup>49</sup> *See* KORITANSKY, *supra* note 21, at 69; John M. Finnis, *Retribution: Punishment’s Formative Aim*, 44 AM. J. JURIS. 91, 97 (1999); Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2183–84 (2001) (discussing “confrontational conception” of retribution and its relational nature); Dan Markel, *Retributive Justice and the Demands of Democratic Citizenship*, 1 VA. J. CRIM. L. 1, 5, 10 (2012); Andrew Skotnicki, *Foundations Once Destroyed: The Catholic Church and Criminal Justice*, 65 THEOLOGICAL STUD. 792, 792, 796 (2004); Kyron Huigens, *Virtue and Inculcation*, 108 HARV. L. REV. 1423, 1425 (1995); Whitman, *supra* note 48, at 84–96 (describing theological and philosophical premises in pre-modernity and how they affected development of reasonable doubt rule).

Part IV compares and contrasts these two theories.<sup>50</sup> This comparison indicates that reconstructivism might be classified as a strand of this retributivism, but one that focuses more on the social activities of humans rather than the moral to define the purpose; at the very least, they are close relatives.<sup>51</sup> Whereas the thinkers at their origin<sup>52</sup> and some first premises might be different,<sup>53</sup> they both end up in very similar places when it comes to the question of how punishment relates to the broader social order.<sup>54</sup> The social solidarity that reconstructivism prioritizes is, to use Professor Kleinfeld's terms, "embedded" in the concept of desert within restorative retributivism, which presumes a transcendence to relationships between individuals in a community, culminating in a concept of the common good that recognizes the inextricable connection between the social and the moral.<sup>55</sup> That social solidarity not only has philosophical roots in Aristotle's concepts of *eudaimonia* and the flourishing of the community,<sup>56</sup> it has been validated by shared intuitions of

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<sup>50</sup> To be clear, I am not the creator of this theory of retributivism. I am merely situating it next to reconstructivism to compare their core claims. And as mentioned above, I am indebted to several philosophical thinkers who have clearly discussed and critiqued it. All errors in my representation of the theory's development and core claims, as well as those scholars' contributions, are, of course, my own.

<sup>51</sup> See *infra* Part IV.

<sup>52</sup> See HONNETH, *supra* note 17, at 7–30; KORITANSKY, *supra* note 21, at 70. Augustine and Thomas Aquinas have very different philosophical systems than Hegel, but interestingly, Aquinas and Hegel both acknowledge Aristotelian influence on their work. See HONNETH, *supra* note 17, at 7–30; Shawn Floyd, *Thomas Aquinas: Moral Philosophy*, INTERNET ENCYCLOPEDIA PHIL., <https://iep.utm.edu/aq-moral/>; *Augustine (354–430 C.E.)*, INTERNET ENCYCLOPEDIA PHIL., <https://iep.utm.edu/augustin/>.

<sup>53</sup> See Kleinfeld, *supra* note 16, at 1529; Finnis, *supra* note 49, at 97–99. For example, Professor Kleinfeld describes the social emotions, impulses, and practices that underlie reconstructivism, while John Finnis has described the finite goods and practical reason that underlies retributivism. See Kleinfeld, *supra* note 16, at 1529; Finnis, *supra* note 49, at 97–99.

<sup>54</sup> Kleinfeld, *supra* note 16, at 1529.

<sup>55</sup> *Id.* at 1492, 1544.

<sup>56</sup> The closest English word for the Ancient Greek term *eudaimonia* is probably "flourishing." See *Ethics Explainer: Eudaimonia*, ETHICS CENTRE (Aug. 4, 2016), <https://ethics.org.au/ethics-explainer-eudaimonia/>. Or, to use Aristotelian terms, the *polis*. HONNETH, *supra* note 17, at 7, 11–30; see Kleinfeld, *supra* note 16, at 1493 n.11.

justice underlying the concept of “empirical desert.”<sup>57</sup> The major distinction between the two theories seems to be that restorative retributivism has a *more* static notion of the common good. Arguably, that notion is richer given its perceptions beyond the social and empirically verifiable.

Part V focuses on the upshot of this philosophical classification and some of the insights that restorative retributivism can bring to current discussions about the criminal justice system. Retributivism, while revived over the past several decades, has been under fire for centuries as too “mystical” and impractical, and too close to the vengeful.<sup>58</sup> Concepts of desert are viewed as indecipherable and thereby not useful, making risk assessment tools even more appealing.<sup>59</sup> To be fair, vengeful and deontological theories of desert struggle to provide clear responses to social ills connected to punishment. Proponents of empirical desert, like Paul Robinson, have fought back against the notion that retribution is a concept forever lost, using modern methods to validate desert as the basis of punishment and to convey its practicability.<sup>60</sup> Nevertheless, this age is one where the language of risk and control pervade discussions of criminal justice, leading to incapacitation and inequitable outcomes. Reconstructivism is a response to that trend, emphasizing the social utility of the criminal law to construct a powerful critique of the current criminal justice moment.

Part V demonstrates how restorative retributivism does the same, but with a richer understanding of purpose that is restorative on more than one level. Reconstructivism is arguably more democratic and less fixed,<sup>61</sup> leaving room for development in democratic society. But restorative retributivism is more stable given its openness to fixed roots in the natural order, providing the constraints that prevent the worst democratic impulses (e.g., incapacitation and incarceration run amok, which is currently a huge problem)<sup>62</sup> from

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<sup>57</sup> Robinson & Darley, *supra* note 34, at 18.

<sup>58</sup> See Kleinfeld, *supra* note 16, at 1515.

<sup>59</sup> See Koritansky, *supra* note 33, at 323–24.

<sup>60</sup> See Robinson & Darley, *supra* note 34, at 18–19.

<sup>61</sup> See Kleinfeld, *supra* note 16, at 1552–55.

<sup>62</sup> Sharon Dolovich, *Creating the Permanent Prisoner*, in *LIFE WITHOUT PAROLE: AMERICA’S NEW DEATH PENALTY?* 96, 98–100 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012).

doing injustice and punitive excess, something not necessarily barred by reconstructivism itself.<sup>63</sup> It also preserves spaces for local communities to make decisions, something the current criminal justice system is poor at accomplishing<sup>64</sup> given its well-known slide into insider-based decision-making.<sup>65</sup> It is synergistic with shared notions of punitive justice held by laypersons, making it cognizable in the modern day, and potentially disruptive of plea-bargaining norms and other streamlined practices that are impersonal. At the same time, it relies on the hard work of prudent individuals to implement<sup>66</sup>—an aspiration most have for government, but a real challenge given the current moment. In short, restorative retributivism would shift the focus of the criminal law and punishment towards the question of human flourishing rather than the mitigation of risk or efficient social control.

In the end, reconstructivism and this version of retributivism are natural partners in reorienting and enriching debates about the criminal law, and they should be viewed as such as conversations about criminal justice reform evolve. They are not that far apart and, at the very least, give forceful reason for reflecting on how what binds the “social fabric” should always be a focus of criminal justice reform.

### I. WHAT IS RECONSTRUCTIVISM?

Reconstructivism is a theory of criminal law nestled within sociological philosophy.<sup>67</sup> Its philosophical forefather is Hegel, and its sociological parent Durkheim.<sup>68</sup> Its first principle is that “social practices and institutions” are the way they are because of values that subsist within them.<sup>69</sup> This is the origin of the phrase, *the* “embodied ethical life,” which holds ethical values are organically

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<sup>63</sup> This point was conceded by Professor Kleinfeld in his Article when he recognized that retributive side constraints might be necessary to prevent reconstructivism from being too relativistic. *See* Kleinfeld, *supra* note 16, at 1529 n.122.

<sup>64</sup> *See infra* Part V (referring to Stuntz’s work on loss of local administration of criminal law that allows law to be simultaneously relational and justice-oriented).

<sup>65</sup> APPLEMAN, *supra* note 2, at 3.

<sup>66</sup> *See* Kleinfeld, *supra* note 16, at 1564–65.

<sup>67</sup> *See id.* at 1494, 1549, 1556–57.

<sup>68</sup> *See id.* at 1487.

<sup>69</sup> *See id.*

contained within social realities.<sup>70</sup> Studying these social practices and institutions thereby reveals the normative order already at work, allowing for the ability to critique those norms.

How does this premise relate to the criminal law, or better yet, the reconstructive approach to criminal law? Reconstructivism posits that the criminal law and punishment make sense because they represent the way that society responds to attacks on the socially embodied ethical life within a community.<sup>71</sup> In short, punishment defends against wrongdoing and reinforces the social fabric underlying the normative order, which necessarily entails certain values held in common, and developed socially.<sup>72</sup> Reconstructivism is thus primarily a social theory of criminal law rather than a metaphysical or logically ethical one. The utility of the criminal law comes from its ability to support social norms.<sup>73</sup> Professor Kleinfeld states that:

[C]riminal law has a distinctive role to play in the social world, a function that gives it a different center from other areas of law, because criminal law is the primary legal institution by which a community reconstructs the moral basis of its social order, its ethical life, in the wake of an attack on that ethical life.<sup>74</sup>

Criminal law protects against wrongdoing that denies the reality of the ethically imbued social order.<sup>75</sup> The reconstruction of socio-ethical norms transgressed by wrongdoers is the purpose (*telos*) of the criminal law.<sup>76</sup> Otherwise the social fabric disintegrates.<sup>77</sup>

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<sup>70</sup> See *id.* at 1487, 1493.

<sup>71</sup> See *id.* at 1486–87.

<sup>72</sup> *Id.* at 1488, 1500 (“[T]he function of criminal law has everything to do with embodied ethical life.”).

<sup>73</sup> See *id.* at 1489.

<sup>74</sup> *Id.*

<sup>75</sup> See *id.* at 1489, 1529.

<sup>76</sup> *Id.* at 1490–91. Professor Kleinfeld uses the metaphor of discipline in a classroom to indicate the purpose of the criminal law. *Id.* at 1506. If violations of the professor’s rules go ignored, and unpunished, then the entire social fabric disintegrates. See *id.* at 1500. Thus, punishment reiterates the persistence of the order. *Id.* at 1489–91.

<sup>77</sup> *Id.* at 1500.

The linchpin of that socio-ethical norm is the concept of solidarity.<sup>78</sup> This word is extremely significant in reconstructive thinking: it emphasizes how punishment's purpose is to reiterate the *shared* moral culture, because "it is shared, rather than solely because it is right . . . ."<sup>79</sup> The emphasis on solidarity stems from Hegel and Durkheim's empirical observation that humans are social beings and that flourishing was contingent on social realities.<sup>80</sup> Importantly, this premise did not arise with either of those thinkers; rather, it is fundamentally Aristotelian,<sup>81</sup> and as will be shown later, that is a key premise of restorative retributivism.<sup>82</sup>

This social basis means that reconstructivism does not share the predominant view<sup>83</sup> that punishment is inherently evil, or always a form of suffering.<sup>84</sup> The corollary is that reconstructivism is not immediately skeptical of state power; better yet, it does not start from the premise of limiting the power of the state in the wake of crime.<sup>85</sup> Rather, the first question for the reconstructivist relates to the nature of wrongdoing. This attribute is claimed as distinctive<sup>86</sup> from typical punishment theory:

[T]he question of how to understand crime is one part of a larger question about how to understand wrongdoing in general. To understand wrongdoing is to

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<sup>78</sup> See *id.* at 1492.

<sup>79</sup> *Id.* at 1492.

<sup>80</sup> See *id.* at 1493.

<sup>81</sup> See HONNETH, *supra* note 17, at 7, 11–30 (describing influence of Aristotle on Hegel, and Aristotle's beliefs that purpose of life was moral flourishing, human beings are naturally social, and flourishing therefore requires a *polis*).

<sup>82</sup> See *infra* Part III (noting how scholastic retributivists, such as Thomas Aquinas, built from the Aristotelian premise that humans are naturally social and political animals).

<sup>83</sup> See, e.g., JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 158 (J.H. Burns & H.L.A. Hart eds., 1996) ("[A]ll punishment is mischief: all punishment in itself is evil.").

<sup>84</sup> Kleinfeld, *supra* note 16, at 1497–98.

<sup>85</sup> *Id.* at 1497 (referencing how retributivism and utilitarianism "give criminal theory a libertarian cast").

<sup>86</sup> Restorative retributivism shares this trait: it sits within a larger moral framework about wrongdoing because of its teleological roots. See Huigens, *supra* note 49, at 1435. Professor Kleinfeld references how modern retributivists care about wrongdoing, but labeling that phenomenon as a late developing interest seems mistaken. See Kleinfeld, *supra* note 16, at 1497–1504.

learn something about the response wrongdoing calls for, which in turn implies a position as to what punishment is and what it is for.<sup>87</sup>

This understanding is fundamentally Hegelian, focusing on how concepts and ideas manifest in real life.<sup>88</sup> “Ideas” are concepts, actualized.<sup>89</sup>

The connection to the criminal law stems from the fact that wrongdoing is the attempted de-actualization of the embodied ethical life, which is an “idea” in the Hegelian sense.<sup>90</sup> Wrongdoing threatens to re-label the predominant social reality false; hence, “[w]rongdoing is *communication*.”<sup>91</sup> This is why reconstructivism goes beyond the modern harm principle when contemplating crime and punishment:<sup>92</sup> wrongdoing causes tangible *and* intangible harm. That intangible harm cuts against the solidarity underlying social conditions: “crime is [an] offense to embodied ethical life,” disturbing socially-derived norms to justify condemnation.<sup>93</sup> Crime denies the socio-moral claims of the law.<sup>94</sup> It expresses disdain for the law and social order underlying it.<sup>95</sup> Failing to respond allows the crime to usurp the socio-moral norm, or, as Professor Kleinfeld puts it, “[C]rime declares: ‘[t]he norm . . . does not hold.’”<sup>96</sup> Because those norms are socially derived, crime is thus anti-social.<sup>97</sup> For the reconstructivist, punishment in the wake of crime is pro-social.

This understanding of wrongdoing has particular implications for victims, a development illustrated by Jean Hampton and Jeffrie

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<sup>87</sup> Kleinfeld, *supra* note 16, at 1498.

<sup>88</sup> *Id.* at 1499 (citing G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 25 (H.B. Nisbet trans., Allen W. Wood eds., Cambridge Univ. Press 1991) (1821)) (“Philosophy has to do with Ideas and therefore not with what are commonly described as *mere concepts*.”).

<sup>89</sup> *See id.*

<sup>90</sup> *See id.*

<sup>91</sup> *Id.* at 1504.

<sup>92</sup> *See id.* at 1501–02.

<sup>93</sup> *Id.* at 1505.

<sup>94</sup> *Id.* at 1512.

<sup>95</sup> *Id.* at 1529.

<sup>96</sup> *Id.* at 1506.

<sup>97</sup> *See id.* at 1505–06.



Murphy.<sup>98</sup> Wrongdoing devalues victims within the prevailing social order<sup>99</sup> and is an intangible harm in the form of an insulting degradation of the victim that threatens to de-actualize the norm embodied in the victim.<sup>100</sup> In short, it is a comment to destabilize the social hierarchy, rejecting the social status of the victim.<sup>101</sup> It is a rejection of that victim's actualized social place.<sup>102</sup>

Punishment, therefore, reiterates the social reality prior to the transgression, reaffirming the "idea," or the embodied ethical life.<sup>103</sup> Its validity rests in its reaction to how wrongdoing disrupts the social norm. Members of the community must respond in order to reiterate the social order again.<sup>104</sup> It is the counterproposal to the proposal put forth by the wrongdoer to undo the social order.<sup>105</sup> Punishment, in true Hegelian form, is the synthesis after crime's antithetical nature disrupts the thesis within the social order.<sup>106</sup> In summary, punishment responds to the "abstract norms or rights *and* a socially approved status structure or hierarchy."<sup>107</sup> It thus goes beyond individual harms, justifying its placement within public law.<sup>108</sup> With respect to victims, the connection to publicly validated dignity is thus apparent.

For the reconstructivist then, the goal of punishment is to "reconstruct a violated normative order in the wake of a crime."<sup>109</sup> It is expressive, negating crime's message and declaring the crime

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<sup>98</sup> See *id.* at 1500, 1507–09, 1516. Kleinfeld claims that Hampton and Murphy are reconstructivists. *Id.*

<sup>99</sup> *Id.* at 1529.

<sup>100</sup> MURPHY & HAMPTON, *supra*, note 15, at 25, 36–40. It is not clear to me why this is *not* metaphysical given the transcendent nature of human relationships.

<sup>101</sup> See Kleinfeld, *supra* note 16, at 1508 (noting how Murphy and Hampton understood effect on victim psychologically, but not as a matter of *social status*).

<sup>102</sup> *Id.* ("[S]ocial status is a socially given thing.')

<sup>103</sup> *Id.* at 1499 ("Punishment, in turn, re-actualizes the right, making it something 'fixed and valid' in the wake of a wrong.')

<sup>104</sup> See *id.* at 1505–06, 1529. As will be described in Part III, this sounds a lot like natural law based human inclinations which, *a priori*, deserve our trust.

<sup>105</sup> *Id.* at 1509 ("Society's response makes the proposal, as a claim about the social world, true or false.')

<sup>106</sup> See Günther Jakobs, *Derecho Penal: Parte General*, 18–19 (1995), as reprinted in LUIS E. CHIESA, *SUBSTANTIVE CRIMINAL LAW* § 2.03 (2014).

<sup>107</sup> Kleinfeld, *supra* note 16, at 1509 (emphasis added).

<sup>108</sup> *Id.* at 1512.

<sup>109</sup> *Id.* at 1513.

“untrue” as a social reality.<sup>110</sup> To be clear, it does not undo the crime; rather, the communicative content of punishment indicates that wrongdoing does not represent the way things are or will be.<sup>111</sup> Interestingly, this makes the reconstructive understanding of punishment fundamentally linguistic and symbolic, providing a “shot in the arm” for those obeying the law.<sup>112</sup> Accordingly, this makes reconstructivism less offender-centric, unlike retributivism.

Thus, reconstructivism contemplates what wrongdoing is, and what crime is, before thinking about punishment. To put it in laymen’s terms, knowledge of what actually happened (in a socio-moral sense) must precede punishment in order for the latter to be appropriate.<sup>113</sup> Criminal law uniquely has the endeavor of helping to revive the social order when it is “offend[ed], threaten[ed], and undermine[d].”<sup>114</sup> Crime tears the social fabric while punishment restitches it.<sup>115</sup> Thus, criminalization and punishment are connected, built on an ethical order derived from shared social bonds.<sup>116</sup> And that ethical order has political implications, tethering criminal law to broader political philosophy<sup>117</sup>:

[T]he nature of criminal wrongdoing is that it violates and threatens embodied ethical life and the nature of punishment is that it restores and protects embodied ethical life in the wake of the crime. Punishment does so for the sake of social solidarity and because respect for the society’s normative order and the worth of all persons, including both offender and victim, demands it.<sup>118</sup>

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<sup>110</sup> *Id.*

<sup>111</sup> *See id.* at 1513–14.

<sup>112</sup> *See id.* at 1514–16 (noting how Durkheim understood punishment to restore faith of rule followers).

<sup>113</sup> *Id.* at 1500 (“One cannot understand punishment as re-actualizing a norm unless one first understands crime as de-actualizing the norm.”).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 1500, 1538.

<sup>116</sup> *Id.* at 1502.

<sup>117</sup> *Id.* at 1503–04.

<sup>118</sup> *Id.* at 1524.

For the reconstructivist, the function of criminal law and punishment is to forge and re-forge the social order.<sup>119</sup>

## II. THE RECONSTRUCTIVE CRITIQUE OF RETRIBUTIVISM

Where does reconstructivism fit within broader legal theories, as well as theories of criminal law and punishment? This Part discusses how reconstructivism labels retributivism, before taking a deeper dive into the type of retributivism used to compare both theories.

Reconstructivism claims to be the *only* theory that has something to say about “embodied ethical life and solidarity . . . necessarily present[ing] a theory of the nature of crime . . . [and] normative content atop a thick description of social life.”<sup>120</sup> The word “necessarily” does a lot of work in this description, as Kleinfeld is careful to note that reconstructivism could be a “*type* of retributivism, utilitarianism, or expressivism.”<sup>121</sup> After all, Hegel considered himself a retributivist given the fact that punishment “re-actualizes the right” that was infringed by wrongdoing.<sup>122</sup> But in the end, Kleinfeld opts for labeling reconstructivism as its own species, but one that simultaneously conflicts with and affirms certain core claims of the alternatives.<sup>123</sup>

One reason for this classification is that reconstructivism acts in the Hegelian fashion described above for instrumental reasons, particularly to promote human welfare: Punishment “ensures that the norms proposed by the wrong do not overtake social life.”<sup>124</sup> Punishment has a function. This sets up a contrast between reconstructivism and Kantian retributivism, which is the version of retributivism juxtaposed with reconstructive thought. Whereas the Kantian retributivist would execute the murderer on the island as a matter of right and obligation (given the violation of the moral rule), the reconstructivist would, rightly, be concerned that doing so has no

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<sup>119</sup> *Id.* at 1523.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 1525.

<sup>122</sup> HEGEL, *supra* note 88, at 127 (“The cancellation . . . of crime is *retribution* in so far as the latter, by its concept, is an infringement of an infringement.”); Kleinfeld, *supra* note 16, at 1499.

<sup>123</sup> See Kleinfeld, *supra* note 16, at 1525.

<sup>124</sup> *Id.* at 1526–27.

instrumental effect on the sociality underlying punishment in the first place.<sup>125</sup> In other words, island executions cannot possibly contribute to human welfare because there is no function for punishment to perform when no community exists to receive the message.<sup>126</sup>

Thus, we come to a key attribute of reconstructivism that distinguishes it from modern theories of punishment: it is teleological.<sup>127</sup> This contrasts with Kantian deontological ethics underlying the criminal law and punishment.<sup>128</sup> For Kant, function has no place in the analysis of justice; categorical imperatives abound, punishment is mandated out of obligation.<sup>129</sup> The teleological nature of reconstructivism stems from its rejection of the default, contemporary philosophical posture requiring a “fact/value distinction.”<sup>130</sup> For Kleinfeld, the descriptive and normative are necessarily intertwined in human thought and reality.<sup>131</sup> The teleological and functional are, therefore, connected; definitions contain standards of evaluation.<sup>132</sup> Once we know what something is, we can assess whether that something is doing well at what it is.<sup>133</sup>

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<sup>125</sup> See *id.* at 1527.

<sup>126</sup> *Id.* at 1527 (“When society disbands, there is no one left to receive the message for which punishment exists.”).

<sup>127</sup> See *id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> See *id.* at 1534–35.

<sup>131</sup> See *id.* at 1534–36. As discussed below, this is a position shared with teleological retributivism, which holds that human realities are both factual and moral realities, such that total disentanglement is hard to accomplish.

<sup>132</sup> See *id.* at 1536.

<sup>133</sup> See *id.* at 1536. Kleinfeld describes a house as a structure that gives shelter. *Id.* If the house “does not give shelter, it is a defective house, and if it is defective to a sufficiently extreme extent, it might cease to be a house altogether,” becoming something like a shack or abandoned structure. *Id.* Thus, function stems from essence. *Id.* (citing CHRISTINE M. KORSGAARD, SELF-CONSTITUTION: AGENCY, IDENTITY, AND INTEGRITY 32 (2009) (“[E]very object and activity is defined by certain standards that are both constitutive of it and normative for it.”)); Hilary Putnam, *The Entanglement of Fact and Value*, in THE COLLAPSE OF THE FACT/VALUE DICHOTOMY AND OTHER ESSAYS 28, 30 (2002) (“[N]ormative judgments are essential to the practice of science itself.”); ROBERT B. BRANDOM, MAKING IT EXPLICIT: REASONING, REPRESENTING, AND DISCURSIVE COMMITMENT 5 (1994) (referencing how social practices provide normative force).

Whereas retributivism (as presented) focuses on moral wrongness and desert to determine what should be criminalized and how punishment should be meted out, reconstructivism looks to “moral culture” and the expressive nature of punishment.<sup>134</sup> This distinction grows from labeling retributivism as exclusively individualistic and concerned with imposition of punishment out of duty, suggesting retributivist callousness towards the socially devastating effects of punishment.<sup>135</sup> This understanding of retributivism is fundamentally deontological.<sup>136</sup> In contrast, reconstructivism takes aim at higher, teleological purposes that are socially inspired, which also leaves room for pluralistic functionality.<sup>137</sup> Reconstructivism is presented as having the longer view and de-mystifying the deontological system underlying Kantian retributivism: “[W]e have here a similarity and a dissimilarity: reconstructivism, like retributivism, sees punishment as good or right in itself, but unlike retributivism, explains that goodness or rightness in terms of human welfare.”<sup>138</sup>

Reconstructivism also purports to explain why punishing is required and why it is useful. Kleinfeld rightly notes how deontological retributivism cannot take account of the social consequences of punishment, whether good or bad.<sup>139</sup> “Reconstructivism can explain why punishing Eichmann is an imperative of justice” and is good; retributivism cannot.<sup>140</sup> In modern terms, retributivism (so the critique goes) has nothing to offer to the problem of mass incarceration, prison conditions, or collateral consequences, for the same reason.<sup>141</sup> In sum, reconstructivism offers a communicative theory of punishment that reiterates principles that are “morally and

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<sup>134</sup> Kleinfeld, *supra* note 16, at 1491–92.

<sup>135</sup> *Id.* at 1496 (noting how retributivism does not address mass racial incarceration because individual desert is all that matters). The idea that retributivism foolishly fails to take account of consequences it knows are likely to ensue has been critiqued by Adam Kolber. Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 200–03 (2009).

<sup>136</sup> See Kleinfeld, *supra* note 16, at 1527.

<sup>137</sup> *Id.* at 1537.

<sup>138</sup> *Id.* at 1527.

<sup>139</sup> *Id.* at 1528. “Justice requires that we uphold the principle, and by upholding it we advance human welfare.” *Id.* As will be shown below, this is a cardinal principle of teleological retributivism. See *id.*; Mark Tunick, *Is Kant a Retributivist?*, 17 HISTORY POL. THOUGHT 60, 67 n.38 (1996).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 1496.

pragmatically essential to social life.”<sup>142</sup> The knock on retributivism, in contrast, is that it only speaks to the morally *required*, with no consideration of the socio-moral component.<sup>143</sup> Retributivism, it is said, speaks to condemnation, but not the control-based function of the criminal law, or the ripple effects of punishment on the broader social fabric.<sup>144</sup>

Reconstructivism also purports to have a different focus with respect to human dignity than Kantian retributivism because it prefers victims.<sup>145</sup> Kantian retributivism disdains instrumental punishment because it uses offenders contrary to their dignity and, in a way, obfuscates the notion of accountability underlying punishment and being conducive to honoring dignity.<sup>146</sup> In contrast, “[r]econstructivism is oriented to the dignity of *victims*[,]” responding to the social degradation caused by wrongdoing.<sup>147</sup> According to Kleinfeld, this works in reconstructivism’s favor because the deontological retributive notion that offenders are fully agential is empirically mistaken given social conditions that impair judgment.<sup>148</sup> Some who violate the law are affected by social conditions, and punishment premised on baseline equality in freedom, in spite of those social conditions, overlooks a key issue in the justice of punishment. Kleinfeld acknowledges deep moral complexity here, but claims retributivism has no answer given its focus on addressing the act of wrongdoing, and nothing else.<sup>149</sup> As presented below, restorative retributivism is cognizant of this moral nuance.<sup>150</sup>

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<sup>142</sup> *Id.* at 1528.

<sup>143</sup> *See id.* at 1496.

<sup>144</sup> *Id.* at 1500, 1542 (“Retributivism . . . speak[s] to one half of the duality.”).

<sup>145</sup> *See id.* at 1531.

<sup>146</sup> *Id.* at 1528–29.

<sup>147</sup> *Id.* at 1529.

<sup>148</sup> *Id.* at 1529 (noting how “agential capacities *are* damaged, and damaged in morally complex ways”). Notably, restorative retributivism considers social conditions that affect the ability of the will to choose rightly as mitigating conditions for punishment. *See id.* at 1529–30.

<sup>149</sup> *See id.* at 1528–29, 1531.

<sup>150</sup> Whether human beings can decipher and manage it is, of course, a different question. But, whereas Kantian retributivism might wipe its hands and say “whatever,” teleological retributivism might have a humbler approach. *See* SKOTNICKI, *supra* note 49, at 65 (describing pro-social, anti-alienation intentions beyond penitential punishment); Mary Sigler, *Humility, Not Doubt: A Reply to Adam Kolber*, 2018 U. ILL. L. REV. 158, 161 (2018).

Kleinfeld offers a third distinction between retributivism and reconstructivism relating to the place of emotions. He claims retributivists contemplate “condemnatory emotions” as part and parcel of the “sense of justice” demanded in the wake of wrongdoing.<sup>151</sup> In contrast, reconstructivists understand emotion as a socially developed response to wrongdoing; emotion undergirds punishment because emotion reflects the social bonds between members of a community.<sup>152</sup> This social origin of punitive emotion is more valid because it is less vengeful; its sharedness makes it less personal, and thereby less susceptible to manipulation because it is bounded by the social order itself.<sup>153</sup>

In short, reconstructivism might be a relative of retributivism, but not a partner. They both hold that justice “demands punishment for wrongdoing.”<sup>154</sup> But the split centers on functionality; deontological retributivism is act-centric. In contrast, reconstructivism, built from social premises, is cognizant of the broader human welfare, but one that is socially and culturally constituted rather than morally abstracted.<sup>155</sup> This leaves room for different strands of reconstructivism across cultures,<sup>156</sup> making the reconstructivist “a criminal law relativist.”<sup>157</sup> The customs of those cultures inform the criminal law.<sup>158</sup> Its teleological roots are unfixed. They are unfixed because the Hegelian roots of reconstructivism contain a “moral center” that mandates criminalization of extremely abhorrent behaviors contrary to “reason and freedom,”<sup>159</sup> while refraining from

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<sup>151</sup> Kleinfeld, *supra* note 16, at 1530.

<sup>152</sup> *Id.*

<sup>153</sup> *See id.*

<sup>154</sup> *Id.* at 1531.

<sup>155</sup> *See id.* at 1530–31.

<sup>156</sup> *Id.* at 1549 (“[R]econstructivism . . . accepts a kind of cultural relativism with respect to criminal law.”).

<sup>157</sup> *Id.* at 1557.

<sup>158</sup> *Id.* at 1552–55. This is why Kleinfeld connects reconstructivism to Burkean conservative thought and labels it democratic: “The state in the criminal context should be the embodiment and protector of society’s lived moral culture – its way of life. Edmund Burke would approve. If Burke were a criminal theorist, he would be a reconstructivist.” *Id.* at 1543, 1555.

<sup>159</sup> *Id.* at 1560. This moral center is fundamentally Hegelian in its relation to the primacy of “reason and freedom.” *See id.* Which specific practices lie within this moral center is not entirely clear.

having the criminal law reach every vice.<sup>160</sup> Reconstructivism also cares more about victim dignity than that of offenders, although it concedes that retributive side-constraints might be necessary to fully protect offender dignity.<sup>161</sup> In the end, reconstructivism is “pro-social” given that its usage of emotions has solidaristic roots rather than abstract moral notions of desert.<sup>162</sup> It is a socially restorative theory of the criminal law, built from descriptive-normative premises.<sup>163</sup>

### III. RESTORATIVE RETRIBUTIVISM

As mentioned in the preceding parts, there are many versions of retributivism.<sup>164</sup> This Part argues that examination of non-deontological—or teleologically-minded retributivism with Aristotelian roots—indicates that reconstructivism is not the only route for those who view the criminal law as instrumental when it comes to social welfare. In fact, restorative retributivism shares many of the traits of reconstructivism, and arguably is its parent.<sup>165</sup> At the very least, it is a theory that has its own conception of wrongdoing that precedes the nature of punishment, and it is cognizant of the broader social effects of punishment in practice.

#### A. *The Roots of Restorative Retributivism*

Like reconstructivism, restorative retributivism presupposes a moral framework and understanding of political philosophy.<sup>166</sup>

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<sup>160</sup> *Id.* (“Because reconstructivism highly values embodied ethical life, . . . the theory does not see every objectionable social practice as abhorrent.”). Interestingly, this resembles the limits of human law. Richard W. Garnett, *Attempts, Complicity, Virtue, and the Limits of Law*, in CHRISTIANITY AND CRIMINAL LAW 238–39, 247, 249 (Norman Doe et al. eds., 2020).

<sup>161</sup> See Kleinfeld, *supra* note 16, at 1499, 1528–29. This suggests that reconstructivism is not the fully relational theory of criminal law that it presents itself to be, which is a point expanded upon in Part IV. See *infra* Part IV.

<sup>162</sup> As will be shown in this Part, this comparison is entirely contingent on the ruling out of a teleology underlying retributivism. See *infra* Part III. But if the *telos* for human life intrinsically contains social affairs, then retributivism looks as pro-social, if not more, than reconstructivism. See *id.*

<sup>163</sup> See *infra* Part III.

<sup>164</sup> See *supra* Part I.

<sup>165</sup> See *infra* Part IV.

<sup>166</sup> See Kleinfeld, *supra* note 16, at 1487, 1503, 1522–23.



Aristotle is its most well-known philosophical forefather, with medieval thinkers developing his theories.<sup>167</sup> The shared link to Aristotle means this version of retributivism shares roots with reconstructivism.<sup>168</sup>

The moral and political thought underlying this retributivism is fundamentally teleological, building from Aristotle's concept of *eudaimonia*.<sup>169</sup> Teleology underlies the moral concepts within this thought and the meaning of political society.<sup>170</sup> These understandings contrast sharply with a deontological retributivist like Kant, and modern retributivists, who operate from individualistic and classically liberal premises that also accept the fact/value distinction.<sup>171</sup> In contrast, *eudaimonia* is an inherently social concept, and what *is* informs what *should be*.<sup>172</sup> In the words of one scholar, it "requires an extended concern for friends and for others in the political community because only that sort of concern will lead to a full development of one's capacities and potential as a human being."<sup>173</sup>

Aristotelian teleology holds that happiness (*eudaimonia*) is the end of all human actions and the reference point from which the

<sup>167</sup> See ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 89–90 (1988); CHRISTOPHER DAWSON, RELIGION AND THE RISE OF WESTERN CULTURE 140–217 (1991) (describing Aristotelian influence in Middle Ages).

<sup>168</sup> See MACINTYRE, *supra* note 167, at 89–90; DAWSON, *supra* note 167, at 140–217 (1991); Kleinfeld, *supra* note 16, at 1486, 1491; Zachary Hoskins, *The Moral Permissibility of Punishment*, INTERNET ENCYCLOPEDIA PHIL., <https://iep.utm.edu/m-p-puni/>.

<sup>169</sup> See ARISTOTLE'S "NICOMACHEAN ETHICS" 33–52 (David Fernbach trans., Otfried Hoffe et al. ed., 2010); KORITANSKY, *supra* note 21, at 69–70; *Ethics Explainer: Eudaimonia*, *supra* note 56.

<sup>170</sup> Some might label this conception of retributivism as "aretaic" as it accords with virtue ethics. See, e.g., Kyron Huigens, *On Aristotelian Criminal Law: A Reply to Duff*, 18 NOTRE DAME J. L. ETHICS & PUB. POL'Y 465, 468–69 (2004) [hereinafter *A Reply to Duff*]; Huigens, *supra* note 49, at 1425. ("The law has a purpose, an end in view, which is to promote the greater good of humanity. The criminal law serves that end by promoting virtue.")

<sup>171</sup> KORITANSKY, *supra* note 21, at 69–70; Kleinfeld, *supra* note 16, at 1534–36.

<sup>172</sup> KORITANSKY, *supra* note 21, at 70, 85–86 n.36; *Ethics Explainer: Eudaimonia*, *supra* note 56.

<sup>173</sup> Huigens, *supra* note 49, at 1445 (citing TERENCE H. IRWIN, ARISTOTLE'S FIRST PRINCIPLES 393–406 (1988)).

goodness of actions should be determined.<sup>174</sup> In other words, the descriptive reality of seeking happiness indicates a normative value by which to evaluate the pursuit of that goal.<sup>175</sup> And that goal is not subjective; instead, it is objective and connected with moral and social realities. Why social realities? Because human beings are naturally social beings.<sup>176</sup> That is a cardinal principle of Aristotelian philosophy.<sup>177</sup> The social is contained within the moral significance of actions. How do we know that happiness has social roots? The act most capable of producing happiness—contemplation of God—is rational and social because the subject of contemplation is Being (or *person* in the Christianized version presented later by Scholastic Christian thinkers); thus, contemplation presumes a relationship.<sup>178</sup> Thus, the teleology underlying restorative retributivism leaves room for the social within the moral.

As happiness is the end of all actions, those actions are evaluated according to how they “contribute to [that] ultimate purpose.”<sup>179</sup> But happiness, as understood in this system, is not subjective.<sup>180</sup> While subjective considerations can inform the effect of an action, there are some actions that are contrary to happiness altogether.<sup>181</sup> How the object of an act comports with the goal of life is how that act is judged.<sup>182</sup> This is one reason why punishment is not viewed as

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<sup>174</sup> See THOMAS AQUINAS, *SUMMA THEOLOGICA*, pt. I of pt. II, question 1, art. 7 (Fathers of the English Dominican Province trans., Benziger Bros. ed. 1947) [hereinafter *SUMMA THEOLOGICA*].

<sup>175</sup> See *id.*

<sup>176</sup> *Id.* at pt. I of pt. II, question 61, art. 5.

<sup>177</sup> See ARISTOTLE, *THE POLITICS OF ARISTOTLE* 1253a7 (Peter L. Phillips Simpson trans., Univ. N.C. Press 1997) (c. 350 B.C.E).

<sup>178</sup> See ARISTOTLE’S “NICOMACHEAN ETHICS”, *supra* note 169, at 207 (describing contemplation as highest pursuit of happiness); *SUMMA THEOLOGICA*, *supra* note 174, at pt. I of pt. II, question 2, art. 8.

<sup>179</sup> KORITANSKY, *supra* note 21, at 72.

<sup>180</sup> *Id.* at 83.

<sup>181</sup> See *id.* at 72, 76. This resembles the Hegelian moral center referenced by Professor Kleinfeld when discussing the content and limits of the criminal law, although its content is different given other first principles. Kleinfeld, *supra* note 16, at 1489 n.2, 1499 n.27, 1543.

<sup>182</sup> This is one reason why the underlying moral philosophy remains teleological rather than deontological. See Kleinfeld, *supra* note 16, at 1527. For example, a prohibition on lying derives from the fact that lying hinders the liar’s ability to develop character. See *id.* at 76.

fundamentally evil in this tradition, although it is not viewed as necessarily good.<sup>183</sup> The margin of its contribution to the good is situational.

The objective nature of happiness stems from an order that exists eternally.<sup>184</sup> Human beings apprehend this end by virtue of their capacity to reason—their existence as “rational agents” who are deliberative.<sup>185</sup> That capacity is naturally ordered—personally and socially—and is the “rule and measure” of human behavior and the basis of morality and politics.<sup>186</sup> Observable and experienced human inclinations and practices inform this idea.<sup>187</sup> These principles cut against a relativistic moral framework, although they are cognizant of social realities in their application.<sup>188</sup> Following natural inclinations in accordance with the object of happiness constitutes the moral life.<sup>189</sup> This has individual and social implications: a “properly functioning human being” or community makes choices that comport with the “inherent purposiveness in those inclinations fundamental to human nature.”<sup>190</sup> Humans are more than the sum total of choices or acts, or the expressions of their freedom; they are an integrated whole necessarily tethered to societal givens and freedom serves the good.<sup>191</sup> This position counters the fact/value

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<sup>183</sup> SUMMA THEOLOGICA, *supra* note 174, at pt. I, question 48, art. 6.

<sup>184</sup> *Id.* at pt. I of pt. II, question 91, art. 1 (“Aquinas understands this to be the “eternal law.”). Of course, Aquinas’ formulation is theologically informed. See Floyd, *supra* note 52. Aristotle recognizes this order as fundamentally part of reality. Huigens, *supra* note 49, at 1447.

<sup>185</sup> Huigens, *supra* note 49, at 1447.

<sup>186</sup> KORITANSKY, *supra* note 21, at 80–81.

<sup>187</sup> *Id.* (“Simply stated, the natural law guides human beings through their fundamental inclinations toward the natural perfection that God, the author of the natural law, intends for them.”).

<sup>188</sup> See Manuel Velasquez et al., *Ethical Relativism*, MARKKULA CTR. APPLIED ETHICS (Aug. 1, 1992), <https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/ethical-relativism/>.

<sup>189</sup> SUMMA THEOLOGICA, *supra* note 174, at pt. I of pt. II, question 94, art. 2 (referencing the connection between natural inclinations and the natural law as “reason”).

<sup>190</sup> KORITANSKY, *supra* note 21, at 84.

<sup>191</sup> Huigens gives an analogy:

My horse has the ability to direct himself to cause external events; he can act, in our modern, limited sense, voluntarily. What he lacks, however, is the ability to conceive of himself as

distinction because what *should be* intrinsically exists with what *is*.<sup>192</sup> Human identity is inextricably tied to the social.<sup>193</sup> Thus, awareness and knowledge of what *is* generally, and what the *criminal law is and does*, can allow for understanding something like the purpose of punishment, and provide the grounds for critiquing a system that is in place. The criminal law and punishment, like the beings they purport to serve, subsist within a whole.

This teleological framework thus leaves room for an assessment of function, and one cognizant of broader human welfare. Punishment is thus connected to a robust conception of the common good that consists of “justice, law, friendship, the dignity of [humans], and fraternal love.”<sup>194</sup> As Peter Koritansky notes, this framework critiques Kantian ethics by pointing to how that system “separates morality from the ultimate *good for man*.”<sup>195</sup> Thus, the philosophical system within which restorative retributivism resides—or to use Professor Kleinfeld’s terminology, is “nestled”—takes stock of the broader social good.<sup>196</sup> Functionality is baked into the *telos* underlying restorative retributivism.<sup>197</sup>

Specifically, this approach holds that social relationships, communities, and societies are fundamentally natural and a constituent element of measuring human action.<sup>198</sup> This is in direct contrast to

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persisting through time, or as being possessed of certain capacities that can be developed to a greater or lesser extent, or as a member of a society, or as having a final good that depends on all of these things and more. My horse, in short, lacks the ability to shape a life into a satisfying and adequate whole.

Huigens, *supra* note 49, at 1447–48.

<sup>192</sup> KORITANSKY, *supra* note 21, at 85; Kleinfeld, *supra* note 16, at 1534–36.

<sup>193</sup> See KORITANSKY, *supra* note 21, at 84, 90.

<sup>194</sup> Lee J. Strang, *The Role of the Common Good in Legal and Constitutional Interpretation*, 3 U. ST. THOMAS. L.J. 48, 55 (2005).

<sup>195</sup> KORITANSKY, *supra* note 21, at 85.

<sup>196</sup> Kleinfeld, *supra* note 16, at 1549, 1556–57; Huigens, *supra* note 49, at 1426 (“[T]he criminal law cannot avoid the question of the good.”); *A Reply to Duff*, *supra* note 170, at 485 (noting how the features of a theory of punishment are the assumptions, arguments, and ethics upon which the theory draws).

<sup>197</sup> See Kleinfeld, *supra* note 16, at 1491, 1522–23.

<sup>198</sup> See THOMAS AQUINAS, COMMENTARY ON ARISTOTLE’S *POLITICS* 18 (Richard J. Regan trans., 2007). Koritansky describes how his view of Aquinas on this point differs from contemporary philosophers like John Finnis. KORITANSKY,

Kantian and classical liberal systems that contemplate human societies as ventures in social contract with otherwise atomistic individuals.<sup>199</sup> The distinction makes all the difference for the institution of punishment. That is because political society has the capacity to aid the moral well-being of individuals and itself.<sup>200</sup> Political community, by virtue of being social, illustrates the connection between the moral and the social.<sup>201</sup> The function of a community is to help individuals live well.<sup>202</sup> And the function of law is to promote the common good.<sup>203</sup> After all, the definition of law offered by those who developed Aristotelian thought is that law is a rule of reason, promulgated by a legitimate authority, ordered toward the common good.<sup>204</sup> Thus, punishment necessarily has a social component and necessarily must be cognizant of the common good. The criminal law is “purposive.”<sup>205</sup> This thinking lays the groundwork for a restorative retributivism that *is aware of social consequences* rather than turning a blind eye to the consequences of punishment.

#### B. *Restorative Retributivism and Punishment*

Restorative retributivism holds that punishment is simultaneously bad and good because it is a type of harm suffered by rational

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*supra* note 21, at 88–89, 93–94. Whereas Koritansky’s reading attributes the idea that societies are natural to Aquinas, resembling Professor Kleinfeld’s observation that social realities are “socially given,” Finnis’ view seems to be that human beings construct communities for “instrumental” purposes, but built from certain inherent goods. KORITANSKY, *supra* note 21, at 87 n.39, 89, 91–94; Kleinfeld, *supra* note 16, at 1508, 1518 Even if Finnis’ view is the right one, it would seem to move teleological retributivism even closer to reconstructivism, given the reconstructivist emphasis on human participation in *forming* social realities. See KORITANSKY, *supra* note 21, at 87 n.39, 89, 90–93.

<sup>199</sup> See KORITANSKY, *supra* note 21, at 68–69, 85.

<sup>200</sup> JACQUES MARITAIN, *THE PERSON AND THE COMMON GOOD* 29 (1st paperback ed.1966) (“Because the common good is the *human* common good, it includes . . . the service of the human person.”).

<sup>201</sup> See *id.*; KORITANSKY, *supra* note 21, at 90.

<sup>202</sup> KORITANSKY, *supra* note 21, at 90.

<sup>203</sup> *Id.* at 97 (“[T]he virtue of legal justice is primarily directed to the common good to a political community.”).

<sup>204</sup> See *SUMMA THEOLOGICA*, *supra* note 174, at pt. I of pt. II, question 90, art. 2; ARISTOTLE’S “NICOMACHEAN ETHICS”, *supra* note 169, at 83.

<sup>205</sup> Strang, *supra* note 194, at 194 (noting how law is a “*purposive instrument*”).

creatures against their will but is also necessary to restore order.<sup>206</sup> It is thus concerned “not only with responsibility,” but with making both the person punished and society better.<sup>207</sup> Punishment thus aims to “restor[e] . . . the equality of justice.”<sup>208</sup> By its orientation to an order of justice, punishment has a function.

This theory of punishment recognizes a communicative component as well. Punishment communicates by (1) restoring order; (2) reaffirming that the act was wrong; (3) promoting future compliance; (4) redressing the hurt caused to victim(s); and (5) acknowledging the responsibility and value of the offender.<sup>209</sup>

Criminal punishment is permitted only in the wake of crime, and crime presupposes wrongdoing. Thus, teleological retributivism has an understanding of the nature of crime and wrongdoing that precedes punishment. Fault is a precondition for criminal punishment.<sup>210</sup> Punishment can simultaneously be experienced as an evil by the one suffering it and a good “from the point of view of the institution inflicting it.”<sup>211</sup>

The moral basis for punishment rests in the natural inclinations constituted within individuals and social communities permeated by a natural, social order.<sup>212</sup> Thus, the “natural inclination to punish” is about the common good rather than private vengeance or some

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<sup>206</sup> See SUMMA THEOLOGICA, *supra* note 174, at pt. I, question 48, art. 5; THOMAS AQUINAS, ON EVIL 75–79 (Brian Davies ed. Richard Regan trans., 2003); AUGUSTINE, *On the Free Choice of the Will*, in ON THE FREE CHOICE OF THE WILL, ON GRACE AND FREE CHOICE, AND OTHER WRITINGS 3–4 (Peter King ed. & trans, 2010).

<sup>207</sup> Huigens says it this way: “We are concerned here not only with responsibility, but also with virtue.” Huigens, *supra* note 49, at 1449. A full development of how punishment can help to develop virtue is beyond the scope of this Article. Professor Huigens has argued that such a connection can exist. See Huigens, *supra* note 49, at 1449. Andrew Skotnicki has argued that Augustine and Thomas Aquinas developed this idea. See Skotnicki, *supra* note 49, at 796 n.16, 797 (referencing Thomistic anthropology that allows for the development of virtues).

<sup>208</sup> KORITANSKY, *supra* note 21, at 105.

<sup>209</sup> See *infra* notes 126–130.

<sup>210</sup> See Antony Duff & Andrew von Hirsch, *Responsibility, Retribution and the “Voluntary”*: A Response to Williams, 56 CAMBRIDGE U. PRESS 103, 105–06 (1997).

<sup>211</sup> KORITANSKY, *supra* note 21, at 109.

<sup>212</sup> SUMMA THEOLOGICA, *supra* note 174, at pt. I of pt. II, question 87, art. 1 (“[W]hoever sins, commits an offence against an order: wherefore he is put down, in consequence, by that same order, which repression is punishment.”).

deontological command.<sup>213</sup> Threats to the common good must be addressed, lest the common good, and the shared inclinations upon which it rests, be undermined.<sup>214</sup> These inclinations are not to be confused with vengeance.<sup>215</sup> Rather, they are tethered to the nature of things, particularly the nature of human beings as “rational agents” and their experienced reality.<sup>216</sup> They also form the basis for boundaries that limit punishment.<sup>217</sup> They are the moral center underlying punishment.<sup>218</sup>

How is this different from Kantian retributivism or modern-day retributivism? Teleological retributivism views desert as corresponding to the degree of transgression of the “order of . . . justice.”<sup>219</sup> It focuses on the harm that has occurred, the nature of the offense, the blameworthiness of the offender,<sup>220</sup> and their connection to

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<sup>213</sup> See KORITANSKY, *supra* note 21, at 110.

<sup>214</sup> KORITANSKY, *supra* note 21, at 110 (“[S]o also the natural inclination to punish criminals directs us to preserving the common good by retaliating against those who threaten it.”).

<sup>215</sup> See Kyron Huigens, *On Commonplace Punishment Theory*, 2005 U. CHI. L.F. 437, 441 (2005) (referencing how deontological retribution, while influential, has never been dominant and that retribution has been “chronically misconstrued as vengeance”).

<sup>216</sup> Huigens, *supra* note 49, at 1447. This is a really important point, and one perhaps confusing to the modern retributivist or utilitarian. Aquinas holds that “fundamental natural inclinations and the natural goods they cause us to desire are to be trusted.” KORITANSKY, *supra* note 21, at 121.

<sup>217</sup> *Id.* at 112 (“[A]nger becomes sinful when it desires the punishment of ‘one who has not deserved it, or beyond his deserts, or again contrary to the order prescribed by law, or not for the . . . maintaining of justice and the correction of defaults.’”) (quoting SUMMA THEOLOGICA, *supra* note 174, at pt. II of pt. II, question 158, art. 2); see also SUMMA THEOLOGICA, *supra* note 174, at pt. I of pt. II, question 46, art. 6 (referencing how anger is connected to desire for *justice*, in contrast to hatred).

<sup>218</sup> See *id.* at 128–29.

<sup>219</sup> SUMMA THEOLOGICA, *supra* note 174, at pt. I of pt. II, question 87, art. 6 (“[T]he act of sin makes man deserving of punishment, in so far as he transgresses the order of divine justice, to which he cannot return except he pay some sort of penal compensation, which restores him to the equality of justice . . . This restoration of the equality of justice by penal compensation is also to be observed in injuries done to one’s fellow men.”).

<sup>220</sup> A focus on blameworthiness is not an exclusively philosophical concept. See J.M.B. CRAWFORD & J.F. QUINN, *THE CHRISTIAN FOUNDATIONS OF CRIMINAL RESPONSIBILITY: A PHILOSOPHICAL STUDY OF LEGAL REASONING* 1–3

norms tethered to the common good.<sup>221</sup> This content of desert is how this version of retributivism is simultaneously formed and flexible. Philosophical reasoning informs the first two attributes (harm and the nature of the offense); social facts and natural inclinations (or community sensibilities that are shared) inform the latter two attributes.<sup>222</sup> This is why it is simultaneously retributive and restorative.

Punishment is both reactive—required by wrongdoing to set things right—and functional—to repair.<sup>223</sup> One medieval thinker noted that punishment is like “medicine . . . healing the past sin, but also preserving from future sin, or conducing to some good.”<sup>224</sup> Thus, punishment has a restorative character and preventive character, but the functional considerations are byproducts of the required desert. Punishment is therefore individually tailored *and* socially oriented.

The restorative character of punishment within restorative retributivism deserves more explanation. What precisely allows punishment to be restorative? First, punishment responds to an “overindulgent will” on the part of the offender.<sup>225</sup> The offender attempts to violate the order of justice by rejecting it. That is bad on two counts: one for the community and one for the offender. Punishment, therefore, is justified in part by its intrinsic relationship to an “order” within which humans reside together.<sup>226</sup> Accordingly, punishment serves as a correction to reset the order that was transgressed.

But lest one think that this resembles Kantian individualism, in reality, the correction is geared towards more than the individual will of the offender; rather, it is designed to address the “inequality

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(1991); Mitchell N. Berman, *Introduction: Punishment and Calpability*, 9 OHIO J. CRIM. L. 441, 443–44 (2021). Christian moral teaching has emphasized it for centuries. *See id.*

<sup>221</sup> *See* Strang, *supra* note 194, at 55.

<sup>222</sup> *See* KORITANSKY, *supra* note 21, at 110. Huigens puts it this way: “[T]he criminal law operates on the basis of thick norms: detailed, context-specific prohibitions that have an organic relationship to human history and the human situation, and that are cognate with moral norms.” *A Reply to Duff*, *supra* note 170, at 498.

<sup>223</sup> *See* KORITANSKY, *supra* note 21, at 105.

<sup>224</sup> SUMMA THEOLOGICA, *supra* note 174, at pt. I of pt. II, question 108, art. 4.

<sup>225</sup> KORITANSKY, *supra* note 21, at 105.

<sup>226</sup> Huigens, *supra* note 49, at 1456 (“The ends one ought to have is the special concern of the criminal law.”); KORITANSKY, *supra* note 21, at 135.



that comes about as a result of the crime.”<sup>227</sup> Thus, punishment is simultaneously offender and order centric, cognizant of a particular individual’s relation to and violation of that order. As Koritansky puts it: “When a kidnapper is deprived of his freedom by being imprisoned, the harm he suffers against his will balances his willful transgression of the law and assault upon on the common good.”<sup>228</sup> In other words, within this form of retributivism, punishment has an expressive component by addressing the defect from which society suffers by virtue of the individual’s action.<sup>229</sup> But that expressive component stems from the retributive nature of punishment to start<sup>230</sup>—the purpose being the correction of the order that was attacked by individual wrongdoing. That is a good related to the common good: “[t]he punishment . . . expresses and reaffirms the political community’s indignation at the crime committed and solders that commitment in the minds of potential criminals whose moral future still lay undetermined.”<sup>231</sup> There is purpose behind the punishment, including denouncing the act, reiterating the moral order,<sup>232</sup> and pushing the individual to something better.<sup>233</sup>

That contrasts sharply with Kantian retributivism that views punishment as an obligation, irrespective of purpose.<sup>234</sup> Punishment is mandatory regardless of its relation to the good; the obligation to punish comes from the violation of a universal maxim.<sup>235</sup> Hence, the bloodlust on the island makes sense because there is no principle guiding the exaction of punishment; there is only a command to do it. Thus, the Kantian retributivist loses sight of the social consequences of punishment or really any notion of human goods.

Another way teleological retributivism differs is with respect to the famous Kantian *lex talionis*, which has been criticized as

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<sup>227</sup> *Id.* at 124.

<sup>228</sup> *Id.*

<sup>229</sup> See JOHN FINNIS, AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY 213–14 (1998) (discussing how crime and wrongdoing offend the common good).

<sup>230</sup> KORITANSKY, *supra* note 21, at 109–10.

<sup>231</sup> KORITANSKY, *supra* note 21, at 162.

<sup>232</sup> SUMMA THEOLOGICA, *supra* note 174, at pt. I of pt. II, question 87, art. 6.

<sup>233</sup> See KORITANSKY, *supra* note 21, at 161.

<sup>234</sup> *Id.* at 125.

<sup>235</sup> *Id.* at 125, 127 (“For Kant, punishment is not, strictly speaking, a good to be pursued. It is simply right or just.”).

justifying horrific punishment practices.<sup>236</sup> The idea that punishment should be exacted in the same form as the crime itself seems barbaric, not to mention impossible to carry out for certain types of crimes. All of this stems from the Kantian obsession with addressing the act that violated universal maxims.<sup>237</sup> Further, as many have said before, deontological retributivism suffers from an abstraction and application problem: many moral philosophers disagree on the quantity of desert required, thereby rendering such a system impracticable.<sup>238</sup> But teleological retributivism need not suffer this fate. Because the focus is the overindulgent will, how it violated the order, and the quality of that violation, rather than the sheer nature of the act, punishment can be meted out in different ways. What matters for the calculation of desert is the seriousness of the crime and the offender's culpability as it has impaired the common good, and the degree of punishment should correspond to what is necessary to restore the order of equality that existed before the crime.<sup>239</sup>

"Deservingness" is grounded in a notion of the common good, naturally and socially informed, and mindful that equality is necessarily linked to justice.<sup>240</sup> To be fair, restorative retributivism is trafficking in non-empirical knowledge here. But punishment relates to the moral integrity of the political community, and the natural and social realities within that community inform that moral fabric.<sup>241</sup> Those realities are not entirely quantifiable. But interestingly, this philosophical commitment jives with modern research that has detected how communities and individuals can comprehend moral nuance when it comes to deserved punishment.<sup>242</sup> The forefathers of

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<sup>236</sup> See *id.* at 130.

<sup>237</sup> See *id.*

<sup>238</sup> Chad Flanders, *Retribution and Reform*, 70 MD. L. REV. 87, 100 n.79 (2010).

<sup>239</sup> See KORITANSKY, *supra* note 21, at 131 n.46 (referencing how Aquinas emphasizes culpability when identifying degree of desert).

<sup>240</sup> See Kleinfeld, *supra* note 16, at 1526.

<sup>241</sup> See KORITANSKY, *supra* note 21, at 159.

<sup>242</sup> See Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1832–80 (2007) (summarizing research); see also Alexis M. Durham III, *Public Opinion Regarding Sentences for Crime: Does It Exist?*, 21 J. CRIM. JUST. 1, 2 (1993) ("Virtually without exception, citizens seem able to assign highly specific sentences for highly specific events.");

restorative retributivism and the proponents of empirical desert are certainly not one and the same; nevertheless, the findings of those in support of empirically based notions of desert complement the premise of teleological retributivism that human inclinations about punishment are discernible, shared, and can inform the measure of punishment.

### C. *Restorative Retributivism and Human Law*

While restorative retributivism presumes a natural order that punishment should conform to,<sup>243</sup> what does that mean for human law? Because this form of retributivism is a theory of criminal law within a broader moral framework, it is important to realize the conception of law within that framework. For a teleological retributivist, human law is necessary given the under-determinate nature of the natural law. Humans thus become partners in constructing the order of justice, making “particular determination[s] of certain matters.”<sup>244</sup>

This is an important point that certainly distinguishes teleological retributivism from something like the *lex talionis* system proposed by Kant.<sup>245</sup> While punishment necessarily follows from the order of justice, the system leaves room for human beings to determine the mode of punishment. Human beings making that assessment, of course, should be simultaneously mindful of the order of justice and concrete realities within a particular political community.<sup>246</sup> Thus, we reach another way that restorative retributivism

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Robinson & Darley, *supra* note 34, at 35–36 (“The conclusion suggested by the empirical evidence is that people take account of a wide variety of factors and often give them quite different effect in different situations. That is, people’s intuitions of justice are not vague or simplistic, as claimed, but rather quite sophisticated and complex.”). This can be compared with the focus of scholars within the Aristotelian tradition, such as John Finnis, who focused on the reality that human beings share an interest in certain finite goods. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 64–69, 100–126 (1980) [hereinafter *NATURAL LAW AND NATURAL RIGHTS*].

<sup>243</sup> KORITANSKY, *supra* note 21, at 169.

<sup>244</sup> SUMMA THEOLOGICA, *supra* note 174, at pt. I of pt. II, question 91, art. 3.

<sup>245</sup> KORITANSKY, *supra* note 21, at 164.

<sup>246</sup> Robinson & Darley, *supra* note 34, at 9 (“fitting with modern studies that show “people widely share intuitions about whether a given offense is more or

exists within a political philosophy: by introducing the “prudence” of the decision-maker. As Koritansky writes, “[P]rudent legislators (or judges) may . . . impose differing punishments according to the various contingencies with which they are faced.”<sup>247</sup> More recently, when critiquing the difficulty with applying retributive theories of punishment, Chad Flanders has described how an institutional understanding of desert is warranted, focusing on *who decides* and *how* decisions are made.<sup>248</sup>

But those determinations about the kind of punishment are not freewheeling. Rather, they remain tethered to the moral center underlying the theory itself. Prudent decision-makers have liberty to determine the shape of punishment,<sup>249</sup> but it cannot be shapeless, and the essence of punishment itself cannot be undermined. Punishment must correspond to the basic function of law—promotion of the common good—and cannot frustrate that purpose. The kinds of punishment must be both functional and teleologically ordered. Thus, restorative retributivism has built-in constraints; but within those parameters, human creativity can be utilized.<sup>250</sup>

But aren’t there limits to what human beings can know about culpability and the seriousness of crime? Absolutely yes, although modern social science has demonstrated that remarkable consistency exists across cultures—and amongst laypersons—when it comes to calibrating punishment—an interesting validation of the

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less serious than another offense, but people and societies may disagree about what the punishment for the most serious offense will be.”); Robinson & Kurzban, *supra* note 242, at 1837–1858 (detailing studies showing remarkable consistency regarding rank ordering and nuance in punishment).

<sup>247</sup> KORITANSKY, *supra* note 21, at 140.

<sup>248</sup> Flanders, *supra* note 238, at 130–31. Flanders proceeds to reference John Finnis’ work on *determination*, “a process of choosing freely from a range of reasonable options none of which is simply rationally superior to the others.” *See id.* at 125 n.214 (citing Finnis, *supra* note 49, at 103).

<sup>249</sup> *See* Flanders *supra* note 238, at 108.

<sup>250</sup> Koritansky interestingly uses the metaphor of a house to describe this idea. *See* KORITANSKY, *supra* note 21, at 141. The punishment is the house, but the exact shape of the house is up to human determinations. *See id.* But essential components of the house, like a door, cannot be so out of bounds (like a one-foot-high door) that it undermines the essence of the house itself. *See id.* Note how similar this is to Professor Kleinfeld’s discussion about the fact/value distinction. Kleinfeld, *supra* note 16, at 1534–36.

teleological retributivist's core supposition that a moral core exists.<sup>251</sup>

That said, consistency does not necessarily mean those intuitions are correct, and a punishment regime in a liberal democratic order tends to look more to “reasoned judgments” than common intuitions.<sup>252</sup> Interestingly, restorative retributivism accounts for the modern critic's concern with heuristics and cognitive biases by recognizing the limits of human capabilities. The function of punishment is necessarily under-determinate given moral complexity.<sup>253</sup> In terms of administration, this means decision-makers strive to ascertain the proper degree of punishment correlating to the order of justice that was violated.<sup>254</sup> Interestingly, this line of thinking arguably made Thomas Aquinas—a Christian thinker who developed the Aristotelian roots described above—cautious when it came to inflicting capital punishment.<sup>255</sup> Because there was uncertainty as to what justice required for such a serious crime and in particular circumstances, Aquinas shifted the locus of the decision to a philosophical discussion about public safety and imminent threats.<sup>256</sup> James Whitman, in his masterful work on the theological roots of the reasonable doubt rule for juries, has illustrated how a similar principle advocating for choosing the safer way (when adjudicating difficult cases of guilt or innocence) characterized decision-making about crime and punishment in the pre-modern world.<sup>257</sup> This suggests cautious

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<sup>251</sup> See Robinson & Kurzban, *supra* note 242, at 1831–40 (discussing laypersons' intuitions of justice).

<sup>252</sup> See Robinson & Darley, *supra* note 34, at 8 (noting how belief that wrongdoing should be punished is intuitive rather than reasoned and how that fact has implications for policy questions).

<sup>253</sup> See Huigens, *supra* note 49, at 1468 (referring to “indeterminacy of Aristotelian virtue”).

<sup>254</sup> See Dena M. Gromet & John M. Darley, *Restoration and Retribution: How Including Retributive Components Affects the Acceptability of Restorative Justice Procedures*, 19 SOC. JUST. RSCH. 395, 400 (2006) (discussing social science research).

<sup>255</sup> See KORITANSKY, *supra* note 21, at 160 n.160, 164–65.

<sup>256</sup> See *id.* at 100, 164–65.

<sup>257</sup> Whitman, *supra* note 48, at 87–90 (discussing medieval theology that suggested humility in adjudication and its reemergence in late 1700s). Whitman refers to trial transcripts from the 1700s to show that this way of thinking persisted. *Id.* at 87, 91; see *Old Bailey Proceedings Online*, 3 June 1789, Trial of John

humility in human decision-making for more serious crimes, and perhaps for all crimes.

This approach leaves room for mercy<sup>258</sup> that is anathema to Kantian retributivism;<sup>259</sup> restorative retributivism, recognizing the multifaceted nature of the good, and thereby wrongdoing, evaluates more than the external act itself. Moreover, there are limits to the capabilities of human punishment, and society would be wise to emphasize its medicinal character—for individuals and communities—rather than its punitive side.<sup>260</sup> Thus, restorative retributivism accounts for the reconstructive nature of punishment, nods to humility in application,<sup>261</sup> and leaves room for the modern ideal of a self-governing, democratic, community.<sup>262</sup>

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Shepherd (t17890603-43), <https://www.oldbaileyonline.org/browse.jsp?name=17890603>; see also *Old Bailey Proceedings Online*, 3 June 1789, Trial of George Green (t17890603-14), <https://www.oldbaileyonline.org/browse.jsp?name=17890603> (defendant was capitally punished within a month of being convicted of violent theft and highway robbery). To be fair, Whitman’s main argument is that choosing a safer path was designed to protect judges, not defendants, out of concern for the decision-maker’s soul. Whitman, *supra* note 48, at 92. Whitman traces this thought from Saint Augustine to the 1700s. See *id.* at 98. For example, Ambrose, when discussing whether judges should be permitted to communion in the Church, suggested that judges should tend towards mercy in their decision-making. See Whitman, *supra* note 48, at 92 n.18 (describing influence of moral theology on concept of “reasonable doubt”); Albert W. Alschuler, *Justice, Mercy, and Equality in Discretionary Criminal Justice Decision Making*, 35 J. L. RELIGION 18, 22 (2020) (referencing how mercy can serve as an enhancement of “earthly justice” deemed necessary).

<sup>258</sup> See Alschuler, *supra* note 257, at 22.

<sup>259</sup> See Jeffrie G. Murphy, *Punishment, Forgiveness, and Mercy*, 35 J. L. RELIGION 5, 14 (2020) (referring to Kantian views combined with humility in one’s attitude while meting out punishment).

<sup>260</sup> SUMMA THEOLOGICA, *supra* note 174, at pt. I of pt. II, question 87, art. 3.

<sup>261</sup> Murphy, *supra* note 259, at 11 (quoting *Johnson v. Phelan*, 69 F. 3d 144, 152 (7th Cir. 1995)). Murphy quotes a dissenting opinion by Judge Posner that powerfully illustrates why humility is necessary to ensure human dignity in punishment: “We must not exaggerate the distance between ‘us,’ the lawful ones, the respectable ones, and the prison and jail population; for such exaggeration will make it too easy for us to deny that population the rudiments of humane consideration.” *Phelan*, 69 F. 3d at 152.

<sup>262</sup> See *A Reply to Duff*, *supra* note 170, at 484.

#### IV. COMPARING RECONSTRUCTIVISM AND RESTORATIVE RETRIBUTIVISM

How do these two theories of criminal law compare? It seems there are two possibilities: (1) restorative retributivism is actually reconstructivist, or (2) reconstructivism is a socio-centric version of this retributivism, making them relatives.<sup>263</sup> If the latter, the common root (or parent) is a return to teleological thinking<sup>264</sup> in punishment,<sup>265</sup> with the key distinction being the reconstructivist's openness to relativistic criminal law because of its emphasis on the social fabric.<sup>266</sup> A discussion of their similarities and differences can potentially illuminate the answer to the taxonomical question.

First, each theory emphasizes that the criminal law and punishment are fundamentally teleological endeavors.<sup>267</sup> Both exist for a purpose, and the key question is identifying what that purpose *is* and *should be*. And that purpose is not exclusively tangible, such as the utilitarian purpose of promoting the public safety.<sup>268</sup> The difference seems to lie with the source for the *telos*.<sup>269</sup> Whereas the restorative retributivist locates purpose in metaphysical reflection on human nature, moral realities built from some observation, and moral positions held in common, reconstructivism emphasizes the purely social realities, and what can be normatively deduced from empirical social realities.<sup>270</sup> This enables the reconstructivist to arguably be more pluralistic,<sup>271</sup> but perhaps dangerously relativistic. On the flip

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<sup>263</sup> In either instance, restorative retributivism holds that punishment was necessarily connected to teleology first. See Kleinfeld, *supra* note 16, at 1533–34, 1537.

<sup>264</sup> See KORITANSKY, *supra* note 21, at 72.

<sup>265</sup> See *id.* at 133 (describing punishment in retributivism as a means of repressing those who “rise up” against man); Kleinfeld, *supra* note 16, at 1488 (explaining that punishment “defends and reinforces” a fragile social good).

<sup>266</sup> See Kleinfeld, *supra* note 16, at 1488, 1500.

<sup>267</sup> See *id.* at 1490, 1523.

<sup>268</sup> See KORITANSKY, *supra* note 21, at 100, 102.

<sup>269</sup> Kleinfeld, *supra* note 16, at 1490–91.

<sup>270</sup> See *id.* at 1522–23.

<sup>271</sup> *Id.* at 1527, 1533–34, 1536–38. It seems that reconstructivism is built from the idea that social facts are observable and tangible, such that the norms reified by the criminal law are grounded in empirical reality. See *id.* Of course, the idea that labeling facts tangible or observable makes them objective and neutral is contentious. Walter B. Kennedy, *Principles or Facts?*, 4 FORDHAM L. REV. 53, 59

side, the restorative retributivist has to answer against charges of non-demonstrable, metaphysical principles and less flexibility in the joints.<sup>272</sup>

With that said, it would be a mistake to think that both theories do not contain first principles based on observing the realities of human affairs.<sup>273</sup> Reconstructivism is descriptive and normative, and so is restorative retributivism.<sup>274</sup> Both theories rest on the observation that human beings are naturally social actors, which is not even a question, having been empirically verified for ages.<sup>275</sup> They are both children of Aristotelian thought in this regard, thereby presuming the reality and necessity of the integrated *polis*.<sup>276</sup> Thus, both theories presume that crime is fundamentally anti-social and that punishment, as a response to crime, is pro-social and necessary to repair the social fabric.<sup>277</sup>

Both recognize that the criminal law is simultaneously purposeful and functional. The purpose for punishment is the same as its justification. The criminal law is then downstream from moral and social reality. But for restorative retributivism, the basis of criminal law is not exclusively social affairs.<sup>278</sup> Human law represents an attempt by a legitimate authority to apply morally true norms to concrete situations, mindful of social circumstances, and cognizant of the common good.<sup>279</sup> But this theory is not as ground up as

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(1935). As Walter B. Kennedy once said, facts can be “just as elusive and nimble as principles and rules.” *Id.*

<sup>272</sup> This might be up for debate amongst Aristotelian scholars. For example, my sense is that Alasdair MacIntyre argued persuasively that applying Aristotelian virtue ethics does not look the same in all places, such that social realities can alter what it means to concretely and *practically* live a virtuous life. See Christopher Stephen Lutz, *Alasdair Chalmers MacIntyre*, INTERNET ENCYCLOPEDIA PHIL., <https://iep.utm.edu/mac-over/>. This seems embedded in the Aristotelian conception of practical reason as *the essential ingredient* on the path to *eudaimonia* (happiness in virtue). *Ethics Explainer: Eudaimonia*, *supra* note 56. AS such, restorative retributivism could fit *within* a liberal regime, even if it is not wholly *of* it.

<sup>273</sup> Kleinfeld, *supra* note 16, at 1521–23.

<sup>274</sup> *Id.* at 1490, 1521–23.

<sup>275</sup> *Id.* at 1493 n.11.

<sup>276</sup> *Id.*; HONNETH, *supra* note 17, at 7, 11–30.

<sup>277</sup> See Kleinfeld, *supra* note 16, at 1500, 1505–06.

<sup>278</sup> *Id.* at 1491–92.

<sup>279</sup> See KORITANSKY, *supra* note 21, at 125–26.



reconstructivism. The reconstructivist, on the other hand, recognizes law as fully downstream from culture born of freedom.<sup>280</sup> The social order that the reconstructivist purports to serve with law determines the content of that law; it does not have other sources, which it likely considers too mystical to comprehend should they go beyond tangible expressions of freedom.

Nevertheless, both theories have a rich understanding of what the law and punishment purport to serve.<sup>281</sup> The reconstructivist points to human welfare, again tethered to socially-derived norms.<sup>282</sup> The restorative retributivist looks toward a robust notion of the common good, which is a concept developed by thinkers for the past two millennia.<sup>283</sup> The common good essentially means achievement of the objective human good held in common, and on an individual and societal level, that is necessary for human flourishing.<sup>284</sup> That is a confluence of natural law-based virtue and social realities,<sup>285</sup> and it could mean different practical ends for different communities. But there is a moral core that derives content from more than social relations. That is a marked distinction from the reconstructivist, whose moral center is determined by social realities,<sup>286</sup> and thus, open to being relativistic across cultures.

The moral center within both theories also allows for an understanding of the nature of wrongdoing (crime), which then informs the response (punishment).<sup>287</sup> For the restorative retributivist, crime

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<sup>280</sup> See Kleinfeld, *supra* note 16, at 1528–29.

<sup>281</sup> See *id.* at 1488 (explaining that punishment serves to defend and reinforce a fragile social good); KORITANSKY, *supra* note 21, at 133 (describing punishment in retributivism as a means of repressing those who rise up against man).

<sup>282</sup> See Kleinfeld, *supra* note 16, at 1526–27.

<sup>283</sup> KORITANSKY, *supra* note 21, at 125–26 (detailing Aquinas’s understanding that punishment serves to preserve the common good).

<sup>284</sup> ARISTOTLE, NICOMACHEAN ETHICS, Book 1, § 2 (c. 350 B.C.E) [<http://classics.mit.edu//Aristotle/nicomachaen.1.i.html>] (“For even if the end is the same for a single man and for a state, that of the state seems at all events something greater and more complete whether to attain or to preserve; though it is worthwhile to attain the end merely for one man, it is finer and more godlike to attain it for a nation or for city-states. These, then, are the ends at which our inquiry aims, since it is political science, in one sense of that term.”).

<sup>285</sup> KORITANSKY, *supra* note 21, at 109.

<sup>286</sup> Kleinfeld, *supra* note 16, at 1512.

<sup>287</sup> See *id.* at 1502.

is an offense against the natural moral order,<sup>288</sup> whether automatically apparent in the case of *malum in se* offenses,<sup>289</sup> or in the case of human created crimes, an attempt to determine how that order applies in concrete social situations. It is also indicative of an individual's failure to pursue the right ends as communicated by the criminal law,<sup>290</sup> in addition to subverting the social order.<sup>291</sup> Thus, like reconstructivism, restorative retributivism has an understanding of crime that precedes the content of punishment.<sup>292</sup>

Both theories also conceive punishment as a direct response to the violated order.<sup>293</sup> This is why both theories hold that punishment is necessary and is one reason why reconstructivism seems to be a socio-centric theory of desert. It arguably is a kind of retributivism, particularly retributivism that contemplates crime and punishment as teleological endeavors. But the reason for the response is also why reconstructivism might be its own species of teleological punishment theory. This is because the reconstructivist's grounds for punishment are fundamentally human and descriptively social;<sup>294</sup> they are not meta-ethical, although they might be metaphysical in the sense that they are intangible principles reflected in the social order. The difference seems to lie in the understanding of the grounds for desert.

This is the crux of the taxonomical question. While the reconstructivist conceives social affairs as dictating the terms of criminal law and punishment,<sup>295</sup> does the reconstructivist think that those social affairs are entirely determined by human will? If any are socially given, beyond human creation, and dictated by the very nature of sociality, in the sense that they are connected to some natural,

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<sup>288</sup> See KORITANSKY, *supra* note 21, at 105.

<sup>289</sup> See *id.* at 104; Richard L. Gray, *Eliminating the (Absurd) Distinction Between Malum in Se and Malum Prohibitum Crimes*, 73 WASH. U. L.Q. 1369, 1370 (1995).

<sup>290</sup> See R.A. DUFF, *THE REALM OF CRIMINAL LAW* 37 (2018) (explaining that the "concept of the criminal law," or what makes it distinctive, is its expression of community condemnation); Sandra G. Mayson, *The Concept of Criminal Law*, 14 CRIM. L. & PHIL. 447, 449 (2020).

<sup>291</sup> Kleinfeld, *supra* note 16, at 1529.

<sup>292</sup> *Id.* at 1505–06.

<sup>293</sup> See KORITANSKY, *supra* note 21, at 107.

<sup>294</sup> Kleinfeld, *supra* note 16, at 1498–99.

<sup>295</sup> See *id.* at 1519, 1523.

metaphysical reality beyond human control, then reconstructivism seems to be a strand of teleological retributivism. The grounds for desert really are more than the social—desert is how the social *reflects* a moral order of which human freedom is a part, but not determinative.<sup>296</sup> But if the reconstructivist conceives punishment as a response to an attack on the exclusively *human-created* social system,<sup>297</sup> then reconstructivism operates from a different first premise: the idea that while human beings are naturally social, none of the elements of that sociality are beyond their control (or put differently, humans are fully free to shape social realities),<sup>298</sup> and at the very least, only the ones that are observable should inform punishment.<sup>299</sup> This anthropological difference is crucial.

Perhaps that makes sense because the social is more observable, or because autonomy is the preeminent value in liberal society. And in a democratic republic, empirical observation is the language of policy debate.<sup>300</sup> And the social purports to make criminal law and punishment seem more about relationships,<sup>301</sup> and the social fabric that binds us.<sup>302</sup> But the idea that the reconstructivist more richly comprehends the relational nature of criminal law than the restorative retributivist seems misplaced.

Remember that reconstructivism views punishment as a response to an attack on the social order.<sup>303</sup> That social order is the idea—to use the language of Hegel—that needs “reaffirming.”<sup>304</sup> Restitching previously existing harmony is *the* objective.<sup>305</sup> This sounds nothing like relationship. In fact, it sounds a lot like the world of concepts, and abstract ones at that. It seems like the individual (remember how the reconstructivist shies away from the

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<sup>296</sup> See Kleinfeld, *supra* note 16, at 1525–26.

<sup>297</sup> See *id.* 1506, 1512–13, 1525.

<sup>298</sup> See *id.* at 1499, 1538.

<sup>299</sup> This key distinction is also why reconstructivism seems closer aligned with liberal theories of justice that presume the social contract as the origin of society. See Kleinfeld, *supra* note 16, 1488–89.

<sup>300</sup> See *id.* at 1553–54.

<sup>301</sup> See *id.* at 1522–24, 1553–54.

<sup>302</sup> *Id.* at 1500.

<sup>303</sup> See *id.* at 1489–90, 1525–26, 1529.

<sup>304</sup> *Id.* at 1489–90, 1529.

<sup>305</sup> See *id.*

condition of the offender)<sup>306</sup> could get lost in this framework because, after all, how the response addresses the social discord created by the crime is what matters. The right precedes the good.<sup>307</sup> Couldn't reconstructivism be just as callous to individuals as the Kantian retributivist in this regard?<sup>308</sup> The reconstructivist cares about reaffirming maxims socially derived and normatively worthy of retaining.<sup>309</sup> But what matters is the holding up of the norm, not the individuals involved.<sup>310</sup> It sounds very close to the cold qualities of Kantian retribution that modern critics detest.<sup>311</sup> Deontological duty gets replaced by solidarity (and the concept thereof), which is the priority.<sup>312</sup>

In contrast, restorative retributivism, by having a notion of individual right and wrong that informs social considerations, seems to be in a position where it can tailor punishments more uniquely to *individuals*.<sup>313</sup> Kleinfeld says Kantian retributivism is offender-centric.<sup>314</sup> That seems a bit off; rather, it seems to be offense-centric, focused entirely on the nature of the offense and nothing else.<sup>315</sup> Restorative retributivism is actually offender and offense-centric, in that it discerns the individual consequences for the offender, and the social consequences that punishment will have for victims and the broader community.<sup>316</sup> This style of retributivism is significantly different than reconstructivism in that it takes stock of the social, but does not over-prioritize it.<sup>317</sup> It situates punishment within a broader

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<sup>306</sup> See *id.* at 1497–98, 1514, 1516, 1520, 1523–24, 1529, 1531.

<sup>307</sup> Huigens, *supra* note 49, at 1436 n.43. Huigens has emphasized how this is the fruit of Rawlsian political philosophy informing the criminal law. *Id.* (noting how modern philosophers of the criminal law operate within a deontological and liberal paradigm that “seek[s] a fair arrangement of society . . . defer[ring] the question of the good”).

<sup>308</sup> See Kleinfeld, *supra* note 16, at 1529.

<sup>309</sup> *Id.* at 1490.

<sup>310</sup> See *id.*

<sup>311</sup> See *id.* at 1527.

<sup>312</sup> See *id.* at 1527 n.119, 1546–47, 1549, 1560–61.

<sup>313</sup> See *id.* at 1528–29.

<sup>314</sup> See *id.* at 1527–29 (“Retributivism in the Kantian tradition is not *teleological* but *deontological*: part of its identity consists in rejecting means-end thinking.”).

<sup>315</sup> See *id.*

<sup>316</sup> See *id.*

<sup>317</sup> See *id.* at 1530.

moral framework, naturally and socially determined, that also takes individual goods into account.<sup>318</sup> Restoration is the fruit of retribution tethered to the situation of the individual and the needs of the community.<sup>319</sup> In contrast, the reconstructivist emphasizes the social, which could lead to some perverse results depending on the social framework underlying the criminal law, not to mention historically-driven social realities and inequities.<sup>320</sup>

Another way of describing this style of retributivism is that it is personalist.<sup>321</sup> The criminal law and punishment thus operate to serve the development of persons, both individually and within the community.<sup>322</sup> As Rick Garnett has mentioned, such an account emphasizes “character, dispositions, projects, vocation, habits, and habituation. It asks not only ‘what was done?’ or ‘what came about and by whom?’ but also ‘*what sort of person did this?*’”<sup>323</sup> Zooming in on the *personal*—and its relation to the social—is ground for a

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<sup>318</sup> This is consistent with the idea that conceiving appropriate desert is possible and not altogether mystical. See Robinson & Kurzban, *supra* note 242, at 1835; Kleinfeld, *supra* note 16, at 1508, 1526; see also JOHN KLEINIG, PUNISHMENT AND DESERT 114 (1973) (“What follows from [attempts to exactly define desert] is not the absurdity of specific desert claims but only the absurdity of expecting them to function like statements of empirical quantity.”). “Ordinal ranking” is feasible once an endpoint for the most serious offense is determined. Robinson & Darley, *supra* note 34, at 34 (“[O]nce a society sets the endpoint of its punishment continuum, the ordinal ranking of cases along that continuum will produce quite specific punishments.”).

<sup>319</sup> Interestingly, R.A. Duff has lauded this type of restorative justice achieved via retribution. R.A. Duff, *Restorative Punishment and Punitive Restoration*, in RESTORATIVE JUSTICE AND THE LAW 82 (Lode Walgrave ed., 2002) (“Our responses to crime should aim for ‘restoration’, for ‘restorative justice’: but the kind of restoration that criminal wrongdoing makes necessary is properly achieved *through a process of retributive punishment.*” (emphasis added)).

<sup>320</sup> Another way of thinking about this is as follows: the restorative retributivist has an argument against egregious systems of criminal law that stem from egregious social practices and norms. See Kleinfeld, *supra* note 16, at 1547, 1550. The reconstructivist has a harder time responding to that situation, which is why it seems Professor Kleinfeld concedes that retributivist constraints might be necessary to rein in reconstructivism in social circumstances. *Id.* at 1529 n.122.

<sup>321</sup> SMITH, *supra* note 42, at 406–08.

<sup>322</sup> See *id.*; Huigens critiques instrumental explanations that fail to view a person as “a full moral agent, with her own scheme of ends, her own talents and abilities, her own strengths of character, and so on.” Huigens, *supra* note 49, at 1438.

<sup>323</sup> Garnett, *supra* note 160, at 239.

richer notion of the meaning of punishment and its aiming towards flourishing, leading to criminal law that *serves* and *restores* rather than *imposes* and *inflicts*.<sup>324</sup>

#### V. RESTORATIVE RETRIBUTIVISM AND THE CURRENT CRIMINAL JUSTICE SYSTEM

If restorative retribution is an alternative to reconstructivism, or other theories of punishment, its application to modern problems of criminal justice is a test of its viability. The above sections communicate that this theory's core is about purpose.<sup>325</sup> In particular, the purpose behind punishment is connected to human flourishing: without that tethering, punishment can become reckless, degrading, other-creating, and undermine itself.<sup>326</sup> This, I propose, is why restorative retributivism is fundamentally *personalist* and *relational*: the social nature of punishment—its effects on the broader community and the punished individual's ability to rejoin that community—is of the utmost concern.<sup>327</sup> The purpose of punishment can simultaneously be appropriate retribution and preparation for reintegration when the development of individual and social well-being underlies the entire project.<sup>328</sup> As Bill Stuntz put it, punishment can

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<sup>324</sup> See SMITH, *supra* note 42, at 406–08; Flanders, *supra* note 238, at 87 (assessing the connection between punishment theory and practice). Of course, there can be a disconnect between an aspiration or ideal and practice. See Flanders, *supra* note 238, at 87.

<sup>325</sup> *Supra* Parts I–IV.

<sup>326</sup> See Murphy, *supra* note 259, at 15.

<sup>327</sup> Skotnicki, *supra* note 49, at 799 (referencing historical Church teaching as suggesting that “rehabilitation of the offender and his or her eventual reincorporation into the ecclesial social body is the goal of punishment”).

<sup>328</sup> Winston Churchill, Home Secretary, Speech Delivered to House of Commons (July 20, 1910), in WINSTON S. CHURCHILL, HIS COMPLETE SPEECHES: 1897-1963, VOLUME II: 1908–13, at 1598 (Robert Rhodes James ed., 1974) (“The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country . . . [This civilized attitude includes] unfaltering faith that there is a treasure, if you can only find it, in the heart of every man.”).

be viewed as “sometimes necessary but always [potentially] dangerous,” demanding caution when exercised.<sup>329</sup>

This results in a key similarity with reconstructivism and a key difference that matters in terms of application. Whereas both theories—given their concern with the social fabric—are inherently democratic, reconstructivism tends towards instillation (or re-installation) of custom.<sup>330</sup> Deference is shown to the way the things are or have been. For the reconstructivist, this is a great benefit because, in the words of Kleinfeld, it is Burkean.<sup>331</sup> Radical change is not the work of the criminal law. Criminal justice reform is therefore likely to be piecemeal, the work of “supermajorities rather than simple majorities”, and the reconstructivist is “skeptical of projects in social reform by means of the criminal law.”<sup>332</sup>

Restorative retributivism, by contrast, seems to have the capacity—perhaps paradoxically given its historical roots—to be more countercultural in the current moment. By its nature, reflective on human nature, it goes to first principles rather than first practices.<sup>333</sup> That is because its core invites a moral reflection that goes beyond social realities.<sup>334</sup> Its nestling inside a broader theory of law—again mindful of *telos* and the common good (that goes beyond public safety)<sup>335</sup>—and its connection to the idea of virtue and flourishing<sup>336</sup> suggests the criminal law has the capacity to affect social reform, while not being the primary catalyst. Perhaps it is accurate to say that the restorative retributivist believes there is more that the

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<sup>329</sup> STUNTZ, *supra* note 2, at 55; *see also* Murphy, *supra* note 259, at 15 (noting how humility “will incline those who would punish to see this not as something to be celebrated but as something to be done with great regret and always with a sense of loss and disappointment, always open to the possibility that the offender has failed us because to some degree we have failed him.”). Whitman makes a similar point about pre-modern approaches to criminal law and punishment, where the awesome spectacle of punishment was viewed as necessary but also an expression of sorrow in the community. Whitman, *supra* note 48, at 84–85.

<sup>330</sup> Kleinfeld, *supra* note 16, at 1552 (“[I]t follows that criminal law must begin in custom and maintain its connection to custom.”).

<sup>331</sup> *Id.* at 1555.

<sup>332</sup> *Id.*

<sup>333</sup> *See* Flanders, *supra* note 238, at 97–98.

<sup>334</sup> *Id.* at 103–04.

<sup>335</sup> *See* KORITANSKY, *supra* note 21, at 100, 102; Kleinfeld, *supra* note 16, at 1549, 1556–57.

<sup>336</sup> *See* Kleinfeld, *supra* note 16, 1493–94, 1532.

criminal law can do—not in terms of more criminalization—but in the sense that the criminal law, as it currently operates, leaves much to be desired.<sup>337</sup>

Thus, the core contribution of the restorative retributivist in this moment is that she demands an accounting of what our system does, why it does it, and whether it accords with a robust and deep sense of human flourishing rather than a thin one focused exclusively on quantifying crime rates, the costs of jail time, and how to engage in social control *en masse*.<sup>338</sup> That is ambitious, aspirational, and reorienting.<sup>339</sup> But it also comes with a dose of humility about the project of the criminal law, such that the criminal law and punishment do not become the antidote to social ills better addressed by other systems of law or private actors.

What does this mean for some of the current issues facing the criminal justice system, such as mass criminalization and incarceration, the encroachment of the criminal law onto the civil law, the conflict between punitive and therapeutic interventions for substance users,<sup>340</sup> plea-bargaining and the decline of the jury trial,<sup>341</sup> recidivism,<sup>342</sup> the social consequences of incarceration on families<sup>343</sup> and communities, and the effect of public criminal records on reentry?<sup>344</sup> While a full accounting is beyond the scope of this article, it is worth mentioning some of the questions that a restorative retributivist might ask when confronted with modern day criminal practices.

Given its Aristotelian roots, it is likely the case that this line of thought would find the significant enlargement of the criminal

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<sup>337</sup> See STUNTZ, *supra* note 2, at 55 (discussing pathological politics of criminal law).

<sup>338</sup> See Stephanos Bibas, *Forgiveness in Criminal Procedure*, 4 OHIO ST. J. CRIM. L. 329, 329 (2007).

<sup>339</sup> See Flanders, *supra* note 238, at 104, 110–11.

<sup>340</sup> See Murphy, *supra* note 259, at 16 (describing punishment as a last resort to deal with drug problems).

<sup>341</sup> Gramlich, *supra* note 2.

<sup>342</sup> *Recidivism*, NAT'L INST. JUST., <https://nij.ojp.gov/topics/corrections/recidivism> (last visited May 15, 2021).

<sup>343</sup> Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, NAT'L INST. JUST., May 2017, at 1–3.

<sup>344</sup> *Re-Entry*, ACLU, <https://www.aclu.org/issues/smart-justice/re-entry> (last visited May 15, 2021).



law—and corresponding sentences in the wake of conviction—a bit puzzling.<sup>345</sup> For an Aristotelian is primarily concerned with the habituation of virtue, not social control.<sup>346</sup> Whether the three felonies that many Americans potentially commit every day under the federal code<sup>347</sup> have any connection to the development of virtuous character is a legitimate question. The core of criminal law once communicated the behaviors most thought deserving of punishment; the norm today is an overbroad criminal law that makes convictions easy to achieve via plea bargain.<sup>348</sup> In addition to the heightened severity of punishment, its frequency is off the charts as a break from American history,<sup>349</sup> and the incarceration of racial minorities is astronomical.<sup>350</sup>

That is not to say that this theory only conceives of a criminal law with *malum in se* prohibitions; rather, it asks whether the criminalization of a particular behavior really does get at the core of who we are, and what is necessary for people to develop right habits and good character. That is not to encourage lawbreaking. Certainly, the breaking of “minor” laws is disruptive to the law overall. Rather, it is to encourage serious consideration about where the criminal law should stop, and where other behavior-shaping forces make more sense.

It also would probably view the modern criminal law’s practice of letting most charges originate with a few discretionary decisions by insiders as problematic. Because of its cognizance of the social elements of the criminal law and punishment, the very acts of the state associated with enforcement of the criminal law should be social.<sup>351</sup> Jury trials were initially conceived as opportunities for the exercise of moral responsibility by the community,<sup>352</sup> but now are relegated to the sidelines as most cases are adjudicated via plea-

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<sup>345</sup> See *A Reply to Duff*, *supra* note 170, at 468.

<sup>346</sup> *Id.*

<sup>347</sup> HARVEY SILVERGATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (2011).

<sup>348</sup> STUNTZ, *supra* note 2, at 39.

<sup>349</sup> See *id.* at 47-50 (noting how frequency of punishment is astronomical, even if drug cases are removed from the statistics).

<sup>350</sup> *Id.*

<sup>351</sup> Kleinfeld, *supra* note 16, at 1522.

<sup>352</sup> WHITMAN, *supra* note 48, at 146 (“[J]ury trial was the scene of complex drama of moral responsibility.”).

bargaining.<sup>353</sup> As such, they were a check on the defendant, impulses of the community, and professional prosecutors.<sup>354</sup> Widespread charging by information, without any sort of normative check by the community, makes that more difficult.<sup>355</sup>

While restorative retributivism has a goal in mind for punishment, it leaves open the mode for accomplishing that goal. Again, it operates from the standpoint that punishment is necessary but easily abused.<sup>356</sup> This is one manifestation of its fixed yet flexible nature: parameters and considerations are present, as is wiggle room in the joints. When the boundaries are clear, creativity (consonant with dignity) can flourish.<sup>357</sup> The under-determinate nature of law leaves room for human discretion and decision-making, reflective of how a *form* of punishment accords with the underlying restorative *purpose* of punishment. It also is open to critically assessing the “American tendency to deal with crime simply by adding more years on to oppressive mandatory sentences . . . .”<sup>358</sup>

This, of course, is not easy work. Tailoring punishment lends itself neither to mathematical formula nor natural instinct. Rather, it requires practical reason and a dose of humility that does not aim to be too ambitious. As Koritansky puts it, “[T]o inflict a punishment that hinders the basic function of human law or frustrates the purposes of the institution of punishment itself would constitute a violation of the natural law the same as having no institution of punishment *at all*.”<sup>359</sup> Human-designed punishment should redress disorder, communicate what is right and good,<sup>360</sup> and aim to make people and institutions better. That is what makes this form of retributivism

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<sup>353</sup> Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731, 733–35 (2010) (discussing history of jury trial, Sixth Amendment right, and how its reemergence could disrupt plea-bargaining norms).

<sup>354</sup> *Id.*

<sup>355</sup> See Josh Bowers, *The Normative Case for Normative Grand Juries*, 47 WAKE FOREST L. REV. 319, 358 (2012) (detailing how modern system addresses lower-level crimes with little community involvement).

<sup>356</sup> Flanders, *supra* note 238, at 128–29.

<sup>357</sup> See Kleinfeld, *supra* note 16, 1508.

<sup>358</sup> Murphy, *supra* note 259, at 15.

<sup>359</sup> KORITANSKY, *supra* note 21, at 141 (emphasis added).

<sup>360</sup> Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 402 (1965) (communicating very well, perhaps better than those who fall into the restorative retributivism camp, that “punishment has a symbolic significance.”).

restorative rather than control-based.<sup>361</sup> It is participative, personal, and open to forgiveness.<sup>362</sup> Punishment solely for the purpose of promoting public safety,<sup>363</sup> or to be cost-efficient,<sup>364</sup> is inadequate to the name because it misreads the human condition. It not only sells the individual short;<sup>365</sup> it deprives society of a possible participant in the common good in the long run.<sup>366</sup> Ensuring peace, improving individuals, and improving the community are symbiotic goals.<sup>367</sup> Punishment is not about settling scores between offender and victim; rather, it is about the relationship between the offender and the broader community of which she was, is, and will continue to be a part.<sup>368</sup> It is reparative<sup>369</sup> and retributive. A knee-jerk, default policy of incarceration is too overbroad, wreaks devastating consequences on communities,<sup>370</sup> and undermines the entire purpose of the criminal law. This is especially true in a democratic society that disproportionately incarcerates certain groups.<sup>371</sup>

Where does humility come into play? Given the epistemic difficulty in knowing, with absolute certainty, the quantity of desert

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<sup>361</sup> See Bibas, *supra* note 338, at 342.

<sup>362</sup> See *id.* at 329 (noting how current system expends “little effort to understand, heal, or reform offenders”).

<sup>363</sup> See KORITANSKY, *supra* note 21, at 100.

<sup>364</sup> See Kleinfeld, *supra* note 16, at 1496, 1532.

<sup>365</sup> This is because the theory holds that the criminal activity giving rise to punishment was not only anti-social, but anti-individual, in the sense that the person has harmed him or herself. See *id.* at 1505–06, 1512.

<sup>366</sup> See Murphy, *supra* note 259, at 14.

<sup>367</sup> KORITANSKY, *supra* note 21, at 142. Augustine said punishment is “for his own good, to readjust him to the peace he has abandoned.” Saint Augustine, *The City of God, Book XIX*, in *THE FATHERS OF THE CHURCH* 225, 225–26 (Gerald G. Walsh & Daniel J. Honan trans., 1954).

<sup>368</sup> Skotnicki, *supra* note 49, at 802 (referencing how pre-modern theories of punishment conceived offenders as still part of the community, as “members of the ‘body’ in an organic sense”).

<sup>369</sup> *Id.* at 132 (“[T]he truest reparation is to be reacquainted with one’s best self.”). Skotnicki argues that this version of retributivism is liberating and provides the ground for the development of restorative justice procedures. See *id.* He cites Brathwaite for this idea. *Id.* at 132 n.22, 33 (citing JOHN BRAITHWAITE, *RESTORATIVE JUSTICE AND RESPONSIVE REGULATION* 5 (2002) (noting how the Catholic Church’s confessional rites are restorative justice)).

<sup>370</sup> The effects of parental incarceration on children, for instance, comes to mind. Martin, *supra* note 343, at 1–3.

<sup>371</sup> STUNTZ, *supra* note 2, at 13.

demanded by a particular situation, decision-makers should strive for punishment calibrated to culpability and the circumstances of the offender. Jeffrie Murphy refers to this as the virtue of “attention.”<sup>372</sup> Paying careful attention to detail about culpability and social circumstances can breed humility about what is deserved because an “attempt to see in a good light what appear to be a person’s bad qualities . . . is an important kind of humility.”<sup>373</sup> It also will likely lead to revelations about luck and its effect on the plight of someone encountering the system, undermining righteousness and self-deception in those who hand out punishments.<sup>374</sup>

Humility of this sort permits erring on the side of under-punishment because, as mentioned above, the catastrophic costs of over-punishment are worth avoiding lest punishment’s utility be completely undermined.<sup>375</sup> If punishment is meant to be reparative, risking additional disruption to society, the community, and the offender through over-punishment is a serious concern.<sup>376</sup> That suggests that absolute confidence in the justice of the death penalty, mandatory minimums for drug offenders, lifetime collateral consequences, or other well-known harsh penalties that are ultimately criminogenic and breed recidivism probably is a step in the wrong direction.<sup>377</sup> That could conflict with deference to strict democratic principles or the total democratization of the criminal law.<sup>378</sup> But the restorative

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<sup>372</sup> See Jeffrie G. Murphy, *Humility as a Moral Virtue*, in HANDBOOK OF HUMILITY: THEORY, RESEARCH, AND APPLICATIONS 19, 22–23 (Everett L. Worthington, Jr., Don E. Davis, & Joshua N. Hook, eds., 2017).

<sup>373</sup> *Id.*

<sup>374</sup> See *id.* at 24 (discussing how “it is all too common for those who have not done certain wrongs to feel an unjustified certainty that they are righteous and thus can hold in utter contempt those who have fallen”).

<sup>375</sup> See *id.* at 30.

<sup>376</sup> Bibas, *supra* note 338, at 338 (“So long as the punishment imposed is sufficient to deter, incapacitate, educate, and condemn the seriousness of the crime, the state’s interests are satisfied. Any margin of punishment above that needed to fulfill those goals should be the victim’s to forgive.”).

<sup>377</sup> See *id.* at 339.

<sup>378</sup> See STUNTZ, *supra* note 2, at 4–5 (discussing how “[d]iscretion and discrimination travel together”).

retributivist is a friend to constrained discretion mindful of broader purposes, accompanied by realistic humility.<sup>379</sup>

David Garland has persuasively articulated how penal institutions transformed into instruments of aggravated social control rather than institutions with environments built to help individuals get better.<sup>380</sup> Criminal justice has become impersonal; but that conflicts with moral intuitions because “crime has a human face,” and the system should reflect it.<sup>381</sup> The meaning of imprisonment in the mid to late twentieth century changed.<sup>382</sup> If imprisonment is the mode by which disorder from crime will be addressed (and there is no reason to think that it won’t be, at least for the time being),<sup>383</sup> then the purpose of the prison is worth thinking about. Its historical origin—connected to penitentiaries and similar institutions focused on repair,<sup>384</sup> rather than controlling the dangerous like cogs in machinery<sup>385</sup>—suggest revitalization of the environment within prisons is sorely in order. But that probably requires a different sort of anthropology or basic understanding of the human condition. As Fyodor Dostoevsky said, “the degree of civilization in a society can be judged by entering its prisons.”<sup>386</sup>

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<sup>379</sup> STUNTZ, *supra* note 2, at 5 (noting how American criminal justice became too deferential to official discretion, ultimately permitting unequal application of the laws to particular communities, resulting in discriminatory law enforcement).

<sup>380</sup> DAVID GARLAND, *THE CULTURE OF CONTROL* 15–19 (2002).

<sup>381</sup> Bibas, *supra* note 338, at 337 (“Crime has a human face, and that face deserves standing and a say in the matter.”).

<sup>382</sup> See STUNTZ, *supra* note 2, at 32–35 (explaining surge in imprisonment and consequences of criminal punishment).

<sup>383</sup> Of course, scholars have been arguing for prison abolition for a long time, and the movement seems to be gaining some traction. See Amna A. Akbar, *How Defund and Disband Became the Demands*, N.Y. REV. (June 15, 2020), <https://www.nybooks.com/daily/2020/06/15/how-defund-and-disband-became-the-demands/>.

<sup>384</sup> Skotnicki, *supra* note 49, at 806 (referencing how prison was an alternative to “cruel forms of justice that often marked life in secular polities”).

<sup>385</sup> See BIBAS, *supra* note 4, at 1, 14–15.

<sup>386</sup> Ilya Vinitzky, *Dostoyevsky Misprisoned: “The House of the Dead” and American Prison Literature*, L.A. REV. BOOKS (Dec. 23, 2021), <https://lareviewofbooks.org/article/dostoyevsky-misprisoned-the-house-of-the-dead-and-american-prison-literature/> (noting that “Dostoyevsky’s ‘famous words’ on prisons and civilization are still very much alive”); see also Larissa Pahomov, *Building a Collective Understanding of Prisons*, 102 ENGLISH J. 38, 38–39, 42 (2013) (examining and criticizing “common attitudes toward prisoners”).

The restorative retributivist would replace the language of “risk”—pervasive in discussions of the criminal law these days and undoubtedly conducive to the “other-ing” of offenders—with “worth.”<sup>387</sup> The same analysis could apply to the notion that diversionary programs are always good for offenders, when in reality they have the capacity to perpetuate if not enhance control.<sup>388</sup> In short, do we primarily understand human beings negatively as risk creators or positively as capable of good?<sup>389</sup>

It would seem that restorative retributivism leaves room for the empowerment of victims, but not in an unconstrained way. Jean Hampton has articulated how the criminal law validates the plight of victims.<sup>390</sup> Because restorative retributivism is cognizant of the individual offender’s well-being and the common good, it leaves room for practices that involve victim forgiveness.<sup>391</sup> Giving a victim “the power to forgive”—and thereby constrain the state so that it does not overpunish—helps to rectify any “power imbalance”

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<sup>387</sup> See Skotnicki, *supra* note 49, at 814 (citing Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 457, 468 (1992)). This is because the Aristotelian tradition prioritizes the development of character, not mitigating potential bad acts. See ROSALIND HURSTHOUSE, ON VIRTUE ETHICS 29–32 (2001).

<sup>388</sup> E. Lea Johnston & Conor P. Flynn, *Mental Health Courts and Sentencing Disparities*, 62 VILL. L. REV. 685, 693 (2017) (unpublished manuscript) (finding that mental health court sentences were significantly longer than potential punishments); see Collins, *supra* note 7, at 1581, 1591, 1603; see also Skotnicki, *supra* note 49, at 815 (“[T]he architects of social control have utilized many of the elements of the decarceration movement such as drug-testing, electronic monitoring, and intensive probation as surveillance mechanisms . . .”).

<sup>389</sup> This is admittedly very different from a systems, actuarial, or management approach to the issues within criminal justice. Skotnicki, *supra* note 49, at 814 (referencing a “systems management approach that ‘aggregates’ the individual, understanding him or her solely as a member of a group, uncoupled from social history and subjective interpretations, and defined in terms of risk”) (citing Feeley & Simon, *supra* note 387 at 457, 468); see also Murphy, *supra* note 259, at 15 (referencing how prisons should be an environment that will be “truly rehabilitative and will provide opportunities for people to become better”).

<sup>390</sup> See MURPHY & HAMPTON, *supra* note 15, at 36–42 (discussing proper definition of forgiveness).

<sup>391</sup> See *id.*

created by the initial crime.<sup>392</sup> Some studies also suggest it has a secondary effect of limiting recidivism.<sup>393</sup>

Given the Aristotelian focus on the local *polis*, restorative retributivism would prioritize local governance when it comes to the criminal law, but again with the objective moral constraints underlying the theory.<sup>394</sup> Stuntz, in *The Collapse of American Criminal Justice*, demonstrated how the historically intended local administration of the criminal justice system has been replaced by a disjunctive political situation where the voters electing officials have little experience with crime in their own communities.<sup>395</sup> This undermines the credibility of the justice system and likely exacerbates racial disparities in policing and the experiences of individuals interacting with the criminal justice system.<sup>396</sup> Locally minded, democratic, and relational criminal justice can be more lenient and less discriminatory than centralized and bureaucratized criminal justice.<sup>397</sup> As Stuntz put it,

Anyone who has been the victim of a serious crime knows the desire to see perpetrators punished that seems to be part of our nature. At the same time, all those who have seen neighbors' sons behind bars, or their own, know the agony incarceration imposes on local communities. Local political control over

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<sup>392</sup> *Id.*; Bibas, *supra* note 338, at 338 (citing Edna Erez, *Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice*, 1999 CRIM. L. REV. 545, 550-53 (1999)).

<sup>393</sup> William R. Nugent et al., *Participation in Victim-Offender Mediation and the Prevalence and Severity of Subsequent Delinquent Behavior: A Meta-Analysis*, 2003 UTAH L. REV. 137, 140, 162 (2003) (meta-analysis finding possibility of reduction in reoffending).

<sup>394</sup> See Kleinfeld, *supra* note 16, at 1493 n.11; HONNETH, *supra* note 17, at 7, 11-30.

<sup>395</sup> STUNTZ, *supra* note 2, at 21 (describing how suburban voters elect officials who make decisions for communities most affected by crime). "[V]oters in safe places elect the officials who shape criminal justice in dangerous ones." *Id.*

<sup>396</sup> *Id.* at 21-22.

<sup>397</sup> See *id.* at 31 (referencing history of local administration of justice that, while imperfect, was more personal, lenient, and democratic, and less discriminatory).

criminal justice harnesses both forces without giving precedence to either.<sup>398</sup>

Placing power to make decisions in the hands of those most affected by the falling and rising rates of crime can reduce agency costs and empower individuals to do what is good for their particular community.<sup>399</sup> At the same time, that discretion, totally unconstrained, can be easily manipulated, leading to perverse results.<sup>400</sup>

What about treatment of those who have been convicted after they have served their sentences? In other words, does this theory of retribution have anything to offer to those suffering under the weight of collateral consequences or permanent damage to their reputations? The answer would seem to be yes. Because of its relational core, how a wrongdoer is perceived after encountering the system must account for the complicated web of relationships central to that person's well-being. Rachel Barkow has written about how perceptions of convicted individuals after punishment differ significantly from perceptions before trial.<sup>401</sup> That empirical reality jives nicely with the reintegrative aspirations of this theory, again designed to improve the situation of the offender through and after punishment, meaning punishment must end. As others have remarked, "continued [governmental] publicity is simply punishment without end."<sup>402</sup>

#### CONCLUSION

The goal of this Article is to situate reconstructivism next to an older theory of retributivism. Where reconstructivism lands taxonomically really depends on how the reconstructivist understands social relations. If they are truly human constituted, and not given at all, then reconstructivism is not a theory of retributive desert. But if they are informed by moral realities, then the social is really just part of the moral; and restorative retributivism has already accounted for that, in both its purpose and function for criminal law and

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<sup>398</sup> *Id.* at 36.

<sup>399</sup> *Id.* at 39 ("Make criminal justice more locally democratic, and justice will be more moderate, more egalitarian, and more effective at controlling crime.").

<sup>400</sup> *See id.* at 5.

<sup>401</sup> Rachel E. Barkow, *Administering Crime*, 52 *UCLA L. REV.* 715, 750–51 (2005).

<sup>402</sup> Bibas, *supra* note 338, at 343.



punishment. Reconstructivism thus becomes a socio-centric version of restorative retributivism.

Does this taxonomical question have a bearing on policy questions? Perhaps, and they would need to be worked out in concrete detail. But the better position seems to me to be that *both* theories have a lot more to offer public policy debates than those operating solely along utilitarian lines. Losing the concept of a *telos*—whether individual or socially defined—is one reason why the trains have run off the tracks when it comes to criminal law and punishment.

The reconstructivist rightly emphasizes the social, reminding those tasked with the criminal law and punishment to keep in mind how both institutions relate to the social fabric. And the restorative retributivist brings necessary reflection on the normative—beyond human constructed social affairs—that makes the criminal law personalist rather than abstract. These are considerations any just system of criminal law should wrestle with when it comes to any policy decision because they go to the very nature of living in a community. Lay intuitions of justice conflict with the wave of American criminal justice politics that has led to incapacitation run amok.<sup>403</sup> And they underlie the public's desire for real, personal justice from the criminal justice system. In short, whether siblings, cousins, or just distant relatives, reconstructivism and restorative retributivism can be partners in restoring the expressive aspects of the criminal law, helping to re-stitch the social fabric,<sup>404</sup> and contributing to human flourishing. As both teach us, a criminal law that does not pursue those goals is a criminal law without a purpose.

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<sup>403</sup> Robinson & Darley, *supra* note 34, at 41 (noting how empirical desert informs common intuitions).

<sup>404</sup> Kleinfeld, *supra* note 16, at 1500.