

REHABILITATION VS. RETRIBUTION, RESTITUTION, AND DETERRENCE.

By Noah McKay

Resolved: Criminal justice ought to prioritize rehabilitation over retribution, restitution, or deterrence.

The United States has one of the most overpopulated, racially striated, economically burdensome prison systems in the world. As of March 2022, American federal and state prisons housed roughly two million inmates, nearly one for every one-hundred thirty American adults. Despite comprising only thirteen percent of the national population, black Americans make up thirty-eight percent of the incarcerated population. More than seventy percent of those released from our state prisons are rearrested within five years. And this institutional revolving door costs taxpayers a whopping eighty-one billion dollars annually. Compared to other western democracies, the United States has done an abysmal job of managing crime, at least on paper.

In the face of such disheartening data, legislators and activists across the country have called for significant criminal justice reforms. Proposals include decriminalizing low-level drug offenses, abolishing mandatory minimum sentences, rerouting government funding toward community development and rehabilitation programs, and even tearing the whole mess down, “abolishing” prisons, and transitioning to a “restorative justice” model that emphasizes reconciliation, rather than punishment. On the other hand, defenders of the status quo point to dramatic reductions in violent crime since the 1970s, when American policymakers pivoted away from rehabilitation and toward “tough-on-crime” approaches. Despite (or perhaps because of) its high incarceration rate, the United States is one of the safest countries in the world, and there is something to be said for the common-sense view that locking up criminals is a *good* thing.

Parallel to these pragmatic questions is a vexed moral question: What kind of treatment do criminals deserve? The traditional, retributivist answer is that criminals are fully responsible for their actions and so ought to be punished in proportion to the seriousness of their crimes. But in light of the extraordinarily high correlations between criminal behavior and poverty, mental illness, intergenerational substance abuse, illiteracy, and fatherlessness, some find the traditional answer hard to swallow. Can we really hold criminals responsible if all these factors are beyond their control? Given the enormous attention “systemic” inequality has received in American politics recently, these questions are more salient than ever.

Of course, this year’s Lincoln-Douglas resolution is not limited to the United States. But the contentious history of criminal justice in America imbues it with significance. The problems raised by the resolution are problems we are actively struggling to solve, problems that bear

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directly on policymaking at both the local and national levels. Your judges will likely cast *actual* ballots on these issues within the year.

Part I: Definitions

Let's begin by defining the four key terms in the resolution. Here are a few dictionary definitions of "rehabilitation":

Oxford Dictionaries. "Rehabilitate" <https://www.lexico.com/en/definition/rehabilitate>.

"Restore (someone) to health or normal life by training and therapy after imprisonment, addiction, or illness."

Merriam-Webster. "Rehabilitation" <https://www.merriam-webster.com/dictionary/rehabilitation>

"The process of restoring someone (such as a criminal) to a useful and constructive place in society."

Collins English Dictionary. "Rehabilitate" <https://www.collinsdictionary.com/us/dictionary/english/rehabilitate>.

"To rehabilitate someone who has been ill or in prison means to help them to live a normal life again. To rehabilitate someone who has a drug or alcohol problem means to help them stop using drugs or alcohol."

Each of these definitions emphasizes a return to normal life. The Merriam-Webster definition is most favorable to the AFF position, since it requires that criminals return to *useful* and *constructive* lives, not merely normal ones. The Oxford Dictionaries definition provides the most detail by pinpointing the two primary methods of criminal rehabilitation: training (usually vocational training) and therapy. We will examine these methods more closely in the applications section.

"Retribution" is a trickier term to define, because it has a broad meaning and a narrow meaning. Broadly, retribution is punishment inflicted in return for something.

Merriam-Webster. "Retribution" <https://www.merriam-webster.com/dictionary/retribution>.

"The dispensing or receiving of reward or punishment especially in the hereafter."

Macmillan Dictionary. "Retribution" <https://www.macmillandictionary.com/dictionary/american/retribution>.

"Punishment that someone deserves because they have done something very bad."

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The narrow meaning of retribution, the meaning that is most relevant to criminal justice, is *deserved* punishment that is *proportional* to the seriousness of the wrong for which it is inflicted.

Jon 'a F. Meyer (*Jon 'a F. Meyer is Associate Professor of Sociology at Rutgers University.*), “*Retributive Justice*,” in *Encyclopedia Britannica*, n.d., accessed July 3, 2022, <https://www.britannica.com/topic/retributive-justice>

“Retributive justice [is a] response to criminal behaviour that focuses on the punishment of lawbreakers and the compensation of victims. In general, the severity of the punishment is proportionate to the seriousness of the crime.”

“Retribution” is often used as shorthand for retributivism or retributive justice, a philosophy of punishment according to which criminals should be punished by a legitimate authority when and only when they deserve it and only to the degree that their offense warrants.

Alec Walen (*Alec Walen is Professor of Law & Philosophy at Rutgers University.*), “*Retributive Justice*,” in *Stanford Encyclopedia of Philosophy* (*Stanford Metaphysics Research Lab*, 2014), <https://plato.stanford.edu/entries/justice-retributive/>.

“The concept of retributive justice has been used in a variety of ways, but it is best understood as that form of justice committed to the following three principles:

1. that those who commit certain kinds of wrongful acts, paradigmatically serious crimes, morally deserve to suffer a proportionate punishment;
2. that it is intrinsically morally good—good without reference to any other goods that might arise—if some legitimate punisher gives them the punishment they deserve; and
3. that it is morally impermissible intentionally to punish the innocent or to inflict disproportionately large punishments on wrongdoers.

The idea of retributive justice has played a dominant role in theorizing about punishment over the past few decades, but many features of it—especially the notions of desert and proportionality, the normative status of suffering, and the ultimate justification for retribution—remain contested and problematic.”

Unfortunately, retribution in this narrow sense is often confused with revenge. Indeed, it is possible to find dictionary definitions of “retribution” that equate it with vengeance. This confusion is due in part to a failure to distinguish between the broad sense and the narrow sense of “retribution.” Revenge is retribution in the broad sense, since it is punishment inflicted in return for a wrong. But it is not retribution in the narrow sense, since revenge is often

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disproportional and inflicted by a private individual out of hatred, rather than by a legitimate authority out of a concern for justice.

George P. Fletcher (*George P. Fletcher is the Cardozo Professor of Jurisprudence at Columbia University School of Law.*), *Rethinking Criminal Law* (New York: Oxford University Press, 1978): 416-418.

“Retribution simply means that punishment is justified by virtue of its relationship to the offense that has been committed. It is obviously not to be identified with vengeance or revenge, any more than love is to be identified with lust.”

Robert Nozick (*Robert Nozick was professor of philosophy at Harvard University and a leading philosophical defender of libertarianism in the 20th century*), *Philosophical Explanations* (Cambridge, MA: Harvard University Press, 1981): 366-367.

“Revenge involves a particular emotional tone, pleasure in the suffering of another, while retribution either need involve no emotional tone, or involves another one, namely, pleasure at justice being done. Therefore, the thirster after revenge often will want to experience (see, be present at) the situation in which the revenge is suffering, whereas with retribution there is no special point in witnessing its infliction.”

Restitution is perhaps the easiest key term to define:

Merriam-Webster. “Restitution” <https://www.merriam-webster.com/dictionary/restitution>

“A legal action serving to cause restoration of a previous state.”

Oxford Dictionaries. “Restitution” <https://www.lexico.com/en/definition/restitution>

“Recompense for injury or loss.”

American Heritage Dictionary. “Restitution” <https://www.ahdictionary.com/word/search.html?q=restitution>

“The act of making good or compensating for loss, damage, or injury; indemnification.”

The most common form of restitution in our legal system (though not the only one) is monetary compensation paid to victims by offenders. While restitution belongs primarily to the arena of civil law in the United States, there is an argument to be made that it should be part of criminal law as well, since upholding victims’ rights is essential to justice.

Deterrence is punishment calculated to prevent crime by instilling fear in potential offenders:

Merriam-Webster. “Deterrence” <https://www.merriam-webster.com/dictionary/deterrence>

“The inhibition of criminal behavior by fear especially of punishment.”

Oxford Dictionaries. “Deterrence” <https://www.lexico.com/en/definition/deterrence>.

“The action of discouraging an action or event through instilling doubt or fear of the consequences.”

A distinction is commonly made between *specific* deterrence and *general* deterrence:

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Legal Dictionary. “*Specific Deterrence*” <https://legaldictionary.net/specific-deterrence/>

“There are two main types of deterrence: (1) specific deterrence, and (2) general deterrence. Specific deterrence is a type of deterrence that is aimed at the specific individual being charged with a crime. General deterrence is a type of deterrence that is used to discourage the public at large from committing the same crime, or a similar one, to that which was committed by the person being sentenced.”

More fine-grained distinctions can be made between different kinds of deterrence -- for example, between deterrence by the threat of severe punishment and deterrence by the threat of certain punishment. Various kinds of deterrence differ widely in their effectiveness: for example, most of the empirical evidence we have suggests that specific deterrence by severe punishment has little impact, if any, on reoffending, while general deterrence by certain punishment (for example, through additional funding for community policing) has a much stronger impact on crime rates.

Part II: Resolutional Analysis

There are three main points of resolutional analysis relevant to this resolution. First, debaters must decide on a resolutional actor. Since criminal justice is generally the provenance of government, a government actor is the natural choice. It is not the only choice, however: in a liberal democracy like ours, individual citizens play a role in criminal justice policies and processes. Furthermore, individual citizens plausibly have a kind of authority that the government does not: the authority to *forgive* criminals for crimes committed against them. If rehabilitation requires forgiveness – and especially if it requires the participation of victims, as do “restorative justice” models of rehabilitation – then a citizen actor (or a compound actor made up of both government and citizen) may be appropriate.

Second, debaters will have to clarify what it means to “prioritize” rehabilitation over alternatives. According to *Merriam-Webster*, a “priority” is

Merriam-Webster. “*Priority*” <https://www.merriam-webster.com/dictionary/priority>

“Something given or meriting attention before competing alternatives.”

Given this definition, debaters may choose to argue that the resolution contains an implicit conflict standard. In other words, to “prioritize” rehabilitation over an alternative is to choose rehabilitation whenever it comes into competition with that alternative. This limits the debate to situations where rehabilitation is in conflict with retribution, restitution, or deterrence. Under this analysis, AFF may consistently value punishments that are compatible with rehabilitation, since in such situations there is no need to prioritize anything.

Third and finally, debaters will have to decide whether to treat the resolution as a *conjunction* or as a *disjunction*. A conjunction is a sentence of the form “x, y, and z”; a

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disjunction is a sentence of the form “*x, y, or z.*” A conjunction says that several claims are *all* true; a disjunction says merely that *at least one of them* is true. So the conjunction “I am tall, skinny, and blond” is only true if all three descriptions are true of me, while the disjunction “I am tall, skinny, or blond” is true as long as at least one of them is. As it happens, the conjunction is false, because I am not blond (or especially tall), but the disjunction is true, because I am skinny.

The resolution can be read either way. On a conjunctive reading, the resolution says that rehabilitation is superior to all three alternatives – i.e., superior to retribution, superior to restitution, *and* superior to deterrence – whereas, on a disjunctive reading, it states only that rehabilitation is superior to at least one of them – i.e., superior to retribution, superior to restitution, *or* superior to deterrence. The fact that the resolution uses the word “or” instead of the word “and” suggests a disjunctive reading. But it turns out that the word “or” is often used in English to express a conjunction. Take, for example, the sentence, “I prefer climbing to running, biking, or swimming.” In a normal context, this sentence means that I prefer climbing to all three alternatives, not just one of them.

On a conjunctive reading, AFF’s burden is quite heavy, since he must offer persuasive arguments against retribution, restitution, and deterrence in the AC. That is possible, but it is difficult. To make things worse, NEG could then choose just one of the three alternatives to rehabilitation and spend the entire NC defending it, and that would be enough to shoulder *his* burden. So, to avoid a heinously lopsided debate, AFF should opt for a disjunctive reading and then choose one of the three alternatives to target. Of course, NEG could challenge this analysis and try to argue for a conjunctive reading in the NC, but AFF could reply in the 1AR that this standard is unfair. (Alternatively, AFF could defend a disjunctive reading *and* offer arguments against all three alternatives to rehabilitation in the AC. That would force NEG to defend all three in the NC. This strategy would be difficult to execute due to time constraints, but it could be quite effective.)

Conclusion

This resolution is relevant, flexible, and full of depth. I expect most debate rounds this competitive season to be interesting and engaging. The threefold nature of the resolution will require debaters to prepare arguments in defense of retribution, restitution, and deterrence (in other words, to write three distinct NEG constructives), but I see that as an advantage, not a drawback. (In any case, it is no less feasible than briefing several AFF plans in team policy.) Suffice it to say that this will be one of the most rewarding STOA resolutions in recent memory.