



**Revising Wolff's support for retribution as a justification for punishment: desistance, rehabilitation and restoring the status of victim *and* offender**

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# **Revising Wolff's support for retribution as a justification for punishment: desistance, rehabilitation and restoring the status of victim *and* offender**

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## **Abstract**

The philosopher Jonathan Wolff has recently supported retribution as a justification for punishment in his book *Ethics and Public Policy: A Philosophical Enquiry* (EPP). His main argument is that the victim's status and self-respect has been undermined by a crime committed against her, and the offender, in the process, is effectively stating he is above the law and societal norms and that he has no regard for the victim. Punishment is therefore responding to both these social violations and acts as a communicative mechanism to both offender and victim, restoring the status of the latter by punishing the former. This paper defends Wolff's main idea supporting retribution, in certain clearly defined cases, but his position needs supplementing. First, when examining the practice of the criminal justice system, we claim that punishment is a necessary but *not* sufficient condition for restoring the status of the victim. Secondly, any re-balancing of status should occur, not only between the offender and the victim, but also between the offender and wider society – the latter acknowledging the social responsibility of ensuring that marginalised members of society (including many offenders) are not socially excluded, and so are helped or assisted in becoming socially included. We further argue that this latter outcome is best achieved via a process of desistance, which assumes that although individuals have an idiosyncratic journey to becoming a 'non-offender', all involve developing socio-economic capital that the individual does not want to place in jeopardy by reoffending.

## Introduction

This paper mounts a critical defence of Wolff's core arguments supporting retribution, recognising that certain crimes at least profoundly undermine the status of the victim and so, when committed, justify punishment for the reasons Wolff outlines. However, consistent with Wolff's position, we argue that retribution should not correspond to vengeance and crude attempts to 'pay back' the offender, and that proportionality, too, is central to mounting any credible defence of retribution. Following these qualifications, 'punishment' is defined by us as any sanction imposed upon an individual for a criminal act, which may include cautions and all other court sentences.

Moreover, the paper will supplement Wolff's position to accommodate some of the main assumptions and arguments of newly emerging 'desistance theory'. Most notably, we extend his position concerning the restoring of status. For Wolff, the main method of restoring the status of the victim is through punishing the offender, leading to a rebalancing of the moral and social order. We accept this premise, assuming the negative impact upon the victim of the crime committed, but add the need to restore the status of the offender – that is, given many (but not all) offenders suffer from multiple social and economic disadvantage.

The core assumption of desistance theory is that rehabilitation and punishment often do not work (although the former might sometimes), because individuals have a highly idiosyncratic journey to becoming a 'non-offender' which cannot be generalised such that it is applicable to traditional 'treatment' methods. When offenders change to non-offenders, they redefine their personal narratives in response to social capital being accumulated. This accumulation produces a sense of belonging and 'stakeholdership', where particular personal, emotional and material 'goods' are acquired which the individual does not want to place in jeopardy by future offending. Developing, then, Wolff's account of retribution, punishment therefore can be re-conceptualised in the light of this understanding of desistance.

Our central claim is that, given many offenders experience low social and economic status (e.g. see Ministry of Justice, 2013), this problem too also needs to be addressed in a fully articulated retributive theory of punishment. Consequently, retribution is better understood as part of a wider *social* communicative endeavour, which does not merely function in response to the injustices of individual crimes committed, but also to more structural forms of social injustice. Therefore, the latter response includes improving the social and economic status of the offender as one of its goals, and that the role of the 'worker' (in whatever professional context) should be to recognise and help remove barriers to desistance, and provide empathic support for the victim *and* the offender, so enhancing the status of both. As a result, the state should accept the social responsibility of ensuring that marginalised members of society (so including many

offenders) are able to enjoy the status of 'stakeholder' which, in turn, becomes a hallmark for possessing valuable socio-economic capital. Once this possession takes place a robust platform for supporting desistance as a legitimate outcome of retribution can be built.

### **Outlining Wolff's position**

We focus on Wolff's chapter in EPP entitled 'Crime and Punishment' (Wolff, 2011: 109–127). The central question for Wolff is: What is so bad about crime that it warrants punishment, and moreover a punishment which is often very severe (especially imprisonment)? The answer for Wolff lies not in the externally observable facts of injury or loss suffered by the victim, as these can be relatively minor compared with other forms of injury and loss, from, for example, accident or natural events/disasters. Rather, it is in the *relationship* between the offender and the victim, and what is being communicated to the latter and wider society as a result of a crime committed:

*... the fact that a crime is something one human being does to another seems to add a further moral or political dimension ... that in picking on you as a target for his or her crime, another person treats you in a particularly undesirable way, showing you lack of respect, or contempt.*  
(Wolff, 2011: 114)

For Wolff the argument doesn't stop with actual crimes committed against persons as even an attempted crime reveals a disregard for the victim: "Contempt is shown even by an attempted crime." (Wolff, 2011: 115). Nevertheless, according to Wolff:

*A successful crime cuts deeper. It seems to be an assault to the self, even to the point of putting one in a different category – that of victim ... In the case of becoming a victim of crime one loses the sense of being master of one's fate. Furthermore one can become the object of pity, which many people can find diminishing. But most of all, another person has treated you with contempt, and has succeeded in doing so ... A successful crime seems, in at least some cases, to bring about a change in status and in self-respect. It is, in this respect, transgressive and disruptive of the social order.*  
(Wolff, 2011: 115–116)

These assumptions are controversial and are explored in more detail below, but how do we justify punishment according to Wolff, if, in certain circumstances at least, these assumptions are true? For Wolff, justification for punishment is not derived from deterrence – as deterrence is often ineffective, being based on over-simplified and inaccurate accounts of human motivation (Wolff, 2011: 117–123). It is also not through

rehabilitation – as this misleadingly exaggerates the positive effects of punishment as a means of changing the behaviour of offenders (Wolff, 2011: 117– 123). This leaves the other main contender for justifying punishment, namely ‘retribution’. Although, at first glance, retribution looks barbaric (as it seems merely to be punishing for the sake of revenge), if it is examined more closely, relating it to a communicative function and the restoration of status, then retribution has much greater justificatory force for Wolff:

*In succeeding in their crime against you ... they have victimized you, and left you in a lowered status. Even when there is no identifiable victim – as in the case of vandalism of public property – the successful criminal implies that in some sense he or she is above the norm, or, at least, above the rules. Crime communicates a message ... If so, then punishment appears in a new light. For at least part of the purpose of punishment then becomes to re-establish some sort of proper status between all parties ... In sum, retribution, understood in its communicative form, may be somewhat less barbaric, as a justification of punishment, than it is sometimes thought.*

*(Wolff, 2011: 124–26)*

Our position accepts this aspect of Wolff’s argument – and that justification for retribution (as he describes) has a particular plausibility for certain crimes especially (e.g. burglary, muggings, assault, theft of private property). However, even if we concede broadly to Wolff’s case for retribution we contend that important supplements should be made to his position that accommodate recent developments in desistance theory and rehabilitation, and fully recognise the diminished status of offenders in many cases. So, although punishment may be justified to restore the status of victim in the way Wolff describes, there is also a wider *social responsibility* to restore the status of the offender as part of any strategy to prevent reoffending (a strategy which includes punishment and the support of desistance).

### **Desert, proportionality, and desistance – supplementing Wolff’s position**

First, we consider further the meaning of retribution in order to clarify some of the claims we make concerning Wolff’s position. Rachels discusses various justifications for punishment, but makes central to all a ‘principle of desert’, based on the abstract claim that: ‘People deserve to be treated in the same way that they (voluntarily) choose to treat others’ (Rachels, 2002: 468). From this he argues that four more specific principles are fundamental to any idea of justice: that only the guilty should be punished; that all should be afforded equal treatment; that punishment should be proportionate; and that excuses should be taken into account (Rachels, 2002: 471). Consistent with Wolff’s position supporting retribution, Rachels then argues that this principled understanding of

desert does not equate to primitive vengeance, but is preferred to both deterrence and rehabilitation.

Secondly, developing the last point, we also propose that in everyday parlance, media and political discourse, and in the practices of the criminal justice system, the term retribution is often used very loosely (to include a more primitive understanding of vengeance) and is rarely closely defined in ways suggested by Wolff, Rachels, et al. Consequently, retribution is commonly associated (and is often synonymous with) severe punishment and, importantly for this discussion, with punitiveness – in particular, the use of custody. We would remove retribution from this assumed necessary link to punitiveness and custody, and redefine it to imply the use of any legitimate means imposed upon individual offenders by the criminal justice system as a result of crimes committed. Thus, retribution (properly understood) may entail a range of outcomes of the criminal justice system, from cautions to discharges, fines, community orders or custody. A retributive response (in whatever guise) is clearly different, then, to deterrence according to the arguments just presented. Deterrent theorists see punishment responses to crime as necessary, but not merely because the crime is a wrongdoing directed toward the victim which needs redressing (enter retribution) – but also because punishment may discourage the offender and others from committing crimes in the future.

After redefining retribution accordingly the next key issue to consider is proportionality; that is, reflecting the idea that acts of retribution should be in proportion to the nature of and harm caused by the original offence. However, while this might seem an uncontroversial principle in its abstract form, and is consistent with Rachels' principles of desert just outlined, proportionality is more difficult to apply to particular cases, raising another more difficult question, namely: what specific form of punishment should be instigated which is equivalent to any particular offence? The difficulty remaining that notions of equivalence are bound to contain arbitrary elements, assuming that we don't take the retributive dictum literally of exchanging an eye for an eye, or a tooth for a tooth. For example, it is fairly easy to demonstrate that understandings of proportionality are variously interpreted across different temporal and cultural domains. So, over the past 20 plus years in the UK, and since the 1993 Criminal Justice Act deliberately sought to reverse the custodial parsimony of its 1991 predecessor, it has frequently been observed that proportionality has spiralled 'up-tariff', leading to significant increases in community orders and custody, while, and despite, offending rates declining during the same period (Deering 2011; Mair 2011; the *Guardian*, 2013). However, this trend suggests that proportionality could alternatively be re-defined in a 'downwards' direction, with the latter based on the assumption that any retributive sanction may only need to be set at a minimal level necessary for justice. Therefore, it is



possible to view the use of many community orders, and especially most custodial sentences, as unnecessary and disproportionate, while at the same time still commit to retribution being a legitimate justification of punishment.

In addition, and changing tack rather, we also reject any singular focus on rebalancing the relative status of the victim in relation the offender, without paying attention to restoring the status of offender. Moreover, this would be part of a wider strategy of maintaining and enhancing social justice and social inclusion, underpinned by a theory of desistance.<sup>1</sup> So, we argue that retribution can be supported if proportionality is revised downwards in many (but not all) cases, and if it addresses wider social concerns about many offenders' relatively low social and economic status. Overwhelming empirical evidence (e.g. Ministry of Justice, 2013) suggests that a large proportion of known offenders are clearly of reduced socio-economic status, which (using the conceptual framework just outlined) provides reasons for the state to restore the offender's status as well as the victim's.

What form should this two-fold restoration take? It could plausibly include community orders insofar as any outcome lower on the sentencing tariff does not involve criminal justice agencies. Although the precise nature of community orders has changed considerably in the last century, since their inception they have been founded on principles of rehabilitation, operationalised via the probation service. Nevertheless, as we have seen, Wolff dismisses rehabilitation as a sound justification of punishment, but does so rather too quickly in our view. Without either fully defining rehabilitation or citing empirical evidence for its ineffectiveness, he states: 'rehabilitation, even if effective, which it probably is not, could only have a marginal effect upon future crime rates' (Wolff, 2011: 118).

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<sup>1</sup> As a corollary to the above argument, we also question the assumption by Wolff that punishing the offender necessarily restores the status of the victim via a clear communicative process (as outlined previously). While this may be the case in some instances, his general supposition lacks an empirical base. Certainly, criminal justice systems have been guilty in the past of ignoring the needs of victims, and perhaps even regarding victims solely as a source of evidence. However, it is unclear how more recent developments, most notably since the 1990's of the *Victims' Charter* and the requirement that the probation service gives certain factual information about the sentencing of the perpetrator to victims of more serious offences (Criminal Justice System, 2005), can be seen as restoring the status of the victim; that is, assuming this restoration is likely to be a complex and difficult process for many victims, requiring something more than simply giving information. This observation does not contradict Wolff's broader justificatory point for retribution, but if restoring the status of the victim is to be implemented then considerable work needs to be done to revise the present criminal justice system to ensure this restoration happens in practice.

For sure, the efficacy of rehabilitation programmes has been long debated through the 'Nothing Works' era (Brody, 1976; Martinson, 1974; Lipton, Martinson et al., 1975) to the 'What Works' era (e.g. McGuire, 2001; McMurrin and McGuire, 2005). In addition, we also claim that if rehabilitation is promoted as a 'top-down' approach of 'treatment' defined by an expert and 'done to' the offender, then it is likely to fail. However, these are not sufficient reasons to throw the baby out with the bathwater, as more recent research on desistance suggests that facilitating the highly individualised process of change from an offender to a non-offender (this being the general aim of rehabilitation), can offer a more promising approach to community orders than more traditional rehabilitative treatment programmes. Here, Wolff's promotion of retribution can be supplemented to accommodate desistance, which then, we believe, makes better sense of his notion of restoring status via punishment. Following this understanding, we also argue that there is no necessary incompatibility between punishing the offender and helping the offender, dependent upon the particular form of a punishment which may punish, and in the process of its application, also help. We now argue that the most effective way of implementing this strategy is to pursue policies of desistance, based, in part, on the Wolffian retributive notion that status should be restored, but not only for the victim, also for the offender.

In the last decade or so there has been an emerging literature on desistance which is both theoretical and empirically based, and offers encouraging signs for policy and practice. Moreover, there is mounting evidence that some probation practice is akin to 'desistance-type' intervention, in that it is reactive and needs-based, rather than proactive and 'treatment based', with many practitioners being disposed towards the former kind of intervention (Deering, 2011; Vanstone, 2004). Desistance is a relatively young and contested field, emerging to some extent from a critique of existing probation practice underpinned by 'treatment' based interventions. It has criticised rehabilitation as being ineffective when helping individuals change their behaviour (e.g. Farrall, 2002) emphasising the importance of developing a healthy professional relationship between worker and offender (Rex, 1999; Trotter, 1999; Burnett and McNeill, 2005; McNeill et al., 2005). While having a range of specific approaches, in general terms desistance advocates argue that this relationship should be employed in assisting offenders to consider building up their own desistance, and thereby removing barriers to their non-offending.

Most importantly, for the arguments presented here, desistance also assumes that offenders are best served by accumulating their personal and social capital, recognising that this accumulation is variously caused (Weaver and McNeill, 2010). For example, Maruna (2000) argues that through age and maturation, life transitions, and the making



of personal and social bonds, an offender is able to redefine his personal narrative in order to become a non-offender. On the other hand, Bottoms et al. have questioned the necessity of such narrative redefinition, arguing that change can occur for a number of reasons, including, for example, good fortune (Bottoms et al., 2004). However, assuming this variety in the causes of change, desistance broadly highlights the idiosyncratic process by which individuals undergo this change. By implication, this assumption challenges top-down treatment based interventions which promote a singular and monolithic method of change, from whatever theoretical base.

More specifically, what role, then, can probation play in this idiosyncratic process of desistance and how might it be seen as a legitimate part of Wolff's support of retribution? Weaver and McNeill (2010) are clear that probation practice needs to identify and help remove barriers to desistance. Following this prompt, and providing what they call a 'desistance paradigm', Maruna and LeBel (2010) argue that the official labelling of individual offenders via criminal records and other practices (such as disbarment from certain types of employment) contributes to the slowing down or even cessation of desistance; it cuts individuals off from various avenues of social inclusion and acceptance and so can lead to reoffending. Thus, policy and practice should become engaged in a 'de-labelling' process. For example, this might include the 'wiping-out' of official records of offending, which, from our point of view, can reflect retributive principles, as once any form of sentence has been administered and completed, then the individual's debt to society has been paid, so preventing what has been termed legacy 'punishments' (Maruna and LeBel, 2010: 78).

In addition, Maruna and LeBel consider developing a proactive process of engagement by offenders, such as voluntary work, that may allow them to earn 'earlier recognition' (2010, 79). They also claim that while individual motivation is central for change to occur, few desisters achieve change alone, often citing significant others who help them achieve desistance, including criminal justice workers. Desistance, then, recognises that any change and rehabilitation is derived, at least in part, from a relational process, where state representatives play a positive role in encouraging change while helping the offender in this process (Maruna and LeBel, 2010: 81). As highlighted, the importance of the professional relationship in probation work has been the focus of research for more than a decade (Rex, 1999; Trotter, 1999; Burnett and McNeill, 2005; McNeill et al., 2005). Indeed, for many commentators, it is the quality and skillfulness of this relationship as it is developed by the worker and the offender that is the most useful aspect of any intervention, rather than any particular form of intervention. Building on these findings, much desistance research has considered the greatest usefulness of probation work being linked to the longevity of the relationship cultivated between the worker and the offender. However, more recently, King (2013) has argued that

probation's efficacy in the early and primary stage of desistance is also important and has often been overlooked. A healthy relationship is facilitated by empathy, genuine engagement and interest, pro-social approaches and the proper use of authority. Based on his study of probation supervisees, King argues that such relationships can help offenders re-examine the past and then consider alternative futures. Nevertheless, these 'alternative futures' are only made possible if the social status of the offender is restored through the accumulation of socio-economic capital. This accumulation allows for a practical realisation of these alternatives, as the offender understands that reoffending would jeopardise this capital which then supports his desistance (Raynor, Ugwudike et al., 2013). The point being here that focusing on restoring the social status of the offender is not only consistent with a desistance approach, but also with our revised justification of retribution defined earlier. In short, the offender, in the process of achieving desistance, has his socio-economic status restored, while at the same time the status of the victim is restored through the punishment of the offender administered via the criminal justice system.

## **Conclusion**

In arguing for a re-casting of probation practice so described, we acknowledge that this re-casting, in many ways, fundamentally challenges government-led changes to the service over the last twenty years or so. These changes, amongst other things, have seen a withdrawal behind desks and computers (NAPO, 2010) and the growth of a monitoring role, alongside 'offender responsabilisation' and cognitive behaviourist interventions, as well as other 'treatment' and 'individualised' therapies (Home Office, 2001; National Offender Management Service, 2006). In our view, these changes not only ignore the complexity and idiosyncratic nature of personal change, but also the importance of maintaining social justice principles at the heart of the criminal justice system. More specifically, in response we have tried to combine a proportionate retributive justification of punishment (as broadly recommended by Wolff), with close attention to the social injustice that many (but not all) offenders experience. We have based this endeavour on the premise that issues concerning the restoration of status (being central to the notion of retribution) are not only confined to victims, but are also pertinent for offenders.

However, another question arises for our argument which we address here: how can our approach be a variant of retribution, given that retribution often seems to be only intent on redressing the status imbalance between victim and offender? Moreover, retribution, as Wolff highlights, is traditionally backward-looking, focusing on the crime already committed, and so is not therefore interested in the future of the offender, only in the past offence and its detrimental effect on the victim. Our approach, while supporting the principle of retribution, clearly challenges this orthodoxy – seeing the

restoration of the victim's status as a necessary but not sufficient condition for retribution. It is in this latter context that we are also concerned with the future behaviour of the individual offender, with the view to restoring the offender's status as well, and so also supporting desistance.

As a result, we are proposing a modified form of retribution which includes a commitment to desistance. Certainly, this proposal involves the offender, as part of a court sentence, having to for example comply with the terms of a community order. Administering this form of punishment includes the possibility of breach and a return to court for non-compliance. Thus, such an order reflects an offender being held to account via the court and, underpinned by an institutional process of punishment, is delivered within a clearly communicated legal framework. This type of accountability has certainly been enshrined in practice since the 1991 Criminal Justice Act, and can be encompassed within Wolff's (and our) understanding of retribution.

Finally, we contend that both retribution and the strategy of desistance stem, in part, from a concern for the offender's moral state. This concern, subsequently, can be further linked to Duff's interpretation of the Hegelian notion that the offender has a '*right to be punished*' – that is, a right to have the wrong expiated, and so allowing the offender to make amends for his crime being administered through his punishment (Duff, 2000). Moreover, and also consistent with this broadly Hegelian approach, and following Rachels (2002: 473), we have argued that one element of retribution – that of desert – requires giving offenders what they deserve in relation to the crime committed, so restoring the status of the victim (and reflecting Wolff's position). Nevertheless, we have also argued that what the offender deserves also includes assistance to serve the ends of social justice. It is via the latter that we have recommended the practice of desistance, acknowledging the importance of building socio-economic capital for the offender to help reduce the chances of reoffending. Consequently, a retributive justification for punishment is only sufficient if matters concerning the diminished social and economic status of most offenders are also addressed, and as an explicit part of the re-balancing of the social order as recommended by Wolff.

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