

A VICTIM'S RIGHT TO VIEW: A DISTORTION OF THE RETRIBUTIVIST THEORY OF PUNISHMENT

Brian D. Skaret*

On April 19, 1995, Timothy McVeigh detonated a bomb and destroyed the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma.¹ The explosion killed 168 people and injured more than 500.² At the time, the bombing was the “worst act of mass murder in American history.”³ A jury convicted McVeigh of conspiracy to use a weapon of mass destruction, use of a weapon of mass destruction, destruction by explosives, and eight counts of first degree murder.⁴ The jury recommended the death penalty, and the court sentenced McVeigh to death by lethal injection.⁵

Over 250 survivors and victims' family members requested to view McVeigh's execution.⁶ Attorney General John Ashcroft granted their requests and announced that victims' family members and survivors of the attack would be permitted to watch the execution via closed-circuit television.⁷ Ashcroft also increased the number of victim witnesses allowed to watch the execution from within the death chamber.⁸ Ashcroft stated that his decisions were influenced by the “savagery” and “stunning magnitude” of McVeigh's crimes,⁹ commenting that “[t]he Oklahoma City survivors may be the largest group of crime victims in our history.”¹⁰ In deciding to broadcast the execution, Ashcroft also cited the “personal circumstances of the absence of closure [in victims' families].”¹¹

* Candidate for *Juris Doctor*, Notre Dame Law School, 2002; B.A., *magna cum laude*, Knox College, 1998. This Note is dedicated to my wife, Valerie Skaret, who encourages me with her uncommon thoughtfulness, undying persistence, and unbending faith. I would like to thank Professor Lucy Payne, for encouraging me to publish my work; Professor John Finnis, for his straightforward comments on my drafts; Professor Jimmy Gurulé, for his suggestions and interest in my work; Elizabeth Hambrick, for her assistance in revising this Note; and Phil Sicuso, for his helpful suggestions and valuable friendship.

1. Kevin Johnson, *Okla. Victims Pleased with McVeigh Rulings*, USA TODAY, Apr. 13, 2001, at A3 [hereinafter *Victims Pleased*].

2. *Id.*

3. Kevin Johnson, *Families May See McVeigh Executed*, USA TODAY, Apr. 11, 2001, at A1.

4. Department of Justice, *Federal Execution Date Set for Timothy James McVeigh*, Jan. 16, 2001, 2001 WL 48685.

5. *Id.*

6. *Victims Pleased*, *supra* note 1, at A3.

7. Mike Dorning, *Hundreds Will Watch McVeigh Die*, CHI. TRIB., Apr. 13, 2001.

8. *Victims Pleased*, *supra* note 1, at A3.

9. *Id.*

10. *Id.*

11. Ana Radelat, *Ashcroft Letting Relatives of Okla. Bomb Victims to View Execution*, GANNETT NEWS SERVICE, Apr. 13, 2001.

On June 11, 2001, Timothy McVeigh was executed in Terre Haute, Indiana, before twenty-four witnesses, including two survivors of the bombing and eight people who lost family members.¹² In addition, over 230 survivors and victims' family members gathered to watch the execution on closed-circuit television in Oklahoma City.¹³ According to one witness, McVeigh died with "no sign of suffering, no sign of discomfort, no sign of fear."¹⁴ After the execution, President Bush declared, "The victims of the Oklahoma City bombing have been given not vengeance, but justice."¹⁵

The emphasis on the victims – the survivors and family members of those killed – and their right to view McVeigh's execution distorts the purpose of why criminals are punished under the retributive theory of punishment. Retributive theory dictates that the criminal justice system does not punish offenders *on behalf of victims*. Rather, the criminal justice system functions *on behalf of society as a whole*, to restrict a criminal's freedom in response to an over-indulgence in a liberty not legally available to the rest of society.

This Note presents the primary justifications of a victim's right to view an execution, and examines how those justifications distort the retributive theory of punishment as set forth by John Finnis in *Natural Law and Natural Rights*. Part I discusses the general justifications of a victim's right to view an execution. Part II presents an outline of Finnis' retributive theory of punishment. Part III critiques the justifications of a victim's right to view based on retributive theory. Finally, Part IV concludes that a victim's right to view an execution distorts the social function and institution of retributive punishment.

I. THE GENERAL JUSTIFICATIONS OF A VICTIM'S RIGHT TO VIEW

The right to view an execution is not without precedent. The victims' rights movement has been instrumental¹⁶ in compelling various states to enact "right to view" legislation, which allows family members of victims to view executions.¹⁷ Existing laws vary with respect to whether they explic-

12. Assoc. Press, *Terror in the Heartland: Bombing in Oklahoma City*, SAN DIEGO UNION & TRIB., June 12, 2001, at A1.

13. Ellen Gamerman, *U.S. Executes McVeigh*, THE BALTIMORE SUN, June 12, 2001, at 1A.

14. *Id.*

15. *Id.* (emphasis added).

16. See Doug Janicik, *Allowing Victims' Families to View Executions: The Eight Amendment and Society's Justifications for Punishment*, 61 OHIO ST. L.J. 935, 937-38 (2000) ([S]trong arguments exist that right to view statutes are a result of the victims' rights movement. Both originated in the same time period, and the rationales behind the legislation appear to be similar – to give the victim a sense of justice that has been missing in the American criminal justice system.).

17. See, e.g., LA. REV. STAT. ANN. § 46:1844(N) (West Supp. 1996); OKLA. STAT. ANN. tit. 22, §

itly permit family members to attend or whether attendance is discretionary.¹⁸ Some states allow victims to view executions through closed-circuit broadcasts; in fact, Oklahoma has televised six separate executions to victims' family members via closed-circuit telecast.¹⁹

The justification for a victim's right to view is not available in state legislative history compilations.²⁰ Victims' rights advocates, however, advance general arguments in favor of the right to view. They argue that (1) a right to view provides victims' families with a sense of justice that lacks throughout the criminal justice process;²¹ (2) the right to view an execution provides victims' families with a sense of closure because they participate in the final sentence of the criminal;²² and (3) the right to view enables victims' family members to "ensure the prisoner pays for what he did."²³

II. FINNIS'S RETRIBUTIVE THEORY OF PUNISHMENT

Various theorists have contributed to the Retributive Theory of Punishment. This Note will draw from and explain retributive punishment as set forth by Dr. John Finnis in his book, *Natural Law and Natural Rights*. Finnis' theory blends principles espoused by Aristotle, Aquinas, Hart, and others to conclude that retribution is the only genuine justification of the institution of punishment.

1015(d) (West Supp. 2000); DEL. CODE ANN. tit. 11, § 4209 (2001); NEV. REV. STAT. ANN. § 176.357 (Michie 2001); OHIO REV. CODE ANN. § 2949.25 (Anderson 1999); WASH. REV. CODE ANN. § 10.95.185 (West Supp. 2002).

18. See, e.g., UTAH CODE ANN. § 77-19-11 (1995 & Supp. 1996) (providing that the Utah Department of Corrections shall have authority to adopt rules regarding who may view executions); MISS. CODE ANN. § 99-19-55(2) (1999) (leaving the decision of a victim's right to view to the discretion of the Commissioner of Corrections).

19. See Leyla Kokmen & Janan Hanna, *Executions Become More Public: Officers in '77 Case Will Watch Killer Die*, CHI. TRIB., Nov. 21, 1995, at A1 (indicating that Illinois permits the right to view via closed circuit television); Nolan Clay, *McVeigh Suggests Televised Execution*, THE DAILY OKLAHOMAN, Feb. 11, 2001, at A1 ("Some states allow relatives of murder victims to watch executions on closed-circuit television. Oklahoma has done so six times, primarily when too many relatives show up for all to watch in person.").

20. See Janicik, *supra* note 18, at 937.

21. See *id.* at n.13, citing Sue Anna Moss Cellini, *The Proposed Victims' Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim*, 14 ARIZ. J. INT'L & COMP. LAW 839, 849-56 (1997) (discussing the dissatisfaction of the criminal justice system that many victims feel).

22. Attorney General Ashcroft allowed the Oklahoma City bombing victims' family members to view Timothy McVeigh's execution "to help them meet their need to close this chapter in their lives." DORNING, *supra* note 9. See also Keith D. Nicholson, *Would You Like More Salt with That Wound? Post-Sentence Victim Allocation in Texas*, 26 ST. MARY'S L.J. 1103, 1134 (1995) ("[P]ost-sentence victim allocation provides victims with a sense of closure following the traumatic experiences of the crime itself."); Brooks Douglass, *Why I Want to Watch a Killer Die*, USA TODAY, Apr. 15, 1996, at 19A ("[I want] closure on an era of my life into which I never chose to enter. Closure of years of anger and hate.").

23. JANICIK, *supra* note 15, at 938. See also DORNING, *supra* note 9 (quoting one Oklahoma City bombing victim's family member, "I want to see [McVeigh] die and that's it."); World News Tonight, ABC NEWS, Apr. 10, 2001 (quoting an Oklahoma City bombing victim's family member, "[McVeigh] executed my wife. So now it's time for his execution. So I want to—I'd like to see him draw his last breath.").

Finnis presents the criminal law as a means to provide for quality communal life.²⁴ When an individual acts out of selfish indifference for quality communal life and violates the law, the law functions to equalize the criminal's unjust gains.²⁵ Punishment provides for the common good by restricting a criminal's freedom in proportion to the freedoms that the criminal unfairly exercised in violation of the law.²⁶ Retributive punishment restores the relative balance of advantages and disadvantages between those who elect to abide by the law and those who do not.²⁷ Therefore, punishment "uphold[s] the proportionate equality of a just distribution of advantages and disadvantages, benefits and burdens, among the members of (and sojourners within) a political community."²⁸

A. *The Criminal Law and the Common Good*

Criminal law ensures that certain conduct and omissions of conduct "shall occur less frequently than they otherwise would."²⁹ It is not only a prohibitory instrument, but functions as a means to provide for quality of communal life, "in which the demands of the common good indeed are unambiguously . . . preferred to selfish indifference or individualistic demands for license but also are recognized as including the good of individual autonomy."³⁰ The law respects individual autonomy, but its provisions make clear the consequences of deviating from the common good.³¹ These intents "are justified because the common good of the community is the good of all its members."³² Therefore, when a member of the community violates the common good and offends the law, the law punishes³³ him for the good of all community members.

B. *Why Punish the Criminal Offender?*

When a member of the community acts in selfish disregard of the common good, retributive theory dictates that society must punish the of-

24. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 261 (1993) [hereinafter FINNIS].

25. *See id.* at 263.

26. *See id.* at 263-64.

27. *See id.* at 263.

28. John Finnis, *Retribution: Punishment's Formative Aim*, 44 AM. J. JURIS. 91, 101 (1999) [hereinafter Finnis and Retribution].

29. FINNIS, *supra* note 26, at 261.

30. *See id.*

31. *See id.*

32. *Id.* at 262.

33. Kant made clear that the law *must* punish the offender. *See* KANT, *THE PHILOSOPHY OF LAW* 198 (1887).

fender.³⁴ Finnis argues that punishment is necessary to provide psychological incentive for all members of the community to uphold the common good, and as a means to balance the social equilibrium of advantages and disadvantages between the criminal and the law-abider.³⁵

1. Punishment as Psychological Incentive to Uphold the Common Good

“There is the need of almost every member of society to be taught what the requirements of the law—the common path for pursuing the common good—actually are.”³⁶ Punishment psychologically ingrains upon the citizenry, both the law-abiding and rebellious, the incentives of upholding the law.³⁷ Through the “public drama” of trials and punishment of those who ignore the common good, the law-abiding are encouraged that criminal behavior is not, in the end, profitable, and “to comply with the law is not to be a mere sucker.”³⁸

2. Punishment to Maintain the Social Equilibrium

To provide for the common good, criminal law creates a social equilibrium, in which fairness and equality are mandated.³⁹ Therefore, when someone chooses to “ascribe too much to their own preferences”⁴⁰ and acts against a common interest prescribed by law, the individual “gains a certain sort of advantage over those who have restrained themselves . . . in order to abide by the law.”⁴¹ The criminal act alters the social equilibrium of fairness and equality because the offender exercises a freedom that the citizenry at

34. *See id.*

35. FINNIS, *supra* note 26, at 262-63. Finnis also maintains that another side constraint of punishment is the rehabilitation of the offender. The criminal is an individual “whose good is as good as any man’s,” save his indulgence in freedoms not available to the entire community. *See id.* at 264. The criminal’s overindulgence in freedom, however, harms not only his community, but also himself. *Id.* The authorities, therefore, should craft punishment as to “restore reasonable personality in the offender, reforming him for the sake not only of others but of himself.” *Id.* This essay does not further review rehabilitation as a valuable side constraint of retributive justice because the use of the death penalty abandons all rehabilitative theories of punishment.

36. *Id.* at 262.

37. *See id.*

38. *Id.* at 262.

39. *See* H.L.A. HART, *THE CONCEPT OF LAW* 165 (1994). Hart maintained that morality was the force that made equality possible between the strong and cunning and the simple and weak. *See id.* Although Hart was theorizing in the context of civil law, Finnis expanded Hart’s notion to claim that retribution, through the law, could restore equality to a community in similar ways as a tortfeasor restores equality with payment of a sum to a victim. *See* Finnis and Retribution, *supra* note 30, at 102.

40. Finnis and Retribution, *supra* note 30, at 98, citing *Compendium Theologiae ad fratrem Reginaldum I* c. 121.

41. FINNIS, *supra* note 26, at 263.

large choose not to exercise in pursuit of the common good and in accordance with the law.

Retributive punishment restores the balance of advantages and disadvantages between the criminal and the law-abiding⁴² so that “no one should actually have been disadvantaged . . . by choosing to remain within the confines of the law.”⁴³

C. *The Essence of Punishment*

To restore the social equilibrium, those in authority “depriv[e] the convicted criminal of his freedom of choice, proportionately to the degree to which he had exercised his freedom . . . in the unlawful act.”⁴⁴ “What is done cannot be undone,”⁴⁵ and retributive punishment cannot look backward at restoring the effects or consequences suffered by a criminal act. Retributive punishment, rather, looks *forward* to restoring a social equilibrium at the level achieved before the offender undertook the criminal act. “Punishment does not negate the crime, but it does negate, cancel out, the advantage the offender gained in the crime—the advantage not necessarily of loot or psychological satisfaction, but of having pursued one’s own purposes even when the law required that one refrain from doing so.”⁴⁶

The essence of punishment, therefore, is not pain or unpleasant activity.⁴⁷ It is, rather, an act or experience contrary to the will of the offender.⁴⁸ The criminal’s freedoms, freely taken, are proportionately restricted⁴⁹ and society again achieves its social equilibrium—a distributively just balance of advantages and disadvantages.

III. A RETRIBUTIVIST CRITIQUE OF RIGHT-TO-VIEW STATUTES

Proponents of a victim’s right to view claim that the right is necessary because: (1) it fulfills a sense of justice that the criminal justice system

42. *See id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. Finnis and Retribution, *supra* note 30, at 102.

47. H.L.A. Hart’s first of five elements of the standard case of punishment is that “It must involve pain or other consequences normally considered unpleasant.” H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 4 (1968). Bentham also argued that punishment is an infliction of suffering. *See generally* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1832).

48. Finnis and Retribution, *supra* note 30, at 98 (“The essence of punishments, as Aquinas clearly and often explains, is that they subject offenders to something contrary to their wills—something *contra voluntatem*.”), citing Thomas Aquinas, *SUMMA THEOLOGIAE* I-II q. 46 a. 6 ad 2 (“est de ratione poenae quod sit *contraria voluntati*”).

49. Finnis and Retribution, *supra* note 30, at 98.

lacks; (2) it provides victims of violent crime with a sense of closure because they play an important role in the punishment of the offender; and (3) victims are able to watch criminals receive their due punishment. These justifications, however, conflict with the precepts of retributive punishment and distort the purposes and goals of the criminal justice system.

A. Gap Theory

Victims' rights advocates often justify a victim's right to view as a way to fulfill a perceived gap in the criminal justice system.⁵⁰ Victims may feel that the offender is not punished severely enough to make up for what has happened in the past. These sentiments parallel a possible critique of retributive punishment; although punishment may equalize a criminal's over-indulgence in freedoms taken in the past, it cannot equalize the often unintended consequences of loss, hurt, and anguish felt by the victims' families and friends. Thus, it could be argued, retributive punishment punishes offenders for exercising unfair freedoms, but fails to punish offenders for the *actual consequences* of the crime. Victims' rights advocates may argue that viewing the execution can help bridge this gap, and allow victims' family members to recoup a sense of justice that lacks in ordinary punishment.

Retributive punishment does not seek to undo all harmful consequences that result from unlawful activity. Rather, it "seeks to restore the distributively just balance of advantages and disadvantages between the criminal and the law-abiding"⁵¹ by restricting a convicted criminal's freedom with "relatively appropriate punitive responses."⁵² Retributive theory does not measure punishment by "material content or consequences of criminal acts, rather on their formal wrongfulness, which consist in a will to prefer unrestrained self-interest to common good."⁵³

Criminal law and state-imposed punishment are not vehicles to obtain personal justice and satisfaction. The law provides other ways to achieve this end. Victims can sue in civil court as the law affords victims a sense of personal justice and satisfaction through damage awards. The criminal law, on the other hand, provides society a means to foster quality communal living by restricting freedoms and liberties of those who selfishly ignore the common good.

50. Janicik, *supra* note 18, at 938.

51. FINNIS, *supra* note 26, at 263.

52. *Id.* at 264.

53. *Id.*

B. Closure

Victims' rights advocates also justify a victim's right to view as a means for victims' families to achieve closure as they participate in the punishment of the criminal.⁵⁴ Retributive punishment, however, is not intended to provide psychological closure or healing for victims' families. Retributive punishment is not a tool used *for* or *on behalf* of victims' families; rather it is society's tool to restore a social equality that has been upset by a criminal's selfish will.

Retributive punishment is punishment imposed by the state for and on behalf of the citizenry. The very purpose of retributive punishment is to ensure that a social equilibrium of fairness and justice is maintained, thereby providing *society* with a sense of social stability. After a criminal's freedom has been restrained, *society can feel closure* because the social equilibrium of fairness and justice again reign. Victims' families need closure, but the healing process is not to be found in viewing an execution.⁵⁵ The state does not punish on behalf of the victims' families, and the process of closure that justice obtains is not meant for them, it is meant for the community.

C. Revenge

Many victims' family members desire to view executions in order to watch the state impose upon criminals what they deserve. Family members, however, are rarely satisfied with the execution. In fact, families may experience increased vengeance after witnessing an execution because they feel that the offender "died an extremely lot easier death than [their family member] did."⁵⁶

Revenge is "[t]he action or an act of doing hurt or harm to another in return for wrong or injury suffered."⁵⁷ Retributive punishment is not revenge. It is not intended to hurt or harm, rather, it restricts a criminal's will on behalf of society because of the criminal's selfish indulgence in freedom contrary to the common good. Punishment is not inflicted upon the criminal

54. "[T]he very concept of closure presents problems. . . . A family may never experience closure after losing a member. The entire concept may merely create a false hope. In addition, an execution chamber . . . may not be the appropriate place for such a cathartic event to occur." Michael Lawrence Goodwin, Note, *An Eyeful for an Eye—An Argument Against Allowing the Families of Murder Victims to View Executions*, 36 BRANDEIS J. FAM. L. 585, 589 (1998).

55. One murder victim's family member said of the victims that watched McVeigh's execution: "I think that people will find in another week or so that they won't have any more closure than they had before, and they may be even more depressed, because it didn't give them what they thought." Leslie Hager-Smith, *Irwin's Opposition to Death Penalty has only Grown*, THE ROANOKE TIMES, June 15, 2001, at B5.

56. Mark Potok, *Looking Death in the Eye in Texas*, USA TODAY, Feb. 1, 1996, at 3A.

57. OXFORD ENGLISH DICTIONARY 2527 (1971).

in return for the wrong or injury suffered by the victims' family. Therefore, family members who attend an execution will rarely satiate their revenge because the punishment inflicted upon the criminal is neither intended to be painful nor issued in response to the victims' injuries or on their behalf.

IV. CONCLUSION

A victim's right to view a criminal execution distorts the social function and institution of retributive punishment. Viewing criminal executions can not equalize the pain and hurt felt by victims' family members or provide them with a sense of closure. The state does not impose criminal punishment on behalf of victims to avenge the injuries caused by the criminal. Retributive punishment, rather, is carried out by the state, on behalf of the citizenry, for the purposes of the common good, in order to restrict a criminal's will and restore a social equilibrium between the criminal and the law-abiding.

Victims' rights advocates argued that the survivors and victims' family members of the Oklahoma City bombing had a right to view McVeigh's execution. Under immense political and social pressure, Attorney General John Ashcroft understandably granted the victims the right to view the execution. But allowing victims' family members to view McVeigh's execution distorted the purpose of retributive punishment, and provided families a false hope that criminal justice and the institution of punishment supplies a forum to pursue personal justice and satisfaction.

