

Washington University Journal of Law & Policy

Volume 36 *Restorative Justice*

2011

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John Owen Haley, *Introduction—Beyond Retribution: An Integrated Approach to Restorative Justice*, 36 WASH. U. J. L. & POL'Y 1 (2011), http://openscholarship.wustl.edu/law_journal_law_policy/vol36/iss1/2

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Washington University Journal of Law & Policy

Restorative Justice

Introduction

Beyond Retribution: An Integrated Approach to Restorative Justice

John O. Haley*

Restorative Justice, as indicated in the papers in this symposium issue of the *Journal*, is most commonly used as a label for victim-offender mediation and related approaches that focus on offender accountability to the victims of their crimes. Although not the first,¹ the Victim-Offender Reconciliation Programs (VORP) were the most influential and enduring. Originating within the Mennonite

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1. The first formal victim offender mediation programs in the United States were, despite their apparent success with respect to victim satisfaction, relatively short-lived projects sponsored by the American Arbitration Association in Philadelphia, Pennsylvania, and Hartford, Connecticut, in 1969. See Lawrence H. Cooke, *Mediation: A Boon or a Bust?*, in *MEDIATION IN THE JUSTICE SYSTEM* (Maria R. Volpe et al. eds., 1983).

community in Elkhart, Indiana, under the leadership and inspiration of Howard Zehr,² as noted herein by Mark Umbreit, himself among the pioneers, within a decade VORP programs had been emulated in hundreds of communities throughout the United States, Canada, the United Kingdom, and northern Europe.³ By then Umbreit had established perhaps the most ambitious and successful research and training programs in the School of Social Work at the University of Minnesota and had become a widely acknowledged leader of the movement both in the United States and abroad. By the 1990s, as these early efforts attracted other pioneers in the field, including Gordon Bazemore and Lode Walgrave, authors of two other papers included here, victim-offender mediation under the rubric of “Restorative Justice” had become a significant international movement.⁴ Often reinforced by victim rights advocacy efforts and no longer moored primarily within religious communities, the movement gained additional momentum with advent and widespread emulation of the South African Truth and Reconciliation Commissions as well as family conferencing in New Zealand and Australia.⁵ With added momentum and the introduction of a variety of new approaches, the scope of restorative justice also began to expand beyond its initial focus. The broader implications were perhaps most eloquently and persuasively argued by John Braithwaite in two seminal works—*Crime, Shame, and Reintegration* (1989) and *Not Just Deserts* (with Philip Petit, 1990). Today, as poignantly expressed in the paper by Sunny Schwartz and Leslie Levitas, restorative justice reflects a variety of approaches and emphases that

2. HOWARD ZEHR, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* (1990), also noted by Mark Umbreit, was one of Zehr’s seminal contributions.

3. As of 2000, over 1000 victim offender mediation programs had been established in North America and Europe. MARK S. UMBREIT & JEAN GREENWOOD, *NATIONAL SURVEY OF VICTIM-OFFENDER MEDIATION PROGRAMS IN THE UNITED STATES* (2000).

4. For an early collection of studies of victim-offender mediation from international perspectives, see *RESTORATIVE JUSTICE ON TRIAL: PITFALLS AND POTENTIAL OF VICTIM-OFFENDER MEDIATION—INTERNATIONAL RESEARCH PERSPECTIVES* (Heinz Messmer & Hans-Uwe Otto eds., 1992). For more recent collection of studies of victim-offender mediation programs in Europe, see *VICTIM-OFFENDER MEDIATION IN EUROPE: MAKING RESTORATIVE JUSTICE WORK* (Eur. Forum for Victim-Offender Mediation & Restorative Justice ed., 2000).

5. For a concise description of the rise of the restorative justice movement in the context of a broad and insightful study of its use and potential, see JOHN BRAITHWAITE, *RESTORATIVE JUSTICE AND RESPONSIVE REGULATION* 8 (2002).

focus on both victim reparation and offender correction. As they suggest, broader and more inclusive applications of the fundamental principles enable restorative justice approaches to be more fully integrated into the formal structures of law enforcement. As Brenda Waugh eloquently reminds us in her paper, however, restorative justice reflects values and principles that extend well beyond the parameters of formal legal structures. With this introduction, I would only add that as broadly defined an integrated approach to restorative justice offers an alternative to the retributive models that far more effectively and efficiently achieve each of the three principal aims of criminal justice—victim reparation, offender correction, and crime prevention. My purpose is to encourage more inclusive definitions and approaches that can be fully incorporated as primary features of criminal law enforcement within its formal structures.

ACHIEVING THE AIMS OF CRIMINAL JUSTICE

The justifications for state-imposed sanctions and penalties for criminal acts and conduct are well-established—victim reparation (from a restorative perspective), deterrence, correction, offender incapacitation, and retribution. Each has a different focus with accordingly different aims and outcomes. The focus of victim reparation is the victim and the injury suffered. The accountability of offenders to their victims is a paramount concern. Deterrence in contrast focuses on the offender and the potential for rational choice—that is, the capacity of the offender to weigh the risk of apprehension and penalty for particular criminal activity. Correction also centers on the individual offender but to be effective must also identify the causal factors for criminal behavior with correctional responses designed to correct the behavior and prevent future misconduct. Incapacitation is equally offender oriented but applies sanctions designed solely to prevent repetition of criminal activity by physical restraint. Retribution in turn centers on the societal gravity offense, the “wrongfulness” of the act and the proportionality of the penalty. Although most contemporary criminal justice systems around the world combine features of each, most are largely retributive. Their principal aim is to punish offenders for their wrongful acts.

An integrated approach to restorative justice satisfies the requirements of each of these aims except for retribution, including incapacitation in cases where the offender poses a significant risk of repeated wrong-doing. This conclusion follows from the two basic requirements for restorative responses to operate with full success.⁶

1. The offender must acknowledge his or her culpability for wrongs committed.
2. The offender must accept accountability including apology and reparation to those harmed.

Integrated restorative justice is thus essentially a response to offenders who accept responsibility for their wrongs. Any and all means used to reintegrate such offenders as constructive members of the community, with victim, if feasible, but always societal acceptance and pardon.

The reparational or compensatory aim of criminal justice centers, as noted, on victims and compensation for their injury. Because an integrated approach to restorative justice requires that offenders acknowledge the wrongfulness of their acts and accept accountability for the injuries they have inflicted, one aspect is to make available effective means for offenders to make amends to those they have harmed. Thus victim-offender mediation programs and truth and reconciliation commissions are core features of any integrated approach. Such efforts ensure that restorative approaches satisfy the first aim of criminal justice (from a restorative perspective as noted above)—compensation for victims, who, if they choose, are also enabled to become central participants in the criminal justice process. Victim-offender mediation and similar approaches with focus on victim reparation and participation should not, however, be isolated as the only or even the primary restorative response. In many instances, as Bazemore notes, victim-offender dialogue has been

6. Although victim-offender mediation may be available to victims even in cases where the offender denies culpability and the prospects for reparations are thus reduced to nil, from the victim's perspective without apology and accountability, such efforts are rarely if ever considered successful. *See, e.g.*, NICHOLAS TAVUCHIS, *MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION* (1991).

effectively incorporated within the formal structures of law enforcement.

Correction is an equally important aim of criminal justice. An integrated approach to restorative justice achieves this objective in that it fosters efforts to identify the factors that have led to the offense, that have motivated the offender to act wrongfully and to engage in criminal conduct. Drug courts and other forms of “therapeutic” justice are thus essentially restorative to the extent that offenders accept the need or at least are willing even under the compulsion of an unwanted alternative, such as imprisonment, to undertake such corrective measures. Drug courts should therefore be considered a significant feature of any crime prevention effort. Similarly, efforts to reintegrate offenders into the community by assisting the effective reentry of former convicts with opportunities for employment, housing, and reeducation are equally restorative as well as correctional in design and effect.

Deterrence is also an aim of criminal justice that can be satisfied by an integrated approach to restorative justice. Although deterrence is a commonly articulated objective of punishment, except in rare instances—collar crimes come immediately to mind—few offenders engage in thoughtful analysis of the punitive consequences of their wrongful acts except to the extent that they perceive that they run a high risk of getting caught. For example, drivers slow down when they see a police car but resume speeding when the police are out of sight. Deterrence is far more apt to operate effectively, however, under restorative rather than punitive approaches.

This conclusion follows from a set of well-established propositions. The first is that social condemnation is the most effective deterrent to crime. Community disapproval is the predominant deterrence to misconduct.⁷ Once we perceive that behavior is unacceptable within our community, we are apt to adjust and exercise greater self-control. By the same token, conduct that the

7. The seminal study is JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* (1989); see also TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990). But see Bradley R. E. Wright, Avshalom Caspi, Terrie E. Moffit & Ray Paternoster, *Does the Perceived Risk of Punishment Deter Criminally Prone Individuals? Rational Choice, Self-Control, and Crime*, 41 J. RES. IN CRIME & DELINQ. 180 (2004).

community condones is far more apt to persist despite the most draconian formal sanctions. The community that matters most of course is not the community at large but family and friends, the particular “gangs” within which “connectedness” with others and dependent relationships form and are sustained. These are the communities whose approval we most seek to maintain. Studies of persistent criminal behavior confirm that although the criminal conduct may be considered “antisocial” by the community at large it persists in large part because it is acceptable or even commendable within the smaller and more intimate communities in which offenders may live or with which they identify. Persistent criminal behavior may also result of a lack of interdependence within any identifiable community.⁸ To deal effectively with such behavior through social disapproval thus requires either reeducation of these sub-communities or reeducation and separation of the offender from their influence. Unlike punitive approaches, an integrated approach to restorative justice seeks to do both. The restorative emphasis on reconciliation and reintegration is communitarian by intent and design. Various forms of victim-offender mediation that focus on offender correction as well as victim reparation attempt to make the offenders aware of the harmful consequences of their acts on victims they must confront as members of their community either narrowly or broadly defined. Family conferencing and similar models of victim-offender mediation are especially effective in this respect by broadening the scope of participants to include the full panoply of those who are injured to include family members, friends, and neighbors. Studies also show that even the most incidental and marginal use of victim-offender mediation within an otherwise punitive system of criminal justice has at least some minimal correspondence with offender correction.⁹ An integrated approach to restorative justice also enables communities to deter future criminal activity. Restorative justice programs operate prospectively in the

8. Bradley R. E. Wright, Avshalom Caspi, Terrie E. Moffitt & Phil A. Silva, *The Effects of Social Ties on Crime Vary by Criminal Propensity: A Life-Course Model of Interdependence*, 39 CRIMINOLOGY 321 (2001).

9. See William Bradshaw, David Roseborough & Mark S. Umbreit, *The Effect of Victim Offender Mediation on Juvenile Offender Recidivism: A Meta-Analysis*, 24 CONFLICT RESOL. Q. 87 (2004).

case of children-at-risk projects that work with parents and peers to deal with the causes of misconduct, to prevent its continuation, and to ensure it will not be condoned. Efforts to ensure the effective reintegration of individual offenders require structures to be in place for reentry. Education and counseling within the communities affected by the offender's misconduct that foster community condemnation of wrongful behavior go hand in glove with such efforts. Moreover, an emphasis on restorative approaches also implicates the excessive resort to criminal law. In the case of smoking bans,¹⁰ when the particular communities in which smokers live, work, or play disapprove of smoking and support the bans, prohibited smoking rarely persists. Such conduct—even though addictive—need not be criminalized nor deterred by the threat of criminal penalties. Community disapproval suffices. If, in contrast, as in the case of marijuana, the communities within which users live, work, or play condone its use, even criminalization with a variety of severe sanctions has proven not to prevent expanded use.¹¹ In short, integrated approaches to restorative justice are demonstrably more effective in deterring offenders than reliance on the prevailing retributive model of criminal justice.

Finally, even the aim of incapacitation is better served by restorative approaches to criminal justice. To the extent that offenders who acknowledge their culpability, express remorse, and accept accountability for their wrongs are less likely to reoffend than those who refuse to satisfy any and all of these prerequisites of restorative justice, approaches based on the fundamental principles of restorative justice are more effective than others in identifying which offenders pose a serious and continuing risk of harm to society.¹² Restorative justice principles thus provide a more rational and accurate basis than focusing significantly even if not exclusively on the offense for determining from a societal perspective which offenders need to be

10. See, e.g., Melanie Wakefield & Frank Chaloupka, *Effectiveness of Comprehensive Tobacco Control Programmes in Reducing Teenage Smoking in the USA*, 9 TOBACCO CONTROL 177 (2000).

11. See, e.g., Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1474–79 (2009).

12. The premise that accountable, repentant offenders are less likely to reoffend has empirical support but remains largely intuitive. More data is needed.

incapacitated and which offenders should be diverted into restorative (and corrective) programs.

THE ALTERNATIVE: RETRIBUTION AND ITS COSTS

Critics of restorative approaches frequently argue that the empirical data fails to provide sufficient support for the claims of its proponents, including those made in this introduction and in the papers that follow. As noted by Gordon Bazemore, some studies indicate that the correctional value of victim-offender mediation is not fully supported by the evidence. Despite the overwhelming evidence of victim satisfaction over the course of four decades,¹³ still others question various aspects of victim-offender mediation including the emphasis on victim “forgiveness” or pardon.¹⁴ The value of “therapeutic” approaches, such as drug courts, are similarly questioned.¹⁵ In each instance, however, the restorative responses that are challenged have either occurred as isolated interventions within an otherwise punitive system or were not implemented pursuant to the principles articulated here and in the papers that follow. In the United States, at least, a fully integrated approach to restorative justice remains untested. As indicated below, the only integrated restorative approach to criminal justice that is fully incorporated within the structure of the criminal justice system by the law enforcement authorities themselves is Japan. As indicated below, the results are outstanding. But, despite evidence to the contrary, critics argue, Japan is too “culturally” exceptional to consider.¹⁶ The crucial

13. By all accounts to date victims express greater satisfaction with mediation than their experience with the prevailing formal processes of criminal justice.

14. See, e.g., Jennifer Gerarda Brown, *The Use of Mediation to Resolve Cases: A Procedural Critique*, 43 EMORY L.J. 1247 (1994). For an excellent summary of the primary critiques, see DECLAN ROCHE, ACCOUNTABILITY IN RESTORATIVE JUSTICE 12–20 (2003).

15. See, e.g., Mae C. Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37 (2000–2001); Mae C. Quinn, *The Modern Problem-Solving Court Movement: Domination of Discourse and Untold Stories of Criminal Justice Reform*, 31 WASH. U. J.L. & POL’Y 57 (2009). For an antidotal positive evaluation of drug court and similar examples of “therapeutic” courts, see C. WEST HUDDLESTON, III, JUDGE KAREN FREEMAN-WILSON & DONNA L. BOONE, PAINTING THE CURRENT PICTURE: A NATIONAL REPORT CARD ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES (2004).

16. This observation is based largely on my personal experience and reactions to lectures

fact is that all or nearly all critics of restorative justice in any and all forms ignore the fulsome evidence of the total failure of the alternative. The perfect becomes the enemy of the good as a retributive system continues a spiral of costly failure.

Today over two million persons are currently incarcerated in state or federal prisons in the United States.¹⁷ More than triple that number are subject to some form of correctional supervision.¹⁸ No country in world imprisons so many for so long.¹⁹ Whether viewed as aim, justification, or implicit rationale, retribution is the cause. Indeed, for over a half century our criminal justice system has increasingly emphasized punishment of the offender with a principal focus on a third century BCE imperial Chinese axiom: “Let the punishment fit the crime (*xing dang zui ze wei, bu dang zui ze wu*).”²⁰ Although justified by the Chinese Legalists over two millennia ago as well as perhaps a few contemporary criminologists as a means of deterrence, little if any empirical evidence supports the efficacy of such claims.²¹ Over two-thirds of those in U.S. prisons and jails are incarcerated for having committed either a violent crime or a drug-related offense.²² Few if any made a rational calculation or choice. Inasmuch as violent

and less formal conversations. In the published literature, the Japanese approach is generally ignored. A few legal scholars have included some reference to Japan but almost uniformly dismiss its relevance based on Japan’s “cultural” exceptionalism, particularly with respect to the role of social disapproval. *See, e.g.,* Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880 (1991). The role and broader relevance of apology has been more positively perceived. *See, e.g.,* Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 L. & SOC’Y REV. 461 (1986).

17. BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES 2009, at 2 (2009).

18. In 2009, over 7.2 million people were under correctional supervision including prison, jail, probation, or parole. Bureau of Justice Statistics, *Total Correctional Population*, OFF. OF JUST. PROGRAMS, <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=11> (last updated Oct. 10, 2011).

19. Adam Liptak, *U.S. Prison Population Dwarfs that of Other Nations*, N.Y. TIMES, Apr. 23, 2008, <http://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html>.

20. The Confucian philosopher and early Legalist, Xun Zi (or Hsün Tzu) ca. 312–230 BCE, is credited for coining the phrase. *See* 3 JOHN KNOBLOCK, XUNZI: A TRANSLATION AND STUDY OF THE COMPLETE WORKS 166 (1988).

21. For a summary of the social science literature with a critical response, see Paul H. Johnson & John M. Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24 OXFORD J. LEGAL STUD. 173 (2004).

22. U.S. GENERAL ACCOUNTING OFFICE, GAO/GGD-00-117, STATE AND FEDERAL PRISONERS: PROFILES OF INMATE CHARACTERISTICS IN 1991 AND 1997, at 3 (2000).

crime is more often than not spontaneous and unpremeditated and drug use (not sales) is the result of addiction, neither act ordinarily reflects the sort of calculated choice for which the risk of incarceration can be justified as a deterrence to potential offenders. Retribution remains as the prevailing justification. In turn, rationality has little to do with retribution.

Retribution can only be fully justified as an essentially arational value or faith-based attribute of justice, in other words, as a moral value rooted in some metaphysical, Manichean view of human nature societal consensus, or some other source.²³ As the prevailing justification for our current system of crime and punishment, those who reject the moral grounds for retribution or themselves believe to be morally repugnant, including myself, are left with the need to defend or to reject it on rational terms. Can retribution be justified empirically as a benefit to society? Does punishment based exclusively or even primarily on the crime achieve any of the societal aims of an effective system of criminal justice? Or does retribution in fact produce unintended consequences that reduce any instrumental utility by which it must be rationally evaluated?

As argued above, unless ameliorated by one or more forms of restorative justice, retribution, at least in form of incarceration and outcasting, fails to achieve effectively or efficiently any of the non-retributive goals of criminal justice—victim reparation, offender correction, or crime prevention. Retribution alone makes no provision for victim compensation or offender correction. Retribution alone under-deters crime and over-incapacitates offenders. To such failures of purpose, I would add its unintended but inexorable social costs. Recidivism increases with incarceration.²⁴ And incarceration produces more proficient offenders. As a Japanese prosecutor told a visitor from the United States who asked why Japan incarcerates so

23. For an eloquent argument in favor of retributive justice, see PAUL H. ROBINSON & MICHAEL T. CAHILL, *LAW WITHOUT JUSTICE: WHY CRIMINAL LAW DOESN'T GIVE PEOPLE WHAT THEY DESERVE* 13–23 (2006). For an equally eloquent rebuttal, see DEIDRE GOLASH, *THE CASE AGAINST PUNISHMENT: RETRIBUTION, CRIME PREVENTION, AND THE LAW* (2005).

24. See *PRISONER REENTRY AND CRIME IN AMERICA* (Jeremy Travis & Christy A. Visher eds., 2005). For a rationale for retribution sourced in public opinion and societal consensus, see PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* (1995).

few offenders, “jails are schools for crime.”²⁵ As Sunny Schwartz has put it, our jails and prisons have become “monster factories.”²⁶ Ignored more often than not is that in addition incarceration and other debilitating punitive measures produce new victims who themselves are more apt to fail as constructive, contributing members of the community and even begin themselves to engage in criminal activity. Recent data shows that 30 percent of those in federal prisons are married.²⁷ In 2007, nearly 2 million children, over two-thirds African-American, had a parent in prison.²⁸ Nearly all inmates have at least one living parent or grandparent. To the extent that such family members are materially dependent or even emotionally tied to an incarcerated offender, they too have become victims not only of the offense committed but equally so of the retributive response meted out. In so doing, retributive punishment violates the cardinal principle of individual guilt. In effect, retribution makes the communities of family and friends within which offenders live collectively liable. They too are punished. Moreover, punishment based on a notion of equality in terms of the crime similarly offends the more meaningful equalitarian principle of treating like offenders alike.²⁹ The financial costs are equally staggering. States today spend nearly as much and in some cases more on building, maintaining, and manning prisons as they do for community college and other educational systems.³⁰ We do not lack the resources for restorative justice; we simply refuse to divert funds from retributive to restorative programs.

25. John O. Haley, *Sheathing the Sword of Justice in Japan: An Essay on Law Without Sanctions*, 8 J. JAPANESE STUD. 265, 273 (1982).

26. SUNNY SCHWARTZ WITH DAVID BOODELL, *DREAMS FROM THE MONSTER FACTORY* (2009).

27. U.S. GENERAL ACCOUNTING OFFICE, *supra* note 22, at 2.

28. THE SENTENCING PROJECT, *INCARCERATED PARENTS AND THEIR CHILDREN: TRENDS 1991–2007*, at 1 (2009).

29. See James Q. Whitman, *Equality in Criminal Law: The Two Divergent Western Roads*, 1 J. LEGAL ANALYSIS 119 (2009).

30. See PEW CTR. ON THE STATES, *ONE IN 100: BEHIND BARS IN AMERICA 2008*, at 31 (2008).

WHAT CAN BE DONE

One example of how an integrated approach could be achieved within structures already in place is a project that, like this symposium, grew out of the seminar on restorative justice that I taught at the Washington University Law School during the spring semester of 2009. The proposal involved an expansion of the Neighborhood Accountability Boards, described by Bazemore, that had been established in over a dozen districts with the highest rates of juvenile crime in the City of St. Louis. The Boards function in tandem with the Juvenile Services Department of the Missouri Circuit Court, a vehicle for juvenile diversion, family conferencing, and victim-offender dialogue. A Restorative Justice Seminar paper on the existing Boards by Jamar Ray, then a third year law student who is currently serving in the U.S. Navy Judge Advocate General's Corps, and with the support of Joseph Scalise, the deputy chief of the Juvenile Service Department (now retired), was made for their expansion to include assistance for the reentry of offenders who, recently released from prison, move into a relevant district. This expansion was designed to provide a more effective means to ensure community safety through the effective reintegration of offenders into the community. The Boards would assume additional responsibility for providing "one-stop" access to information related to various services, including employment and housing, as well as the legal requirements for notice to parole and other law enforcement authorities. The Boards would also assume responsibility to assist residents fearful of reentrants in voicing their concerns in the context of victim-offender dialogue or conferencing. The proposal included a provision for the assignment of both a police officer and a social worker to each district to assist the Boards. The emphasis on reintegration is designed to prevent the recurrence of criminal activity and the current spiral of failure. Despite expressions of support from all concerned agencies, as of today, lack of funds has apparently been a major obstacle to its implementation.

Funding reflects the priorities of the law enforcement community. Active and widespread support within the law enforcement community is essential to any successful effort to move from a retributive to a restorative approach. I thus take issue with those

within the community of supporters of restorative justice who view and explain restorative justice as separated from the formal structures of criminal law enforcement. An integrated approach requires that law enforcement authorities—police, prosecutors, and judges—understand and encourage restorative responses. Without their acceptance of restorative principles and their implementation of restorative approaches, restorative justice will remain at the margins of the criminal justice system. Efforts to transform the retributive nature of our current system thus must include an emphasis on education within the legal profession. The contrast, as detailed below, of the priorities of Japanese and U.S. prosecutors is a telling remainder of how much is to be done.

In terms of outcomes and long-term crime prevention, Japan has by all accounts the most successful criminal justice system in the world.³¹ Not only does Japan enjoy the lowest crime rates of any of the major industrial countries, including those a fraction of its size, it is the only country that had witnessed significant reduction in violent crime over the course of a half century.³² Ethnic homogeneity, social

31. See GORDON BARCLAY & CYNTHIA TAVARES, INTERNATIONAL COMPARISONS OF CRIMINAL JUSTICE STATISTICS 2001 (2003), available at <http://csdp.org/research/hosp1203.pdf>; John O. Haley, *Comment on Using Criminal Punishment to Serve Both Victim and Social Needs*, 72 L. & CONTEMP. PROBS. 219, 219–25 (2009); John O. Haley, *Apology and Pardon: Learning from Japan*, in CIVIC REPENTANCE 97, 97–120 (Amitai Etzioni ed., 1999); John O. Haley, *Crime Prevention Through Restorative Justice: Lessons from Japan*, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES 349, 349–71 (Burt Galaway & Joe Hudson eds., 1996); John O. Haley, assisted by Ann Marie Neugebauer, *Victim-Offender Mediation: Japanese and American Comparisons*, in RESTORATIVE JUSTICE ON TRIAL: PITFALLS AND POTENTIALS OF VICTIM-OFFENDER MEDIATION—INTERNATIONAL RESEARCH PERSPECTIVES, *supra* note 4, at 105; John O. Haley, *Confession, Repentance and Absolution*, in MEDIATION AND CRIMINAL JUSTICE: VICTIMS, OFFENDERS, AND COMMUNITY 195 (Martin Wright & Burt Galaway eds., 1989).

32. Japanese homicide rates rose from 1910 (excluding the years during World War II) reaching their peak in 1960. They decreased dramatically into the mid 1990s to a level that has remained relatively constant. Rates for bodily injury were the lowest between 1910 and 1950 at which point the rose dramatically to their peak in 1965 then fell equally dramatically until about 2000. They have also remained relative constant thereafter. The rate of assaults similarly rose steadily from 1910 to 1970, again excluding the war years, then fell steadily until the late 1990s, at which point they began to rise almost as dramatically until 2006, at which point they have become more stable. Rates of arson rose steadily from 1910 to the early 1940s then in 1945 fell to their lowest level in a century. They have stabilized roughly at this level ever since. The number of reported rapes similarly increased steadily from 1910 with the per capita rates reaching their highest level in 1970. The rate declined thereafter into the mid-to-late 1990s with

density and the effective of informal social controls, as well as other “cultural” factors may help to explain low crime rates in Japan, but cannot account for the dramatic decline of violent crime—homicide, bodily injury, assault, arson, and rape—since the early to mid-1960s. Nor do other measures of societal well-being have convincing explanatory force. Even the Nordic countries with populations a small fraction of Japan’s, equally high literacy rates, even higher rates of income equality, and well-established social welfare structures,³³ have all experienced rising rates of violent crime during the past four or five decades.³⁴ In other words, Japan has been able to reverse the U.S. spiral of failure. One factor in Japan’s success is that law enforcement authorities respond to offenders in terms of restorative principles. Those offenders who confess, apologize, and seek to compensate any victims and in return receive some formal expression of pardon are far more likely than not to be in some fashion “diverted” out of the formal system and receive no punishment. Those guilty (by their own admission) of a minor crime are generally (an estimated 40 percent of all cases) reprimanded but not reported by the police. Those who are reported by the police and determined by the public prosecutors to be convictable (a high threshold) may have their prosecution suspended depending on the office. (On average for all crimes prosecutors suspend prosecution for about a third of all convictable offenders.) Those prosecuted are almost certain to be convicted,³⁵ but sentences are suspended in over half of all cases.³⁶ Japanese law enforcement officials uniformly

a slight increase for about five years thereafter. Since 2003 the rate of reported rapes have gradually decreased.

33. OECD Gini indices rank Japan slightly behind the welfare states of Europe. OECD, <http://www.oecd.org/dataoecd/12/2/35445297.xls> (last visited Mar. 17, 2011). UN data, however, rank Japan just behind Denmark and just ahead of Norway and Sweden. *Human Development Report 2009: L Demographic Trends*, HUM. DEV. REP., <http://hdrstats.undp.org/en/indicators/147.html> (last visited June 1, 2011).

34. See, e.g., Hanns von Hofer, Notes on Crime and Punishment in Sweden and Scandinavia (115th International Training Course Visiting Experts Papers, Resource Material Series No. 57), available at http://www.unafei.or.jp/english/pdf/PDF_rms/no57/57-21.pdf.

35. As in other civil law systems, Japan has no guilty plea and thus all cases, even those in which the defendant makes no defense, require a judicial determination of guilt based on evidence presented by the prosecutor.

36. Based on statistics in Ministry of Justice, [annual] White Paper on Crime for the years 1982 through 2005.

explain that the principal criterion for such leniency is the response of the offender. Offenders who acknowledge their wrongdoing and accept their accountability are restored and reintegrated into their communities. The contrast of attitudes and responses between Japanese and U.S. prosecutors is telling. The highest priority for Japanese prosecutors in dealing with offenders is to encourage confession and apology and the restoration of relations with those they have harmed. For U.S. prosecutors, it appears, such concerns hardly matter at all.³⁷

Several recently published studies note the increase in public concern over rising crime rates in the mid to late 1990s and early 2000s, fostered by exaggerated media reports, with a consequent increase in public support for more retribution-oriented responses.³⁸ Despite both the increase in crime and public support for a more punitive response, as detailed by Erik Herber,³⁹ no significant change occurred in the otherwise remarkably stable lenient diversion practices. In 1999 the courts in fact abruptly *increased* the percentage of cases in which they suspended execution of any sentence.⁴⁰ Thereafter crime rates in all categories of violent crime either stabilized or renewed a significant decline.⁴¹ In other words, public opinion did not produce a greater punitiveness by law enforcing authorities but appears to have been largely ignored. Moreover, the consequences of refusing to follow public opinion did not have negative consequences in terms of crime prevention, as some in the United States have argued,⁴² but arguably at least may have had some causal effect in stabilizing or even reducing crime rates. The most recent statistics on the attitudes of lay judges (*saibannin*) under the

37. DAVID T. JOHNSON, *THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN* (2002).

38. Koichi Hamai & Thomas Ellis, *Crime and Criminal Justice in Modern Japan: From Re-integrative Shaming to Popular Punitivism*, 34 INT'L J. OF THE SOC. OF L. 157 (2006); Koichi Hamai & Thomas Ellis, *Japanese Criminal Justice: Was Reintegrative Shaming a Chimera?*, 10 CRIME AND PUNISHMENT 25 (2008); Setsuo Miyazawa, *The Politics of Increasing Punitiveness and the Rising Populism in Japanese Criminal Justice Policy*, 10 PUNISHMENT & SOC'Y 47 (2008).

39. Erik Herber, *Change and Continuity in Japanese Criminal Justice*, 15 J. JAPANESE L. 137 (2010).

40. *Id.* at 138.

41. *See supra* note 32.

42. *See* ROBINSON & DARLEY, *supra* note 24.

system introduced for serious crimes in 2009 indicate that although lay judges tend to suspend execution and apply longer jail terms for rape resulting in death or injury, they are even more likely to suspend execution or impose lighter sentences for other crimes.⁴³

CONCLUSION

Retribution and restorative justice may both be fully justified as competing moral values or defining attributes of justice. The issue that remains is as implemented within legal structures and institutions of the legal system which value best serves the social interests and fundamental aims of criminal justice. As argued above and in the papers that follow, the empirical evidence available to date leads, in my view, inexorably to the conclusion that an integrated approach based on the principles of restorative justice is by far superior.

43. *Lay Judges Prove Tougher on Sex Crimes: Study*, JAPAN TIMES, Mar. 6, 2011, <http://search.japantimes.co.jp/cgi-bin/nm20110306a8.html>.