CARE IN RESTORATIVE JUSTICE

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ABSTRACT OF THE THESIS

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Restorative justice stands for a philosophy and set of practices that have recently been introduced in the U.S. legal system. Practices of restorative justice respond to crime and conflict with rehabilitation, reconciliation, and dialogue, as opposed to punishment and retributive justice. In the present work I argue care ethics should be established as a philosophical and theoretical foundation for restorative justice. Such a foundation is necessary to recognize the importance of care in the practices of restorative justice, to which the success of the latter can be attributed. I demonstrate care ethics and restorative justice share values, sometimes implicit in restorative justice, by looking at several restorative practices and programs. I argue that implicit views in restorative justice, such as a relational view of persons and relational autonomy, should be made explicit and taken from care ethics in order to advance the theoretical foundation of restorative justice.

The objection may be raised that a fully restorative justice system cannot be “fully” restorative if it occasionally uses of incarceration and hence that the idea that such a system is unrealistic. I will explain how restorative justice can overcome this objection by justifying the use of incarceration, not as a retributive practice, but as a practice justified by the values of restorative justice and care. On the other hand, care ethics can also benefit from taking a restorative view of justice. Care ethicists have held care and justice to be incompatible ethical frameworks; however, restorative justice demonstrates the contrary by incorporating care into its practices and values. Overall, recognizing care as a central value of restorative justice can ultimately allow us to imagine and realistically model a legal system based on care and restoration, instead of punishment and retribution.
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INTRODUCTION

In American society retributive justice is the philosophy underlying the practices of the criminal justice system, and it often goes unquestioned. We live under the assumption that punishment, which usually takes the form of incarceration, is the right way to respond to crime and wrongdoing. These assumptions are being challenged by restorative justice, a different view of justice that focuses on repairing the harm caused by crime through rehabilitation, reconciliation, and care, not through the punishment (or incarceration) of offenders. Restorative justice has relatively recently been introduced in the criminal justice system in the U.S., and it has been proven to work better than retributive justice in lowering crime rates and reducing recidivism.\(^1\) For this reason, some advocates of restorative justice hope that eventually the legal system becomes fully based on the values of restorative justice, thereby reducing or eliminating the use of incarceration.\(^2\)

However, as a theory, restorative justice is partly incomplete and still needs much work. Restorative justice needs to account for possible situations in which restorative practices don’t seem likely to work, for example, cases dealing with dangerous or uncooperative persons. There is currently no definite explanation for why the practices of restorative justice are so successful in lowering crime and recidivism, and such an explanation is necessary in order to replicate this success. Consequently, it is unclear that a


fully restorative legal system is a realistic possibility. Before considering the transformation of the entire legal system, restorative justice must address some objections and fill in gaps in its theory to provide a stronger overall account and show how a fully restorative legal system is a realistic possibility. I will analyze restorative justice in more detail in the following section and then focus on an objection (section two) regarding the voluntary character of restorative practices and what should be done with individuals who don’t want to cooperate with restorative practices. If the solution is to incarcerate them, then this would easily lead back to the use of retributive justice, as incarceration is commonly defined and used as a retributive practice. The use of incarceration would also weaken the claim that transforming the legal system to be fully restorative—i.e. without relying on retributivist practices—is a realistic project to undertake.

Restorative justice responds to crime with practices that primarily rely on rehabilitation, reconciliation, and care. The role of care, however, hasn’t been sufficiently recognized by advocates of restorative justice, even though care is a fundamental virtue and practice within restorative justice. Care can properly be incorporated as a value into restorative justice by adopting the values of care ethics, a feminist philosophical theory based on the values and practices of care. In the fourth section, I will show how restorative justice and care ethics are compatible theories that share values and practices in common.

Restorative justice could benefit from care ethics not only by incorporating its values into its theory but also its tenets as well, like its relational view of persons and relational autonomy. By adopting the values and views of care ethics restorative justice could respond to objections that raise questions about the practical reality of increasing restorative practices to respond to crime. Care ethics can help respond to such objections by justifying the use of incarceration in cases where individuals do not want to cooperate with practices of restorative justice, based on the value for caring relations and a relational understanding of persons. Under a fully restorative legal system, incarceration would not be used as punishment or seen as a retributivist practice, under the assumption that individuals need to be punished for their crime. Based on the values of care ethics and restorative justice, incarceration would rather be used for incapacitation and rehabilitation, left as a last resort in cases where there are no other ways to ensure the safety of the community. As a result, the implementation and purpose of incarceration would be largely different from the way it is
currently used under retributive justice, and the opportunity to participate in practices of
restorative justice and rehabilitation would always be available. It is important to address the
concern about individuals refusing to cooperate with procedures of restorative justice to
determine whether we can realistically transform the legal system to be entirely based on
restorative justice.

On the other hand, restorative justice can also make significant contributions to care
ethics. Care ethicists argue that care and justice are incompatible ethics, but restorative
justice shows otherwise. Care ethicists have overlooked restorative justice when criticizing
an ethic of justice, generally assuming and particularly criticizing retributive justice. In the
sixth section, I will demonstrate how care ethics can benefit from taking a restorative view of
justice, having the potential to reconcile and show that care and justice are compatible values
and practices.

Acknowledging the importance of care and incorporating it as a fundamental value of
restorative justice can also explain why restorative justice is so successful, as I will show in
the seventh section. Care ethics can make significant contributions to restorative justice
theory not only by responding to objections against restorative justice but also by accounting
for its success. Care ethics can thereby help us determine how realistic it is to propose the
transformation of the legal system to one that is fully restorative.

Overall, it is my purpose to show that these two theories are compatible and can
complement one another. But most importantly, I want to highlight the role of care within
restorative justice to argue that it should be recognized as one of its central values, being just
as important as some of its other core values, such as respect and responsibility. The project
of transforming the legal system to be fully restorative, which some advocates of restorative
justice support, entails that the values on which the legal system is currently based with the
values of restorative justice. The legal system is currently based on the values of retributive
justice, which include noninterference, impartiality, punishment, and in which persons are
seen as unrelated and independent moral agents. Care and caring relations have largely been
excluded from legal processes and retributive practices. Care has also been excluded from
restorative justice in theory, but, as I will show, it has been a fundamental value in the
practices of restorative justice. If care were identified as a central value of restorative justice,
then transforming the legal system to be fully restorative would also entail that it be based on
care. This would altogether allow us to imagine a legal system drastically different from the one we have today, one where care is the norm and all the practices opposite of care, such as punishment, the exception.
THE PROMISE OF RESTORATIVE JUSTICE

The criminal justice system in the U.S. relies on a philosophy of retributive justice. In this view, punishment is considered the right way to respond to crime and wrongdoing. Existing practices of the criminal justice system punish individuals with different types of sentences, which include fines, imprisonment, or capital punishment, among others. Punishment is a retributive practice, intended to achieve several goals, such as retribution, deterrence, incapacitation, and rehabilitation. Individuals who commit crimes are punished to deter people from committing crime, based on the understanding that they deserve to be punished in proportion to the harm caused by their crime. Punishment is intended to incapacitate by removing an individual from society for the purpose of society’s safety and security. It can also be intended to rehabilitate individuals and transform them into productive members of society.

The justification of retributivism and punishment can be traced to dominant moral theories, primarily deontology and utilitarianism. Punishment is justified under deontology by claiming a person guilty of wrongdoing deserves to be punished. This view is backward-looking or retrospective, punishing for a crime committed in the past without regard for the consequences that may come after the punishment. A utilitarian justification, on the other hand, is prospective, focusing on the consequences and benefits that may come as a result of the punishment. Under utilitarianism, punishment is justified if it benefits society. For example, punishment is justified if it deters others from committing crimes and thereby increases the security of society. It must be noted that these moral theories don’t describe the person that is being punished; the person is simply regarded guilty if they have committed a

crime. Persons are understood as abstract agents, subjects to the universal rules that are derived from moral theories.⁴

Imprisonment is perhaps the most notorious punishment used in the U.S. criminal justice system. However, it has been shown and argued that this type of punishment doesn’t work and doesn’t achieve the goals for which it is intended, as imprisonment largely ignores the real conditions that constitute people’s lives.⁵ The typical prisoner is illiterate, poor, and in bad physical and mental health by drug addiction. The typical prisoner also comes from a family used to crime and may inevitably see crime as a survival strategy.⁶ Consequently, it could be argued that an offender isn’t ultimately responsible for the way he is, and perhaps should not be jailed.⁷

Moreover, another problem with retributive justice and imprisonment is their primary focus on the offender and the punishment they deserve for their crime, as opposed to focusing on the victims of crime and their needs to restore the harm caused to them. A third party—the state—intervenes and directs the legal process, in which the state is identified as the victim. Legal processes leave victims out of their own legal process and thus render them powerless, as they tend to be represented by lawyers and the state. Hence, legal processes do not only ignore the real conditions of offender’s lives but also ignore the needs of victims of crime, which come as a result of the crime itself. Some of these needs, for example, are the need for information about the crime, empowerment by being involved in their own cases, and restitution.⁸

⁴ An example of a universal rule would be “if a person has committed a crime, then he deserves to be punished.”
⁶ Ibid. I should note this description of the typical prisoner, of course, might not capture other the lives and crimes of other of prisoners, such as sex offenders and serial killers. It only means to describe the average prisoner.
⁷ Ibid. Stuart Greenstreet suggests this idea.
Clearly, punishment and imprisonment is the way justice has traditionally been established in the U.S. The fact that the practice of incarcerating people is so common and seemingly natural shows punishment is assumed to be a necessary part of justice. However, punishment is not the only way to establish justice and make things right whenever someone commits a crime. The practices of the existing criminal justice system are only one way to respond to crime. It is not necessary for justice to rely on punishing and incarcerating people, or to ignore the needs of victims of crime. There are other ways of establishing justice, like restorative justice.

Angela Y. Davis points to the case of Amy Biehl at the end of her book, *Are Prisons Obsolete?* to challenge the notion that punishment logically follows crime. The case of Amy Biehl is an example of restorative justice. Amy was a Fulbright scholar who was stabbed and stoned to death in 1993 in Capetown, South Africa. The men responsible for her murder were convicted to eighteen years in prison. Five years after serving their sentence they filed an amnesty petition for the Truth and Reconciliation Commission to meet and apologize to Amy’s parents, Linda and Peter Biehl. The men were soon released from prison, but two of them, Ntobeko Peni and Easy Nofemela, requested to meet again with the Biehls to ask them to take them as their own children in order to repair the harm they caused them for the murder of their daughter. The Biehls asked Peni and Nofemela to work at the foundation they established in memory of their daughter. In 2002, nine years after Amy’s murder, Linda Biehl was asked how she felt about the men who murdered her daughter, and she stated, “I have a lot of love for them.”

This is a very interesting case because it represents justice in a way that is completely different from what we are used to seeing. We would expect Amy’s murderers to be punished and for them to do their full prison sentence, but instead we see the Biehls caring for their daughter’s murderers and getting their sentence reduced. It is not usual for the families of

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10 Ibid., 114-5.
murdered victims and the people who murdered them to become friends. The case of Amy Biehl case shows victims of crime and offenders working together to repair the harm caused from crime and holding offenders directly accountable to their victims. An example of this would be how Peni and Nofemela worked for the Biehls in the foundation established in memory of Amy Biehl.

Restorative justice approaches harm and conflict across various contexts and situations differently than retributive justice does; it responds to conflict with dialogue, not punishment. Restorative practices and programs are most commonly known and implemented in the context of criminal justice, but they have also been more recently applied in schools and workplaces. For the purposes of this work I will only focus on restorative justice in law and criminal justice. In this field, the principles of restorative justice include repairing harm caused from crime, focusing on the needs and obligations that result from harm both in the victim, the offender, and the community at large, and using a collaborative process to acknowledge and repair the harm caused from crime as well as the root causes of crime.

Restorative justice understands crime first and foremost as harm, not as the breaking of a law, which is how the U.S. legal system currently understands the fundamental nature of crime. Harm can be understood as a wrong or offense caused to one or multiple persons, as well as a community. According to Howard Zehr, crime represents a wound in a community and damaged relationships.11 Based on this definition, restorative justice focuses on victims and their needs resulting from crime, which the existing criminal justice system fails to do. Responding to the needs of victims of crime requires that offenders take the obligations that result from such needs for offenders to repair the harm they caused. Restorative justice is focused on empowering victims of crime and involving them in their own cases by allowing them to determine the means of their restitution or vindication.12 In restorative procedures,

12 Ibid., 24-5.
offenders can be directly held accountable to their victims and their community, not to the state. Zehr defines restorative justice as, “an approach to achieving justice that involves, to the extent possible, those who have a stake in a specific offense or harm to collectively identify and address harms, needs, and obligations in order to heal and put things as right as possible.”

The values that underlie restorative justice include respect, responsibility, and relationships or interconnectedness. Restorative justice is based on the vision that we are all connected to each other in a web of relationships, and that we are all affected when this web is disrupted by harm or wrongdoing. In philosophy, this conception might be understood as an appeal to relational personhood. As I mentioned previously, retributive justice and the theories that justify it view persons as abstract beings and thereby fail to acknowledge the real conditions of people’s lives. Restorative justice does acknowledge and respect the particularity of individuals in terms of diversity and individuality, taking into account specific contexts and situations, in addition to focusing on the specific needs and obligations that may result from crime. Persons are neither abstracted from their particular sociohistorical conditions and relations nor regarded as independent abstract agents; persons are rather seen as relational agents. In this way, restorative justice acknowledges our interconnections and respects our individuality, as Zehr claims justice should. Zehr suggests restorative justice could basically be reduced to respect. The ideas of interconnectedness and particularity are ultimately reflected in the value of respect, as restorative justice holds all persons should be respected while also respecting our particular differences as individuals.

Restorative justice, as a theory, is relatively young and still in development. Its introduction into the legal system in the 1970s was meant to address some of the limitations

13 Ibid., 50.
14 Ibid., 93.
15 Ibid.
and failures within the Western legal system approach, particularly the failure to meet the needs of victims of crime, offenders, and community members. Restorative programs and practices are recognized as formal legal procedures in some parts of the world, such as New Zealand\textsuperscript{16} and Canada.\textsuperscript{17} Researchers and proponents of restorative justice show that restorative processes provide positive outcomes, satisfying victims, offenders, and communities more than punitive practices.\textsuperscript{18} Furthermore, restorative justice has been shown to lower recidivism, and its increased use in U.S. correctional settings indicates the increasing utilization of restorative processes.\textsuperscript{19}

The promise and positive results of restorative practices lead proponents of restorative justice, like Zehr and John Braithwaite, to have what critic Margarita Zernova refers to as, “ambitious aspirations.”\textsuperscript{20} They hope that the legal system one day becomes fully restorative and that restorative practices become standard legal procedure. Although Zehr explains that restorative justice is “not necessarily an alternative to prison,”\textsuperscript{21} he holds that “restorative justice advocates dream of a day when justice is fully restorative.”\textsuperscript{22} Zehr states that in his dream of a truly restorative justice approach “prisons would be used as last


\textsuperscript{18} Braithwaite, \textit{Restorative Justice}, 45.

\textsuperscript{19} Gaboury and Ruth-Heffelbower, “Innovations in Correctional Settings,” 14. Gaboury and Ruth-Heffelbower point to several national surveys to show a “significant level of a variety of restorative justice programs throughout the United States.”


\textsuperscript{21} Zehr, “The Little Book,” 22.

\textsuperscript{22} Ibid., 78.
resorts.” Braithwaite, similarly holds that it is possible to transform and remake the entire legal system according to the principles of restorative justice, and that “such a project is not as utopian as it may seem.”

Braithwaite proposes a model he calls responsive regulation, where restorative justice comes before incarceration, using the latter only when the former fails.

The project of transforming the legal system to a system that makes restorative justice the rule and punishment the exception or that completely eliminates it can be seen as a rather ambitious proposal. The criminal justice system encompasses legal processes, courts, and the prison institution. To ordinary citizens born into this system these institutions seem natural, held in place for so long that their removal or transformation may seem radical. Both Zehr and Braithwaite are aware that their claims and hopes of transforming the legal system to a fully restorative legal system can seem unrealistic. It requires the assumptions about justice that underlie existing criminal justice practices be removed and that the principles of restorative justice be introduced in their place. It also entails the roles of retributive justice and restorative justice be reversed, meaning that restorative justice becomes the norm to respond to crime and that retributive practices be left as a last resort, an exception to the norm, if not completely eliminating their use. Incarceration would rarely, if ever, be a consequence of crime.

Proponents of restorative justice do not explicitly argue for prison abolition, yet the project of transforming the legal system to be fully restorative significantly diminishes, and even has the potential of eliminating, the use of prisons. This can put them in the same category as prison abolitionists, as utopians. Davis claims “prison abolitionists are dismissed as utopians and idealists, whose ideas are at best unrealistic and impracticable, and at worst,

23 Ibid., 80.
24 John Braithwaite, Restorative Justice, 239.
25 Ibid., 42.
mystifying and foolish.”

Both proponents of restorative justice and prison abolitionists have to prove the practical reality of their claims. In the same way that Davis defends prison abolition, Braithwaite tries to prove the project of transforming the legal system to be fully restorative is not an unrealistic or a utopian idea, or an “ambitious aspiration,” as Zernova would call it.

Despite how unrealistic or radical this project may seem, it is important we give it serious consideration, given how evidence shows restorative justice works better than punitive practices. However, restorative justice theory is by no means a complete theory. Braithwaite even refers to restorative justice as an “immature literature, short on theoretical sophistication.” The theory must be expanded and the objections it faces must be addressed to evaluate its practical potential to transform the legal system. Restorative justice must provide a complete account of its values, principles, and practices, not only to understand its response to crime, but also to be able to address the objections that it faces. In the following section I will explain an objection relating to the voluntary character of the practices of restorative justice. Participation in restorative practices is fully voluntary, and supposing a fully restorative justice system were in place, the values and tenets of restorative justice do not provide a clear answer about what should be done with individuals who refuse to cooperate with restorative practices.

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27 Braithwaite, *Restorative Justice*, 239.
28 Ibid., 167.
AN OBJECTION TO RESTORATIVE JUSTICE

Transforming the legal system to be fully restorative entails that the procedures and processes of restorative justice become the default response to crime and that the use of retributive practices is significantly diminished, even possibly completely eliminated. Under a fully restorative legal system, such as the one Braithwaite and Zehr propose, instead of incarcerating persons when they cause harm or commit a crime, the process would be to have them participate in some form of restorative justice program. Ideally, offenders would join victim awareness programs, develop empathy toward the persons they harm, and eventually meet them to determine some means of restitution (assuming the victim agrees with meeting them). But there are some cases in which restorative practices seem unlikely to work and the use of retributive practices might be necessary. Consequently, objections can be raised about how realistic it is to increase the use of restorative practices. The particular objection I focus on deals with the voluntariness of restorative programs.

One important aspect of the meetings between offenders and victims, and virtually all restorative justice programs, is that participants must voluntarily partake in them. There seems to be a general consensus between researchers and supporters of restorative justice that participation should be fully voluntary, otherwise conferences between victims and offenders should not be held.29 Victim offender conferences are voluntary for several reasons, one reason being that if the victim and the offender do come to some agreement for restitution, it is more likely the agreement will be kept if it is voluntary.30 Neither victims nor offenders


should feel coerced into meeting with one another or into participating in these programs. Certainly, there are cases in which the victim could not want to meet with the offender, and it also has been shown that victims are usually unsatisfied if the offender was forced to meet or if the offender’s apology does not seem sincere.31

However, the condition that participation in conferences be absolutely voluntary brings up a problem when we consider this in conjunction with Braithwaite and Zehr’s aspirations of a fully restorative legal system. Suppose the legal system has been transformed and is fully based on restorative justice principles and practices. Such a legal system would not respond to crime with punishment and incarceration. But, what should the community do if a person is unwilling to cooperate with restorative processes? What should happen when an offender refuses to meet with his victim and participate in any form of restorative justice program? We can’t assume persons who severely harm others will always agree to cooperate with restorative practices.

In the same way there is no way to insure that offenders will always be willing to participate in restorative justice programs, victims can’t be expected in each instance to cooperate and want to meet the offender. Therefore, it is unrealistic to make restorative practices the default response to crime because inevitably there will be cases in which restorative justice won’t work and some form of punishment will be necessary. It has been suggested that if the offender is unwilling to participate in a restorative process then retributive practices—i.e. incarceration—are the expected default response.32 What is problematic about this response is that it entails that proponents of restorative justice would have to support some form of retributive justice as a last resort to deal with uncooperative offenders, yet supporters of restorative justice support the philosophy of restorative justice precisely over that of retributive justice. Researchers point to the success and benefits of restorative practices to partly argue against the use of retributive practices. The problem here

isn’t that retributivist and restorative justice are opposite philosophies or incompatible within the same system. Clearly, they are compatible, as restorative programs are offered in prisons and detention facilities across the U.S today.

The problem, rather, is that if punishment or incarceration were used in cases where restorative justice doesn’t work then some form of retributive justice will remain in the legal system, and hence, it cannot be fully restorative. In other words, the problem with this objection is that it poses possible scenarios that would require the use of retributive practices, like incarceration, under a legal system that claims to be fully restorative. The inevitable need for retributive practices is what makes Braithwaite and Zehr’s hope of a legal system entirely based on the principles of restorative justice appear unrealistic. Leaving incarceration as a last resort weakens the claim that the legal system can ever be fully restorative. Since restorative justice doesn’t respond to crime with punitive practices like incarceration, a legal system that claims to be based on restorative justice but leaves incarceration as an option can’t be said to be a fully restorative justice legal system. The issue is how to deal with circumstances that may oblige us to use retributive practices while still recognizing the legal system as fully restorative.

The concern about individuals unwilling to cooperate with restorative practices poses a similar worry that prison abolitionists face when they argue we should aim to become a society that has no use for prisons. People who are skeptical of prison abolition may object to it by asking, “How is a community without prisons supposed to deal with the most dangerous individuals?” The “dangerous individuals” in this objection are thought to be the Jeffrey Dahmers and John Hughes, people who refuse to cooperate in keeping a community safe and who deliberately threaten to reoffend. One of the many replies prison abolitionists, such as Dean Spade and Reina Gossett, give to address this concern is to reassure that the percentage of “dangerous individuals” is too low and these cases are very rare to justify the use of

33 Zehr claims retributive justice and restorative justice aren’t opposite philosophies in “The Little Book,” 22.
prisons.\textsuperscript{34} Proponents of restorative justice could reply in a similar way, stating that the percentage of individuals unwilling to cooperate with a restorative justice system will be too low to justify the use of retributive practices. This reply, however, wouldn’t really refute the objection. The question would remain; even if it is a low number, what is a community to do with dangerous individuals?

As I mentioned before, my purpose in this work is to show care ethics can help address objections against restorative justice and contribute to restorative justice theory. Care ethics is a feminist philosophical theory based on the virtue and practice of care, and, like restorative justice, it challenges assumptions specifically about morality. It offers a very different approach to morality from the dominant moral theories like Kantian ethics and Utilitarianism that justify retributive justice. Care ethics focuses on relations and takes a relational view of autonomy and persons. Restorative justice could address objections like the one in this section if it took into its theory the values and beliefs from care ethics, such as the value for care and its relational view of persons. These views can help justify the use of incarceration in cases where individuals refuse to participate in practices of restorative justice without using or regarding incarceration as a punishment. Before going further into this idea, I will first say more about care ethics and explain how these theories are similar.

SIMILARITIES BETWEEN CARE ETHICS AND
RESTORATIVE JUSTICE

Restorative justice and care ethics share values and practices in common that are central to each theory. Practices of care valued within care ethics—such as responding to needs, empathy, mutual concern, trust, and respect—also characterize restorative practices. Both theories also value care and relationships. However, this can only be appreciated by closely looking at restorative practices and comparing them with the practices valued within care ethics, given that care isn’t mentioned almost at all in restorative justice.

Care ethics is a feminist approach and relational model of moral agency that, like restorative justice, challenges deep-seated assumptions about the way moral issues have traditionally been approached and interpreted. Feminist ethics challenge and attempt to create an ethics that rethinks traditional moral theories, which have devalued and ignored the moral issues and interests of women. Traditional moral theories have undermined reasoning and traits associated with women, such as emotion, interdependence, relationships, and partiality. These theories have prioritized instead masculine traits and reasoning associated with men, such as independence, autonomy, impartiality, and universality.

Whereas deontology and utilitarianism have traditionally valued reason and rationality over emotion to approach moral questions, care ethics values emotion, holding that it should be cultivated and used to determine morality. Virginia Held claims moral inquiries relying solely on reason and completely divorced from emotion are deficient. She rejects the idea that moral judgments and problems should solely rely on abstract reasoning and principles to favor impartiality and avoid bias.35 This doesn’t mean that logical reasoning

35 Virginia Held, *The Ethics of Care: Personal, Political, and Global* (New York: Oxford University
should be taken out of moral questions, but that its applicability should be limited, especially when it comes to abstract and universal rules. In this way, care ethics respects claims about particular others with whom people share caring relationships.

I. PRACTICES OF CARE

Care ethics is based on the experience of care and the values involved in practices of care.36 This alternate approach to morality recognizes the dependence of human beings on the care they need to flourish and stresses the moral force of the responsibility to respond to such need. Held defines care as a value and a practice. As a practice, she explains, “care must concern itself with the effectiveness of its efforts to meet needs, but also with the motives with which care is provided. It seeks good caring relations.”37 Practices of care include activities from mothering and caring for the ill to teaching children and cultivating social relations,38 and these practices themselves already incorporate other values. Hence, the values of care ethics are in part derived from practices of care. Although there are many forms of caring, Held claims all care is characterized by “attentiveness, sensitivity, and responding to needs.”39 Needs include emotional and psychological kinds, as well as basic and biological kinds, such as food.

As a value, Held argues, care must “pick out the appropriate cluster of moral considerations, such as sensitivity, trust, and mutual concern,”40 by means of which practices of care can be evaluated. Identifying the values that characterize practices of care will help not only clarify what constitutes care but also argue for the relevance of these values in practices from which care has been excluded. Practices of care are not always redundantly


36 Ibid., 3.
37 Ibid., 36.
38 Ibid., 37. These are the examples Held uses.
39 Ibid., 39.
40 Ibid., 38.
characterized by care; they are also constituted by values belonging to different domains, such as respect and justice. Held argues care has been largely excluded from practices of justice,\textsuperscript{41} when instead these values should be incorporated when it is appropriate. Held mainly refers to justice as it is currently practiced and has traditionally been seen in dominant moral theories and liberal individualism, i.e., retributive justice. Later I will say more about how care ethicists have assumed and criticized a retributivist view of justice and overlooked restorative justice. For now I want to show that the values and practices that Held claims have been excluded from justice are not excluded from restorative practices. Values and practices of care on which care ethics is based, like attentiveness, sensitivity, and responding to needs, among others, are central practices within restorative justice as well.

Like care ethics, restorative justice also focuses on identifying and meeting the needs of others, particularly the needs of victims of crime and offenders. For example, victim-offender dialogues or conferences are the most common type\textsuperscript{42} of restorative program in prisons. These programs are focused on attending to the needs of victims of crime, bringing together those directly harmed by crime and those who caused it to reach an agreement for restitution. Families and people who care for either party are invited to participate to provide support,\textsuperscript{43} and a trained facilitator representing the community organizes and facilitates the conference. This process serves not only to hold offenders accountable but also to give victims a chance to determine what they need to make things as right as possible to repair the harm caused to them.\textsuperscript{44} This opportunity is rarely ever given to victims under existing legal processes, as they focus primarily on the offender and they are neither attentive nor sensitive to victims’ needs. As a consequence, victims are rendered powerless, unable to tell their story or to have the offender be directly accountable to them. Restorative justice fixes these

\textsuperscript{41} Ibid., 40.

\textsuperscript{42} Gaboury and Heffelbower, “Innovations,” 13.


\textsuperscript{44} Zehr, “The Little Book,” 62.
failures by incorporating caring practices into its own practices, offering legal procedures that respond and are sensitive to the needs of victims of crime.

Restorative justice also focuses on the harms and needs of offenders in order to fix the root causes of crime within individuals.45 This focus entails seeing offenders as victims themselves. Zehr claims that the need to resolve past emotional trauma is key to change the behaviors of offenders and thus prevent them from harming again.46 He explains harm or perceptions of harm and unresolved emotional trauma can be a contributing cause of crime, as crime tends to be “a response to—or an effort to undo—a sense of victimization. […] Sometimes the damage done [to offenders] must be repaired before they can be expected to change their behavior.”47 Hence, in order to change the behaviors of offenders and subsequently reduce crime, their needs must also be addressed; otherwise it is likely they will continue to commit crimes. Offenders’ needs are met through restorative practices that, like the practices that focus on victims’ needs, do not exclude care and caring practices but rather rely on them.

Restorative programs, such as victim offender education groups—also known as “victim awareness” or “empathy education” programs—are meant to educate incarcerated offenders about the impact of crime on victims. The outcome of these programs include, “understanding of victimization facts, knowledge of victims’ rights, and sensitivity to the

45 Restorative justice can be interpreted as an individualized approach to crime, given that it addresses the root causes of crime at a personal level, as opposed to a systemic or institutional level. As such, restorative justice may be deemed unable to address structural causes of crime, such as systemic oppression and racism by the criminal justice system. Nevertheless, it is important to acknowledge the significance of focusing and establishing deep levels of personal accountability, which enable the kind of personal transformation that reduces recidivism. Recidivism is also a way to weaken and dismantle oppressive institutions, such as the prison institution. It may even be argued personal accountability and transformation need to come first before some people can begin to focus on social justice and change.

46 Ibid., 43-4.
47 Ibid., 43.
plight of victims.”48 Other important results from the implementation of these programs include, “tangible improvements in delinquents’ attitudes toward victims and indicate a positive change in prosocial behavior.”49 Clearly, this type of program is aiming at shaping caring individuals by making them aware and more empathetic to the impact of harm on persons. In the process of developing empathy and sensitivity, these groups also rely on other values of caring practices, such as trust and respect. Victim awareness programs are usually arranged as circle processes where participants set their own values or agreements (rules of the group). Zehr states the values of circle processes tend to emphasize “respect, the value of each participant, integrity, the importance of speaking from the heart,”50 and so on.

As I have shown, the goals, outcomes, and values of victim awareness programs rely are practices of care also valued within care ethics. Hence, values and practices of care may have been excluded from other types of justice (such as retributive justice), as care ethicists claim, but they have certainly not been excluded from restorative justice. Care ethics and restorative justice value care and caring practices, in care ethics with respect to moral issues, and in restorative justice with respect to resolving harm caused by crime and establishing restitution.

However, the role and importance of care and caring practices hasn’t been sufficiently recognized in restorative justice literature as it has in care ethics. Although restorative justice has not excluded care from its practices, it has excluded care from its theory by failing to recognize it as one of its values. We can see from the goals and outcomes of restorative programs, like victim offender dialogues and victim awareness programs, that caring practices are evidently central to restorative practices. Restorative justice fixes the failure of existing criminal justice practices to meet and be sensitive to the needs of victims precisely by introducing care into restorative practices. Restorative justice is

49 Ibid.
50 Zehr, “The Little Book,” 66.
challenging the conception of justice underlying legal practices by offering a different approach to crime that incorporates care into the values and practices the constitute restorative practices. Therefore, restorative justice needs to recognize the role of care within its practices not only to describe its values and contribute to this “immature” theory (as Braithwaite describes it), but also to further distinguish itself from existing legal practices and retributive justice. Restorative justice can appeal to the value of care already present within care ethics, take this ethical theory as part of its theoretical framework, and thereby adopt some of the other values and views within care ethics, such as caring relations and a relational view of persons. These values are already present within restorative practices, but as with caring practices, they are largely excluded from restorative justice theory.

II. CARING RELATIONS

In dominant moral theories moral problems have been interpreted as conflicts between self-interested individuals. This view sharply contrasts with how moral problems and persons are seen in care ethics. Seeing care as a practice shows us how care connects persons by responding to needs, building trust, and through mutual concern. Held explains that the practice of care is not a series of individual actions but a connected practice that develops between persons.\textsuperscript{51} Care ethics recognizes the moral value of caring relations, such as friendship and family, and Held argues, they should be used to understand and guide how relations should be understood in other domains, like the social and the political. Relationships are also important in restorative justice. As I stated above, Zehr holds relationships (or interconnectedness) to be one of the three core values of restorative justice. He explains how restorative justice is based on the belief that we are all connected, viewing a community as a web of relations. The definition of crime within restorative justice is also based on relationships, being defined as harm, representing a wound in the web of relations that constitute society.

\textsuperscript{51} Held, \textit{Ethics of Care}, 42.
Just as care ethics focuses on building caring relations, there are restorative justice programs specifically meant to build caring relations between offenders and community members to repair the harm caused from their crime and prevent offenders from reoffending. An example, and perhaps the most important one, is circles of support and accountability (COSAs). COSAs are reentry programs, particularly aimed to work with sex offenders. Clare Ann Ruth-Heffelbower defines these groups as,

community-based restorative justice initiative that assists high-risk offenders who are released from prison with their reentry into the community. It takes seriously the idea that the community is responsible for its own safety and that the healing and wholeness for victims and offenders is possible.52

In this type of program an offender is assigned a small group of people volunteering to assist with their reintegration in society. The volunteers are supposed to assist with practical needs, such as getting a driver’s license, finding housing and a job, and providing support with emotional and spiritual needs. Volunteers are meant to provide support and accountability “in the context of friendship,”53 basically becoming the offender’s friends and confronting or holding the offender accountable whenever there is suspicion of reoffending. COSAs incorporate caring practices by having volunteers respond to offenders’ immediate and emotional needs to help them reenter society and prevent reoffending. These programs basically rely on caring relations by having volunteers build a friendship with the offender.

Restorative justice and care ethics also share the value of respect. Zehr includes respect as one of the core values of restorative justice. As I explained above, the values that make a practice particularly a practice of care are not always related to care. Care as a practice can also pick out values from justice, such as respect. It is fair to assume a caring relation ought to involve respect. We can conclude from this that, although care ethics doesn’t take respect to be a central value as existing restorative justice theory does, both theories can agree this is an important value characterizing caring relations.

53 Ibid., 32.
Furthermore, the idea within restorative justice that people in a community are interconnected takes into account not only the way people are immediately related, e.g. family, but also communal relations, and how crime can disrupt these relations. COSAs acknowledge social ties within a community by giving an opportunity to the community to make it safer and building caring relations with the people who harm it. Ruth-Heffelbower states, “By taking on the responsibility rather than depending on law enforcement and corrections, the community reclaims its capacity to ‘restore peace’ and overcome the fear that is rampant.”54 This point relates to care ethics in the sense that its value for caring relations doesn’t stop at immediate relations, such as friends and family. An ethic of care has the potential reach to the community, the societal, political, and international dimensions of relations. Held argues caring relations can provide a basis as well for how these broader relations ought to be built. This type of broader social caring relations is exemplified in COSAs, in the caring relations that are built between community volunteers and offenders.

Regarding how an ethic of care can help structure society Held observes,

At the level of what constitutes a society […] a domain within which rights are to be assured and care provided, appeal must be made to something like the often weak but not negligible caring relations among persons that enable them to recognize each other as members of the same society.55

Here Held suggests taking communal relations a step further by appealing to care, which restorative justice certainly does in its practices, but not in theory. Programs like COSAs show how restorative practices already recognize the importance of building caring relations between members of a community, particularly when it comes to repairing harm and establishing safety. Ruth-Heffelbower describes COSAs and shows their effectiveness in reducing recidivism, but she doesn’t state that the type of relations these groups work to build are particularly caring relations. Ruth-Heffelbower talks about relations of “support” that participants find meaningful, “in the context of a friendship.” This gives strong indication to

54 Ibid., 30.
55 Held, The Ethics of Care, 17.
understand the relationships that Ruth-Heffelbower refers to as caring relations. Although relationships in general are a central value in restorative justice theory, COSAs show restorative practices specifically value *caring* relations. Restorative justice, with reentry programs like COSAs, show what social caring relations that structure communities, and which Held supports, can actually look like, as well as their potential to respond to crime and secure a community. Thus, both restorative justice and care ethics value the wider societal dimensions of caring relations.

Caring relations further challenge the assumption that justice must be retributive. They prove that justice can be established with care. Caring practices also distinguish restorative practices from the way retributive justice has traditionally responded to crime, disposing of offenders from society, instead of reintegrating them. Hence, restorative justice must rely on care ethics to incorporate an appeal to the value of care into its theory, not only in the context of its practices, but also in the relations that they aim to build to prevent crime. Moreover, restorative justice could expand and strengthen its theory incorporating other views from care ethics, like a relational view of persons.

**III. RELATIONAL PERSONHOOD**

Care ethics views persons as relational and interdependent individuals. On the other hand, persons have traditionally been treated in dominant moral theories as fully rational, unrelated, independent, self-interested, autonomous, mutually indifferent, and equal.56 But care ethicists largely disagree with this view of persons, arguing that the reality is that humanity is characterized by dependence, and this is a fact that dominant moral theories overlook. We are dependent and interdependent beings at many different points in our lives, like when we are young, when we grow old, when we are disabled or ill, etc.

Writers and advocates of restorative justice don’t seem to presuppose any particular view of persons, but I argue that restorative justice shares with care ethics a relational view

56 Ibid, 12-13; 46.
of persons based on its value for relationships and its inclusion of caring relations in restorative practices. Just as care ethics rejects the traditional view of persons, as independent, self-sufficient, rational moral agents, the nature of restorative practices indicate that they also reject an individualist view of persons. Taking COSAs as an example again, these programs clearly don’t assume offenders to be independent persons, self-sufficient and able to reintegrate themselves into society by themselves, or rational enough to make the decision not to reoffend. Reentry programs, like COSAs, treat persons as interdependent and relational individuals. The aim to build caring relations between offenders and community volunteers reflects the idea that offenders need other people for support to re-enter society and to avoid reoffending. This also reflects an understanding that persons are essentially relational, clearly disagreeing with the traditional view of persons in dominant moral theories that care ethics rejects.

Care ethics also holds that individuals are partly constituted and causally affected by their social ties. This means individuals form their moral identity and develop their autonomy within a specific social context that influences these developments.57 Restorative justice seems to be in agreement with this idea, in part by recognizing the particularity of persons and social contexts, but also by focusing on the need to address unresolved trauma in offenders. For example, victim awareness programs imparted by Insight Prison Project58 include a component about attachment theory that educates offenders about how their behavior can be explained through the kind of relations they formed in early childhood. This psychological model holds that behavior is largely influenced by the relationships learned in early childhood. In this way, restorative justice recognizes, as care ethics does, how contextual relationships causally affect and constitute individuals, specifically their behavior and moral identity.

57 Ibid., 47. The idea that relations help individuals develop their moral identities comes from Diana Meyers and is cited by Held.

58 Victim Offender Education Group by Insight Prison Program is an example of a program that includes in its curriculum a section focusing on attachment theory.
Although this shows that a relational view of persons is supported and reflected in restorative practices, the concept of relational personhood is missing from restorative justice theory, just as the value for care, caring practices, and caring relations. Therefore, in addition to recognizing the value for care and caring relations, restorative justice should take the relational view of persons from care ethics, which is already present in its restorative practices. This would contribute significantly to restorative justice theory, but, as I will show in the next section, the importance of taking a relational view of persons rests primarily in its potential to address an objection about the practical reality of transforming the legal system to be based entirely on restorative justice values and principles. Lastly, if restorative justice were to take from care ethics a relational view of persons, it should also take the relational view of autonomy within care ethics. Overall, these additions would strengthen restorative justice as a theory, which is necessary when we consider increasing the use of restorative procedures to become standard legal procedure in response to crime.

IV. RELATIONAL AUTONOMY

By viewing persons as relational and interdependent moral agents, care ethics challenges and redefines other traditional views, such as autonomy. The traditional understanding of autonomy in moral dominant theories assumes persons to be independent, rational, and self-sufficient individuals. However, an understanding of persons as relational, interdependent, and caring individuals requires a concept of autonomy that agrees with the concept of relational personhood. For this reason care ethicists frame a concept of relational autonomy.

Jean Keller framed a relational view of autonomy, in which autonomy is understood as a capacity for self-reflection, to respect oneself and act accordingly to one’s values. This capacity is a skill that is socially learned. Keller holds, “a person can be thoroughly socially
constituted, can even be relationship-oriented, and yet still be deemed capable of acting autonomously.”⁵⁹ Held herself redefines autonomy within care ethics as,

a capacity to reshape and cultivate new relations, not to ever more closely resemble the unencumbered abstract rational self of liberal political and moral theories. Those motivated by the ethics of care would seek to become more admirable relational persons in better caring relations.⁶⁰

Autonomy is not yet a central concept in restorative justice theory. John Braithwaite and Howard Zehr certainly don’t mention autonomy in some of their most important writings on restorative justice.⁶¹ However, if restorative justice were to adopt a relational view of persons, which it already implicitly does in restorative practices (as I just explained), the theory would need a concept of relational autonomy that supports a relational view of persons. Adopting a relational view of autonomy would help to further describe how reentry programs like COSAs work to help offenders re-enter society and to become productive, responsible, and autonomous individuals while assigning them friends to rely on for support. Caring relations between offenders and community volunteers are supposed to influence the personality and moral identity of offenders by providing support and holding them accountable. At the same time, this support helps offenders become autonomous persons in society. This represents the relational view of autonomy that care ethics supports. It may not be necessary or as important to incorporate the concept of relational autonomy in restorative justice as it is to incorporate the value for care, caring relations, and a relational view of persons. But the concept of relational autonomy could further contribute to restorative theory. In the case that restorative justice theory is to make use of a concept of autonomy, relational autonomy, as framed by care ethicists, will be more consistent with restorative practices than traditional views of autonomy, which assume persons to be independent and unrelated.

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⁶¹ This is true of Braithwaite’s *Restorative Justice and Responsive Regulation*, and Zehr’s “The Little Book of Restorative Justice.”
So far I have shown the practices, values, and views that restorative justice and care ethics have in common. Practices of care valued within care ethics, and from which it derives its values, are common in restorative practices. Both care ethics and restorative justice value attentiveness, responding to needs, trust, sensitivity, and respect. They also share a value for caring relations, which are the goal of some restorative justice programs, like circles of support and accountability. The value for caring relations within restorative practices shows these practices share with care ethics the concept of relational personhood.

The theoretical framework of restorative justice must provide a complete account of its values, principles, and practices not only to understand its response to crime, but also to be able to address the objections that restorative justice faces. Care ethics can complement and strengthen the philosophy and theoretical framework of restorative justice, filling in theoretical gaps, adding a relational view of persons and autonomy, where restorative justice offers none, and appealing to the value of care, which restorative justice doesn’t consider enough. This would strengthen restorative justice as a theory and further legitimize it as an alternate approach to justice. These contributions from care ethics can also help address the objections against restorative justice.
ADDRESSING NON-COOPERATION UNDER A FULLY RESTORATIVE JUSTICE SYSTEM WITH CARE ETHICS

In the third section I discussed an objection that can be raised against the idea of a fully restorative justice legal system. As I mentioned, participation in practices of restorative justice is meant to be voluntary, but it is easy to imagine cases in which offenders do not want to participate and thus restorative practices wouldn’t work. It has been suggested that in this kind of cases offenders should be incarcerated. However, incarceration is understood as a punishment and thus a retributive practice. If incarceration were used under a fully restorative justice legal system, then such a system should not be recognized as “fully” restorative, given that it would make use of retributive practices. Occasionally using retributive practices would make the legal system only partially restorative and therefore would weaken the claim that a fully restorative justice system is a realistic possibility.

One way to justify the use of incarceration under a “fully” restorative legal system is by taking some of the views within care ethics. If advocates of restorative justice were to incorporate in their theory the value of care and a relational view of persons from care ethics to complement its value for relationships, the use of retributive practices—specifically, incarceration—could be justified without resorting to a retributivist philosophy. This view of justice believes persons who break the law deserve to be punished, which usually means incarceration, and in some cases death. Under a fully restorative justice system the definition of crime would be based on relationships; crime would be understood as harm, a violation of relationships. In terms of care, harm could be defined as the opposite of care. The proper way to respond to crime would be with practices of care within restorative practices. These procedures focus on responding to the needs of victims and offenders, in addition to holding offenders directly accountable to the persons and the community they harmed.
In the possible case that a person is unwilling to work with restorative practices and is putting their community in danger, the community could temporarily remove the individual from the community by incarcerating them. Restorative justice theory could justify the use of incarceration without recognizing it as a punishment or as a retributive practice by incorporating into its theory care ethics’ relational view of persons and its value for caring relations. A relational view of persons recognizes the importance of relations, acknowledging their essential role in constituting persons. Hence, it is imperative to preserve the caring relations that make up persons and a community. If an individual were to damage those relations and continually threaten to damage those relations again, their incapacitation could be justified on the basis of understanding persons are essentially relational and thus valuing and prioritizing the safety of caring relations in a community. A relational understanding of persons would further emphasize the importance of preserving relationships, enough to incarcerate an individual who openly threatens the community.

Incarceration would be based and justified under values of restorative justice rather than retributive justice. The purpose of incarceration would not be to punish an individual for the crime they committed. Incarceration instead could be used under a fully restorative legal system for the purpose of incapacitation in cases where individuals vehemently refuse to cooperate with practices of restorative justice. Incapacitation deprives someone of a capacity or a power; in the context of restorative justice, incapacitation would take away the power of an individual to harm people and communities when they refuse to stop. However, practices of restorative justice would always be readily available upon an individual’s request and willingness to participate. Consequently, incarceration under a fully restorative legal system would reflect more the Scandinavian “open prisons” rather than U.S. prisons. Prisons in Scandinavian countries emphasize rehabilitation and community, they allow individuals to grow and learn new skills to become productive members of society.62 On the other hand, U.S. prisons emphasize punishment and confinement.

Take for example the case John Hughes, a prisoner serving a life sentence for murder but who claims allegedly to have been involved in dozens of other murders. In an interview with KMBC’s news anchor, Lara Moritz, Hughes declares if he were to be released from prison he is “more than positive” he would kill again. Hughes states, “I wouldn’t let me go. I wouldn’t advise anyone to, not unless they want a lion loose in the streets.”63 Hughes presents himself as a threat to people in his community with no apparent desire for rehabilitation. This is the type of case usually used to object to both restorative justice and prison abolition advocates. Supposing the legal system is fully restorative and Hughes would have rejected to participate in any type of restorative justice program, the current theoretical framework of restorative justice wouldn’t be able to justify his incarceration with the values that constitute it. Restorative justice opposes that punishment should be the response to crime, hence incarceration—currently understood as a retributive practice, or as punishment—couldn’t be used in a legal system that is fully based on the values of restorative justice.

The incarceration of Hughes could actually be justified if caring relations and the concept of relational personhood were incorporated in restorative justice theory. The safety of the community would be prioritized under the value for caring relations that essentially constitute persons. The safety of the community would come first when a person such as Hughes deliberately threatens it. The reason for his incapacitation would not be that Hughes is an independent and unrelated person who deserves to be punished for breaking the law. His removal, instead, would be based on the fact that he’s threatening the safety of relationships in the community, lack of empathy and regard for such relationships. Moreover,

http://www.theatlantic.com/international/archive/2013/09/why-scandinavian-prisons-are-superior/279949/ In this piece Larson compares Scandinavian prisons to American prisons, and argues the former should be a model for the latter.

under a fully restorative justice legal system, restorative practices would always be readily available upon Hughes’ request.

As I have explained, restorative justice theory doesn’t incorporate a specific view of persons, but a relational view of persons can be seen in restorative practices. The value for relationships and interconnectedness could be enough to justify the removal of individuals from the society they threaten. However, a stronger case could be provided if restorative justice were to base its value for relationships on a relational view of persons, as well a value for care and the caring relations in a community. Relational personhood could justify the use of incarceration when individuals are unwilling to work with restorative practices. It could also explain why priority should be given to the safety of relationships. Incarceration would therefore cease to be regarded as a retributive practice because a relational view of persons complemented with a value for relationships would altogether provide a different basis to justify their use. The use of incarceration under a fully restorative system would not be regarded as the punishment that independent, self-interested, and unrelated persons deserve. The need for their use would perhaps be understood instead more as an obligation to the safety community. Subsequently, the status of a “fully” restorative justice legal system would not be affected if incarceration were used in certain extreme or rare cases, like Hughes’. A legal system could still be “fully” based on principles of restorative justice, as incarceration would be justified under principles of restorative justice and care.

Addressing this objection makes more realistic the idea of transforming the legal system to be fully restorative. However, even with this objection covered, it is still necessary for proponents of restorative justice to explain why restorative justice works. In the sixth section I will continue to explain how care ethics can help explain the success of restorative justice, as the success of restorative procedures (as opposed to court procedures) can be attributed to the presence of care, caring relations, and treating persons as relational individuals in restorative practices.

The focus of my argument in the present work so far has been on how restorative justice can use care ethics to incorporate care into its theoretical framework as a fundamental value and practice. This would benefit and contribute to restorative justice theory by providing a more complete account that considers the importance of the care and caring relations present in the practices of restorative justice. Furthermore, another benefit of my
approach is how restorative justice can contribute to care ethics theory, by reconciling care and justice. Care ethicists have voiced concerns about the incompatibility of an ethic of care and an ethic of justice, as each ethical framework prioritizes different values and practices. Care and justice have been seen as incompatible perspectives, each ethic belonging to a different domain. Depending on how one approaches moral issues, it may be an issue of care or an issue of justice. But this apparent disagreement between care and justice can be resolved if care ethics integrates restorative justice into its theory, as I will now show.
RESTORATIVE JUSTICE WITHIN CARE ETHICS

Care ethicists have argued care and justice are incompatible moral perspectives because they have altogether different ways of approaching moral issues. The main objections that have been raised by care ethicists against an ethic of justice is that it relies on universal and abstract moral claims and impartiality, and that it prioritizes values and practices different from an ethic of care. I will go over these objections and show they aren’t relevant to restorative justice. Care ethicists have overlooked restorative justice, assuming and rejecting only a retributivist view of justice. I continue to argue in this section that a restorative view of justice, as opposed to retributive justice, is in fact compatible and shares much in common with an ethic of care.

According to Carol Gilligan, moral judgments can be seen from two different moral perspectives, either from a perspective of care or a perspective of justice. Each ethic thinks in different ways, relying on different sets of values, and “grounded in different dimensions of relationship.”64 This suggests one must choose between one of these perspectives. Held explains the difference between the two ethics,

An ethic of justice focuses on questions of fairness, equality, individual rights, abstract principles, and the consistent application of them. An ethic of care focuses on attentiveness, trust, responsiveness to need, narrative nuance, and cultivating caring relations. Whereas an ethic of justice seeks a fair solution between competing individual interests and rights, an ethic of care sees the interests of carers and cared-for as importantly intertwined rather than as simply competing. Whereas justice protects equality and freedom, care fosters social bonds and cooperation.65

65 Held, Ethics of Care, 15.
The problems that Held points to in an ethic justice are an individualist understanding of moral agents and an appeal to abstract rules, in addition to the values an ethic of justice relies on. The view of justice that Held criticizes assumes persons to be self-interested and unrelated moral agents, in competition against the interests of other persons. Care ethicists disagree with this view of personhood for reasons I discussed above. They also disagree with the way an ethic of justice approaches moral problems, with abstract reasoning and universal principles to avoid bias and achieve impartiality. Abstract principles and impartiality don’t give priority to caring relations. Held concludes this is where the conflict between care and justice stems from. Held claims that proponents of care ethics will see a potential conflict when moral claims about particular individuals are put against the universalizable moral judgments of other moral theories.

Hence the potential conflict between care and justice, friendship and impartiality, loyalty and universality. To others [advocates of care ethics], however, there need be no conflict if universal judgments come to incorporate appropriately the norms of care previously disregarded.66

And this is precisely what happens when we compare restorative justice with an ethic of care; the conflict disappears. Contrary to Held’s objection to an ethic of justice, restorative justice doesn’t rely on abstract rules or impartiality. According to Zehr, restorative practices are guided by three basic questions: 1) Who has been hurt? 2) What are their needs? 3) Who has the obligation to address the needs, to put right the harms, to restore relationships?67 Zehr contrasts these questions with the ones that guide current retributive practices: What rules were broken? Who did it? And, what do they deserve? The questions that guide restorative practices may seem general, even abstract, but these are rather questions that seek specific responses to each given circumstance. It could be said that it is generally a rule under restorative justice that the needs of victims of crime should be responded to, but the needs will vary depending on the situation. In this way, restorative justice focuses on factors—

66 Ibid., 11.
67 Zehr, “The Little Book,” 93.
needs, obligations, and means of restoration—that are specific to a particular situation. Thus, we conclude that restorative processes don’t rely on abstract reasoning and abstract rules, such as the ones of retributive justice (e.g. criminals deserve to be punished), which care ethicists reject.

Although restorative justice doesn’t explicitly support in its theory a relational personhood, restorative processes, like COSAs, show that offenders are treated as essentially relational persons. COSAs don’t assume offenders are independent, self-sufficient, and unrelated. Instead they are seen and treated as individuals in need of caring relations to reenter society and avoid reoffending. Hence, restorative justice neither uses abstract rules nor relies on the individualist view of persons that Held claims underlies an ethic of justice. Restorative justice also doesn’t rely on the values that Held claims an ethic of justice does. In the following quote Held contrasts the values and practices that care and justice prioritize respectively,

In the dominant moral theories of the ethics of justice, the values of equality, impartiality, fair distribution, and noninterference have priority; in practices of justice, individual rights are protected, impartial judgments are arrived at, punishments are deserved, and equal treatment is sought. In contrast, in the ethics of care, the values of trust, solidarity, mutual concern, and empathetic responsiveness have priority; in practices of care, relationships are cultivated, needs are responded to, and sensitivity is demonstrated.\textsuperscript{68}

The values and practices that Held lists to describe an ethic of justice are true of retributive justice. After all, this is how justice has traditionally been seen in dominant moral theories. These values and practices, however, do not constitute restorative justice. The values of restorative justice do not focus on impartiality and fair distribution, much less noninterference. Restorative practices, like victim-offender conferences and COSAs, primarily rely on interference by holding an offender accountable to their victims, making sure they fulfill their obligation to their victims to repair harm, and confronting them when they seem like they will reoffend. Since equality is not a significant part of the restorative

\textsuperscript{68} Held, \textit{Ethics of Care}, 15.
justice theory, it is questionable how equality relates to restorative values. Restorative justice, just as the ethics of care, also focuses on mutual concern and developing empathy in programs like victim awareness groups, cultivating caring relations in programs such as COSAs, and responding to needs in victim-offender conferences. Restorative justice and care ethics share values and views in common, making these theories compatible. The values of care ethics can be found within restorative justice, making it hard to distinguish or to choose between care and justice; care, as a value and a practice, is necessarily involved in restorative justice to make justice.

The fact that Held claims punishments are deserved in practices of justice indicates that she is assuming and specifically criticizing a retributivist view of justice. But the way these criticisms are phrased makes it seem as though a broader statement is being made about the division between care and justice. Held claims that, “justice in all its forms requires impartiality, treating persons as equals, and recognizing their rights.”69 As we have seen, this is not the case in restorative justice, hence it can be inferred that Held is not considering other views of justice. Held reduces all forms of justice to resemble more or less the retributivist view of justice present in dominant moral theories. At certain points in The Ethics of Care Held does clearly state she is specifically addressing dominant moral theories, mainly Kantian ethics, Utilitarianism, and John Rawls’ theory of justice. Nevertheless, Held doesn’t clearly provide that context in the line just quoted, and lines like these suggest that care is not compatible with any form of justice, when in reality the incompatibility is only between care and retributive justice.

Care ethics could resolve the disagreement between care and justice by taking a relational view of justice that supports its other tenets and values. Whenever a concept from dominant moral theories does not conform to the views of care ethics, care ethicists critically redefine the concept to one that agrees with the values and views within their relational model of moral agency. For example, care ethicists put forward a relational view of persons

69 Ibid., 39. Emphases added.
and autonomy to reject the individualist view present in dominant moral theories. Hence, care ethicists should adopt a relational view of justice, which is precisely how John Braithwaite refers to restorative justice when he writes, “Crime wounds, justice heals; but only if the justice is relational.”70 Restorative justice can show that care and justice are compatible, and that it is not necessary to choose between an ethic of care or justice, as care is already involved within restorative justice. Care would first have to be introduced in restorative justice as one of its central values in order for these ethical frameworks to work together and build a common theoretical foundation on which to base their tenets.

In Held’s view, the way to overcome the incompatibility between care and justice is to reintegrate these values but keep them conceptually distinct, and “to delineate the domains in which they should have priority.”71 However, delineating the domains in which each value should have priority seems to further affirm the division and incompatibility between care and justice. If care ethics were instead to integrate restorative justice into its theory, there would be very different theoretical implications than those Held claims when she only considers retributive justice. The family is the appropriate and most obvious realm for an ethic of care, and the legal context for an ethic of justice, but restorative justice shows that all situations with a potential for conflict and harm in any type of relationship are appropriate for restorative practices. Restorative justice is not limited to the law; its practices are also being applied in schools and workplaces. Given that restorative practices already incorporate care (caring relations and caring practices), giving priority to restorative justice in the context of the law would entail to give priority to care as well. If care ethics took a restorative view of justice, this would show that both justice and care are relevant within the same domains, such as family and law. It wouldn’t be necessary to give priority to one ethical framework over another depending on the domain, as Held claims. In conclusion, it is not evident that care

70 Ibid., 49.
71 Ibid., 17.
and justice should be assigned to and given priority in specific domains, nor that they should be sharply distinct concepts.

Incorporating a restorative justice within care ethics would also have implications for Held’s view of care, as “the most deeply fundamental value,” as opposed to justice. Held claims,

“There can be care without justice: There has historically been little justice in the family, but care and life have gone without it. There can be no justice without care, however, for without care no child would survive and there would be no persons to respect.”

We can assume the type of justice that Held is referring to in this quote is retributive justice. To determine the truth of the claim that there can be no justice without care we would have to analyze this claim considering different views of justice. It is questionable whether there is enough evidence in restorative justice to determine whether its proponents would agree with this claim. As I have shown, care is an important value and practice in restorative justice. It is very unlikely that there can be restorative practices that do not involve care, such as caring relations, empathy, mutual concern, responding to needs, etc. Hence, it is unlikely there can be restorative justice without care. The case would still have to be made as to whether retributive justice can be applied with care, whether one can punish on the basis of care. Some argue that punishment can be based on care. This could also imply that there can be no retributive justice without care.

In sum, restorative justice can challenge care ethicists’ criticisms of justice and its incompatibility with an ethic of care. Restorative justice proves that justice and care are compatible, but their compatibility depends on the understanding of justice one is presupposing. Of course, the introduction of restorative justice in care ethics would only be the beginning. More research is necessary to determine which value—care or justice—is

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72 Ibid., 17.
73 Ibid.
most fundamental, as well as their potential similarities, how necessary it is to keep them conceptually distinct, and what are the implications for moral responsibility and accountability. Although this would require much philosophical investigation, restorative justice undoubtedly can help advance care ethics, just in the same way care ethics can advance restorative justice theory.

Both theoretical frameworks can benefit from one another and strengthen each other, thereby increasing the practical reality and utility of the other. Incorporating care into restorative justice can not only help address the objection discussed in the third section and potentially other objections as well, but it can also help explain the success of the practices of restorative justice. The success, just as the purpose, goals, and principles of restorative practices, need to be accounted for in order to provide a complete theory of restorative justice. Restorative practices could then be based and modeled on such a theory in order to replicate their success. The success of restorative procedures can be attributed to the presence of care, caring relations, and the treatment of persons as relational individuals in practices of restorative justice. In this way, care ethics can help restorative justice explain why it works.
CARE EXPLAINS THE SUCCESS OF RESTORATIVE PRACTICES

In several of his writings, John Braithwaite examines many theories that could explain why restorative practices are effective in reducing crime. I will focus on three of these theories. The purpose of finding these theories, according to Braithwaite, is to develop and continue to improve programs based on the theories that explain the success of restorative justice. I believe the purpose of explaining why restorative justice is successful is also to strengthen this philosophy as a whole by providing a complete and coherent theory that accounts not only for its values and practices, but also for its success in comparison to retributive practices.

The writings of Braithwaite and the observations of Maria Zernova show that care plays a significant role in restorative practices. Care seems to be the cause for offenders’ participation and compliance with the law, but writers of restorative justice haven’t taken sufficient notice of the importance of caring relations within restorative practices. Therefore, it is important to account for the role of care in restorative practices and to find an explanation for the success of restorative justice. I will argue care ethics can contribute to this explanation due to the important presence of care in restorative practices, which has largely gone unacknowledged by writers of restorative justice.

The first theory Braithwaite considers is his own theory of reintegrative shaming. This theory is based on the belief that shame is more likely to prevent reoffending when we

experience it “in the eyes of those we respect and trust,” as opposed to shame of police and newspapers. Since respect and trust are values that constitute caring relations, we have enough reason to conclude Braithwaite refers to shame in the eyes of those we care about. The invitation of offenders and victims’ supporters—e.g. family and friends—to restorative conferences is what structures reintegrative shaming into the restorative process. Braithwaite explains,

In terms of reintegrative shaming theory, the discussion of the consequences of the crime for victims (or consequences for the offender’s family) structures shame into the conference; the support of those who enjoy the strongest relationships of love or respect with the offender structures reintegration into the ritual.

This shows the reintegrative shame that Braithwaite argues is what makes offenders less likely to reoffend is introduced into restorative conferences precisely by introducing caring relations. This idea is further supported by evidence that compares cases in which offenders were assigned to court processes against others who were assigned restorative conferences. Braithwaite notes,

“Offenders both report and are observed to encounter more reintegrative shaming in [restorative] conferences than in court, that conference offenders experience more remorse and more forgiveness than court offenders, and are more likely to report that they have learnt from the process that there are people who care about them.”

Reintegrative shaming in restorative conferences is the factor that allows offenders to feel remorse and forgiveness, and what leads them to not reoffend. Clearly, reintegrative shaming is possible due to the presence of people who care about the offenders in restorative conferences. Therefore, the success of these conferences ultimately relies on the presence of caring relations.

The second theory Braithwaite looks at is procedural justice theory. In this theory respect plays a key role in explaining why restorative conferences are successful in
preventing reoffending. Braithwaite notes offenders perceive that restorative processes treat them with more respect and more fairly than court processes, making them more likely to understand the purpose of the conferences.\textsuperscript{79} Citizens show high levels of satisfaction with restorative processes, which, Braithwaite claims, explains why these processes “improve compliance with the law.”\textsuperscript{80} Offenders are more likely to comply with the law due to the respect and fairness they perceive from restorative processes.

Respect, as I mentioned above, is one of the core values in restorative justice, and it is also a value that characterizes caring relations. Perhaps respect is rooted in the caring relations established in restorative processes. In “Aspirations of Restorative Justice Proponents and Experiences of Participants in Family Group Conferences,” Maria Zernova notes facilitators and restorative conference organizers establish a caring relation with offenders. Zernova describes one case study,

> When preparing offenders for restorative encounters, conference organizers acted towards them in a friendly, caring and sympathetic way. This discouraged resistance on the part of offenders and served to promote their willingness to submit to the guidance of facilitators. […] During the actual conferences, facilitators continued to act towards offenders in the same sympathetic way as during the conference preparation stage. They generally avoided expressing an open disapproval of the offending behaviour (delegating this function to victims), and demonstrated a deep concern for the well-being of offenders and a willingness to help. Such treatment by facilitators discouraged offenders from interpreting conferences as punishment.\textsuperscript{81}

The reason I cite this lengthy quote is because it clearly shows that establishing a caring relation with offenders within restorative practices promotes cooperation. Caring relations also distinguish and set apart restorative practices from practices that are understood as punishment, and thus from retributive justice in general. The respect that offenders perceive from restorative processes may result from the caring relation established with

\textsuperscript{79} Ibid., 48.
\textsuperscript{80} Ibid.
\textsuperscript{81} Zernova, “Aspirations of Restorative Justice,” 495. Emphases added.
facilitators, since respect characterizes a caring relation and is one of the many values involved within care, as Held contends. Again, this shows the reason why offenders cooperate with restorative practices and become less likely to reoffend may just be rooted in caring relations.

The theory of reintegrative shaming and procedural justice evidently show that caring relations play an important role in restorative justice, yet not much is said about care. Like Braithwaite and Zehr, Zernova does not pay enough attention to care as a principle of restorative justice, but only briefly mentions (in the passage I quoted) how care discourages resistance. The value of care and caring relations deserves much more than a few lines. It needs to be integrated from care ethics into restorative justice, as it is an important element of restorative practices that can explain why offenders are more likely to comply with the law from restorative processes than from court procedures.

Lastly, a third theory that Braithwaite considers is the theory of unacknowledged shame, which is based on the nature of shame. According to this theory shame can be a destructive emotion, leading to attack oneself and others, and thus to commit a crime. This theory emphasizes the need for a process that allows offenders to deal with internalized and complicated shame, the type of shame that can worsen if offenders do not confront it with “emotional repair work.”82 Braithwaite notes restorative processes create spaces that acknowledge internalized shame, unlike court processes. Braithwaite quotes researchers of this theory, “if we want a world with less violence and less dominating abuse of others, we need to take seriously rituals that encourage approval of caring behavior so that citizens will acquire pride in being caring and non-dominating.”83 The “rituals” that encourage caring behaviour and that Braithwaite refers to are restorative justice processes. Here, we can see once more the importance of care in restorative processes be recognized, as well as its relevance to confront and acknowledge internalized shame in restorative processes. Care is

82 Braithwaite, “Restorative Justice: Theories,” 49.
83 Ibid.
the factor in restorative processes that allows to process in a healthy way the kind of shame that can push individuals to commit crimes. Therefore, in this theory too, the explanation of why restorative processes reduce crime can ultimately be traced to care.

The problem, as with the other theories, is that care is not seriously taken as a value and a principle of restorative justice, when care is partly what defines and sets apart restorative justice from retributive justice and also explains the success of restorative practices. Restorative justice should introduce and appeal to care as one of its values by relying on care ethics as a theoretical framework. Further research may indicate that the success of restorative justice is not ultimately and solely explained with the theory of care ethics, but for now it is clear that care plays a significant role in restorative justice, and this needs to be recognized in restorative justice theory rather than merely mentioned. Care ethics could provide altogether a different focus that not only explains why restorative conferences work better than court processes, but also help model and continue to improve restorative practices based on care. Furthermore, with care as a core value of restorative justice, Braithwaite could respond to the objections he addresses in the same article he talks about these theories, such as the following objection.

I. RESTORATIVE PRACTICES AS “SHAMING MACHINES”

In “Restorative Justice: Theories and Worries,” Braithwaite addresses several objections against restorative justice. One of them is that restorative justice can be a “shaming machine” and thereby worsen the stigmatization of offenders. Braithwaite asserts restorative justice processes are already heavy with shame as they are, and moral lecturing could potentially make this situation worse. Braithwaite addresses this objection by claiming that the vices of sarcasm and moral lecturing can be discouraged by inviting caring supporters to restorative conferences.84 He claims, “If these invitees really do care about the offender, they will counter moral lecturing with tributes to the sense of responsibility and

84 Ibid., 52.
other virtues of the offender.\textsuperscript{85} The purpose of inviting people who care about the offender to restorative conferences is not to debase and stigmatize the offender, which would actually be contrary to a relation of care. Instead, the invitees who care about the offender are meant to provide support. Hence, caring relations play a significant role in the success of restorative processes also by preventing moral lecturing and sarcasm and restorative processes from turning into shaming machines.

This provides yet another reason why restorative justice needs to incorporate within its theory the values and views of care ethics. In sum, care ethics can contribute and strengthen restorative justice by expanding values and views that are missing in theory but present in restorative practices. Adding care as a value of restorative justice can describe and explain the importance of having and building caring relations in restorative practices. It can also distinguish restorative justice from the retributive justice that underlies existing criminal justice practices, even if incarceration had to be necessarily used under restorative justice. A relational view of persons taken from care ethics can serve as the base and further emphasize the value for relationships. Consequently, the use of incarceration in difficult cases could be justified on values and views of care ethics and restorative justice. These additions would fill theoretical gaps in restorative justice, help remove it from its “immature” status as a theory, and thus strengthen it. This would ultimately prove restorative justice is a practical theory that should be analyzed with seriousness as a legitimate alternate response to crime with the potential to transform the legal system.

\textsuperscript{85} Ibid., 53.
CONCLUSION: A LEGAL SYSTEM BASED ON CARE

Care ethics has considered care and justice to be contrasting ethical frameworks to the point of declaring they are incompatible, unable to equally approach the same domains. So has the U.S. legal system. Care has been completely taken out of the places, practices, and processes of the criminal justice system. Courts and jails are not recognized as spaces of trust and solidarity. Legal processes do not make it a priority to respond or show concern and empathy to the needs of victims of crime, much less of offenders. The criminal justice system treats offenders as independent, unrelated, and self-sufficient individuals, ignoring the relations and the social context constituting them. It is assumed that punishment and incarceration, which undervalue building and strengthening social ties, are the right way to respond to crime. Resulting from this assumption and all of these practices is the acceptance of the values and views of retributive justice in the legal system—values such as noninterference, impartiality, abstract principles, deserved punishment, and persons as independent and unrelated individuals. Consequently, it is assumed and accepted that care as a value and practice has no place in the legal system or in justice. This may be the cause why cases like the Biehls’ seem odd or incredible. In this case we see victims of crime reconciled with and caring for their offenders; in other words, we see the opposite of the outcome usually seen and expected from a crime like murder.

Restorative justice is challenging these assumptions and proving an alternate set of values and practices can be used to establish justice and lower crime. Practices of restorative justice are showing that legal processes can be sensitive to the needs of victims’ of crime and respectful to offenders; that legal procedures for accountability can be processes that involve empathy and mutual concern; that care and caring relations can have a significant role in the criminal justice system. Restorative justice shows that care and justice are not necessarily
mutually exclusive, as it has been argued by care ethicists and generally assumed in the legal system.

When advocates of restorative justice propose that the legal system be transformed to be fully restorative, they don’t simply propose that restorative practices be made the default response to crime, as opposed to punishment. They also propose to transform the legal system by introducing altogether a new set of values, replacing the values underlying the practices of the criminal justice system with the values of restorative justice. Transforming the legal system to be fully restorative requires that instead of using in legal processes principles like noninterference, impartiality, and abstract rules, values like respect, relationships, and responsibility be used instead. Thus, this transformation entails the introduction of a new philosophy in the legal system, a different view of justice, crime, accountability, and persons.

The objective of this work has been to show that care is also a significant value in restorative justice, by analyzing its values and practices. Caring relations are present in victim offender dialogues, between friends and family members present to provide support either to the offender or the victim(s), and also between participants, facilitators and conference organizers. Caring relations are also built between offenders and volunteers from the community in reentry programs to reintegrate offenders into society and prevent them from reoffending. However, care has not been recognized as one of the values of restorative justice in the same way that respect, responsibility, and relationships have, even though it plays a very important role in restorative practices. Care is such a fundamental part of restorative practices that it is hard to imagine whether they can even take place without necessarily involving caring practices and relations. Therefore, introducing the values of restorative justice into the legal system, as advocates of restorative justice propose, entails introducing care as a value. For this reason care needs to be recognized as an important value and practice of restorative justice to provide a more complete and accurate account of the views, practices, and values of restorative justice. Restorative justice can incorporate care into its theory by relying on care ethics, introducing its values and views, which are already centered and based on the values and practices of care.

Care ethics can add to restorative justice theory the value for caring practices and caring relations, as well as a relational view of persons and autonomy, which in some ways
restorative practices already support. The result of this would be a more nearly complete theory of restorative justice that can overcome the objections it is currently facing and explain the success of restorative justice. Restorative justice processes could be modeled based on care, which allows these processes to succeed lowering crime and recidivism. With care ethics, advocates of restorative justice can respond to the objection that it is unrealistic or a utopian idea to reduce or eliminate the use of prisons and make restorative practices the default response to crime. They could say that a relational view of persons and the value for caring relations from care ethics, as well as the values of restorative justice, can show us that punishment can’t be the response to crime because the values and views that underlie and justify punishment do not accord with the values of restorative justice. However, they can also acknowledge that there may be situations where apprehension can be necessary, and in those cases apprehension could be justified still under the values of care ethics and restorative justice. Therefore, leaving incarceration as a last resort under a fully restorative justice system would not be to use punishment or to return to retributivist practices.

Addressing the concern about what should be done with dangerous or uncooperative individuals under a legal system that doesn’t rely on incarceration makes the project of transforming the legal system a realistic possibility. Objections such as these must be addressed without losing sight of the values of restorative justice, since such a transformation relies on introducing this set of values, precisely on which restorative practices are based.

As mentioned previously, advocates of restorative justice do not necessarily identify as prison abolitionists. But when advocates like Braithwaite and Zehr share hopes of a fully restorative legal system, it sounds like they have a common goal with prison abolitionists: a community without prisons. Restorative justice relies on restoration and reconciliation, not incarceration, so a fully restorative justice legal system would imply a legal system without prisons. But it is not that simple. Depending on the account of restorative justice one reads the desired outcome may be the reform of the legal system or a full transformation of it. I have focused here on the transformative claims, as I find them to be the most interesting and promising.

Transforming the legal system challenges the understanding of restorative justice as a legal reform because it demands that the values that currently underlie the legal system be replaced with values of restorative justice; the assumed conceptions about punishment would
be completely removed, making restoration and reconciliation the norm. Most importantly, if restorative justice took the values and views of care ethics, care could become the foundation of the legal system and legal practices. A legal system that is based on care and restorative justice, but which also leaves incarceration as a last resort, may be just the step needed to gradually and realistically transition into a society without prisons. Care and restorative justice together have the potential to transform our society into one that has absolutely no need for punishment and incarceration.
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