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## Restorative Justice and Retributive Justice: An Opportunity for Cooperation or an Occasion for Conflict in the Search for Justice

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Donald H.J. Hermann

### I. INTRODUCTION

For over a quarter of a century criminal punishment has emphasized the retributive as the principal justification with an emphasis on the degree of deprivation as a significant measure of the appropriate sanction.<sup>1</sup> This approach has resulted in extended sentences for many offenders, as well as an increase in the population of incarcerated individuals.

An integration of the current system<sup>2</sup> of retributive justice, with a recently developed approach of restorative justice, offers promise to reduce the harshness of contemporary sentencing. Critics to such an approach argue that there is a conflict between the reconciliation objective of restorative justice and the condemnatory objective of retributive punishment. This article recognizes that these are two processes for dealing with crime and that each have distinctive features; however, it is argued that there is a firm basis for finding a complimentary in the operation of these two processes, which ultimately have the same goal of justice for the offender, victim, and community.

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<sup>1</sup> Eleanor Hannon Judah & Michael Bryant, *Rethinking Criminal Justice: Retribution vs. Restoration*, in CRIMINAL JUSTICE: RETRIBUTION VS. RESTORATION 1, 1 (2004) (“Our present criminal justice philosophy is based on the concept of *retribution*, that is ‘something given or demanded in repayment, especially punishment.’”)

<sup>2</sup> *Id.* at 2 (“The criminal justice system is clearly in crisis. Currently, two million people in the United States are imprisoned.”)

The contemporary practice of restorative justice as it is being practiced today is relatively new. One of the most prominent practitioners of restorative justice, Howard Zehr, dates the beginning of current engagement with restorative justice to an event in 1974 in Canada, when a probation officer and his coworker accompanied two frightened offenders to their victim's home for a conversation of reconciliation.<sup>3</sup> Zehr has identified the participants and goal of restorative justice in simple terms: "Restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offense and to carefully and to collectively identify and address harms, needs, and obligations, in order that one put things as right as possible."<sup>4</sup>

Retributive justice, on the other hand, has been related to the institution of criminal punishment. Retribution involves the imposition of an appropriate sanction or punishment for violation of the penal law.<sup>5</sup> The state through prosecution before a judge must establish the guilt of a person for violation of the law. Following the determination of guilt, a judge imposes the appropriate sentence, which can include a fine, incarceration, and, in extreme cases, a penalty of death.<sup>6</sup>

These two approaches to the criminal offender raise the immediate issue of an apparent conflict between reconciliation and condemnation. Ultimately, these are two processes for dealing with crime, and each have

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<sup>3</sup> HOWARD ZEHR, *Restorative Justice: The Concept*, CRIMINAL JUSTICE DATABASE 68 (7th ed. Dec. 2006).

<sup>4</sup> HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 37 (Good Books 2002).

<sup>5</sup> See JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 28 (Cambridge Univ. Press 1998) ("[R]etributionists typically endorse the *lex talionis* as a punishment formulae or (as I would interpret it) as a formula for determining the extent to which the wrongdoer must be mastered. That formula calls for a wrongdoer to suffer something like what his victim suffered.")

<sup>6</sup> Henry Hart, *The Aims of the Criminal Law*, 23 L. & CONTEMPORARY PROBLEMS 401-06 (1958) ("In traditional thought and speech, the ideas of crime and punishment have been inseparable, the consequences of conviction for crime have been described as a matter of course as punishment.")

distinctive features and focus. There is, however, a firm basis for finding a complementarity in the operation of these two processes, which ultimately have the same goal of justice.

This article identifies the important features of both restorative and retributive justice. The views and arguments of those who maintain an opposition, and even incompatibility, between these two approaches to justice will be examined and criticized. Similarly, claims of compatibility and mutual enrichment through use of both the process of restorative and retributive justice will be closely examined. The article concludes with an argument in support of the compatibility approach.

## II. RESTORATIVE JUSTICE

While there is no agreed upon definition of “restorative justice,” a working definition has been provided by Tony Marshall of the United Kingdom Restorative Commission: “Restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offense and its implications for their future.”<sup>7</sup> The minimum elements of a restorative justice program involve a process in which the victims and their offender(s) meet face-to-face and that they come to some understanding, which constitutes the outcome that they have determined.<sup>8</sup>

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<sup>7</sup> Tony Marshall, *Restorative Justice in Britain*, in RESTORATIVE JUSTICE ON TRIAL: PITFALLS AND POTENTIALS OF VICTIM-OFFENDER MEDIATION – INTERNATIONAL RESEARCH PERSPECTIVES 15–28 (H. Messenger & H Otto eds., Kluwer Academic Publications 1992).

<sup>8</sup> See Paul McCord, *Toward a Holistic Vision of Restorative Juvenile Justice: A Reply to the Maximalist Model*, 3 CONTEMPORARY JUST. REV. 337 (2000) (“This operational definition provides a clear minimum requirement for restorative programs. At a minimum, a restorative justice program must (1) involve victims, offenders and their communities in face to face meetings where (2) they determine the outcome . . . . The acknowledgement of the wrong and the active participation in the reparation of harm is believed to be the most direct way to healing for all those affected by the harm.”)

The first contemporary victim-offender mediation and restorative process in North America occurred at Kitchener, Canada, in May 1974.<sup>9</sup> A Mennonite probation officer, Mark Yantzi, took two arrestees to apologize to the victims of the twenty-two homes they had vandalized.<sup>10</sup> The first reported use of the process in the United States was in Elkhart, Indiana, in 1972.<sup>11</sup> Marian Liebman reported the following: “The idea was taken up more generally in Canada and the U.S., leading to the establishment of several victim-offender reconciliation programs (VORP). These in turn led to the development of other restorative justice projects. In 2002 there were 773 projects in the U.S. and in 2003 there were 123 in Canada.”<sup>12</sup>

Restorative justice, as has been the case with reconciliation generally (of which restorative justice is a specific process), has been seen as applicable to a wide variety of contexts in which one party may identify as the victim. Use of the process extends beyond the context of crime to domestic disputes and even to international conflicts.<sup>13</sup> Daniel Philpott states that restorative justice is one of the bases for the process of reconciliation that links the concept of justice to notions of peace and mercy.<sup>14</sup> This also suggests a “wider, broader and more holistic response to past injustices than alternative concepts do.”<sup>15</sup> It has been observed that “restorative justice has been a

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<sup>9</sup> MARIAN LIEBMAN, *RESTORATIVE JUSTICE: HOW IT WORKS* 38 (Jessica Kingsley Publishers 2007).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> G. Burford & J. Pennell, *Family Group Decision Making: Generating Indigenous Structures for Resolving Family Violence*, 12 *PROTECTING CHILDREN* 17–21 (1996); *RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES* 137–56 (B. Galaway & J. Hudson eds., Criminal Justice Press 1966).

<sup>14</sup> DANIEL PHILPOTT, *JUST AND UNJUST PEACE: AN ETHIC OF POLITICAL RECONCILIATION* 68 (Oxford Univ. Press 2012).

<sup>15</sup> *Id.*

social movement that impacts the way we understand and respond to crime and conflict in diverse communities throughout the world.”<sup>16</sup>

However, it is important to recognize that the contemporary restorative justice movement developed into a crime context and its methods are particularly well suited to meeting the needs of victims and offenders in that context.<sup>17</sup> Some writers have viewed crime as the principal context for restorative justice and a precondition for application of restorative justice is the commission of crime. For instance, Lode Walgrave writes that “the core of restorative justice is a restricted option on doing justice after the occurrence of a crime.”<sup>18</sup> It is the aspect of forgiveness in the crime context that gives restorative justice its moral significance according to Walgrave—although she wishes to avoid having the process labeled “evangelical criminology.”<sup>19</sup> It is recognized that Howard Zehr and others with specifically Christian motivation have been supportive of the restorative justice movement.<sup>20</sup> Nevertheless, the movement includes a significant secular component, so it is accurate to say that there is a pluripotent restorative justice activism.<sup>21</sup>

In assessing the religious importance of restorative justice, it is significant that the first reported contemporary case involved a Mennonite. The Mennonites are a religious group that emphasize peaceable restoration

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<sup>16</sup> Mark Umbreit et al., *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 254 (2005).

<sup>17</sup> Brenda Blackwell & Clark Cunningham, *Taking the Punishment Out of the Process: From Substantive Criminal Justice Through Procedural Justice*, 67 LAW & CONTEMP. PROBS. 59, 68–69 (2004) (“Restorative justice has become a global movement, with applications in highly varied settings . . . However, the literature in the field consistently speaks in terms of ‘victims’ and ‘offenders,’ terms that assume both that a crime has been committed and that the criminal- the ‘offender’- has been conclusively identified.”).

<sup>18</sup> LODE WALGRAVE, *RESTORATIVE JUSTICE, SELF-INTEREST AND RESPONSIBLE CITIZENSHIP*, 2 (Willan Publishing 2008).

<sup>19</sup> *Id.* at 2–3.

<sup>20</sup> Jordan Baliov, *To Reform or to Abolish? Christian Perspectives on Punishment, Prison, and Restorative Justice*, 6 AVE MARIA L. REV. 487 (2008).

<sup>21</sup> *Id.* at 510.

of disputes.<sup>22</sup> Howard Zehr, a Mennonite who is a leading proponent of restorative justice, has identified a series of presentations that he considers “ways to live restoratively which are foundational beliefs of the practice of restorative justice.”<sup>23</sup> While these are characteristic of a religious ethical view, they are also consistent with secular humanism. These foundational prescriptions of restorative justice include:

Take relationships seriously, envisioning yourself in an interconnected web of people, institutions and the environment . . . when you negatively impact others, take responsibility by acknowledging and seeking to repair the harm—even when you could probably get away with avoiding or denying it. Treat everyone respectfully, even those you don’t expect to encounter again, even those you feel don’t deserve it, even those who have harmed or offended you or others . . . Engage in dialogue with others, even when what is being said is difficult, remaining open to learning from them and the encounter . . . Sensitively confront everyday injustice including sexism, racism, homophobia and classism.<sup>24</sup>

The Catholic Bishops of the United States have endorsed restorative justice as a central basis of a Christian and religious response to crime.<sup>25</sup> A scriptural basis for restorative justice is found in the Old Testament; the bishops assert that “[t]he Old Testament provides us with a rich tradition

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<sup>22</sup>*Restorative Justice*, MENNONITE CENT. COM. (2017), <http://mcc.org/learn/what/restorativejustice> (“When people hurt each other, relationships suffer – but they can be restored. MCC’s restorative justice work in the U.S. and around the world focuses on strengthening relationships based on respect and responsibility. MCC and its partners: Bring together people who have experienced harm or conflict to respectfully hear each other’s experiences and emotions. Together they agree on appropriate consequences.”)

<sup>23</sup> Howard Zinn, *Ten Ways to Live Restoratively*, in *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 95 (Good Books 2015).

<sup>24</sup> *Id.* at 95–96.

<sup>25</sup> U.S. CATHOLIC BISHOPS, *RESPONSIBILITY, REHABILITATION AND RESTORATION: A CATHOLIC PERSPECTIVE ON CRIME AND CRIMINAL JUSTICE* 17 (United States Catholic Conference 2000).

that demonstrates both God's justice and mercy [in his covenant with his people] . . . Punishment was required, repentances were demanded and relations were restored."<sup>26</sup>

Even more significantly, the New Testament supports restorative justice. The bishops draw attention to the fact that Jesus condemned revenge and urged transformation of the laws of harshly punishing offenders. The bishops maintain that "[t]he New Testament builds on this tradition and extends it . . . rejected punishment for its own sake, noting that we are all sinners (Jn. 8). Jesus also rejected revenge and retaliation, and was very hopeful that offenders would transform their lives and turn to be embraced by God's love."<sup>27</sup> The bishops go on to identify the significant concern expressed by Jesus for victims of crime. This is an important observation since one of the most significant aspects of restorative justice is that it begins with a focus on the victim rather than the offender. The bishops underscore "The story of the Good Samaritan (Lk. 10) who did all he could to help a victim of crime, a stranger, as a model for us today. We must be willing to stop and help victims of crime recover from physical and emotional wounds."<sup>28</sup>

The bishops find authority in Pope John Paul II's endorsement of restorative justice; the Pope asserted that "[w]hat Christ is looking for is trusting acceptance, an attitude which opens the mind to generous decisions aimed at rectifying the evil that was done and fostering what is good."<sup>29</sup> According to the bishops this means that "[v]ictims and their families must have a more central place in a reformed criminal justice system."<sup>30</sup> The

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<sup>26</sup> *Id.* at 7.

<sup>27</sup> *Id.* at 7–8.

<sup>28</sup> *Id.* at 8.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 12.



Pope observes that it is not only that victims suffer, but most victims experience emotional scars that are much harder to heal.<sup>31</sup>

In their statement, the US bishops acknowledge and expressly endorse contemporary programs of restorative justice as supported by Catholic social teaching. The bishops see the widespread adoption of restorative justice as a positive development. The emphasis shifts from the state and prosecution of the perpetrator to support the victim and the community harmed by the crime. According to the bishops' statement, "[t]he shift in focus affirms the hurt and loss of the victim, as well as the harm and fear of the community, and insists that offenders come to grips with the consequence of their actions."<sup>32</sup> However, the ideal outcome of the process of restorative justice benefits both the victim and the offender. This outcome is possible because both victim and offender are positively affected by the process: "[t]he experience offers victims much greater sense of peace and accountability. Offenders who are willing to face the harmful consequences of their actions are more ready to accept responsibility, make reparations, and rebuild their lives."<sup>33</sup>

The bishops conclude that restorative justice promotes basic Christian values of justice and forgiveness beyond that which occur in the simple operation of the penal law system: "Restorative justice also reflects on values and traditions. Our faith calls us to hold people accountable, to forgive and to heal. Focusing primarily on the legal infraction without a recognition of the human damage does not advance our values."<sup>34</sup>

The involvement of many faith-based institutions in programs of restorative justice is reflective of the fact that the values that underlie restorative justice are values shared in many religions, and specifically

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 12.

<sup>33</sup> *Id.* at 13.

<sup>34</sup> *Id.*

Christian, traditions. For example, in Canada, the Church Council on Justice and Corrections, founded in 1974 by the Canadian Council of Churches and the Canadian Conference of Catholic Bishops, identified a restorative justice approach to justice as central to its current activity.<sup>35</sup> The faith communities involved in Canada have adopted “a vision of love, mercy, and forgiveness as foundational values for the restorative justice programs they administer.”<sup>36</sup> Ultimately, there is a need to move from a vision of mercy and justice to application of these values to the practical concerns posed by the consequences of criminal behavior on both victim and offender.

### III. RESTORATIVE JUSTICE AND CRIME

Contemporary criminal punishment is dominated by the retributive objective of punishment.<sup>37</sup> This traditional penal approach to crime views the state as the primary offended party or victim of the criminal offense and places those harmed by the offense, and the community, in passive or subsidiary roles (as witness or juror).<sup>38</sup> Restorative justice begins with a focus on the individual(s) harmed by criminal conduct.<sup>39</sup> With interaction with the offender, restorative justice gives victims a voice to express their feelings and give an account of the consequences they have suffered as a

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<sup>35</sup> Katherine Chiste, *Faith-Based Organizations and the Pursuit of Restorative Justice*, 32 *MAN. L. J.* 27, 28 n.1 (2007).

<sup>36</sup> *Id.*

<sup>37</sup> Kent Greenwalt, *Punishment*, in *ENCYCLOPEDIA OF CRIME AND PUNISHMENT* 1284 (Joshua Dressler eds., 2<sup>nd</sup> ed., Vol. 3) (“The dominant approaches to justification [of punishment] are retributive and utilitarian. Briefly stated, a retributivist claims that punishment is justified because people deserve it; a utilitarian believes that justification lies in the useful purpose that punishment serves.”).

<sup>38</sup> Andrew Ashworth, *Some Doubts About Restorative Justice*, 4 *CRIM. L. F.* 277, 277–78 (1993) (“It is noticeable that when the state took over the criminal process, there was diminishing recognition of any entitlement of the victim . . . [it is] assume[d] that the offender and the state are the only significant parties concerned.”).

<sup>39</sup> David Miers, *The Responsibilities of the Rights of Victims of Crime*, 55 *MOD. L. REV.* 482, 496 (1992) (“[I]n criminal justice debate, concern for the interests of victims of crime constitutes an almost unassailable moral position.”).

result of the offender's conduct.<sup>40</sup> Victim and offender can come to an agreement, with the offender acknowledging the injury caused, along with the acknowledgment of the offender's responsibility of what can be done to restore a sense of justice.<sup>41</sup> The agreed upon response of the offender can involve compensation to the victim; compensation or service to other victims of similar offenses or to the wider community; or where appropriate, traditional punishment as provided in the penal code.<sup>42</sup> Punishment should meet appropriate retributive and rehabilitative objectives.

The process of restorative justice occurs through deliberation between victim, offender, and facilitator directed at promoting healing of the victim and, secondarily, restoring the offender.<sup>43</sup> The penal or retributive criminal proceeding aims at determining guilt and imposing an appropriate punishment.<sup>44</sup> Restorative justice is directed toward healing the offender by rebuilding his moral and social sense. The penal system effectuating

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<sup>40</sup> Heather Strang & Lawrence Sherman, *Repairing the Harm: Victims and Restorative Justice*, 15 UTAH. L. REV. 15 (2003) (“[P]articipants discussed what had happened when the offense had affected and in what ways and what could be done to repair the harm caused.”).

<sup>41</sup> *Id.* at 25–26 (“[V]ictims explained directly to their offenders the full consequences of the offense. Offenders had the opportunity to take responsibility for their actions and understand the consequences.”).

<sup>42</sup> *Id.* at 34 (In this study: “The restorative justice group more than received some other form of material restitution [than financial reparation, such as work by the offender for community organizations or for other people affected by the offense.”]).

<sup>43</sup> Paul McCold & Ted Wachtel, *In Pursuit of Paradigm: A Theory of Restorative Justice*, RESTORATIVE PRACTICES FORUM (Aug. 12, 2003), [www.restorativepractices.org](http://www.restorativepractices.org) (“Restorative practices provide an opportunity for those who have been most affected by an incident to come together to share their feelings, describe how they were affected and develop a plan to repair the harm done or prevent a recurrence. The restorative approach is reintegrative.”).

<sup>44</sup> Hart, *supra* note 6, at 406 (“In traditional thought and speech, the ideas of crime and punishment have been inseparable, the consequences of conviction of crime have been described as a matter of course as ‘punishment.’”).

retributive justice aims to impose punishment or deprivation proportionate to the offense which was committed.

The criminal process is punitive by seeking to impose a punishment (deprivation or restriction) on the offender; the restorative process seeks to compensate the victim, repair the harm, and facilitate the offender's remorse. While it is generally acknowledged that crime is about harm caused by the offender's act, the penal system focuses primarily on the violation of the law or the category of the offense, and secondarily on the impact of criminal conduct on human victims. It is not that the penal law entirely ignores the effect on the victim of the offender's conduct, instead this effect on the individual victim may be considered in determining the category of the offense or the seriousness of the legal violation. The restorative justice perspective, however, focuses on the injury experienced by the victim as the primary concern. The offender is encouraged to understand the harm that has been caused and to understand the full consequences of their criminal conduct. Rather than being the subject of court-imposed punishment, the offender in the restorative justice process is encouraged to take responsibility for the criminal offense, to agree to remedial action necessary to repair the harm done, and to satisfy the victim and community by remorse and assurance of future safety.

Commission of a crime most often involves injury to a victim as a result of the violation of community norms of behavior. In the traditional retributive penal process, there are two primary actors, the offender and the court as the agent of the state, standing in for the community as the *parens patriae*.<sup>45</sup> What is missing is the participation and restoration of the victim to a pre-offense condition. The argument is made that "[t]he advantage of

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<sup>45</sup> See Generally MICHAEL WENZEL, TYLER OKIMOTO, NORMAN FEATHER & MICHAEL PLATOW, *Retributive and Restorative Justice*, 32 L. & HUM. BEHAV. 375 (2008) ("In the criminal justice system in Western societies at least, the primary means of dealing with the injustice implied in a transgression is punishment. Courts impose punishment on offenders; once punishment is imposed, justice is often considered done.")

the restorative justice paradigm is its three-dimensional view of crime and its focus on the needs of all parties, victims, community and the offender.”<sup>46</sup> The penal law system focuses on one question, guilt for violation of a legal prescription. From a restorative justice perspective, crime amounts to much more: “Crime acts are also violation of people and relationships, accountability also means offenders must understand the impact of their crimes and the need/opportunity to repair the harm.”<sup>47</sup> A restorative justice approach involves participation of all parties to the crime: victim, offender, and community.

When one considers restorative justice as confined to the context of criminal offenses, restorative justice must be viewed in the aftermath of crime with its primary focus on reparation or restoration. Gerry Johnston has stated that: “[f]or most proponents of restorative justice, the main point of reparation is to ensure that harm done by crime be repaired, i.e. it is mainly for the victim’s benefit.”<sup>48</sup>

Commentators on criminal punishment, such as W. Moberly, discussed in some detail by Johnston, have expressed concern that this restorative approach seems to focus exclusively on the harm done by the legal violation.<sup>49</sup> From the critic’s point of view, restorative justice fails to deal fully with the offender’s status as wrongdoer and moral agent. Johnston admits that reparation does not totally annul the crime and there remains a place for anger and indignation at the offenses by the state and the community it represents. According to Johnston: “[t]he harm caused by crime usually extends far beyond material harm which is relatively easy to

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<sup>46</sup> Marc Matter, *The Sacred Cost of America’s Race to Incarcerate*, in CRIMINAL JUSTICE: RETRIBUTION VS. RESTORATION 21 (Eleanor Hannon Judah & Michal Bryant eds., Haworth Press 2004).

<sup>47</sup> *Id.*

<sup>48</sup> GERRY JOHNSTON, RESTORATIVE JUSTICE: IDEAS, VALUE AND DEBATES 85 (2nd ed., Routledge 2011).

<sup>49</sup> *Id.*

rectify.”<sup>50</sup> For example, property which is taken may be restored. However, with the deprivation that accompanies a taking, the victim may have experienced mental trauma. If some time passes before restitution of the property, the lack of availability of the property or its resources, such as tools, may have impacted the victim’s livelihood. As Johnston observes, “To try to make up for such mental disturbance the robber might pay the crime damages as well as compensate for the material loss:” however, money damages cannot restore the status quo or eliminate the mental distress suffered in the past.<sup>51</sup>

When one considers crimes of personal violence with the infliction of physical injury, the possibility of restitution is even more problematic; the problem is greatly compounded: “[t]he person who punches or strikes another can never un-punch or un-strike them, no matter how much genuine remorse they might later show and no matter how much they might try to compensate the victim.”<sup>52</sup> This inevitably leads to the conclusion that adult offenders can rarely, if ever, truly purge themselves. Moreover, the matter is further complicated by the fact that the effects of crime often ripple through a community as others vicariously experience the harm, and by the fact that others are inspired to imitate the offender. Finally, there is the moral degradation of the offender that has occurred as his or her conduct has led to the status of offender.

Restorative justice provides the offender opportunity for some restoration of moral status through confession, repentance, and reparation. The morally degraded status of the offender and the moral disapproval of the society may be seen as remaining after the reparative actions involved in the restorative justice process. Philosophers such as Hegel and Kant have asserted that beyond restitution, punishment is required to annul the moral

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 86.

<sup>52</sup> *Id.*

wrong entailed in a criminal act and to restore the moral balance.<sup>53</sup> For example, Hegel wrote, “[t]he immediacy superseded in crime leads through punishment, i.e. through the nullity of this nullity, to affirmation, i.e. to morality.”<sup>54</sup> There remains a need to annul the moral guilt or blameworthiness of the offender as the assuaging of the moral condemnation from the community of the offender’s blameworthiness. It is to these concerns that retributive justice theory attempts to respond.

#### IV. RETRIBUTIVE JUSTICE

Retribution is often mistakenly understood as seeking vengeance by inflicting suffering upon an offender. Instead, retribution needs to be understood as the justification for criminal punishment.<sup>55</sup> This understanding of retribution is reflected in the first definition of “punishment” in the *Oxford English Dictionary*, which provides that “punishment” is the infliction of a penalty in retribution for an offense.<sup>56</sup> Punishment is imposed as a consequence of a judicial finding that an individual is guilty of a criminal offense.<sup>57</sup>

Crime as defined in American case law is “any wrong against the public which is punishable in a criminal proceeding prosecuted by the state in its own name, or in the name of the people, or of the sovereign.”<sup>58</sup> Similarly, a standard British treatise adopts the following definition: “A crime or an

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<sup>53</sup> G.W.F. HEGEL, PHILOSOPHY OF RIGHT 248 (T.M. Knox trans., Clarendon Press 1952); IMMANUEL KANT, THE METAPHYSICAL ELEMENT OF JUSTICE 99–107 (Library of Liberal Arts 1965).

<sup>54</sup> *Id.* at 248.

<sup>55</sup> See WENZEL ET AL., *supra* note 45, at 375 (“Retributive justice essentially refers to the repair of justice through the imposition of punishment.”).

<sup>56</sup> THE OXFORD ENGLISH DICTIONARY 1654 (Vol. 2, The Clarendon Press 1933).

<sup>57</sup> WENZEL ET AL., *supra* note 45, at 375 (“In the criminal justice system in Western societies at least, the primary means of dealing with injustice implied in transgression is punishment. Courts impose punishment on offenders.”).

<sup>58</sup> *In re Bergin*, 31 Wis. 383 (1872).

unlawful act or default which is an offense against the public, and renders the person guilty of the fault, liable to punishment.”<sup>59</sup>

Penal law is concerned with social harm; it operates to impose, as a consequence, both attribution of culpability and retribution. Moral culpability in this situation requires more than reparation, which addresses the material element of the offense, it also requires expiation, which is related to the moral culpability of the offender.<sup>60</sup> In the contemporary situation, whatever wrong was done by the offender—even— if it involved harm to an individual such as infliction of physical injury or deprivation of property—is converted into a social harm, which is now denominated a crime. The crime is now viewed as a violation of a rule, which provides an established punishment for the rule infraction. This punishment is the anticipated consequence of the rule infraction. Retribution is simply the state imposing the established consequences of the choice made by the offender when he or she broke the rule.<sup>61</sup>

There was a time before the existence of the modern state when harm done to victims was dealt with differently. In earlier times, conduct that we now view as crime was a wrong for which the victim (or the victim’s

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<sup>59</sup> HALSBURY’S LAWS OF ENGLAND 271 (Simmons, ed., Vol. 10, Bubs Merrill and Co. 1955).

<sup>60</sup> Michael Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER AND THE EMOTIONS: NEW ESSAYS IN MORAL PHILOSOPHY 182 (Ferdinand Schoeman ed., 1987)

Moral culpability (“desert”) is in such a [retributive] view both a sufficient as well as necessary condition of liability to punitive sanctions. Such justification gives society more than merely a right to punish culpable offenders. It does this, making it not unfair to punish them, but retributivism justifies more than this. For a retributivist, the moral culpability of the offender also gives the society the duty to punish. Retributivism, in other words, is truly a theory of justice such that, if it is true, we have an obligation to set up institutions so that retribution is achieved.

<sup>61</sup> IMMANUEL KANT, THE PHILOSOPHY OF LAW 194 (W. Hastie trans., 1847) (“The right of administering punishment is the right of the sovereign as the supreme power to inflict pain upon a subject on account of a crime committed by him.”).



representatives such as family) sought compensation or reparation.<sup>62</sup> These origins of crime lie in the practice of indigenous or tribal people who were focused on compensation to the victim and the prevention of violent conflict within the group or between tribes (i.e. blood feuds) in order to foreclose revenge.<sup>63</sup> Wrongs inflicted within a tribe required compensation (and in extreme cases exile).<sup>64</sup> Offenses committed by members of a different tribe were more complex. For example, if the member of a particular tribe was killed by the member of another tribe, through a process of inter-tribe adjudication, responsibility was determined and the person causing a death might be made a slave of the tribe of the victim or even killed.<sup>65</sup> The objective was to limit revenge, to prevent blood feuds, and to prevent tribal wars.<sup>66</sup>

Even under Roman law, private parties could obtain reparation from those who killed the victim's relatives, or from relatives of a killer, and from individuals who caused losses by injury to persons or property.<sup>67</sup> However, by Anglo-Saxon times, the *wer*, the assessment for a killing, or the *bot*, the compensation for injury to person and property, were not the only consequences for injurious or offensive conduct. The king or the public guardian could obtain the *wite*, which is a payment for the breach of the King's Decree. There is historical evidence that for some offenses no compensation would atone, and for others the *wite* was so great that the ordinary wrongdoer could not pay and was obligated to accept

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<sup>62</sup> John Braithworth, *Restorative Justice*, in THE HANDBOOK OF CRIME AND PUNISHMENT 323 (Michael Tonry ed., 1998).

<sup>63</sup> Robert Redfield, *Primitive Law*, in LAW AND WARFARE 3, 12 (Paul Bohannan ed., 1967).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 9 (Vol. 1, MacMillan and Co. 1883).

imprisonment or other severe penalty.<sup>68</sup> The doctrine of the King's Decree and the use of punishment to maintain it was firmly established by the twelfth century.

This shift from an ancient form of restorative justice has been recognized by contemporary writers on the subject of restorative justice as a shift from a focus on victims (and their families) to the state as occurring as a result of an officer's royal decree in England. Mark Umbrett and his colleagues described this process as a paradigm shift from ancient restorative justice to retributive justice: "Within the English-speaking world, roots of the prevailing focus on harm to the state can be traced back to eleventh-century England," after the Norman invasion of Britain, royal punishment of offenders of the king's peace replaced a view of crime as a victim-offender conflict within the context of the community.<sup>69</sup>

This shift from a victim-focused understanding of offense, to offense against the sovereign and the state involves not only the development of state penal authority but also the formation of a central political state. As an example of this shift, "William the Conqueror's son, Henry I, issued a decree securing royal jurisdiction over certain offenses (robbery, arson, murder, theft and other violent crimes) against the King's palace."<sup>70</sup> Prior to the decree, crime had been viewed as conflict between individuals, which resulted in an emphasis on restoring the victim by compensation or other reparation.

Recognition of retribution as the justification or the fundamental aspect of punishment, raises the question of the place of the consequential aspects of criminal punishment including deterrence (special deterrence of the

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<sup>68</sup> POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 442 (Vol. 2, Cambridge Univ. Press 1952).

<sup>69</sup> Mark Umbrett, Betty Vos, Robert Coates & Elizabeth Lightfoot, *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls* 89 MARQ. L. REV. 251, 255 (2005).

<sup>70</sup> *Id.*

offender and general deterrence of members of the community), rehabilitation, and isolation (because of dangerousness).<sup>71</sup> Deriving these benefits from subjecting the offender to control by the state must be viewed as presenting opportunities for social efforts to derive benefit from the presence of the offender in the correctional system—not the reason for state control of the offender. To make these consequential concerns the justifications for punishment would necessarily involve using the offender for social benefit. This would necessarily diminish the offenders' autonomy. The offender should be punished because he or she deserves to be punished for choosing to violate an official rule of behavior. To punish the offender because he or she needs to be rehabilitated or because the offender can be made to be an example to instruct others, involves using the offender for some purpose. Retributive punishment is based on human autonomy and respect for the individual as a rational actor obligated to conform to the law. The law says "do not do x" or you will be "punished by the penalty y." When the offender chooses to do "x," he is actually choosing to be "punished by penalty y." The basic principle is simple: when an offender has violated rules or laws, the offender deserves to be punished because it is necessary for justice to be reestablished; moreover, the offender has to be punished in proportion to the severity of the wrongdoing.<sup>72</sup>

The understanding of justice entailed in retributive theory is confined to the enforcement and maintenance of the law. The consequentialist aspects of criminal correction, such as deterrence or retribution, cannot justify punishment, but may occur incidentally on the occasion of punishment.

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<sup>71</sup> Kent Greenwalt, *Punishment*, in *ENCYCLOPEDIA OF CRIME AND JUSTICE* 1284 (Joshua Dressler ed., 2<sup>nd</sup> ed., 2002) ("The dominant approaches to justification [of punishment] are retributive and utilitarian. Briefly stated, a retributivist claims that punishment is justified because people deserve it; a utilitarian believes that justification lies in the useful purpose that punishment serves (the latter approach is sometimes referred to as 'consequentialist,' or 'instrumentalist'). Satisfying both retributive and utilitarian criteria may be thought necessary to warrant punishment.").

<sup>72</sup> WENZEL ET AL., *supra* note 45, at 375.

Similarly, the reparation and restoration of the victim is a secondary consideration to the fundamental objective of the maintenance of the law and social order.

One of the most significant modern considerations given by a religious authority to the subject of retribution and criminal punishment was provided by Pope Pius XII in a series of addresses given between 1952 and 1955 dealing extensively with the issue of punishment.<sup>73</sup> A major focus of the Pope's remarks on criminal punishment were directed at the retributive nature of legitimate criminal punishment. Underlying the Pope's views were the ontological views of punishment favored by Kant and Hegel; the view that the offender has chosen punishment by the free act of violating a penal prohibition.<sup>74</sup> Pope Pius XII clearly adhered to this classical view of retribution when addressing the question of execution of a condemned man when he stated, "In this case it is reserved for the public power to deprive the condemned person of the enjoyment of life, in expiation of his crime, when by his crime, he has already dispossessed himself of the right to live."<sup>75</sup>

According to Pope Pius XII's view, the purpose of punishment includes not only the physical protection of members of society, but also the maintenance of the moral order that underlies the common good. Additionally, the penal law has moral significance because it contributes to the maintenance of public order, which is conducive to the common good. It

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<sup>73</sup> See POPE PIUS XII, *Moral Limits of Medical Research and Treatment*, 51 CATHOLIC MIND, 305 (1953) (September 14, 1952); *International Penal Law*, 52 CATHOLIC MIND, 109 (1954) (October 3, 1953); "Crime and Punishment", 53 CATHOLIC MIND 354 (1955) (address to Station Association of Catholic Jurists (December 5, 1954)).

<sup>74</sup> J.D. MABBOTT, *Punishment*, 48 CATHOLIC MIND 152-167 (1939) ("The past act is the basis of punishment, Kant and Hegel reason by choosing to commit an act designated a crime with subsequent punishment, the actor in fact chooses to be punished."); See G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* (T.M. Knox trans., Clarendon Press, 1952).

<sup>75</sup> Pope Pius XII, *The Moral Limits of Medical Research and Treatment*, *supra* note 73 at 305-13.

is this condition of society in which public order is maintained in which the individual can realize the moral self. It is this higher concern to which Pope Pius XII gave priority: “The protection of the community against crimes and criminals must be ensured, but the final purpose of punishment must be sought on a higher plane.”<sup>76</sup> Punishment of the criminal offender facilitates the restoration and maintenance of the moral order, which entails respect for the offender as a responsible moral agent; this respect for moral responsibility requires the imposition of sanction or punishment for violation of the law and elevates retributive criminal punishment to the “higher plane” identified by the Pope.

Pope Pius XII articulated a theological understanding of the retributive justification of punishment that is not concerned with the harm experienced by the victim of an offense. While the Pope recognized the loss suffered by the victim, no way existed for the offender to recall his offending conduct. For Pope Pius XII, it is the violation of the law that must be attended to. The Pope asserted:

The essence of the culpable act is the free opposition to a law recognized as binding. It is the rupture and deliberate violation of just order. Once done, it is impossible to recall. Nevertheless, in so far as it is possible to make satisfaction for the order violated, that should be done. For this is a fundamental exigency, if it is just, and to restore the balance when upset. It demands that by punishment a person responsible be forcibly brought to order. And the fulfillment of this demand proclaims the absolute supremacy of good over evil, right triumphs sovereignly over wrong.<sup>77</sup>

Pope Pius XII rooted his endorsement of a theory of retributive justice and the expiatory function of punishment in the New Testament. He invoked Romans chapter 13 not only for the legitimacy of imposing punishment as a mechanism of self-defense, but also as a source of support

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<sup>76</sup> Pope Pius XII, *International Penal Law*, *supra* note 73 at 117 n.4.

<sup>77</sup> Pope Pius XII, *International Penal Law*, *supra* note 73 at 117 n.4.

for the moral code underlying the common good. The Pope suggested a need to give full meaning to the well-known words of the Apostle in the Epistle to the Romans: “*Non enim sine causa gladium portat. . .vindex in iram ei qui malum agit.*” (Rom 13:41) (“It is not for nothing that he bears the sword: he is God’s minister still, to inflict punishment on the wrong doer.”)<sup>78</sup>

The focus of the Pope is the maintenance of the penal law, which has moral roots and is necessary to the public order that is required, as a social sanction, for rectification of the common good. There are, however, two other real concerns when one looks at criminal behavior, which is the subject of the Pope’s discourse. A criminal act necessarily is a violation of the penal law. Also, it is an infliction of harm on the victim who justly asks for retribution or restoration. Further, it is a degradation of the offender because he has degraded himself, weakened his own character, and set himself in opposition to the victim and society. The offender, also, looks for restoration in the form of forgiveness and acceptance back into the society from which he has alienated himself by his criminal act. This allows the offender to regain a sense of moral worth and to re-establish his social relationship with the victim where that is appropriate, and allows him to regain full social status in the community.

Thus, while it may be argued that retribution is necessary to restore justice, or that retributive justice is necessary to maintain both the legal and moral order, it does not seem adequate to address the consequences of crime—victim harm and offender degradation.

#### V. ARGUMENT FOR RETURN TO RESTORATIVE JUSTICE

Some proponents of restorative justice argue that the current system of corrections has been built on the idealized theory of retributive justice as

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<sup>78</sup> Pope Pius XII, *International Penal Law*, *supra* note 73 at 117 n.4.

unjust to the offender, ineffective in producing social safety and order, and burdensome due to the cost of social resources.<sup>79</sup> The basic argument is that a criminal justice system that is based on the concept of retribution as a basis for punishment, most often inflicted through imprisonment, has failed.<sup>80</sup> The negative effects of the current system have been described by Tom Tyler where he identifies the human and social costs of the American system of punishment:

Central to this punitive society is a model in which the primary way of motivating compliance with the law is via the application of sanction. There have been several negative consequences of this sanction orientation. One is that it has led to a swelling of the prison population with the result that America is now one of the leading countries in the world in terms of the proportion of its adult population held in jails and prisons. This statistic itself does not capture the true impact of the larger prison population. That impact has been disproportionately upon the poor and minorities whose communities have been decimated, as large numbers of young minority males have spent time in prison.<sup>81</sup>

Two important failures of the retributive system are cited by proponents of restorative justice: the failure of the present corrections approach to crime to produce effective deterrence and the programmatic effect of failure to address the rights of victims to any effective redress.<sup>82</sup> This is not simply

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<sup>79</sup> Theo Gavrielides, *Reconciling the Notions of Restorative Justice and Imprisonment*, 94 PRISON J. 479, 479–80 (2014) (“The increasing number of prisoner suicides, the deepening racism and inequality in the secure estate, prison overcrowding and the inhumane conditions to which prisoners are subjected, high rates of reoffending, and the rising costs of incapacitation as a policy and philosophy for crime control are some of the factors quoted by reformists from around the world in their search for new avenues of justice, one of which is restorative justice.”).

<sup>80</sup> JUDAH & BRYANT *supra* note 46, at 21.

<sup>81</sup> Tom Tyler, *Restorative Justice and Procedural Justice: Dealing with Rule Breaking*, 62 J. SOC. ACTION 307, 308 (2006).

<sup>82</sup> See Generally Heather Strang & Lawrence Sherman, *Repairing the Harm: Victims and Restorative Justice*, 15 UTAH L. REV. 15 (2003) (“One of the leading arguments for  
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an American concern, but a phenomenon observed in other countries as reported by Lode Walgrave, a Professor of Criminology in Belgium who reports on the lack of effective instrumental practices accompanying retributive punishment:

The instrumental approach is open to empirical control: (i) An extensive body of research shows that punitive prevention (or deterrence) is far less general [effective] than may be thought. It is effective only in certain conditions, for certain offenses and certain types of offenders. (ii) It would seem to be more the exception than the rule for an offender to be reformed by application of the conventional penalties of criminal law. On the contrary, in fact, various studies suggest that they have a marginalizing and labeling effect. (iii) The preservation of the victim's rights is certainly not central to existing penal justice procedures. Other existing systems are far more effective in addressing the rights and needs of victims.<sup>83</sup>

It is important, however, to observe that these criticisms are directed at the operation of the contemporary correction systems, not at the operation of retributive justice itself.

It is established that the adoption of the system of retributive justice replaced an earlier tribal system of compensatory justice.<sup>84</sup> Today, the issue of proper designation has been reversed and there is a call to replace the established system of retributive justice, which focuses on the state imposing punishment, with a "new" system of restorative justice. This contemporary understanding was made clear by Mark Umbrett who reflects

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restorative justice is the abandonment of victims' interests by the jurisprudence of retribution.")

<sup>83</sup> Lode Walgrave, *Restorative Justice for Juveniles: Just a Technique or a Fully Fledged Alternative*, 34 HOWARD J. CRIME & JUST. 228, 229 (1995).

<sup>84</sup> Stephen Garvey, *Restorative Justice, Punishment, and Atonement*, 1 UTAH L. REV. 303, 304 (2003) ("Although restorative justice is put forth as a new philosophy for modern societies, its proponents trace its roots to older traditions in non-modern societies.")



this modern view: “The old paradigm of ‘retributive justice’ focuses upon the state being the victim and places the individual victim in a passive position with little if any participation in the justice process.”<sup>85</sup>

Conversely, a new approach to compensation for criminal offenses appears as a new system in which both the victim and offender are actively involved in resolving the aftermath of the offense. Under this theory, the state now becomes the passive participant, or at most a party facilitating the interaction of victim and offender. Umbrett describes this change as follows:

The new paradigm of ‘restorative justice’ defines crime as a violation of one person, by another, not a violation of the state. Dialogue and negotiations are normative, with a focus upon problem-solving for the future rather than establishing blame for past behavior. Rather than the imposition of severe punishment, restorative justice emphasizes restitution as a means of restoring both parties; reconciliation and restoration of the parties is the goal. Instead of ignoring the victims and placing offenders in a passive role, the new paradigm of restorative justice places both victim and offender in active and interpersonal problem-solving roles.<sup>86</sup>

Some advocates of restorative justice view this as being opposite as well as a replacement for the retributive justice approach. Kathleen Daly argues, “[a]dvocates [for restorative justice] seem to assume that an ideal justice system should be of one type only, that it should be pure and not contaminated by or mixed with others.”<sup>87</sup> Daly maintains that advocates of restorative justice view it in binary opposition to retributive punishment—retributive justice is “bad” because it is based on “hostility” to lawbreakers

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<sup>85</sup> Mark Umbrett, *Crime Victims Seeking Fairness, Not Revenge: Toward Restorative Justice*, 53 FED. PROBATION 52, 52 (1989).

<sup>86</sup> *Id.*

<sup>87</sup> Kathleen Daly, *Restorative Justice*, 4 PUNISHMENT & SOC. 55, 59 (2002)

and focuses on repression and exclusion of the lawbreaker as an “enemy.”<sup>88</sup> Conversely, restorative justice is “good” focused on social and individual breakdown requiring restoration and focused on the future rather than the past.<sup>89</sup>

Daly also argues that by defining justice aims or principles in binary or oppositional terms, restorative justice advocates present a restricted view of justice: “They assume that restorative justice *practices* should exclude elements of retribution and in rejecting an attitude of hostility, they assume that retribution as a justice *principle* must also be rejected.”<sup>90</sup>

There are compelling reasons for not instituting programs of restorative justice to the exclusion of retributive justice on both principled grounds and on the basis of practical considerations. The next section of this paper will address the principled argument for combining both approaches to restorative justice with a system of retributive punishment. At this point, it is appropriate to consider the practical considerations for adopting an approach that joins a restorative approach to criminal offenders while maintaining a commitment to retribution. The practical considerations were taken up by Ken Roach has posed this question convincingly in “Restorative justice on the rise” where Roach suggests:

The question of unity [or a singular approach] in corrections is even more difficult. There are multiple and conflicting goals of punishment including retributive, deterrence, rehabilitation, and, increasingly, the achievement of restorative justice . . . Could a unified approach satisfy the diverse and growing number of interests who make demands on the criminal justice system? Even if unity could be achieved, there are questions about whether it would be desirable. The broad sweep of correctional history

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 59.

illustrates both the fallibility and contingency of particular approaches to punishment.<sup>91</sup>

Clearly, the adoption of restorative justice is a valuable development for dealing with crime and ameliorating the harshness of contemporary correctional practice. Roach has expressed agreement with the recognition of the value of a renewed adoption of practices of restorative justice. While restorative justice has ancient roots, today it constitutes a genuine and powerful approach to justice and crime, “it provides a helpful antidote to punitive penalties which would feed a growing crime control industry which relies on imprisonment as a primary response to crime.”<sup>92</sup>

However, in contemporary society, where the response to crime is widely understood as punishment, there necessarily will be a limited role for restorative justice. “In a society which associates punishment with taking crime seriously, restorative justice is most likely to be used for less serious offenses.”<sup>93</sup>

Again, Roach expresses sensitivity to this reality when he suggests that restorative justice may be most appropriate when limited to less serious criminal offenses.

Actually, the use of restorative justice may be effective when limited to specific areas of conflict and specific classes of offenders such as juveniles: “Restorative justice is most often used to describe informal and non-adjudicative forms of dispute resolution such as victim offender mediation, family conferences and aboriginal forms of justice which give victims, offenders and the community decision-making power.”<sup>94</sup> Realistically, restorative justice should be viewed as a specific response to crime and as part of a general theory of criminal justice. For example, Roach has argued,

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<sup>91</sup> Ken Roach, *Changing punishment at the turn of the century: Restorative justice on the rise*, 42 CAN. J. CRIM. 249, 251 (2000).

<sup>92</sup> *Id.* at 275.

<sup>93</sup> *Id.* at 259.

<sup>94</sup> *Id.* at 253.

“[r]estorative justice as a partial theory of justice must be reconciled with retributive theories of justice.”<sup>95</sup> There ultimately is a need to develop a comprehensive response to crime which requires attention to the requirements of both restorative and retributive justice.

#### V. RECONCILING RESTORATIVE JUSTICE WITH A RETRIBUTIVE THEORY OF JUSTICE

As has been shown earlier in this article, retributive justice by itself the process excludes direct participation of the victim and disregards any necessary reparation or restoration of the victim. While retributive justice includes the notion of punishment restoring the balance of justice and providing the claim is made that such punishment provides the opportunity for deterrence and rehabilitation, however, the latter are neither necessary as a theoretical matter nor are they being achieved in the present system of American corrections.<sup>96</sup> There is a clear place for restorative justice in attending to the injury suffered by the victim and the need for forgiveness and re-socialization of the offender in the contemporary response to criminal behavior.

Restorative justice operating alone is inadequate because of the lack of participation by the state; nor does restorative justice provide adequate regard for maintenance of the criminal code of conduct. Nor is there sufficient regard for the harm to the social order caused by criminal violations beyond the observable injury to the identified victims or the specific impact on the community. Consideration needs to be given to such secondary impacts as bad examples to others, required costs to increase

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<sup>95</sup> *Id.* at 258.

<sup>96</sup> James Bonta et al., *Restorative Justice and Recidivism: Promises made, promises kept?*, in *HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE* 108, 109 (Dennis Sullivan & Larry Tiff ed., 2008) (“[Q]uite simply, punishment does not appear to deter offenders from further crime.”)

protection from anticipated similar incidents of crime, and the emotional costs to neighbors who empathize with the victim.

To most successfully address the needs of victims, offenders, and the state, a combination of restorative and retributive justice should be implemented. This necessary combination addresses the interests of all parties to a criminal event, including the victim (and community), the offender, and the state (social harm).<sup>97</sup> Restorative justice addresses the needs of the victim for reparation and restoration. Similarly, restorative justice addresses the needs of the offender for forgiveness and reintegration into the community. Furthermore, retributive justice addresses the need of the state to maintain the criminal law through enforcement and punishment. Finally, retributive justice restores the offender's moral state as a result of the imposition and acceptance of prescribed punishment.<sup>98</sup>

The view that while there are apparent oppositional concerns between restorative and retributive justice, both are needed to provide an enriched response to criminal conduct. This view has been advocated by commentators such as Daly who argued:

I have come to see that apparently contrary principles of retribution and reparation should be viewed as dependent on one another. Retributive censure should ideally occur before reparative gestures (or a victim's interest or movement to negotiate these) are possible in an ethical or psychological sense. Both censure and reparation may be experienced as punishment by offenders (even if not the intent of decision makers), and both censure and reparation need to

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<sup>97</sup> GERRY JOHNSTONE, *RESTORATIVE JUSTICE: IDEAS, VALUES, DEBATES* 80 (2<sup>nd</sup> ed. 2011) (“One important point about the restorative response to offenders is that the reintegration of offenders into the community is conditional upon their expressing repentance and genuinely committing themselves to a change of ways.”).

<sup>98</sup> *Id.* at 74 (“[L]egal guilt is usually interpreted as a product of individual moral failing. The individual found guilty is deemed to be a free moral agent who had a choice about how to behave and freely made the unacceptable choice.”).

occur before a victim or community can reintegrate an offender into the community.<sup>99</sup>

A dichotomy can be drawn between restorative justice and its facilitating a victim's reparation, and retributive justice, which imposes offender punishment and may seek potential rehabilitation. However, restorative justice is directly concerned with the offender being restored to the community and restoration of the dignity of the offender. Tom Tyler has supported: "Restorative justice argues that the social goal that should dominate reactions to transgressions is to resolve the dispute via re-integrative shame."<sup>100</sup> Whether in the consciousness of Tom Tyler, or not, it is the function of shame which relates his understanding of restorative justice to that of tribal expiation, which was largely focused on notions of shame. Significantly, Tyler concludes:

Restorative shaming combines strong disapproval of bad conduct with respect for the person who committed these bad acts. The group is restoring victims, offenders, and the community. In the case of offenders, the goal is to encourage feelings of shame regarding one's bad acts, accepting responsibility, and sincerely apologizing. This restores the dignity of offenders.<sup>101</sup>

One of the significant features of restorative justice is its moderation of retributive punishment by reducing the unacceptable contemporary harshness of much criminal sentencing. Gerry Johnston supported this view when he identified the impact of a restorative justice process on the impact of retributive punishment imposed on an offender:

Those deemed responsible for committing a crime will not be judged as severely as they are in [a purely] retributive system.

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<sup>99</sup> Kathleen Daly, *Restorative Justice*, 4 PUNISHMENT & SOC. 55, 60 (2002).

<sup>100</sup> Tom Tyler, *Restorative Justice and Procedural Justice: Dealing with Rule Breaking*, 62 J. SOC. ISSUES 305, 315 (2006).

<sup>101</sup> *Id.*

Condemnation of their behavior as unacceptable to the community will be mixed with empathy for them as members of the community who have erred. At the same time, it will be made clear that the circumstances which might militate their guilt do not excuse their actions and certainly do not remove their liability to make amends for the harm they have caused.<sup>102</sup>

The good understanding of the proper place for restorative justice is that it broadens the response to crime from a focus on the violation of rules and the consequential punishment, to a primary focus on the victim and offender. However, it is equally significant that such a combination of restorative and retributive justice also meets the additional goals of compensating or provision of reparations for the victim and the possibility of forgiveness and reintegration of the offender into the community. Charles Villa-Vicencio has acknowledged this effect of the relationship of retributive and restorative justice: “Restorative justice seeks to recover dimensions of justice often lost within the institutional retributive justice process”; thus, “[restorative justice] does not necessarily reject all punitive measures associated with the retributive process. It seeks rather to be more inclusive in the promotion of justice.”<sup>103</sup>

A psychological evaluation of both retributive and restorative justice support that there is a requirement for punishment of criminal offenses that is independent of compensation to the victim or remorse by the offender. There is a sense in which the state’s imposition of retributive punishment for violation of the penal law satisfies the demand for censure for the moral violation embedded in the criminal act. Psychologist Michael Wenzel and his associates support this conclusion when they observe that “[p]eople

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<sup>102</sup> JOHNSTONE, *supra* note 97, at 77.

<sup>103</sup> Charles Villa-Vicencio, *Traditional Justice, Restoration and Prosecution*, in HANDBOOK OF RESTORATIVE JUSTICE 387, (Dennis Sullivan & Larry Tiff eds., 2008).

usually feel justice demands that the offender be punished, above and beyond a possible restitution or compensation to the victim.”<sup>104</sup>

The requirement of punishment goes beyond concerns about loss or harm. This demand for punishment relates to the core concept of guilt, which plays a central role in retributive justice and its focus on expiation. Again, Wenzel and his associates identify a need beyond reparation for an act of censure by the state: “Generally, we can say what is deemed necessary as an undoing of the moral-symbolic meanings of the offense . . . .”<sup>105</sup> Censure effectively undoes the moral violation: “In declaring the rule violation as wrongful, as something that should not have happened, censure in effect annuls the moral symbolic meaning of the offense.”<sup>106</sup>

Restorative justice and the accountability required by retributive justice are not mutually exclusive as long as punishment is humane and rehabilitative. There is for certain a recognition among many people today of the need for treatment programs to rehabilitate offenders.<sup>107</sup> However, the need for censure should not be understood as contrary to the support for restorative justice. Mark Umbreit argues that there is widespread support for programs of restorative justice:

Without question, nearly all citizens at large and crime victims specifically want criminals to be held accountable through some form of punishment. For many, however, their need for justice and fairness is grounded more in a deep concern that violators, particularly juveniles, receive humane treatment and counseling

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<sup>104</sup> Michael Wenzel, Tyler Okimoto, Norman Feather & Michael Platow, *Retributive and Restorative Justice*, 32 L. & HUM. BEHAV. 375, 379 (2008).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> LODE WALGRAVE, RESTORATIVE JUSTICE, SELF-INTEREST AND RESPONSIBLE CITIZENSHIP 64 (2008) (“Taking care of the offender’s rehabilitation by treatment, social integration, re-education and support is a high socio-ethical principle, but it must remain subordinate to retributive principles.”).



that can lead to their rehabilitation, rather than a belief in the need for lengthy.<sup>108</sup>

Retributive and restorative justice work hand in hand, but the acknowledgement and repentance of one's deeds is necessary before restoration can begin. It becomes clear that not only at the theoretical level, but also at the practical experiential level, there is a need to combine retributive and restorative justice. Restorative justice best meets the needs of victim and offender—retribution assures satisfaction of the needs of state censure. No approach, standing alone, meets all the needs of victim, offender, and state. While it may be argued that the punishment or censure phase should precede the restorative justice process, it seems necessary for the sentencing authority to be able to take account of the results of the restorative justice process when determining culpability and the nature of the censure. Just as confession and remorse are relevant factors in determining punishment or censure, the acceptance of responsibility, the making of amends through restitution and reparation, and the authentic petition for forgiveness are relevant to the determination of an appropriate sentence or punishment.

## VI. CONCLUSION

The contemporary movement of restorative justice focuses on the victim of crime and on the offender. An effort is made to restore the victim to his or her pre-crime position. Reparation and compensation are often provided. At the same, time there is an effort to restore the offender's membership in the community by a reciprocal process of remorse and forgiveness. Restorative justice has deep support in the Christian tradition of mercy and forgiveness following repentance.

Retributive justice focuses on the guilt of the offender and the imposition of compensatory punishment following a conviction with a finding of guilt. At one level, the focus is on the offender who, as a rational person, has chosen to violate a law and deserves to suffer the consequence for a willful

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<sup>108</sup> Mark Umbrett, *Crime Victims Seeking Fairness, Not Revenge: Toward Restorative Justice*, 53 FED. PROBATION 52, 52 (1989).

violation of the law. In a deeper sense, the violation of the penal code involves moral guilt, which requires censure and expiation. For example, Catholic Church teaching has traditionally recognized the essential function of retributive punishment for infraction of the law. Punishment of violations of public order is essential for all people to be able to achieve the common good.

Some commentators have advocated the abandonment of the retributive system, which is based on finding blame and imposing punishment, because they view it as degrading and inhumane. Rather than focus on supposed harm to the state, advocates of restorative justice maintain that the proper focus should be on compensating the victim and reforming the offender. An approach that restricts the response to crime to restorative justice alone ignores the continuing need to take into account the requirements of public order and the felt need for censure of the offender, which requires application of retributive punishment.

Restorative justice meets a need ignored by the modern system of criminal justice. The victim's need for compensation and reparation and the offender's need for forgiveness and return to full membership in the community are important considerations that are the focus of restorative justice. Nevertheless, there is a complementary need to attend to the societal rupture caused by the violation of the criminal law. Moreover, there is a need to recognize the authority and compelling force of the demand for censure and expiation of the criminal offender.