

TO REFORM OR TO ABOLISH? CHRISTIAN PERSPECTIVES ON PUNISHMENT, PRISON, AND RESTORATIVE JUSTICE

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Efforts to modify or replace public systems of criminal justice in accord with the principles of restorative justice have long been understood to include a variety of practices, ranging from educational programs to victim-offender conferencing. What has only come to the forefront relatively recently is the pluriformity of perspectives on the values and principles that underlie various restorative justice practices. Thus, the dialogue and debates over what restorative justice is have expanded far beyond discussions of *praxis*. Generally speaking, restorative justice is a theory of justice that emphasizes concepts such as reconciliation, forgiveness, and healing. As we shall see, there is little unanimous agreement about how justice that is specifically restorative relates to other ideas of justice (most notably retributive justice). At its most basic level, however, restorative justice has focused as much on particular practices, such as victim-offender conferences, as on theoretical foundations for restoration. If restorative justice is to be seen in continuity with classical definitions of justice as related to dues and desert, then restoration, reconciliation, and healing should be seen as what human beings in the aftermath of crime are due.¹

Some writers seem to assume particular principles and values are exclusively determinative of restorative justice. For instance, Kay Pranis writes, “Restorative justice appears remarkably successful as a philosophy and guiding vision. Restorative justice sets out a clear set

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1. For a brief but helpful survey of various theories of justice, especially with reference to the Roman Catholic moral tradition (but without reference to “restorative” justice), see STEPHEN J. GRABILL ET AL., *DOING JUSTICE TO JUSTICE: COMPETING FRAMEWORKS OF INTERPRETATION IN CHRISTIAN SOCIAL ETHICS* (2002).

of values to shape our actions."² Howard Zehr, a leading voice in the conversations about restorative justice, acknowledges, "Although the term 'restorative justice' encompasses a variety of programs and practices, at its core it is a set of principles, a philosophy, an alternate set of guiding questions. Ultimately, restorative justice provides an alternative framework for thinking about wrongdoing."³ Other commentators have explored the diversity of opinions about the nature of restorative justice.⁴ Gerry Johnstone notes that a more intentional examination of the differences in perspectives regarding restorative justice is necessary:

It is important to look at these "internal tensions" in order to offset the tendency to regard the campaign for restorative justice as a completely unified one. To understand and assess the campaign for restorative justice it is crucial to realise that it is characterised by diversity, difference and some disagreement.⁵

Through the influence of figures like Howard Zehr and others, the religious and specifically Christian motivations behind restorative justice movements are undeniable.⁶

In this Essay, I will attempt to fill in a gap in preceding studies of restorative justice by paying special attention to the religious, most specifically to the Christian, perspectives on restorative justice. I will show that it is more accurate to speak of a plurality of restorative justice movements than of a unified and univocal restorative justice movement, particularly with respect to the variety of Christian approaches.⁷ In delineating the various Christian perspectives on restorative justice, I will use as a primary litmus test the various figures' attitudes toward government coercion and punishment, most

2. Kay Pranis, *The Practice and Efficacy of Restorative Justice*, 23 J. RELIGION & SPIRITUALITY SOC. WORK, 133, 136 (2004).

3. HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 5 (2002).

4. See, e.g., Gerry Johnstone & Daniel W. Van Ness, *The Meaning of Restorative Justice*, in *HANDBOOK OF RESTORATIVE JUSTICE* 5 (Gerry Johnstone & Daniel W. Van Ness eds., 2007); Margarita Zernova & Martin Wright, *Alternative Visions of Restorative Justice*, in *HANDBOOK OF RESTORATIVE JUSTICE*, *supra*, at 91.

5. GERRY JOHNSTONE, *RESTORATIVE JUSTICE* 16 (2002).

6. See Pierre Allard & Wayne Northey, *Christianity: The Rediscovery of Restorative Justice*, in *THE SPIRITUAL ROOTS OF RESTORATIVE JUSTICE* 119, 119–21 (Michael Hadley ed., 2001); Daniel J. Mischeh & Evelyn U. Hanneman, *Emerging Issues: The Faith Communities and the Criminal Justice System*, 23 J. RELIGION & SPIRITUALITY SOC. WORK 111, 112 (2004).

7. For a pluralist account of justice, see DAVID SCHMIDTZ, *ELEMENTS OF JUSTICE* (2006).

particularly with regard to incarceration, detention, and imprisonment. Attitudes toward prison provide an excellent way to map out the restorative justice landscape. Other types of punishment, such as the death penalty, are less helpful in getting at the crux of the disagreements and distinctive elements of each position, simply because there is so much agreement about the non-restorative nature of such sanctions. An expression representative of the general consensus is given by Howard Zehr: "'Restorative' has become such a popular term that many acts and efforts are being labeled 'restorative,' but in fact they are not. Some of these might be rescued. Others cannot. The death penalty, which causes additional and irreparable harm, is one of the latter."⁸ Imprisonment can be seen both as the most serious regular form of non-capital punishment and as the factor that undergirds the efficacy of the entire criminal justice system, and therefore makes a most useful point of reference.

In using coercion as a delimiting factor, my analysis mirrors in a general way the approach used by numerous others to describe Christian engagement with society in general.⁹ Paying attention to coercion also has the added benefit of relativizing the widespread terminological disagreements over the definitions of words like *punishment* and *sanction*.¹⁰ Moreover, given the parameters of the discussion introduced by Howard Zehr's influential study, it is highly

8. ZEHR, *supra* note 3, at 57. Of restorative justice theorists, only complementarian reformists, *see infra* Part I.A, are likely to consider capital punishment acceptable and even some complementarian reformists are likely to dismiss it. Rather than considering the issue of capital punishment determinative in categorizing theories of restorative justice, it may be that views of lifetime prison sentences is the best distinguishing factor. But there are very few, if any, writers who address so specific a punishment in sufficient detail to be useful. *See* KIMMETT EDGAR & TIM NEWELL, *RESTORATIVE JUSTICE IN PRISONS* 22–25 (2006) (recognizing a spectrum of restorative justice theories with regard to imprisonment).

9. *See, e.g.*, CRAIG A. CARTER, *RETHINKING CHRIST AND CULTURE* 113 (2006) (presenting a generic typology that divides Christian approaches into Christendom, which embraces coercion, and non-Christendom, which rejects coercion); *see also* Johnstone & Van Ness, *supra* note 4, at 5 (stating that restorative justice "seeks to replace our existing highly professionalized systems of punitive justice and control . . . with community-based reparative justice and moralizing social control"); Lawrence W. Sherman, *Two Protestant Ethics and the Spirit of Restoration*, in *RESTORATIVE JUSTICE AND CIVIL SOCIETY* 35–38 (Heather Strang & John Braithwaite eds., 2001) (discussing the different attitudes of Puritans and Quakers). On the question of restorative justice, while there are identifiable tendencies among descendents of the magisterial and radical reformation toward different positions, these tendencies are not inviolable and therefore it is not appropriate simply to identify the reformists with a "Puritan" ethic and the radicalists with a "Quaker" ethic. E. DIGBY BALTZELL, *PURITAN BOSTON AND QUAKER PHILADELPHIA* 93–95 (1979).

10. *See infra* Part II.A.

plausible that the basis of the disagreements among proponents of restorative justice is over issues of punishment.¹¹

In Part I of this Essay, I delineate and describe the four basic positions I have found to be representative of Christian restorative justice advocates. These four positions form a divide over whether restorative justice includes or is reconcilable with elements of coercion, punishment, and sanction administered by government authority. In Part II, I explore and analyze the theological implications and interrelationships between the various positions with regard to the following topics, from more specific to most general: pain and punishment, jurisprudence and forgiveness, church and state, sin and crime, and love and justice. I conclude that those advocates of restorative justice described as complementarian reformists occupy the position most closely in alignment with the historically dominant Christian tradition. Part III of the study includes some comments and observations about the prospects for rapprochement among the various restorative justice positions, both with regard to questions of principle and value as well as practice and public policy.

I. REFORMISTS AND RADICALISTS

This survey of various views of restorative justice outlines four basic positions. The first major group, whom I call *reformists*, affirms the compatibility of government sanction while the second major group, whom I call *radicalists*, denies the compatibility of restorative justice ideals with punishment. The use of such terminology is an attempt to recognize the truth of the suggestion made by Johnstone and Van Ness that “it would be useful to adopt names for the different conceptions to avoid disputes that arise because of misunderstanding and to increase collaboration.”¹² My terms differ from those I have encountered in various literature both because of

11. HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE 175–214 (1990) (proposing a restorative framework as an alternative “lens” to view crime and justice); *see also* DAVID CAYLEY, THE EXPANDING PRISON: THE CRISIS IN CRIME AND PUNISHMENT AND THE SEARCH FOR ALTERNATIVES 363–64 (1998) (stating that proponents of restorative justice alternatives to criminal justice must answer the charge that such alternatives “do not constitute serious sanctions”); CHRISTOPHER D. MARSHALL, BEYOND RETRIBUTION: A NEW TESTAMENT VISION FOR JUSTICE, CRIME, AND PUNISHMENT 138 (2001) (arguing that the criticisms from within and without restorative justice positions “underline the need for restorative justice to articulate a theory of punishment that matches its agenda”).

12. Johnstone & Van Ness, *supra* note 4, at 19–20.

my specific attention to Christian restorative justice perspectives and because I believe my categorization uses different criteria than previous efforts. With regard to the use of the term “radicalist,” however, which could carry a pejorative connotation, I have decided to use this term because it is one that is expressly used by such writers to describe their own position.¹³ By using this and other terms, I do not intend to prejudice the reader about the validity or viability of any of these positions.

Each of the two major groups is then sub-divided into two smaller groups. Of those who affirm the state’s coercive role in pursuing restorative justice, I distinguish between those who do so because they believe that punishment is a legitimate purpose for criminal justice, and those who see punishment as having a purely instrumental role. The former I term *complementarian reformists*,¹⁴ while the latter I term *instrumentalist reformists*.¹⁵ Of those who deny

13. See, e.g., LEE GRIFFITH, *THE FALL OF THE PRISON: BIBLICAL PERSPECTIVES ON PRISON ABOLITION*, at xi (1993); J. ARTHUR HOYLES, *PUNISHMENT IN THE BIBLE* 139 (1986); Zernova & Wright, *supra* note 4, at 101.

14. Examples of complementarian reformist writings from a religious and Christian perspective include: CHARLES W. COLSON, *JUSTICE THAT RESTORES* (2001); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 260–64, 410 (10th prtg. 1999); L. GREGORY JONES, *EMBODYING FORGIVENESS: A THEOLOGICAL ANALYSIS* 270–78 (1995); MARSHALL, *supra* note 11; Jonathan Burnside, *Retribution and Restoration in Biblical Texts*, in *HANDBOOK OF RESTORATIVE JUSTICE*, *supra* note 4, at 132; see also Pope Pius XII, Address at the Meeting of the Italian Association of Catholic Jurists: Crime and Punishment (December 5, 1954), in 53 *CATHOLIC MIND* 364, 371–73 (1955). Works reflecting a secular complementarian reformist viewpoint include: CHARLES K.B. BARTON, *GETTING EVEN: REVENGE AS A FORM OF JUSTICE* (1999) [hereinafter BARTON, *GETTING EVEN*]; R.A. DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY* (2001); Charles Barton, *Empowerment and Retribution in Criminal Justice*, in *RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE* 55 (Heather Strang & John Braithwaite eds., 2000); Antony Duff, *Restoration and Retribution*, in *RESTORATIVE JUSTICE AND CRIMINAL JUSTICE* 43 (Andrew von Hirsch et al. eds., 2003) [hereinafter Duff, *Restoration and Retribution*]; Linda Radzik, *Making Amends*, 41 *AM. PHIL. Q.* 141 (2004) [hereinafter Radzik, *Making Amends*]; Linda Radzik, *Offenders, the Making of Amends and the State*, in *HANDBOOK OF RESTORATIVE JUSTICE*, *supra* note 4, at 192 [hereinafter Radzik, *Offenders*].

15. Instrumentalist reformist writings articulating a religious perspective include: JIM CONSEDINE, *RESTORATIVE JUSTICE: HEALING THE EFFECTS OF CRIME* (1995); GERALD AUSTIN MCHUGH, *CHRISTIAN FAITH AND CRIMINAL JUSTICE: TOWARD A CHRISTIAN RESPONSE TO CRIME AND PUNISHMENT* 163–65 (1978); T. RICHARD SNYDER, *THE PROTESTANT ETHIC AND THE SPIRIT OF PUNISHMENT* 157 (2001); CHRIS WOOD, *THE END OF PUNISHMENT: CHRISTIAN PERSPECTIVES ON THE CRISIS IN CRIMINAL JUSTICE* (1991); ZEHR, *supra* note 11; ZEHR, *supra* note 3; Ted Grimsrud & Howard Zehr, *Rethinking God, Justice, and Treatment of Offenders, in RELIGION, THE COMMUNITY, AND THE REHABILITATION OF CRIMINAL OFFENDERS* 259 (Thomas P. O’Connor & Nathaniel J. Pallone eds., 2002); Nicholas Wolterstorff, *Does Forgiveness Undermine Justice?, in GOD AND THE ETHICS OF BELIEF* 219 (Andrew Dole & Andrew Chignell eds., 2005); Nicholas Wolterstorff, *The Place of Forgiveness in the Actions of the State*, in *THE POLITICS OF PAST EVIL*

the validity of a coercive state role, I divide them according to whether they advocate the founding of separate and alternative institutions of restorative justice (*separatist radicalists*)¹⁶ or whether they actively advocate the abolition of the criminal justice system in general and prisons in particular (*abolitionist radicalists*).¹⁷

87 (Daniel Philpott ed., 2006); Howard Zehr, *Journey to Belonging*, in RESTORATIVE JUSTICE: THEORETICAL FOUNDATIONS 21, 28–30 (Elmar G.M. Weitekamp & Hans-Jürgen Kerner eds., 2002). Works from a secular, or so-called “maximalist,” perspective include: MICHAEL BRASWELL ET AL., CORRECTIONS, PEACEMAKING, AND RESTORATIVE JUSTICE 71–74 (2001); WESLEY CRAGG, THE PRACTICE OF PUNISHMENT: TOWARDS A THEORY OF RESTORATIVE JUSTICE (1992); MARTIN WRIGHT, JUSTICE FOR VICTIMS AND OFFENDERS: A RESTORATIVE RESPONSE TO CRIME 147 (2d ed., Waterside Press 1996) (1991); Randy E. Barnett, *Restitution: A New Paradigm of Criminal Justice*, 87 ETHICS 279 (1977); Jim Dignan, *Towards a Systemic Model of Restorative Justice: Reflections on the Concept, Its Context and the Need for Clear Constraints*, in RESTORATIVE JUSTICE AND CRIMINAL JUSTICE, *supra* note 14, at 135; Pranis, *supra* note 2, at 137, 144–45; Luc Robert & Tony Peters, *How Restorative Justice Is Able to Transcend the Prison Walls: A Discussion of the “Restorative Detention” Project*, in RESTORATIVE JUSTICE IN CONTEXT: INTERNATIONAL PRACTICE AND DIRECTIONS 95 (Elmar G.M. Weitekamp & Hans-Jürgen Kerner eds., 2003); Joanna Shapland, *Restorative Justice and Criminal Justice: Just Responses to Crime?*, in RESTORATIVE JUSTICE AND CRIMINAL JUSTICE, *supra* note 14, at 195; Lode Walgrave, *Imposing Restoration Instead of Inflicting Pain: Reflections on the Judicial Reaction to Crime*, in RESTORATIVE JUSTICE AND CRIMINAL JUSTICE, *supra* note 14, at 61 [hereinafter Walgrave, *Imposing Restoration*]; Lode Walgrave, *Integrating Criminal Justice and Restorative Justice*, in HANDBOOK OF RESTORATIVE JUSTICE, *supra* note 4, at 559 [hereinafter Walgrave, *Integrating Criminal Justice*]; Jolien Willemsens, *Restorative Justice: A Discussion of Punishment*, in REPOSITIONING RESTORATIVE JUSTICE 24 (Lode Walgrave ed., 2003); Martin Wright, *Is It Time to Question the Concept of Punishment?*, in REPOSITIONING RESTORATIVE JUSTICE, *supra*, at 3 [hereinafter Wright, *Time to Question*].

16. Among the writings of Christians advocating a separatist radicalist position are: TIMOTHY GORRINGE, GOD’S JUST VENGEANCE: CRIME, VIOLENCE AND THE RHETORIC OF SALVATION 248–71 (1996); JOHN HOWARD YODER, THE POLITICS OF JESUS 198 (2d ed. 1994). Works from secular writers in this group include: JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION (2002) [hereinafter BRAITHWAITE, RESTORATIVE JUSTICE]; CAYLEY, *supra* note 11, at 272; JOHNSTONE, *supra* note 5; DANIEL VAN NESS & KAREN HEETDERKS STRONG, RESTORING JUSTICE 179–80 (1997); John Braithwaite, *Principles of Restorative Justice*, in RESTORATIVE JUSTICE AND CRIMINAL JUSTICE, *supra* note 14, at 1 [hereinafter Braithwaite, *Principles*]; Odillo Vidoni Guidoni, *The Ambivalences of Restorative Justice: Some Reflections on an Italian Prison Project*, 6 CONTEMP. JUST. REV. 55 (2003); Ottmar Hagemann, *Restorative Justice in Prison?*, in REPOSITIONING RESTORATIVE JUSTICE, *supra* note 15, at 221; Gerry Johnstone, *Critical Perspectives on Restorative Justice*, in HANDBOOK OF RESTORATIVE JUSTICE, *supra* note 4, at 598, 606–07; Daniel W. Van Ness, *Justice That Restores: From Impersonal to Personal Justice*, 23 J. RELIGION & SPIRITUALITY SOC. WORK 93 (2004); Daniel W. Van Ness, *Prisons and Restorative Justice*, in HANDBOOK OF RESTORATIVE JUSTICE, *supra* note 4, at 312 [hereinafter Van Ness, *Prisons and Restorative Justice*]. Writers from a so-called “purist” perspective of separatists include: HERMAN BIANCHI, JUSTICE AS SANCTUARY: TOWARD A NEW SYSTEM OF CRIME CONTROL (1994); Paul McCold, *Toward a Holistic Vision of Restorative Juvenile Justice: A Reply to the Maximalist Model*, 3 CONTEMP. JUST. REV. 357 (2000).

17. Some works by Christian advocates of the abolitionist radical position are: GRIFFITH, *supra* note 13, at xi–xv; HOYLES, *supra* note 13, at 139; RUTH MORRIS, STORIES OF

A. *Complementarian Reformists*

Figures such as Charles W. Colson argue for reform of the criminal justice system toward a restorative paradigm. But this restorative paradigm is not one that eliminates punitive measures. Colson writes that “criminal justice requires a just means to restore the domestic order as well as a punishment system that is redemptive.”¹⁸ The primary rationale assumed for the administration of punishment is that it is a requisite aspect of treating criminal offenders as responsible moral agents. In this sense, punishment is deserved, and so the concept of *desert* plays an important role in the complementarian reformist view of restorative justice. Just as the “wages of sin is death,”¹⁹ criminal acts earn or warrant punishment. Thus writes Finnis: “Sanctions are punishment because they are required in reason to avoid injustice, to maintain a rational order of proportionate equality, or fairness, as between all members of the society.”²⁰ Most typically from a Christian perspective, this view is based on recognition of the divine nature as both loving and just. Jonathan Burnside summarizes his survey of the biblical material thusly: “Throughout the Bible, the interdependence of retribution and restoration reflects the consistent character of a God who remains true to himself by punishing sin, but who also wishes offenders to repent and be reunited to his original good purposes.”²¹ L. Gregory Jones says that in his account of the restoration “an element of retribution” is present. He writes: “As there is responsibility in the offenses that have been committed, so punishment for the offenders requires that

TRANSFORMATIVE JUSTICE 1–10 (2000); WILL D. CAMPBELL & JAMES Y. HOLLOWAY, *THE GOOD NEWS FROM GOD IN JESUS IS FREEDOM TO THE PRISONERS*, reprinted in “. . . AND THE CRIMINALS WITH HIM . . .” 140 (Will D. Campbell & James Y. Holloway eds., 1973); Virginia Mackey, *Punishment in the Scripture and Tradition of Judaism, Christianity, and Islam*, in *CRIME, VALUES, AND RELIGION* 23 (James M. Day & William S. Laufer eds., 1987). Secular abolitionist writings include: MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* (Alan Sheridan trans., Pantheon Books 1977) (1975); FAY HONEY KNOPP ET AL., *INSTEAD OF PRISONS: A HANDBOOK FOR ABOLITIONISTS* (Mark Morris ed., 1976); DENNIS SULLIVAN & LARRY TIFFT, *RESTORATIVE JUSTICE: HEALING THE FOUNDATIONS OF OUR EVERYDAY LIVES* (2001); MARGARET WILSON, *THE CRIME OF PUNISHMENT* (1931); Ezzat A. Fattah, *From Philosophical Abstraction to Restorative Action, from Senseless Retribution to Meaningful Restitution: Just Deserts and Restorative Justice Revisited*, in *RESTORATIVE JUSTICE: THEORETICAL FOUNDATIONS*, *supra* note 15, at 308.

18. COLSON, *supra* note 14, at 10.

19. *Romans* 6:23.

20. FINNIS, *supra* note 14, at 262.

21. Burnside, *supra* note 14, at 137–38.

they accept such responsibility. In requiring this," he continues, "the community must determine what responsibility is involved and hence what punishment is appropriate. Such retribution is, at least in principle, separable from any feelings of hatred or desires for vengeance."²²

While the meting out of punishment by authorized institutions is a manifestation of retributive justice, what differentiates the complementarian reformist view from a purely retributive view is that the purpose, end, or *telos* of the punishment can be coordinated or even subordinated to the goal of restoration. Jones affirms that the linkage of punishment to a restorative purpose does not entail that the view of punishment is utilitarian or instrumental: "[A] view that maintains reconciliation as the *telos*, the context in which punishment is to be understood and carried out, is *not* necessarily a view that punishment exists for the sake of rehabilitation."²³ This view of punishment is, therefore, *deontological* rather than *consequentialist* because punishment is not valid *only* as it promotes rehabilitation. Christopher D. Marshall expresses why simply resting with the moral obligation to punish wrongdoing is insufficient. He writes: "Retributivism contains valid insights, and there are retributivist features in the biblical tradition. But on its own, retributivism is inadequate to deal with the complexities of the social institution of punishment and the depth and breadth of the biblical witness."²⁴ The concern in this view of restorative justice is to properly relate the equally valid claims of retributive and restorative justice.

As Colson says, restorative justice "works to maintain the balance between punishment and individual responsibility on the one hand, and reparation and healing on the other."²⁵ It is this concern with balancing punishment and restoration that makes this the *complementarian* view, in which punishment, often deserved on its own, can and sometimes must complement the goals of restorative justice.²⁶ Finnis describes the balance between various purposes of

22. JONES, *supra* note 14, at 273.

23. *Id.* at 274.

24. MARSHALL, *supra* note 11, at 129.

25. COLSON, *supra* note 14, at 143.

26. Cragg describes the secular counterparts to these views as "hybrid" theories, combining retributive and utilitarian elements. CRAGG, *supra* note 15, at 67. Schmidt's pluralist account of justice describes four "elements"—desert, reciprocity, equality, and need—none of which "is an overarching standard to which the others reduce." SCHMIDT, *supra* note 7, at 13–14, 17. Where the scope of these elements overlap they must be balanced appropriately,

punishment in this way: "The punitive sanction ought therefore to be adapted so that . . . it may work to restore reasonable personality in the offender, reforming him for the sake not only of others but of himself . . ." ²⁷ In this view punishment can be both an end and a means. Thus, Marshall is not to be seen as endorsing a purely instrumentalist view of punishment, which is the other reformist position outlined below, when he writes that "punishment is not merely the negative infliction of pain but an attempt to check the evil consequences that flow from wrongdoing. Punishment is, in other words, a legitimate—perhaps necessary—instrument of restoration, though it is by no means an infallible instrument." ²⁸ That is why Marshall contends that both purely utilitarian and purely retributivist theories of punishment need to be harmonized. ²⁹

B. *Instrumentalist Reformist*

The second category of reformists includes those who view the use of punishment in purely instrumental terms. That is, the use of punishment is valid if and only if it advances the purposes of restorative justice. There is a subtle but important difference between the complementarian and the instrumentalist reformist; the former acknowledges that punishment is legitimate in some sense as a deserved response to criminal wrongdoing, while the latter denies the validity of grounding punishment in desert and typically sees punitive measures as permissible only on consequentialist or utilitarian grounds. ³⁰ At least in theory, then, instrumentalist reformists could see a system in which punishment is done away with because it is no longer helpful in realizing restorative goals.

The key for a number of figures I place in the category of instrumentalist reformist is a distinction between punishment and sanction. A fuller discussion of the terminological debate appears in Part II.A below, but at this point it is crucial to note the distinction. *Punishment* is understood to be pain inflicted as an end in itself and

and in this way Schmidtz's account resembles what complementarian reformists hold regarding punitive retribution and restoration. *Id.*

27. FINNIS, *supra* note 14, at 264.

28. MARSHALL, *supra* note 11, at 142; accord Duff, *Restoration and Retribution*, *supra* note 14, at 43 ("Restoration is not only compatible with retribution: it *requires* retribution . . .").

29. MARSHALL, *supra* note 11, at 115.

30. Compare Braithwaite, *Principles*, *supra* note 16, at 2–3, with Walgrave, *Imposing Restoration*, *supra* note 15, at 64.

is rejected as immoral. *Sanction* is understood to be a potentially painful process undergone for some other end or purpose. Thus, says Howard Zehr, "The real question . . . is not whether persons will experience some elements of restorative justice as punishment, but whether punishment *intended as punishment* has a place."³¹ Gerald McHugh uses this distinction between the subjective understanding on the part of the offender and the intent on the part of the justice system to be of key practical importance. He says that until we "overcome the false dichotomy between [the] 'retributive' and 'distributive' aspects" of the "biblical conception of justice," it will remain "perfectly meaningless to speak of punishment as being in any way purifying or reformatory, because prisoners will refuse to see their punishment as just and will instead (often) view it as simply another form of oppression against them, taken by an already repressive society."³² For this reason McHugh doubts the efficacy of punitive sanctions under contemporary systems of criminal justice. The debate among instrumentalist reformists then becomes whether or not punishment is indeed practically dispensable, even if it is theoretically possible to rule out punishment.³³ T. Richard Snyder says that this view of restorative justice "does not mean that we should not 'get tough,' not prevent people from doing acts that harm. It does not mean that we should never put anyone in prison."³⁴ Instead, it only means that society should punish when doing so effectively advances restorative purposes.

It should be noted that although the instrumentalist reformist's view of punishment is consequentialist, it does not follow that the overarching ethic is consequentialist. Indeed, as Zehr accurately notes, the difference between a complementarian and instrumentalist approach is *what* precisely each views as morally obligatory.³⁵ For Zehr, crime does not by definition merit punishment, but rather "restorative justice is done first of all because it is the right thing to do. Victims' needs *should* be addressed, offenders *should* be encouraged to take responsibility, those affected by an offense *should* be

31. ZEHR, *supra* note 11, at 209.

32. MCHUGH, *supra* note 15, at 97–98.

33. See BRAITHWAITE, RESTORATIVE JUSTICE, *supra* note 16, at 34–35; ZEHR, *supra* note 11, at 209–10; Walgrave, *Integrating Criminal Justice*, *supra* note 15, at 570, 574.

34. SNYDER, *supra* note 15, at 157.

35. See ZEHR, *supra* note 3, at 58–59.

involved in the process, regardless of whether offenders catch on and reduce their offending."³⁶

C. *Separatist Radicalist*

The first of the radicalist perspectives, which deny in wholesale fashion the compatibility of punishment, retribution, coercion, or force with the principles and practice of restorative justice, are those which advocate the creation of a system of restorative justice separate from state-administered institutions. Typically there is little to no emphasis on either the reform or the abolition of state criminal justice systems. There may even be a degree of implicit reliance on or validation of the continuing existence of state institutions, and in that sense there may be ambivalence toward the ultimate necessity of coercion.³⁷ But there is no ambiguity regarding the incongruity of restorative justice and punishment.³⁸ In some sense, this is the model that various Anabaptist groups have been pursuing since the Protestant Reformation of the sixteenth century.³⁹ There is a separate socio-political structure, namely the church, that apart from the secular court system administers its own form of justice differing from the punitive sanctions of state force.⁴⁰

There are other more recent developments and articulations of this basic position. At the conclusion of his theological study of justice and retribution, Timothy Gorringer affirms that the church should be the institution that manifests this alternative system. He writes:

36. *Id.* at 10.

37. See, e.g., CAYLEY, *supra* note 11, at 364 (emphasizing cooperation between state institutions and community, and recognizing the "threat of incarceration" in cases where community alternatives are abused).

38. E.g., Hagemann, *supra* note 16, at 231 (arguing that approaches involving "imposed punishment" are incompatible with restorative justice).

39. See GRIFFITH, *supra* note 13, at 155 (noting that "[t]he Anabaptist rejected Protestant endorsement of Christian participation in the legal system," and especially in punishment).

40. See The Schleithem Articles (1527), *in* FROM IRENAEUS TO GROTIUS: A SOURCEBOOK IN CHRISTIAN POLITICAL THOUGHT 631, 635 (Oliver O'Donovan & Joan Lockwood O'Donovan eds., Michael G. Baylor trans., 1999) ("Concerning the sword we have reached the following agreement. The sword is ordained by God outside the perfection of Christ. It punishes and kills evil people and protects and defends the good. In the law the sword is established to punish and to kill the wicked, and secular authorities are established to use it. But in the perfection of Christ the ban alone will be used to admonish and expel him who has sinned, without putting the flesh to death, and only by using the admonition and the command to sin no more.").

The upshot of two centuries of penal experimentation is that nothing but “mainstream process of socialisation” is of any use in rehabilitating offenders. The demand that the church should offer an alternative social space, therefore, and that it might be this which is the redemptive alternative to retribution, is neither nostalgia for a vanished past nor facile Pickwickian optimism. It is, rather, a sober account of the only realistic and creative way of dealing with human fecklessness and evil which we have discovered.⁴¹

Restorative justice is thus taken to be something that non-coercive, non-state actors and institutions pursue.

David Cayley commends the model proposed by Herman Bianchi, a “dual system” that offers the best prospects for realizing a system of restorative justice.⁴² Bianchi explores the biblical concept of *tsedeka* to build a paradigm organized around the creation of “modern sanctuar[ies],” defined as places “of immunity and refuge where fugitives from prosecution, persecution, or revenge by legal authorities or any other power can be secured against arrest or violence on condition that they contribute to negotiating a resolution of their conflicts.”⁴³ Bianchi says of his own program, “Far from proposing a reform of the present repressive system, I argue for putting in place an entirely different system of crime control”⁴⁴

D. *Abolitionist Radicalists*

The second group of radicalists is the abolitionists, who not only deny the compatibility of punishment and restorative justice, but actively seek to do away with the criminal justice system. There is a conscious distinction made by abolitionist radicalists between their view and the various reformist views. Will D. Campbell and James Y. Holloway note that “it is not of reform that our Scriptures speak. Rather, it is that prisoners remind us again that Jesus is not a social reformer.”⁴⁵ From a Christian perspective, this position typically

41. GORRINGE, *supra* note 16, at 271.

42. See CAYLEY, *supra* note 11, at 358–59.

43. BIANCHI, *supra* note 16, at 6, 149. I consider Bianchi to write from a secular perspective because he says, “Any religious concept in this book is used merely for sensitization.” *Id.* at 3.

44. *Id.* at 2.

45. CAMPBELL & HOLLOWAY, *supra* note 17, at 148; cf. HOYLES, *supra* note 13, at 139 (calling for the state to at least *strive* to the Christian ideal, as proclaimed by Jesus, to abolish all punishment).

involves the literal interpretation of Jesus' ministry of liberation. As Campell and Holloway put it: "In Jesus God proclaims freedom for those in prison. The prisoners are to be turned loose. Literally. This is good news *from God*. In Jesus God is not reform. Not rehabilitation. Not parole. In Jesus God is freedom. Liberation."⁴⁶ Similarly, Lee Griffith writes: "We need to hear the Good News that Jesus is victor. The prison is fallen. The kingdom of God is in our very midst, and we can no longer pretend that our human warehouses serve good or restrain evil."⁴⁷ Describing a view of prison in eschatological terms, Griffith contends: "The power of the prison is the spirit of death, and death itself has been defeated by resurrection. These imprisoned people belong to God, not Caesar. In the name of Jesus, unlock the cages!"⁴⁸

As noted earlier, the question of imprisonment is helpful because it tends to capture the particular perspective's approach toward punishment in general. Griffith also rejects all forms of state coercion, for "[t]here is no longer any recourse to death threats or reliance on the power of death, for death has been totally and irrevocably defeated. All punishments (capital or otherwise) based on the threat or the spirit of death are left behind in the call to follow the resurrected Christ."⁴⁹ The abolitionist position differs from the separatist vision in that the former is much more concerned with the practices of the governmental system of criminal justice. In addition, abolitionists typically never acknowledge the valid use of any state punishment. So, says Griffith: "Prisons will not be abolished when this or that governing authority declares it to be so. Rather, prisons will cease to exist when the community of believers faithfully lives according to that freedom which Jesus has already declared."⁵⁰ Thus it is not only the attitude of concern regarding the state that differentiates separatists from abolitionists, but also the corresponding explicit denial or reliance upon any coercive measures, even in the background.

46. CAMPBELL & HOLLOWAY, *supra* note 17, at 142. *Contra* MCHUGH, *supra* note 15, at 185 ("Contrary to the views of some writers, it is wrong to interpret this promise of freedom literally, as referring to the physical liberty of prisoners.").

47. GRIFFITH, *supra* note 13, at 227.

48. *Id.*

49. *Id.* at 178.

50. *Id.* at xv.

II. THEOLOGICAL ANALYSIS

In this Part I analyze the various positions with respect to a number of different theological topics and linkages. This is not an exhaustive analysis, and there are other relevant theological pairings that shed light on the different restorative justice views outlined above. These include positions on the relationship between common and special grace, law and gospel, and models of the atonement, specifically the penal substitution theory and the Christus Victor model. Below I examine those areas I judge to be most germane to the question of punishment in criminal justice.

A. *Pain and Punishment*

As alluded to previously, a great deal of confusion has been created in discussions about restorative justice because of disagreements over the definitions and appropriateness of terminology. This has led Jolien Willemsens to say that “when we take a closer look at the content of this discussion, it seems almost to be mere bickering about words: what some call punishment, others call restorative sanctions.”⁵¹ In his early and influential work on restorative justice, Howard Zehr sharply juxtaposes retribution and restoration, and classifies punishment as belonging to the retributive model. He further defines punishment as “inflicting pain, intended as pain.”⁵² While Zehr has more recently acknowledged that it is difficult to draw distinctions between retribution and restoration as easily as he had done previously, his definition of punishment has not undergone any material alteration.⁵³ Thus, Zehr writes with Ted Grimsrud, “Punishment involves, by definition, the intentional infliction of pain and the use of coercion and thus must be seen as a form of violence.”⁵⁴

51. Willemsens, *supra* note 15, at 24; *cf.* Declan Roche, *Retribution and Restorative Justice*, in HANDBOOK OF RESTORATIVE JUSTICE, *supra* note 4, at 75, 78 (addressing the distortion of the term “retributive”).

52. ZEH, *supra* note 11, at 75. *But cf.* Burnside, *supra* note 14, at 144 (arguing that retribution and restoration are not mutually exclusive concepts but instead are concepts that can work together).

53. ZEH, *supra* note 3, at 13, 58–59.

54. Grimsrud & Zehr, *supra* note 15, at 261; *accord* CONSEDINE, *supra* note 15, at 19 (“Punishment is the deliberate infliction of suffering: it is legal violence.”); MARSHALL, *supra* note 11, at 97 (“Punishment may be defined as the deliberate infliction of an unpleasant or painful experience on a person . . .”).

Zehr's definition of punishment has come under a great deal of scrutiny. Cragg identifies it with what he calls the "philosophical" definition of punishment, and says that one of the negative consequences of adopting such a definition is that "it has the result of setting criminal punishment off from conventional or everyday uses of the word."⁵⁵ Martin Wright observes that "[t]he infliction of pain is not always punitive," while Linda Radzik contends that "there is a reason to believe that one cannot fully recognize that one is responsible for wronging another person without feeling pain."⁵⁶ Zehr's hesitancy to include punitive elements in his conception of restorative justice relates to his concerns about the moral validity of violence. Grimsrud and Zehr write, "Punishment by the state, then, is morally problematic as it involves the state doing things that are normally considered morally and socially unacceptable."⁵⁷ Seen as a basic moral evil, state-administered violence stands in need of justification in order to attain a level of acceptability. As we have seen, for Zehr the extent to which violent punishment ultimately achieves this validation is related only to its utility as an aid to restoration.

The question of the basic moral validity of violence on the part of the state seems to be a core disagreement between complementarian reformists and other views of restorative justice. In this sense, the complementarian position claims to stand in continuity with the main stream of punitive thought in the Christian tradition. A quote from St. John Chrysostom is representative of the classic view of the relation between punishment and reconciliation: "For punishment is not evil, but sin is evil. The latter separates us from God, but the former leads us towards God, and dissolves his anger."⁵⁸ More recently, C.S. Lewis articulated the relationship between deserved punishment and restoration when he wrote, "I wish society to be protected and I should be very glad if all punishments were also

55. CRAGG, *supra* note 15, at 211.

56. Wright, *Time to Question*, *supra* note 15, at 5; Radzik, *Making Amends*, *supra* note 14, at 151.

57. Grimsrud & Zehr, *supra* note 15, at 261; *see also* GRIFFITH, *supra* note 13, at 57 (arguing that punishment is a case of the ends justifying the means, which is "essentially a Faustian pact with the devil"); Walgrave, *Imposing Restoration*, *supra* note 15, at 66 (questioning why "the general ethical rule not to inflict pain on others does not apply to responding to crime"); *cf.* MARSHALL, *supra* note 11, at 168 (noting tension in New Testament language regarding retaliation).

58. ST. JOHN CHRYSOSTOM, *ON WEALTH AND POVERTY* 65 (Catharine P. Roth trans., 1984).

cures. All I plead for is the *prior* condition of ill desert; loss of liberty justified on retributive grounds *before* we begin considering the other factors."⁵⁹

B. *Jurisprudence and Forgiveness*

The view of the traditional Christian position on punishment and restoration has been misrepresented as being solely and exclusively concerned with retribution.⁶⁰ Martin Luther, a Protestant reformer who accepted the traditional Christian position, lays out three courses of action for the person victimized by wrongdoing.⁶¹ The first sort are those who "seek vengeance and judgment from the representatives of God," and of these, who perhaps make up a majority of people in the world, Luther judges that such desire is "merely lawful" but that "that passion for one's own advantage must be destroyed."⁶²

The second kind of response is of those "who do not desire vengeance," but rather "[f]ar from avenging themselves, if those in authority should wish to seek revenge in their behalf, they either do not desire it or seek it, or they only permit it." In some cases, "if they are among the most advanced, they forbid and prevent it, prepared rather to lose their other possessions also."⁶³ Luther extols this second sort of response to crime. By sacrificing their own rights and claims, "they may recall those offenders from their sin rather than avenge the wrongs they themselves have suffered."⁶⁴

It should be noted that even in this second response, the authority and right of the governing authorities to punish is acknowledged, even as in the most extreme cases the punishment is sought to be commuted. C.S. Lewis puts it this way: "The older view was that mercy 'tempered' justice, or (on the highest level of all) that mercy

59. C.S. LEWIS, *On Punishment: A Reply to Criticism*, in *GOD IN THE DOCK* 295, 299 (Walter Hooper ed., 1970).

60. See, e.g., GRIFFITH, *supra* note 13, at 192 ("The history of Christendom is a history of chaplains who helped to oppress prisoners and of reforms that helped to entrench the prison system.").

61. MARTIN LUTHER, *TWO KINDS OF RIGHTEOUSNESS* (1519), *reprinted in* 31 *LUTHER'S WORKS* 293, 305-06 (Harold Grimm ed., Lowell J. Satre trans., American ed. 1957).

62. *Id.* at 305; cf. JOHN CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION*, Bk. IV, Ch. XX, para. 17 (1559), *reprinted in* 21 *THE LIBRARY OF CHRISTIAN CLASSICS* 1506 (John T. McNeill ed., Ford Lewis Battles trans., 1960) (rebuking men who "boil with a rage for litigation").

63. LUTHER, *supra* note 61, at 305-06.

64. *Id.* at 306.

and justice had met and kissed. The essential act of mercy was to pardon; and pardon in its very essence involves the recognition of guilt and ill-desert in the recipient."⁶⁵ Only in the context of ill-desert can forgiveness have any meaning.⁶⁶

In this way love and justice, as we shall explore in greater detail in Part II.E, are seen as complementary. Philosopher Henry Stob describes the relationship in terms of the law applied prudently (in a loving way):

[F]or the proper or existential administration or application of the law the judge must have recourse to the sensitivities of love. Love will clarify and heighten the judge's perception of the relevant factors in the concrete situation and impel him so to choose as maximally to validate the substance and intention of the law. Love is able in this way to convert abstract law into civil justice, and civil justice into true equity.⁶⁷

This accords with Luther's view of vocation as the place of responsibility in which we express our love for our neighbors. For the judge, this means that the prudent application of the law is imperative, for "[w]here there is love, there is no legal rigidity."⁶⁸ As other theologians have observed, elements of mercy prescriptions are embedded in, rather than external to, Old Testament legal codes.⁶⁹

This emphasis on loving application of the law might mean in a contemporary context that legal structures intended to bind the discerning power of judges ought to be removed. Mandatory sentencing could in this context be seen as effectively removing the *prudence* from the practice of *jurisprudence*. Concerns that the law is applied unequally in such situations might be met by pointing to the

65. C.S. LEWIS, *Humanitarian Theory of Punishment*, in *GOD IN THE DOCK*, *supra* note 59, at 287, 294.

66. See GUSTAF WINGREN, *LUTHER ON VOCATION* 60 (Carl C. Rasmussen trans., Wipf & Stock Publishers 2004) (1957) ("Grace would not be grace without the prior terror of conscience.").

67. HENRY STOB, *ETHICAL REFLECTIONS* 140 (1978).

68. WINGREN, *supra* note 66, at 49.

69. MICHAEL WELKER, *GOD THE SPIRIT* 18–20 (John F. Hoffmeyer trans., 1994). With respect to clemency, see CALVIN, *supra* note 62, Bk. IV, Ch. XX, para. 10, *reprinted in* 21 *THE LIBRARY OF CHRISTIAN CLASSICS*, *supra* note 62, at 1498–99.

individuality of each case and the need for discretion to render appropriate judgments in each concrete instance.⁷⁰

Luther describes the group that proposes a third way of responding to unjust violence as similar to the second in persuasion. In practice, however, “[t]hey are the ones who demand back their own property or seek punishment to be meted out, not because they seek their own advantage, but through the punishment and restoration of their own things they seek the betterment of the one who has stolen or offended.”⁷¹ In a statement that captures well the spirit of a complementarian reformist view of restorative justice, Luther declares: “They discern that the offender cannot be improved without punishment.”⁷² Luther is concerned, however, about the danger of this view, that the innate and fallen drive for personal revenge may be disguised as benevolence. He warns that “no one ought to attempt this unless he is mature and highly experienced in the second class just mentioned, lest he mistake wrath for zeal and be convicted of doing from anger and impatience that which he believes he is doing from love of justice.”⁷³

Luther has in mind something like this sentiment expressed by Heinrich Heine:

[I]f God wants to make my happiness complete, he will grant me the joy of seeing some six or seven of my enemies hanging from those trees. Before their death I shall, moved in my heart, forgive them all the wrong they did me in their lifetime. One must, it is true, forgive one’s enemies—but not before they have been hanged.⁷⁴

Here, acknowledgment of the necessity of forgiveness is all too easily reconciled with the lust for revenge. Heine is right to note the necessity of forgiveness. As Marshall writes, “Forgiveness is not an optional response to wrongdoing; it is an obligation placed upon all who celebrate the saving justice of God made manifest in the life,

70. See CRAGG, *supra* note 15, at 4.

71. LUTHER, *supra* note 61, at 306.

72. *Id.*

73. *Id.*; cf. CALVIN *supra* note 62, Bk. IV, Ch. XX, para. 18, *reprinted in* 21 THE LIBRARY OF CHRISTIAN CLASSICS, *supra* note 62, at 1506 (explaining that litigation, if used rightly, must be “far from all passion to harm or take revenge, far from harshness and hatred, far from burning desire for contention”).

74. SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 102 n.2 (James Strachey ed. & trans., standard ed. 2005) (quoting HEINRICH HEINE, GEDANKEN UND EINFÄLLE, n.p., n.d.).

death, and resurrection of Jesus Christ."⁷⁵ But one place in which Heine's expression fails is in its superficial conception of the nature of forgiveness and reconciliation. Victor V. Claar and John N. Oswalt distinguish between "weak" and "strong" forms of forgiveness.⁷⁶ Heine's understanding would relate to the weak form, in which forgiveness is given by the party offended, but is not received or reciprocated by the offender.⁷⁷ If the offender is dead before forgiveness can be offered, there is no hope of reconciliation (this is why so many advocates of restorative justice see capital punishment to be inherently un-restorative). By contrast, the strong form of forgiveness delineated by Claar and Oswalt includes both the offer of forgiveness on the part of the victim and acknowledgment and repentance on the part of the offender.⁷⁸

The question is here how this forgiveness ought to relate to the administration of public justice. What constructive role might the state play? Linda Radzik notes, "Even though the state cannot guarantee that offenders will be remorseful and victims will be willing to forgive, it can try to create conditions in which this is more likely to happen."⁷⁹ In the cases of recalcitrant offenders a coercive element may be necessary, at least initially. Thus John Braithwaite observes:

Very few criminal offenders who participate in restorative justice processes would be sitting in the room absent a certain amount of coercion. Without their detection and/or arrest, without the specter of the alternative of a criminal trial, they simply would not cooperate with a process that puts their behavior under public scrutiny. No coercion, no restorative justice (in most cases).⁸⁰

So state power seems to be indispensable to the creation of the conditions in which strong forgiveness may, but also may not, occur:

Confronted with the wrongfulness of her actions, the offender is still able to choose whether or not to apologize. As before, should she

75. MARSHALL, *supra* note 11, at 95; accord JONES, *supra* note 14, at 238.

76. Victor V. Claar & John N. Oswalt, *Can Neoclassical Economics Handle a Scriptural View of Forgiveness?*, 9 J. MARKETS & MORALITY 71, 75-76 (2006).

77. *See id.*

78. *Id.* at 75-76.

79. Radzik, *Offenders*, *supra* note 14, at 197.

80. BRAITHWAITE, RESTORATIVE JUSTICE, *supra* note 16, at 34.

opt not to apologize, then the strong form of forgiveness will never be available. With no apology, the victim's only options are either not to forgive, or to extend forgiveness in its weak form. Again, the relationship will never be repaired.⁸¹

Luther's third type of reaction to wrongdoing anticipates the complementarian reformist approach to restorative justice. As Marshall contends,

[F]orgiveness need not stand in opposition to formal justice. They are different but related—and sometimes complementary—processes. . . . It is therefore possible for legal justice (entailing the vindication of law) and interpersonal forgiveness (entailing the remission of guilt and the healing of relationship) to work in parallel.⁸²

C. *Church and State*

A dominant theme in the historiographical foundation for much of the radicalist account of restorative justice is the judgment that Constantinian Christendom represents a severely defective form of social polity, and that the resulting conflation of church and state obscured more ancient forms of justice.⁸³ For instance, Lee Griffith concludes, "Ever since the church first unconditionally surrendered to Constantine, the history of Christendom has been a history of doing what the world was going to do anyway."⁸⁴ A key element of this worldly ethic, according to the radicalists, is the elevation of retribution in the criminal justice system. Unfortunately, such accounts tend both to unduly glorify indigenous, native, and ancient justice traditions and to unjustly malign classical Christian approaches. A number of observers of the restorative justice movement have noted that pre-Constantinian systems of justice were not exemplifications of purely restorative theory. Robert E. Mackay writes that "the findings of anthropology from different eras and

81. Claar & Oswalt, *supra* note 76, at 85.

82. MARSHALL, *supra* note 11, at 271; *cf.* MCHUGH, *supra* note 15, at 163 ("A wholesale application of 'forgiveness' would undermine the very basis of law, which by its very nature insists upon determining liability and requires the existence of sanctions or penalties for enforcing its statutes.").

83. See Allard & Northey, *supra* note 6, at 125.

84. GRIFFITH, *supra* note 13, at 191.

places suggest that ‘restorative’ practices and attitudes can co-exist with strong currents of punitiveness and violence, and often incorporate strong religious elements relating to sacrifice, and appeasement of the dead and of the spirit world.”⁸⁵ Summarizing his findings, Mackay concludes: “What we need to recognize is that where restorative practices were operative in the past or in traditional societies, these included elements that are redolent of a sterner and bloodier worldview.”⁸⁶ Mackay further points to seemingly constitutive elements of human nature, which in the face of wrongdoing aim instinctively at retribution.⁸⁷ Timothy Gorringer likewise notes, “One reason satisfaction theory was, and remains, so powerful is that in so many areas it is true to human experience. The need to make expiation or atonement for wrongdoing seems to be one of the most powerful human impulses, operating both on the individual and the collective level.”⁸⁸

From the side of some abolitionist radicalists, the critique of Christendom extends to criticisms of any two-sphere or two-kingdom ethic, whether represented by the magisterial Reformation or by Anabaptist traditions.⁸⁹ Griffith, criticizing the views I have categorized as separatist radicalist, writes that a “subtle danger with this traditional Anabaptist understanding is that, in the process of offering a laudable witness for peace by speaking out against participation in the military establishment of the state, there has been a simultaneous blessing (whether intentional or not) of the domestic military—police, jails, and prisons.”⁹⁰ For Griffith, the traditional

85. Robert Mackay, *Punishment, Guilt, and Spirit in Restorative Justice: An Essay in Legal and Religious Anthropology*, in RESTORATIVE JUSTICE: THEORETICAL FOUNDATIONS, *supra* note 15, at 247, 248; cf. BARTON, GETTING EVEN, *supra* note 14, at 3 (arguing that restorative practices must “make allowances” for traditional systems of “institutionalized revenge”); Braithwaite, *Principles*, *supra* note 16, at 4–5 (discussing the need for a “realistic” theory of transition to a system of restorative justice); Chris Cunneen, *Reviving Restorative Justice Traditions?*, in HANDBOOK OF RESTORATIVE JUSTICE, *supra* note 4, at 113, 129 (discussing the “hybridity” of contemporary state justice concepts and informal “indigenous justice”).

86. Mackay, *supra* note 85, at 264.

87. *See id.*

88. GORRINGER, *supra* note 16, at 11; *see also* Duff, *Restoration and Retribution*, *supra* note 14, at 43 (arguing that “certain deep features of our social lives” require retributive punishment to crime).

89. *See* GRIFFITH, *supra* note 13, at 28; cf. MARSHALL, *supra* note 11, at 22 (“Over against a two-sphere ethic, it must therefore be affirmed that God has only one moral will for human life.”).

90. GRIFFITH, *supra* note 13, at 23.

Anabaptist critique of and response to worldly government is simply not sufficiently comprehensive. Griffith's critique is aimed at figures like John Howard Yoder or David Cayley who advocate for a separatist solution to the criminal justice system and yet remain implicitly or ultimately dependent on government's active repression of crime. For Yoder there is a key distinction to be made between the unjustifiable use of government force in the case of war and the theoretically valid exercise of police force. Yoder writes that this distinction "between police and war is not simply a matter of the degree to which the appeal to force goes, the number of persons killed or killing. It is a structural and a profound difference in the sociological meaning of the appeal to force."⁹¹ To such an approach Griffith responds, "If we believe that death is conquered and that it is against God's will to carry guns and threaten violence, then we must not ask the police to sin on our behalf while we pretend to remain guiltless."⁹²

The view of the relation between the church and the state held by the complementarian reformists is that there is, in a sense, a division of labor between the two entities. While the state is primarily concerned with the administration of public justice and retribution, the church is the forum in which spiritual healing, reconciliation, and forgiveness can occur. This is not to say that the state has no concern over whether or not restoration is possible or intended, but simply means that the state alone cannot guarantee reconciliation. It is precisely because the complementarian reformists believe that the state has an indispensable (but not undivided) role in pursuing restorative justice that these modern advocates concur with John Calvin that one of the tasks of the civil magistrate is "to reconcile us with one another."⁹³

D. *Sin and Crime*

A constitutive element of the radicalist critique of the traditional Christian approach to criminal justice is the canard that Christian theology, whether in the tradition of the Constantinian, medieval, and modern Church, or in the form of the Protestant Reformation, did not distinguish between the concepts of crime and sin. Any sin was seen to be a crime against God and therefore the magistrate, as God's

91. YODER, *supra* note 16, at 204.

92. GRIFFITH, *supra* note 13, at 190.

93. See CALVIN, *supra* note 62, Bk. IV, Ch. XX, para. 2, *reprinted in* 21 THE LIBRARY OF CHRISTIAN CLASSICS, *supra* note 62, at 1487.

representative, had a duty to punish sin by government force.⁹⁴ Thus Griffith writes, "Like most other Protestant reformers, Calvin drew no significant distinction between 'crime' and 'sin.'"⁹⁵ Such assertions caricature the complex theological meditations upon sin, crime, and government that characterize the great minds of the Christian tradition. There is, for example, a significant strand of theological reflection that makes precisely the distinction that abolitionist reformists deny was present. Early in his career, St. Augustine wrote that "although every crime is a sin, not every sin is a crime," and this concept is picked up and expanded by St. Thomas Aquinas.⁹⁶

Some Protestant reformers also accept the distinction between divine, natural, and human law.⁹⁷ Indeed, the common distinction of the use of the law as a bridle on sin presupposes a distinction between sinful and unregenerate men and the commission of public crimes. Thus Calvin writes that unjust men "are restrained, not because their inner mind is stirred or affected, but because, being bridled so to speak, they keep their hands from outward activity, and hold inside the depravity that otherwise they would wantonly have indulged."⁹⁸ Here it should be understood that sin, as expressed in the commission of crimes, is restrained. The second use of the law does not eliminate all sin, since even while reined in unjust men "are neither better nor more righteous before God."⁹⁹ Even so, this distinction "is necessary for the public community of men, for whose tranquility the Lord herein provided when he took care that everything be not tumultuously confounded."¹⁰⁰ In this way Calvin, as do most other Protestant reformers and modern complementarian reformists, not only draws distinctions between the more particular category of crime and the more general category of sin, but also finds that the

94. See, e.g., GRIFFITH, *supra* note 13, at 151–57 (discussing the Protestant Reformation).

95. *Id.* at 153.

96. ST. AUGUSTINE, THE ENCHIRIDION ON FAITH, HOPE, AND LOVE, para. 64, *reprinted in* 1 THE AUGUSTINE CATECHISM 88 (John E. Rotelle ed., Bruce Herbert trans., 1999); see also ST. THOMAS AQUINAS, SUMMA THEOLOGICA, Pt. II, Q. 96, Art. 2 (Fathers of the English Dominican Province trans., Christian Classics 1981).

97. See, e.g., CALVIN, *supra* note 62, Bk. IV, Ch. XII, paras. 4, 16, *reprinted in* 21 THE LIBRARY OF CHRISTIAN CLASSICS, *supra* note 62, at 1231–32, 1504–05.

98. CALVIN, *supra* note 62, Bk. II, Ch. VII, para. 10, *reprinted in* 20 THE LIBRARY OF CHRISTIAN CLASSICS, *supra* note 62, at 358.

99. *Id.*

100. CALVIN, *supra* note 62, Bk. II, Ch. VII, para. 10, *reprinted in* 20 THE LIBRARY OF CHRISTIAN CLASSICS, *supra* note 62, at 359 (footnote omitted).

application of such a distinction in the form of the restraining function of the law is a necessary feature of fallen human society.

E. *Love and Justice*

As we have seen, disagreements between the various advocates of restorative justice are largely derivative of differing operative principles and values. This comes through in its most theoretical form in the divergent conceptions of the relationship between love and justice. Howard Zehr writes,

We tend to assume that love and mercy are different from or opposite to justice. A judge pronounces a sentence. Then as an act of mercy, she may mitigate the penalty. Biblical justice, however, grows out of love. Such justice is in fact an act of love which seeks to make things right.¹⁰¹

In his own description of the dialectical relationship between the two concepts, Zehr concludes: "Love and justice are not opposites, nor are they in conflict. Instead, love provides for a justice which seeks first to make right."¹⁰² Cragg similarly says, "To interpret mercy as requiring that the offence be overlooked or ignored sets mercy in conflict with justice, by shifting the burden created by the offence from offenders to their victims."¹⁰³ The tendency among many abolitionist radicals, however, is to juxtapose love and justice. For Griffith, the human administration of justice is typically understood to be fallacious. He distinguishes between the justice of the Greek philosophers and the justice of God. The philosophical view of justice is defined in terms of desert, while "the God of justice shows love to the least deserving."¹⁰⁴ The dispute here is not whether love and justice are related but rather how they are related. Griffith's understanding subsumes distributive and retributive senses of justice into a notion of divine "unmerited love."¹⁰⁵ This differs from the traditional view in that it derogates classical notions of justice as incompatible with divine love.

101. ZEHR, *supra* note 11, at 139.

102. *Id.*

103. CRAGG, *supra* note 15, at 216.

104. GRIFFITH, *supra* note 13, at 69.

105. *Id.*

Contrariwise, Henry Stob describes the relationship between love and justice as “partners in every area of human existence. They are in fact delicately interlocked. There is indeed a tension between them, but the tension should not be broken or disrupted into conflict.”¹⁰⁶ For Griffith, justice means the abolition of punishment and prison; for Stob, it means the conscientious and equitable application of the law. Stob expresses his view thusly: “Consider a judge who out of love and pity pardons and acquits a truly guilty man. Is this act of pardon really an act of love? My thesis is that he who pardons a guilty man without due cause is neither just nor loving.”¹⁰⁷ Stob instead characterizes such an action as “something like romantic sentimentality.”¹⁰⁸ In this way the true act of love is dependent upon the recognition of prior claims of justice, just as in the complementarian reformist view the notion of desert is a precondition for the possibility for restoration. C.S. Lewis’s imagery, which is both in accord with a classical Augustinian perspective and coheres with a complementarian reformist view, perhaps describes this conception the best. He writes, “As there are plants which will flourish only in mountain soil, so it appears that Mercy will flower only when it grows in the crannies of the rock of Justice”¹⁰⁹

III. PROSPECTS FOR RECONCILIATION

For advocates of restorative justice that line up on different sides of the questions and issues under examination in this Essay, the potential for cooperation among the various strands looms large. As Daniel W. Van Ness puts it from the perspective of those who oppose imprisonment:

[D]o restorative proponents refuse opportunities to extend the benefits of restorative justice to prisoners on the grounds that the institutions in which they have been confined are unjust, or do they work to transform the prison experience along restorative lines,

106. STOB, *supra* note 67, at 135.

107. *Id.* at 142.

108. *Id.*

109. LEWIS, *supra* note 65, at 294.

running the risk that this creates a new justification for an unjust institution?¹¹⁰

This sort of question has been raised by many and answered in different ways. For Odillo Vidoni Guidoni, who began working within the prison system in Italy in order to implement restorative practices, his experiences have convinced him of the untenable character of an incrementalist approach. He writes: "Restorative justice seems to be better able to realize its purposes not as a policy of prison reform but as an alternative to prison. Its goal should be to reduce detention not legitimize it." Guidoni concludes from this that "we should take the restorative model back to where it was born and concentrate on social prevention projects, community action projects, services for the victims, all social rather than penal policies."¹¹¹ He concludes further that such an approach "will at least remain an ideal that we can pursue with less anxiety and ambivalence about sacrificing our cherished values."¹¹²

Others within restorative justice movements have come to the opposite conclusion. Shapland writes that "the future will need to lie with mainstream schemes, if restorative justice is to have an impact."¹¹³ Zehr endorses an incrementalist approach, finding that: "While we contemplate larger possibilities, we must also pursue

110. Van Ness, *Prisons and Restorative Justice*, *supra* note 16, at 321; accord GRIFFITH, *supra* note 13, at 193 ("On the one hand, to endorse nothing short of immediate prison abolition risks ignoring opportunities to alleviate the current suffering of both offenders and victims of crime. On the other hand, endorsing any interim steps short of prison abolition risks ignoring the persistent way in which history has demonstrated that 'innovations that appeared to be substitutes for incarceration became supplements to incarceration.'"); cf. BRASWELL ET AL., *supra* note 15, at 74 ("Any attempt to transform corrections into a more effective and humane institution requires us to become aware of the political and financial interests in the status quo."); HOYLES, *supra* note 13, at 125 ("The Christian who is committed to the radical ethic of Jesus finds himself in a dilemma when his involvement in an imperfect world demands a compromise."); MCHUGH, *supra* note 15, at 210 ("There is the problem of being co-opted by the system; of simply supporting a corrupt system by providing band-aid services without effecting any significant change."); ZEHR, *supra* note 3, at 60 ("Real world justice might . . . best be viewed as a continuum. On the one end is the Western legal or criminal justice model . . . [that] has some glaring weaknesses. At the other end is the restorative alternative . . . It, too, has limits, at least as it is currently conceived and practiced."); Zernova & Wright, *supra* note 4, at 103 ("This presents a recurrent dilemma for reformers: should they leave people to suffer bad conditions so as to build of a head of steam to force a thoroughgoing upheaval, or should they alleviate the present suffering at the risk of weakening the pressure for change?").

111. Guidoni, *supra* note 16, at 66.

112. *Id.*

113. Shapland, *supra* note 15, at 211.

interim goals and activities. There are things that we can and must do here and now, in the meantime.”¹¹⁴ Luc Robert and Tony Peters concur:

When imprisonment is unavoidable, then the means must still be made available to the victim, imprisoned offender, and the broader societal context in which they are located, to search for a constructive—i.e., problem-solving—approach. In other words, restorative justice should not be allowed to end with punishment or at the walls of the prison.¹¹⁵

The fear here is that the perfect will become the enemy of the good.

What is clear in these differing conclusions is that they are expressions of deeply held convictions about the nature and purpose of restorative justice movements. Guidoni refers to “cherished values,” while Shapland and others find it a moral obligation to pursue reforms immediately. As the preceding study has shown, there are a number of different Christian perspectives on restorative justice, and they are rooted in sometimes radically different principles and values. If the various strands of restorative justice are to be reconciled into a unified movement, the discussion needs to begin at the level of first principles. This is precisely the approach that Zehr recommends. He writes about the concerns for diversion of restorative movements:

One of the most important safeguards we can exert against such sidetracks is to give attention to core principles. If we are clear about principles, if we design our programs with principles in mind, if we are open to being evaluated by these principles, we are much more likely to stay on track.¹¹⁶

One critical area of disagreement is over the nature of punishment and whether or not it has a role to play in pursuing restorative goals. Declan Roche finds it doubtful that there will be agreement on this particular issue, but finds hope for cooperation anyway. He writes, “While it is unlikely that consensus will emerge on the role punishment should play in restorative justice, there are greater

114. ZEHR, *supra* note 11, at 223.

115. Robert & Peters, *supra* note 15, at 98.

116. ZEHR, *supra* note 3, at 7.

prospects for more widespread agreement, if not consensus, on what should be done in practice."¹¹⁷

If we view the four basic positions outlined in Part I as lying on a continuum rather than occupying radically independent alternatives, it becomes clearer where such prospects for cooperation might come. The best hope for practical agreement on particular policy issues would seem to come between positions that occupy neighboring regions. So, on any given policy prescription it is more likely, although not guaranteed, that complementarian and instrumentalist reformists will be able to find agreement, as opposed to complementarians agreeing with either of the radicalist positions. For instance, both complementarian and instrumentalist reformists might pursue a strategy aimed at humanizing the current system of criminal justice. It is worthwhile to note that, as the two reform-oriented positions, the instrumentalists and the complementarians represent the only restorative justice advocates who will have any opportunity to directly engage and influence governmental practice. Snyder writes, "[I]n our toughness, in our justice, in our dealing with crime, we should recognize that we are dealing with our brothers and sisters—God's children . . ."¹¹⁸ Zehr similarly sums up his approach to restorative justice with the word "respect," the sort of respect that a personalist ethic, which appreciates the human being as possessing inherent dignity and not as merely an object to be manipulated, demands.¹¹⁹ Each of these statements echoes Colson's concerns that the problems with the current criminal justice system are traceable to an inadequate anthropology.¹²⁰

A practice that might come under joint scrutiny as inhumane and de-personalizing is the administration of mandatory sentences. Each criminal is an individual with his or her own history and background. It seems obvious that from a perspective of personalism, relevant contextual differences should be considered in sentencing, and judges should have the ability to exercise their prudential judgments on such matters. Given the rather prominent political concerns with the phenomenon of global terrorism, another avenue for positive dialog between groups that might be inclined toward shared views of restor-

117. Roche, *supra* note 51, at 86.

118. SNYDER, *supra* note 15, at 157.

119. See ZEHR, *supra* note 3, at 36.

120. COLSON, *supra* note 14, at 71–74.

ative justice, but are typically not seen as partners in ecclesiastical contexts, concerns the treatment of war prisoners (terror suspects or otherwise) and the relation between just war and criminal punishment.¹²¹

In a brief statement on pastoral care to those in prison that provides an excellent summary of the complementarian reformist position, Pope Benedict XVI notes that “[j]udicial and penal institutions . . . must contribute to the rehabilitation of offenders, facilitating their transition from despair to hope and from unreliability to dependability.”¹²² Referring both to the essential recognition of human dignity and to the Church’s prohibition against torture, Pope Benedict says, “Public authorities must be ever vigilant in this task, eschewing any means of punishment or correction that either undermine or debase the human dignity of prisoners.”¹²³ Similarly, a noteworthy group of evangelical leaders in the United States has also recently spoken out against the use of torture, and in doing so explicitly depends in part on Roman Catholic social teaching.¹²⁴ The declaration notes that “humans must have the right to security of person” including “the right not to have one’s body mutilated, and the right not to be abused, maimed, tortured, molested, or starved . . .”¹²⁵ The *Evangelical Declaration Against Torture* has not been without its critics,¹²⁶ but what is clear from the concord between the positions of Pope Benedict XVI and the *Evangelical Declaration Against Torture*, which likewise emphasizes the indispensable role of

121. See Calvin’s defense and definition of just war as derived from the right of the magistrate to administer public justice in his or her own realm. CALVIN, *supra* note 62, Bk. IV, Ch. XX, paras. 11–12, *reprinted in* 21 THE LIBRARY OF CHRISTIAN CLASSICS, *supra* note 62, at 1499–1501.

122. Pope Benedict XVI, Address to the Twelfth World Congress of the International Commission of Catholic Prison Pastoral Care (Sept. 6, 2007), in *Discovering the Face of Christ in Every Prisoner*, L’OSSERVATORE ROMANO, Sept. 19, 2007, at 2.

123. *Id.*

124. Evangelicals for Human Rights, *An Evangelical Declaration Against Torture: Protecting Human Rights in an Age of Terror*, 5 REV. FAITH & INT’L AFF. 41, 46–49 (2007).

125. *Id.* at 47.

126. Daniel R. Heimbach, professor of Christian ethics at Southeastern Baptist Theological Seminary, criticized the *Evangelical Declaration Against Torture* precisely because it does not clearly articulate principles that relate to questions of just war. Heimbach says that the statement “threatens to undermine Christian moral witness in contemporary culture by dividing evangelicals into renouncers and justifiers of nebulous torture—when no one disagrees with rejecting immorality or defends mistreating fellow human beings made in the image of God.” Erin Roach, *Ethicist: NAE Torture Declaration ‘Irrational,’* BAPTIST PRESS, Mar. 15, 2007, <http://www.baptistpress.com/BPNews.asp?ID=25190>.

the state,¹²⁷ is that an important step in any compromise between various proponents of restorative justice will be to determine precisely which punitive practices are universally impermissible. Torture and capital punishment are two likely candidates for fruitful and illuminating discussion.

Lest optimism about possible concord reach beyond wise limits, it should be noted that such cooperation on particular questions of policy is also likely to more clearly delineate the differences between the groups identified in this survey. Complementarian reformists would hold that part of a properly personalist administration of criminal justice requires treating offenders as moral agents whose actions merit punishment.¹²⁸ No doubt instrumentalist reformists would balk at such justifications for punishment. Noting how the different perspectives on restorative justice are rooted in widely disparate worldviews, Zernova and Wright conclude, "Achieving some sort of consensus on the question of what the scope of restorative justice should be and what exactly it should aim to achieve would require no less than proponents radically changing their wider political and philosophical stances—a highly unlikely event."¹²⁹ So as Declan Roche has said, the best possibilities for consensus among the pluriform perspectives on restorative justice remain at the level of ad hoc agreement on particular and specific questions of policy.¹³⁰ And this level of cooperation is only likely among neighboring views of restorative justice. But an added benefit of such cooperation, where deemed appropriate by the various parties, is that precisely how the various positions differ in principle will be clarified through dialogue and interaction.

CONCLUSION

Part I of this Essay outlined four basic positions with regard to restorative justice, delineated among issues relating to punishment, pain, imprisonment, and coercion. Although the primary concern has

127. See Evangelicals for Human Rights, *supra* note 124, at 48–49.

128. See, e.g., LEWIS, *supra* note 65, at 288 ("Thus when we cease to consider what the criminal deserves and consider only what will cure him or deter others, we have tacitly removed him from the sphere of justice altogether; instead of a person, a subject of rights, we now have a mere object . . .").

129. Zernova & Wright, *supra* note 4, at 101.

130. See Roche, *supra* note 51, at 86.

been to focus on identifiably Christian perspectives on restorative justice, to the extent that the categorization accurately reflects streams of thinking among proponents working from other fundamental assumptions, the framework provided is a helpful tool in showing just how pluriform restorative justice activism is. Indeed, with such distinctions in view it becomes much more helpful to talk of restorative justice movements in the plural than of any single overarching or unified restorative justice movement.

Part II examined in greater detail some of the theological issues at stake in the disputes about the nature of the relationship of punishment to restorative justice. From this analysis it becomes clear that the complementarian reformist position lies in the greatest continuity with the historic positions of the Christian theological tradition represented by figures such as St. Augustine and St. Thomas Aquinas, as well as the positions of Luther and Calvin. Part II also illustrated the disagreements over fundamental theological, philosophical, and historical issues that separate the various strands of restorative justice.

The final Part dealt with the consequences of the fundamental nature of these disputes, and while all advocates of restorative justice agree that the status quo of criminal justice needs to be altered, the prospects for widespread accord on shared values and principles appear remote. The use of criteria including concepts like coercion, punishment, and imprisonment allows for a fruitful demarcation of various restorative justice movements.

At the conclusion of this survey we have arrived at a clearer picture of the restorative justice landscape, with particular concern for the multiplicity of Christian attitudes toward restorative justice. With this landscape in view, restorative justice activists will be better able to pursue strategic alliances with a more informed sense both of what unites and what divides restorative justice movements. Likewise, critics and interested observers of developments in the area of restorative justice will have a greater sense of the diversity of views often identified under the umbrella term "restorative justice."