

## **WHAT'S JUSTICE and WHO DECIDES**

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Justice has been a concern of humans since the beginning of recorded history. From religious manuscripts, such as the Bible and the Hindu Laws of Manu, to the secular statutes of The Code of Hammurabi and the *ius privatum* of Roman law, civilizations have sought to define and administer justice. The definition of justice varies from culture to culture, but, in a very broad sense, the means by which justice is served can be reduced to two basic philosophical positions: retribution or restoration. In the context of administration of the law perhaps the position most recognizable to westerners is the retributive/adversarial system of jurisprudence. The application of this normative legal theory usually involves a plaintiff bringing an action against a defendant in a lawsuit resulting, ordinarily, in a winner and a loser. Typically only one party is satisfied with the outcome and often neither party likes how the case was resolved.

Since the inception of Colonial governance in America right up to modern times, criminal jurisprudence has relied heavily on retribution to exact punishment on offenders. In the retributive system the law is preeminent and a verdict or decision is considered just if legitimate law was applied fairly. However, the retributive/adversarial philosophy of justice is being challenged by an ever-increasing group of legal professionals, academicians, and social scientists. These critics cite religious texts, justice practices of indigenous peoples, quantitative statistics, as well as social and psychological studies to support their perspective that an alternate normative judicial philosophy needs to be adopted. They claim that in cultures and jurisdictions where strength of community and continuity is the focus, a cooperative, non-dichotomous system of jurisprudence results in a more just addressing of conflict which, in

turn, facilitates more peaceful communities. That system is commonly referred to as restorative justice.

In the restorative paradigm justice is defined and determined by those affected by the harm resulting from the action of a stakeholder . Stakeholders may include anyone impacted by a cause and effect relational dynamic. History teaches that the pursuit of justice impacts all persons and areas of society. For that reason, all community sectors have a vested interest in its definition and administration.

The model of jurisprudence a society employs is significant because the effectiveness of its justice system and the confidence its members have in that process may be directly influenced by how society defines justice and what systematic approach it uses in its pursuit. Public policy and laws are affected by a society's definition of justice. Lives, property, and a society's structure, systems, and culture are impacted by the understanding of justice. It is in light of these concerns and others that a comparative analysis of the retributive/adversarial model and the restorative/cooperative model may illumine their similarities and differences and in understanding respective affect on society and the quality of life of stakeholders.

Criminal offenses perhaps best lend themselves to an apples-to-apples comparison, so the analysis will be limited to those types of cases. However, since the criminal justice approach of either system will likely pervade and affect other societal institutions, such as public education and community justice, the effectiveness of both justice philosophies will be studied as applied in those areas as well.

### **Historical and Background Information**

The **retributive** justice system currently employed in the United States is a product of the common law system which ostensibly began in medieval Europe at the time of the Norman

Conquest. Prior to the era of common law, offenses were considered to have been committed against individuals and were usually dealt with through tribal councils or the general consensus of the community. After the Conquest, the monarchy was in control of all subjects and property within its realm, and, as a result of this decree, offenses were considered crimes perpetrated against the kingdom, and those responsible for the offense were declared to be criminals. In courts established by the monarchy, adversarial trials pitted the crown against the indicted defendant. The defendant might suffer punishment if found guilty, and fines were often paid to the government rather than restitution to the victim. The fear of retribution and the suppression of rights were intended to work as deterrents and help maintain the subservience of the kingdom's subjects. English common law, from which the United States adopted its system of jurisprudence, arose from this societal philosophy and immigrated to America with the pilgrims.<sup>1</sup> The retributive/adversarial model considers justice to have been achieved when the law is fairly and equitably administered.<sup>2</sup>

In colonial America punishment for crime usually consisted of public humiliation, corporal punishment, or capital punishment.<sup>3</sup> The advent of modern prisons, which were originally conceived by the Quakers of Pennsylvania, was an attempt to find a better way to reprove wrongdoers. The penitentiary was seen as a more civilized tool to encourage offenders to contemplate their wrongdoing, perform penance for their crime (thus the term “penitentiary”), and, hopefully, leave as rehabilitated citizens.<sup>4</sup> Very soon after the inception of the penitentiary, however, the new prisons became used as tools by which retribution could be imposed on offenders.

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<sup>1</sup> John Hudson, *The Formation of the English Common Law: Law and Society in England from the Norman Conquest to Magna Carta 1066-1215* (David Bates ed., Longman 1996).

<sup>2</sup> Black's Law Dictionary

<sup>3</sup> Lawrence Meir Friedman, *Crime and Punishment in American History*. 19-51 (1993).

<sup>4</sup> Norman Johnston, *Prison Reform in Pennsylvania* <http://www.prisonersociety.org/about/history.shtml> (last visited Aug. 01, 2008).

In **restorative** justice, a transgression is not determined by a violation of the law, but, rather, by harm experienced as a result of the action of another person. And an offense is not committed against the state, instead, it is perpetrated against a person. An offense damages relationships between persons, and justice is achieved by the healing and restoration of those relationships. This concept is primarily borne out of the tribal customs of indigenous peoples. A tribe's strength was determined by its population and the harmonious coexistence of its members. When an offense was claimed to have been suffered by one of the tribe's members a council was called and the tribal elders, along with those affected by the offense, were encouraged to attend. Typically those in attendance gathered in a circle facing one another. There was no hierarchy of power in the circle and all members were recognized to have intrinsic value as persons and value to the tribe. Participants were given an opportunity to share their story and work cooperatively toward consensus on how to address the harm in a way that provided opportunity for healing and the restoration of wholeness to those affected.<sup>5</sup>

In the modern restorative model, persons affected by a harmful act are considered stakeholders and have a say in how the harm is addressed. Circle procedures and restorative dialogue techniques are used to provide the stakeholders an opportunity to arrive at what they determine to be justice.<sup>6</sup> Whereas circles may deal with the specific harm experienced by stakeholders they also attempt to address the underlying causes that contributed to the harmful act.<sup>7</sup> Those underlying causes may include errant cognitive processing, an abusive home environment, low socio-economic status, poor job skills, limited education, and

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<sup>5</sup> Marianne O. Nielsen, A Comparison of Developmental Ideologies: Navajo Nation Peacemaker Courts and Canadian Native Justice Committees, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES 207, 211 (Burt Galaway et al. ed., 1996).

<sup>6</sup> Barry Stuart, *Circle Sentencing: Turning Swords Into Ploughshares*, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES 193, 195 (Burt Galaway et al. ed., 1996).

<sup>7</sup> *Id.* at 195.

ignorance of the process of determining ethical decisions and actions. Some circles dialogues are held in conventional courthouses but most are conducted in schools, community centers, churches and other municipal facilities.<sup>8</sup> Reconciliation may be experienced through the application of restorative principles such as responsibility, accountability, confession, transformation, and forgiveness. Restitution is also an integral part of the restorative process and is used in a more limited fashion in retributive justice.<sup>9</sup> Restitution may include replacing stolen goods, and/or monetarily compensating the stakeholder(s) for the loss of use of their property. Restitution may also be a service provided by the person responsible for the harm to the stakeholder(s) and/or community. Restitution, like all other aspects of the restorative justice process, is determined by the consensus of the stakeholders.

Storytelling in the first person narrative form by stakeholders is a key component of restorative dialogue. The restorative process is intended to humanize each party to the other, and to give all stakeholders the opportunity to make statements and ask questions that can only be answered by those affected by the offense.

### **Issues to be considered**

Issues pertinent to the exploration and examination of justice systems are: cost and benefit considerations; goal attainment; ancillary effects on society such as reduced tax base, child care and welfare assistance; and the effect of system norms on the corporate state of mind of the community and the mental health of the stakeholders. Other considerations are effects on community safety, recidivism rates, administrative fiscal efficiency, and the cohesiveness of society.

Questions that will be addressed through this comparative analysis are: what is justice

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<sup>8</sup> *Id.* at 195.

<sup>9</sup> Bridges to Life, <http://www.bridgestolife.org/the-program> (last visited Aug. 3, 2008).

and how is that determination made, what process should be employed to effect justice, and what should be the result of justice being achieved? These questions are important because they cause us to consider personal and public assumptions concerning justice. For example, politics and religion may play a part in the assumptions relating to criminal justice; explicit and implicit bias along with personal experiences may influence our perspective on the effectiveness of the criminal justice system; and understanding of the law and jurisprudence could skew one's perception of justice and the affect the system has on individuals, families, and community.

For instance, some may assume that prison provides an opportunity for reform and change for the offender, or they may not care about reform, rather, they may presuppose that retribution and vengeance is the sole purpose of incarceration. Others may see penitentiaries as monster factories where novice criminals learn how to hone their skills so that when they are released they will be more adept at their trade. Restorative justice could be imagined to be a "feel good" process that is soft on crime and inconsiderate of those affected by harmful acts. It may also be taken for granted as a system of justice that heals broken relationships and reduces recidivism rates. These assumptions and other pertinent notions will be explored and examined using quantified research, qualified examples, and anecdotal stories to delineate fact from myth.

## **Policy Perspectives**

### ***1. Policy perspective of proponents of Retributive Justice***

Proponents of the status quo, such as the National Center for Victims of Crime, Mothers Against Drunk Driving, and the National District Attorney's Association advocate the continued use of retribution in the punishment of crime. They also see the current adversarial system of

court procedure to be the best process by which justice can be realized and administered. For these supporters retribution is necessary for justice to be served. Although mainstream retributive justice advocates agree that justice requires “treatment in accord with desert” (getting what one deserves), some believe vengeance (getting even) is an appropriate judicial response while others would add that *lex talionis* (an eye for an eye) is necessary for the execution of just punishment.<sup>10</sup>

Modern *Tough on Crime* policies began in the late 1960s. At the core of the social environment that spawned the upsurge in retributive criminal justice practices was the movement that was initiated politically by Barry Goldwater’s conservative war-on-crime rhetoric. Goldwater’s presidential nomination acceptance speech at the 1964 Republican National Convention is considered a dramatic turning point in America’s relentless desire to be tough on crime. In his speech Goldwater referred to the television images of violence spawned by the civil rights movement to call Americans to support increased criminal penalties and abandon what he viewed as liberal rehabilitative programs.<sup>11</sup> Retribution soon afterward became nationally accepted as the best, and, for the most part, only means by which justice is achieved. The popularity of the message led to the increase in the criminalization of previously legal acts. Longer sentences became commonplace, and, in some instances, compulsory. With these increases came greater prison populations and the need for more and larger penitentiaries.<sup>12</sup>

During this period a multitude of new laws requiring mandatory sentences emanated from both the United States Congress and state legislatures revealing the political appeal of retributive justice policies. Politicians campaigning on law-and-order platforms viewed their

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<sup>10</sup> John Hospers, *Assessing the Criminal* 181-183 (John Hagel III et al. eds., 1977).

<sup>11</sup> Barry Goldwater, *Barry Goldwater’s 1964 Acceptance Speech*, <http://www.nationalcenter.org/Goldwater.html> (last visited Aug. 18, 2008).

<sup>12</sup> Katherine Beckett et al., *The Origins of the Current Conservative Discourse on Law and Order* 43-59 <http://www.defendingjustice.org/pdfs/chapters/toughcrime.pdf> (last visited Aug. 18, 2008).

elections as public mandates for stricter legislation and harsher penalties. Some of the practices utilized in these laws and penalties include:

- Truth-in-Sentencing;
- Determinate and mandatory sentencing;
- Service of the full sentence imposed without possibility of early release for good behavior or without parole consideration;
- A mandatory period of incarceration;
- Imposition of modern “chain gangs” in clearly marked uniforms;
- Humiliation, status degradation, and the public shaming of offenders;
- Imposition of electronic monitoring;
- Automatic bind-over or waiver of juveniles to adult courts.<sup>13</sup>

To supporters, increased incarceration rates are indication that more criminals are being removed from society. For example, in 1977 the prisoner-to-citizen ratio in the United States was 129 per 100,000.<sup>14</sup> But by 2007 that same ratio had grown to 750 per 100,000 citizens. This increase represents a more than 500% increase in imprisoned offenders per 100,000 U.S. population. And in 2008 the total number of persons in jails and prisons in the United States exceeded 1009 per 100,000 citizens indicating to supporters of the tough on crime retributive model that more criminals are being removed from the streets making society safer.<sup>15</sup>

The ultimate retributive justice tool may be the death penalty. To retribute (pay back) life for life is considered just deserts by many retributive justice proponents.<sup>16</sup> However, even this approach to justice may not satisfy those left behind who have a need to even the score.

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<sup>13</sup> An Accountability-Based Sanctions Handbook for Juvenile Justice Professionals, <http://ehe.osu.edu/abs/handbook/> (last visited Aug. 18, 2008).

<sup>14</sup> Paige Harrison, Incarceration Rates for Prisoners under State or Federal Jurisdiction, Per 100,000 Residents (2000).

<sup>15</sup> Pew Charitable Trusts, One in 100: Behind Bars in America 5 [http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS\\_Prison08\\_FINAL\\_2-1-1\\_FORWEB.pdf](http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf) (last visited Aug. 18, 2008).

<sup>16</sup> Charles E. Rice, Retribution is an Obligation, [http://www.thenewamerican.com/focus/cap\\_punishment/vo03no13\\_retribution.htm](http://www.thenewamerican.com/focus/cap_punishment/vo03no13_retribution.htm) (last visited Aug. 18, 2008).



Linda Kelley falls into this category. Kelley was the first family member of a person victimized by a harmful act to witness an execution under Texas' current death penalty law. Her words reveal the emotional fury that proponents of retribution seek to address:

When I was standing there watching him...this anger came back in me. All I could think of was that he stood there and looked at my precious children and shot them in the head. I kept thinking, I hate you for what you did. I hate you for taking the father of my two grandbabies... . You stand there and you watch a man take two gasps and it's over... . I would like to have seen him humiliated a little bit. I think that he should have been brought in and strapped down in front of us. My son dies after being shot in the face and choking on his own blood. We make it too easy on killers.<sup>17</sup>

Theoretically, retribution does not necessarily require or embrace vengeance. It is, however, difficult to separate the philosophy of *just deserts* from the emotional desire of those who have been victimized to get even. It is common practice for judges to allow those victimized and their families and friends to direct their hatred and desire for vengeance during allocution toward the person responsible for causing the harm. This action has developed into an accepted aspect of the retributive process.

Although rehabilitative programs are offered to prisoners, change is not a chief goal of retributive justice. The goal of retribution is for criminals to receive what the state deems they have coming to them primarily through punitive means.

## ***2. Policy perspective of proponents of Restorative Justice***

Supporters of restorative justice are include groups like Bridges to Life (a Texas based restorative justice prison program), the Milwaukee County District Attorney's Office

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<sup>17</sup> Shannon Brownlee et al., The Place for Vengeance, [http://www.usnews.com/usnews/news/articles/970616/archive\\_007198.htm](http://www.usnews.com/usnews/news/articles/970616/archive_007198.htm) (last visited Aug. 19, 2008).

(Wisconsin), Marquette University School of Law (Milwaukee, Wisconsin), St. Mary's School of Law Restorative Justice Initiative (San Antonio, Texas), University of Texas - San Antonio School of Public Policy (San Antonio, Texas), and the Institute of Restorative Justice and Restorative Dialogue at the University of Texas - Austin. Those in favor of the restorative model believe justice occurs through a process that facilitates healing and the restoration of wholeness.<sup>18</sup> They promote justice not through vengeance, but, rather, through a process that involves storytelling and active, empathetic listening. The advocates of this procedure are not opposed to the incarceration of recalcitrant offenders, but they believe the continual instruction of restorative principles and processes should be pursued during a person's time in prison. Central to the process of restoration is genuine contrition on the part of the person responsible for causing harm. Some working in the field of restorative justice argue that forgiveness by stakeholders is equally essential. However, others do not consider it to be necessary in order for healing and meaningful transformation to occur.<sup>19</sup>

Supporters of the restorative model realize that most convicted offenders will be released back into society. Under the current U.S. system, approximately 51% of those offenders will return to prison within 3 years of their release. Those with the highest rate of recidivism are non-violent offenders usually re-incarcerated for crimes involving stolen property and drug offenses.<sup>20</sup> Many of those who are incarcerated have a family that must receive government assistance while the mother or father is in prison. And, of course, while incarcerated that person is a tax burden rather than a taxpayer. Recidivism rates of inmates who participate in a

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<sup>18</sup> Michelle Maiese, The Aims of Restorative Justice, [http://www.beyondintractability.org/m/restorative\\_justice.jsp](http://www.beyondintractability.org/m/restorative_justice.jsp) (last viewed Aug. 2, 2008).

<sup>19</sup> Gordon Bazemore, Restorative Justice and Earned Redemption: Communities, Victims and Offender Reintegration, 20 <http://abs.sagepub.com/cgi/content/short/41/6/768?rss=1&ssource=mfc> (last viewed Aug. 19, 2008).

<sup>20</sup> Patrick Langan et al., Recidivism of Prisoners Released in 1994, 1 (U.S. Department of Justice: Bureau of Justice Statistics ed., 1994).

restorative justice program while incarcerated are reduced to less than 13% which seems to indicate a return to the workforce by those who stay out of prison.<sup>21</sup>

Although these societal concerns are important to proponents of restorative justice, the most foremost aspect of the process is the well-being of the stakeholders and the restoration of relationships. In addition to the tangible harm experienced by stakeholders, restorative justice promoters recognize the injury encountered by subsequent fear, anxiety, and hatred that may continue to adversely affect the persons for years after the act.

The restoration process involves the voluntary participation of the stakeholders. In order for restorative justice to be initiated the stakeholder who caused the harm must recognize the harm caused, take responsibility for that harm, identify who was harmed and express earnest contrition for the harmful act. Some practitioners refer to this recognition of responsibility as “taking ownership” of the offense. Many months or years may be needed in order to engage the process of restoration. A goal of the process is to humanize all stakeholders. Often a person who caused harm may not even know the identity of other stakeholders. Persons affected by a harmful act may tend to sustain the rage they feel by demonizing and dehumanizing others. This action may prevent them from moving forward with their life, and, also, it may adversely affect other personal relationships. The community may not be willing to accept a criminal “monster” back into its fold, and the state may view the stakeholder who caused harm as a risk to societal safety. The restorative process brings the parties together so they may have the opportunity to dialogue, tell their stories, and learn about one another.

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<sup>21</sup> Bridges to Life, <http://www.bridgestolife.org/other/recidivism> (last visited Aug. 02, 2008).

During the restorative dialogue all stakeholders have the opportunity to speak freely in a non-contentious manner to one another, and to ask questions. In doing so they learn how the harmful act has impacted each other's lives and what circumstances may have been contributory to the act. Through this process it is hoped that stakeholders will see each other as sentient moral agents and develop mutual empathy and compassion. These meetings occur as often as the stakeholders desire. Once genuine healing is experienced and expressed by the primary parties the process of healing within the community is addressed. The hope of communal restoration is to reintegrate the community member who caused harm into the community and to work toward complete restoration of rights and privileges. Community members and officials offer an opportunity for the person who caused harm to meet with them and work together to develop a plan for restoration and reintegration into the community.

Restorative justice proponents declare that in order for community restoration to occur the person responsible for causing harm must have the opportunity to regain full citizenship within their community and society. They also recognize that the stakeholders must have the tools and opportunities to facilitate reintegration and work toward communal reconciliation. These tools may include counseling, job skills training, job placement services, and education.

Incarceration is not antithetical to the goals of restorative justice. However, restorative justice does not consider imprisonment an end, but, rather, a tool that may be used to sequester those who have caused harm to give them an opportunity to seek healing and restoration.

## Critical Analysis of the Justice Models

### 1. *Retributive Justice*

Retributive justice supporters argue that the increased number of prisoners in U.S. criminal justice facilities is evidence of the effectiveness of the current justice system. One important product of retribution, they claim, is that offenders are removed from society and isolated away from law abiding citizens. But, in actuality, only the most violent offenders and habitual criminals are sentenced to lengthy prison sentences. Supporters also point to the dramatic decrease in crime over the past 15 years. In fact, all types of crimes (except drug offenses) have dramatically decreased since the early 1990s.<sup>22</sup> However, the substantial increase in prison population and recidivism rates over that same period diminish the possibility of a causal relationship between lower crime rate and higher prison population. What is indicated, though, is the propensity of convicts to commit crimes again after they have been released from criminal justice facilities. In a 1994 study over 75% of those released after having been incarcerated for property crimes were rearrested for a similar offense within three years of their release.<sup>23</sup> These statistics imply that since crime rates are down, and prison population and recidivism rates are up, a substantial amount of crime is committed by repeat offenders. Some studies suggest that the public views prisons as a trade-off: they make offenders more likely to recommit crime when released, but they reduce crime while the prisoners are incarcerated.<sup>24</sup>

Another possible cause for the high recidivism rate of released convicts may be the social stigma associated with a criminal record. In many states convicted felons lose the right to vote, and even those convicted of a misdemeanor may lose the ability to be licensed by the state for

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<sup>22</sup> Shannon M. Catalano, *Criminal Victimization*, 2004, 5 (U.S. Department of Justice: Bureau of Justice Statistics ed., 2005).

<sup>23</sup> Timothy Hughes, *Reentry Trends in the United States*, 1 (U.S. Department of Justice: Bureau of Justice Statistics ed., 1994).

<sup>24</sup> Francis T. Cullen et al., *Public Opinion About Punishment and Corrections*, 27 *Crime & Just.* 1 (2000).

vocational activities such as pest control applicator, masseuse, or hair stylist. The emotive appeal of retribution makes these types of restrictions socially attractive and politically advantageous. They exist as an attempt to protect society from persons with a proven propensity to commit crime even though they have a negative effect on the social reintegration of convicted offenders upon their release from incarceration. Quantitative data indicates that retribution may be a useful deterrent to ordinarily law abiding citizens, but the penitentiary experience seems to offer incarcerated inmates little hope for rehabilitation.

In his essay entitled *Thoughts on Revenge and Retribution*, J. Daryl Charles, professor of philosophy at Taylor University, offers this concise explanation and endorsement for retributive justice:

Retributive justice, when properly understood, serves a civilized culture in several important ways. It isolates individuals who endanger the community; it expresses social outrage at morally perverse acts; it controls the extent to which the citizenry is victimized by criminal acts; it rewards the perpetrator proportionately with consequences befitting the crime; and it rehabilitates the offender by forcing him to reflect on the grievous nature of the crime. Each of these elements is critical in preserving the social order.<sup>25</sup>

Charles contends that “forgiveness occurs in the context of personal relationships, not duties of the state.”<sup>26</sup> In this view, crime is a debt owed to society, and justice requires the debt be paid through retributive sentencing and punitive social policy.

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<sup>25</sup> J. Daryl Charles, *Thoughts on Revenge and Retribution*, in *A Call for Reckoning: Religion & The Death Penalty* (The Pew Forum on Religion & Public Life ed., 2005) <http://pewforum.org/deathpenalty/resources/reader/20.php> (last viewed Aug. 2, 2008).

<sup>26</sup> *id.*

The current retributive system permits convicted criminals to be legally discriminated against in regard to housing and employment. Since forgiveness does not occur in duties of the state the offender becomes a personally and corporately disenfranchised member of society. According to the stated goal of retribution this diminished social status is part of the *just deserts* of retributive justice.

Retributive justice does not insist that the offender, the victim, and the state regard one another as hostile enemies. However, the adversarial system under which retribution is meted out encourages divisive attitudes and communal segregation. These social mindsets are considered indicators that the offender is receiving the deserved punishment. And, as the criminal experiences retribution for his crime justice is served.

## ***2. Restorative Justice***

Providing the opportunity for healing of the stakeholder(s) and the restoration of relationships is the design of restorative justice. Many supporters define justice as the healing of the wound caused by an offense. Retributive justice is considered an offender centered justice model with most of the resources of the system used to punish the offender through retributive means.

Critics of restorative justice claim that the adversarial legal system of retributive justice offers a fairer contest than dialogue between stakeholders. However, supporters of restorative justice respond that the adversarial system tends to “foster a culture of denial, while restorative justice provides an opportunity for recognition of responsibility and contrition.<sup>27</sup> Denial of a wrong, even if merely for the purpose of legal wrangling, encourages the rationalization and justification of the act. Contrition, on the other hand, creates an atmosphere in which the actor accepts responsibility for the deed and takes the situation seriously.

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<sup>27</sup> John Braithwaite, Restorative Justice and Social Justice, 63 Sask. L. Rev. 185, 189 (2000).

Some opponents of restorative justice even suggest that although it may prevent some crime it also causes crime. Their fear is that offenders may learn the identity of their victim, and other information, through the restorative process that would make it easier for re-victimization to occur. Or, they fear the victim may be traumatized and re-victimized by the intimidating statement of an offender during dialogue. Although this can happen, proponents claim that in practice those who have experienced harm are usually surprised by the humility exhibited by the stakeholders who admit to being responsible for causing harm.<sup>28</sup>

Unlike the common law basis of retributive justice, restorative justice believes the state has a vested interest in ensuring societal safety but it does not recognize a political entity as a stakeholder. In the restorative model persons are stakeholders and stakeholders are those affected by a harmful act. Supporters posit that by harming an individual member of the community the person responsible for the harm causes harm to the community as a whole. In their view community involves the corporate connectedness of individual members; it is not synonymous with a potent governing body or bureaucracy. Therefore, healing is sought between stakeholders.

In order to heal and restore the damaged relationships the person responsible for the harm must identify the harm done, recognize their responsibility for the harmful act, recognize who has been harmed and to whom they must make themselves accountable, confess the wrong, exhibit a changed perspective and behavior, seek forgiveness and reconciliation, and offer restitution to the stakeholders. The other stakeholders' part in the healing process is to thoughtfully consider their responsibility in the matter (e.g. how they respond to the harm and toward the person who caused the harm) and be willing to earnestly participate in the process.

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<sup>28</sup> John Braithwaite, Restorative Justice: Assessing Optimistic and Pessimistic Accounts, 25 Crime & Just. 1 81 (1999).



High recidivism rates are proof to supporters of restorative justice that retributive incarceration is part of the problem, not the solution. Opponents of restorative justice criticize the process as personally invasive for the victim, and as relying on unrealistic expectations for success. But proponents posit that all stakeholder participation is voluntary, and success is a subjective determination to be made by the parties involved. Restorative justice does not demand contrition and forgiveness, but the environment and tools that facilitate reconciliation are found at all levels of the process.

As a system of jurisprudence, restorative justice is designed to provide opportunity for healing to all stakeholders. It also provides education, training, and encouragement to stakeholders to make possible transformation in their life and behavior. By developing a system that addresses the issues that produce harms, proponents of restorative justice believe stakeholders' behavior can change and broken relationships can be healed. Supporters declare that justice is served when relational healing and the restoration of wholeness, as determined by the stakeholders, occurs.

### **Restorative Justice as a Societal Norm**

Currently, in the United States, justice is defined by those in positions of authority. To some, justice is mercy granted to a contrite offender. To others, it is retribution from which there is no rescue. In most instances political popularity outweighs beneficial social policy, as elected officials endeavor to give the populace what they “think” they want. However, honestly assessing what the people desire is difficult if they are kept ignorant of alternative possibilities. At present, the method through which justice occurs is adversarial litigation and retributive sentencing. This scheme has a poor track record when it comes to changing behavior and improving societal relations. What it does offer, however, is the momentary feeling of

empowerment that vengeance provides the victim and society by appealing to the base desires of the human psyche. Fear and hatred amongst the masses is addressed with “feel good” judicial policy that offers society a temporary solution to a permanent problem. For proponents of restorative justice, harmful acts are a wound to stakeholders and to society, and if harm is a wound then justice is healing of that wound.<sup>29</sup> Restorative justice is a functional alternative to the current dysfunctional retributive justice system employed in the United States.

The goal of restorative justice is to provide an opportunity for healing through the transformation of the hearts and minds of all those affected by the harmful act. In doing so healing occurs and relationships are restored. A case in point that powerfully illustrates the process is that of the White family of Tomball, Texas and a fifteen year-old offender named Gary Brown.

In 1986 Brown and an accomplice had been doing drugs and drinking alcohol one hot summer day near Tomball, Texas. While at a convenience store they spotted Kathy O’Daniel refueling her car. O’Daniel was the mother of a five year-old daughter, Ami, and had just recently found out she was two months pregnant. Brown and his male companion asked O’Daniel for a ride into town. Typical of small town hospitality, O’Daniel happily agreed to give the boys a lift. But, tragically, Brown and his partner had other plans. The pair forced O’Daniel to drive them to Alvin, Texas south of Houston. On the way to Alvin Brown instructed O’Daniel to take a back road that led to a secluded farm with which Brown was familiar. During the following hour the boys beat and sexually assaulted the pregnant mother as she begged them to stop. Vowing to not report the attack to the police, O’Daniel offered her attackers her car if they would only spare her life. High on drugs and fearful of

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<sup>29</sup> Kay Pranis, [A Cry for Love](http://www.restorativejustice.org/resources/docs/praniskay/), <http://www.restorativejustice.org/resources/docs/praniskay/> (last visited Aug. 2, 2008).

being sent back to the Texas Youth Commission reformatory from which they had recently been released, the two rapists decided to shoot the woman in the extremities to hamper her ability to telephone authorities until they were far down the road. Brown's accomplice pulled his pistol and wounded O'Daniel in the leg. But then, according to Brown, something must have snapped in his partner's mind. While O'Daniel lay motionless on the ground, he shot her three times in the head, ending a life and beginning a painful process of anger and despair for a family that at that moment was awaiting their loved one's return from her trip to the store.

Ordinarily the story of Kathy O'Daniel's murder would end with a vengeful family and community seeking justice through a system of criminal jurisprudence that would encourage the victims to view the murderers as bloodthirsty animals who needed to be locked up for the rest of their lives. And, in fact, that is exactly how O'Daniel's story was acted out. That is, until restorative justice entered the lives of Linda White – Kathy O'Daniel's mother, and O'Daniel's daughter – Ami.

In 2000, fourteen years after the murder of her daughter, Linda White contacted the Texas Department of Criminal Justice (TDCJ) to ask if she could meet with Gary Brown face-to-face. White had been agonizing over this decision for years. She had such pent up hurt and hatred that she wanted her daughter's killer to know how she felt and what he had taken away from her and her family. And she wanted to know why: why had he chosen her daughter, Kathy; why had he decided to kill her; why didn't he just leave her after the assault so she could return home to her daughter and her family? These questions had haunted White since the day they received the news that the police had located Kathy's body.

Linda White was referred to a woman who had recently joined a pilot program at TDCJ headed by Lutheran minister and former prison guard, David Doerfler. The woman's name was Ellen Halbert. Halbert had become involved with Doerfler through her own experience with violent crime. She had been raped and stabbed five times by an intruder in her home. After years of physical and psychological therapy, Halbert, too, desired to meet with her attacker. However, in her case the young man refused to accommodate her request. Halbert's disappointment birthed a desire within her to assist other victims of crime. She decided to join Doerfler in orchestrating a program in Texas prisons that implemented an alternative judicial philosophy called restorative justice.

Halbert met with Linda White and her then nineteen year-old granddaughter, Ami. She explained to them that the purpose of the meeting was not simply so they could unleash the anger and hatred they felt toward Gary Brown, but rather to initiate and facilitate healing for them and for the attacker who had caused them so much pain. Halbert would spend the next year preparing the Whites and Brown for the dialogue in which they all agreed to participate.

By that time Brown was in his 30s. He had spent fourteen years in a maximum security prison not learning to accept responsibility for his actions, but, quite the opposite, learning to be a better criminal. Halbert's job was to implore Brown to take ownership of his actions. She encouraged him to think about the harms he had committed and to relive his actions fourteen years previous that had resulted in the life he was now living. To her astonishment Brown told Halbert that he had not thought about O'Daniel or his murderous act since he had been sent to prison. With Halbert's help all that changed.

More than a year after their first contact Halbert accompanied Linda and Ami White to a maximum security prison in Wichita Falls, Texas where they would finally meet Gary Brown.

The dialogue took place in the chapel of the prison. Linda and Ami were seated when Brown walked in the room. He hung his head, afraid to make eye contact with the Whites. It was just the four of them: Ellen Halbert, Linda White, Ami White, and Gary Brown. Halbert began the dialogue by telling the group that they were there to tell one another how this crime had affected their lives and to ask any questions they might have of each other. Tears flowed throughout the meeting as Brown was asked to recount the events that led up to the murder of Kathy O'Daniel. Never throughout the proceeding did Brown try to defend or excuse his actions. Over and over he expressed his remorse and sorrow for the pain he had caused. After the Whites had articulated their feelings toward Brown and told him how difficult their lives had been since the death of their loved one, Linda White asked Brown about his childhood and background. What Brown told them was so horrific that it changed the atmosphere of the meeting.

Brown had been raised by a stepfather who abused him terribly. From a very young age he was given a choice to either engage in sexual acts with his stepfather or receive a beating. Brown endured the beatings until they became unbearable. Afterward he began to medicate himself with drugs so he could acquiesce to his stepfather's sexual demands with little memory of the repulsive event. His first suicide attempt was at the age of eight and many more followed. At thirteen Brown ran away from home and lived on the street doing whatever was necessary to survive and feed his drug habit. On the day of O'Daniel's murder he had been drinking and taking several different drugs since early that morning. He made no excuse for the murder, but he told the Whites that he was so high that he could not remember many of the details of the event. Brown went on to tell them that never during the adjudication of his case was he informed of any details about his victim, or that she had any family. For fourteen years

Brown had lived in prison insulated from the voices and faces of the people whose lives he had changed forever.

What had begun as a confrontation between a person who had been regarded as a bloodthirsty animal and the angry, hate-filled victims of his crime ended with Gary Brown, Linda White, and Ami White embracing and posing for pictures as if they were somehow intimately related. Gary Brown vowed to change his life by never forgetting about the pain he caused on a hot day in Southeast Texas. The Whites said their lives have been transformed forever. Gone are the questions and fears. No more do they hate the man they previously had known only in their imaginations. When asked by Brown their opinion of him being released on parole someday, both Linda and Ami told him they were fine with him getting out, and they wanted him to make something of his life. A contrite Brown promised them both that he would.<sup>30</sup>

Perhaps one reason it took so long for the Whites and Brown to receive healing is because once the act of murder was committed, and Brown was apprehended and indicted, the state became the plaintiff in the criminal lawsuit against him. Although Kathy O'Daniel was dead, it was the state that claimed to have been harmed by a transgression of a law. O'Daniel's family members were relegated to the position of spectators in the retributive/adversarial justice model.<sup>31</sup> The designation of the state as the plaintiff in a criminal case is not necessarily a hindrance to the restorative process. However when stakeholders are systematically barred from participation in the justice process (except, of course, when they can be used by either the prosecution or defense to bolster their arguments) they may feel re-victimized by the process and become disenchanted with the justice system. It may be surmised from the testimony of

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<sup>30</sup> MEETING WITH A KILLER – ONE FAMILY'S JOURNEY (Lucky Duck Productions 2001).

<sup>31</sup> Barry Stuart, Circle Sentencing: Turning Swords Into Ploughshares, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES 193, 201 (Burt Galaway et al. ed., 1996).

those victimized like the Whites, and those who have caused harm like Gary Brown, that the philosophical underpinnings of a justice system model are more important to the healing and restoration of the stakeholders than the procedures used to effect adjudication. In other words, if the design of the process is to effect retribution or revenge then healing might occur in spite of the system, however, if the purpose is to offer opportunity for reconciliation and restoration then healing may be facilitated by the system.

In a January 2004 American Bar Association Journal article, writer Steven Keeva recounts his experience in a restorative justice circle with inmates housed at a maximum security prison in Green Bay, Wisconsin. He was the guest of Justice Janine Geske (ret.), a professor at the Marquette University School of Law and a former Wisconsin Supreme Court justice. Keeva sat in a circle with “Geske, three crime survivors, a state senator, a law student, and a few other visitors,” along with 26 felons convicted of serious offenses such as “contract killings, sex crimes, armed robberies and drug related offenses.”<sup>32</sup> In the article Geske is quoted as iterating to the offenders a common philosophical theme espoused by restorative justice practitioners:

The crime victims who have come to tell their stories have not come in anger or retribution, but instead to shine a beacon on how you might live your lives going into the future. ...we are all here in this circle as human beings with the capacity to hurt, to hurt others and the change our lives.<sup>33</sup>

The crime victims Geske referred to were not the actual victims of the offenders in the circle, but, rather, surrogate victims who volunteer their time to sit in circles with prisoners who have committed similar offenses to the ones they have suffered, and share with them their story of

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<sup>32</sup> Steven Keeva, Facing the Victims, 71 ABA Journal Jan. (2004).

<sup>33</sup> *Id.* at 71.

pain and, in some instances, triumph. One of those surrogate victims, Lynn, whose police officer husband was shot and killed when he tried to intervene in a domestic violence disturbance, expressed to the members of the circle why she continues to come to the prisons to tell her story:

It is so hard to ever have closure after the loss of a loved one. They take part of your heart. Your heart heals, but there's always a piece missing. You've given me part of that piece back.<sup>34</sup>

Keeva also noted some of the comments from the prisoners after they had experienced the restorative process:

- “I was real comfortable being numb. I figure that if this can turn me on after being numb all these years, it's got something to give everyone.”
- “Yesterday, I wrote letters to people I harmed in the past. I never thought about doing that until I became part of this group.”<sup>35</sup>

Even prison officials have recognized the benefits of restorative justice. Warden Dan Bertrand of the Green Bay prison where Keeva and Geske conducted their circle stated, “I'd say that probably 90 percent of inmates who take the program change. From before to after, there's a world of difference.”<sup>36</sup>

All those who had been harmed and those who had caused harm in Keeva's story had gone through the retributive justice system after experiencing the harm that brought them together in a circle in a prison in Wisconsin. But the reason they were all there is because none of them had been positively transformed by the occurrence. They had been through the

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<sup>34</sup> Id. at 73.

<sup>35</sup> Id. at 73.

<sup>36</sup> Id. at 73



retributive system but they had not experienced a justice that restored the peace they had once known. It took the restorative justice process to facilitate the healing they desired.

The transformative and peacemaking ability of restorative practices have been recognized by other institutions besides the criminal justice system. In schools around the world restorative processes and principles are employed as preventative and peacemaking tools between student and student, teacher and student, and faculty and administration.

Pat Lacocque is a restorative justice facilitator with the Milwaukee, Wisconsin Public Schools. She trains teachers and students in the use of and participation in restorative circle processes. Lacocque told a group of visiting law students from St. Mary's University School of Law in San Antonio, Texas that she encourages teachers to conduct preventative circles at least twice per week. Although the circles do limit the time teachers have to present curriculum on those days, Lacocque told the law students that the teachers claim they actually are able to cover more classroom material over the course of a semester due to fewer discipline problems. And they also have told her that grades and test scores have dramatically improved since they began employing restorative practices in their classrooms. Lacocque said she believes this is due to students having the opportunity to express emotions and share their experiences with others, thus relieving them of the burden of internalizing anxiety and stress that may originate from both in and out of school.<sup>37</sup>

Restorative justice has been a part of policy in the Milwaukee Public Schools long enough to have had an effect on the community. A sufficient number of students who are familiar with restorative practices have graduated from the public school system and entered

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<sup>37</sup> Interview with Pat Lacocque, Restorative Justice Facilitator, Milwaukee, Wis. (Jun. 13, 2008).

Milwaukee society to have a measurable influence on public policy and law enforcement tactics. In 2007 the Marquette University School of Law Restorative Justice Initiative was awarded a \$400,000 federal grant to implement a community justice program in the inner city communities of Milwaukee.<sup>38</sup> With that money the law school hired two community coordinators who work closely with law enforcement, the district attorney's office, community leaders and members, government officials and law students to facilitate community peacemaking circles. These stakeholders attend regularly held circles to address crime issues, neighborhood disputes, and any other issue that may arise which disturbs the peace of the members of the community. Participants of these circles testify that the new insight they gained into the lives of their neighbors and constituents has helped them make better decisions regarding those relationships.<sup>39</sup>

### **Conclusion: Justice is Healing as Defined by Stakeholders**

Justice has been a concern since the beginning of recorded history. The definition of justice varies from culture to culture, but, in a very broad sense, the means by which justice is served can be reduced to two basic philosophical positions: retribution or restoration. The position a society employs to seek justice may determine the satisfaction of affected parties and the confidence the citizenry has in the system.

The retributive justice model focuses on the transgression of a law by an offender and may provide the victim a momentary feeling of satisfaction, and, in some instances, vengeance resulting from punitive sentencing. Restorative justice is designed to offer the opportunity for healing and the restoration of wholeness to stakeholders affected by harmful

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<sup>38</sup> Sonya Bice, *Responding to Crime In a Different Way*, Marquette Lawyer, Spring/Summer 2008, at 16, 17.

<sup>39</sup> Interview with Ron Johnson, Community Coordinator, Milwaukee, Wis. (June 12, 2008).

acts through the application of principles and processes that facilitate reconciliation and peace.

Retributive justice is achieved through an adversarial win/lose process. Restorative justice results from cooperative interaction of stakeholders involving dialogue and storytelling. Recidivism rates of offenders can be dramatically reduced for those participating in restorative justice programs.

Restorative practices are not limited to a criminal justice application. Schools and neighborhoods have benefitted from the implementation of preventative and peacemaking circles, and business organizations are beginning to recognize the utility of the process to facilitate communication, decision-making, and to address conflict.

Restorative justice is a philosophy derived from the practices of ancient peoples that is as applicable and effective in the 21<sup>st</sup> century as it was thousands of years ago. We would do well to learn from our ancestors and adopt as a societal norm this justice model that offers healing and the restoration of wholeness to those wounded by harm.