


# Preserving Liberty in the American Justice System through Circle Processes

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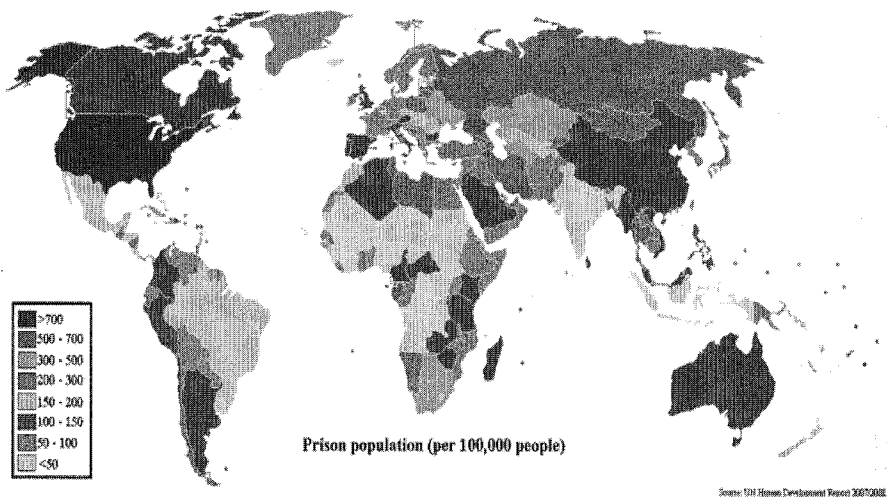
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# PRESERVING LIBERTY IN THE AMERICAN JUSTICE SYSTEM THROUGH CIRCLE PROCESSES

NICOLE CONCORDIA\*

## INTRODUCTION

The United States incarcerates more criminals than any other country in the world.<sup>1</sup>



An over-reliance on incarceration as the primary method of punishment for offenders contributes to this high rate.<sup>2</sup> But additional factors exacerbate this policy problem, including: the burgeoning number of criminal offenses enacted at both the state and federal level each year, the increasing length of sentences, and high recidivism rates among offenders.<sup>3</sup> At the extreme end of instituting longer sentences, “three strikes” laws that mandate increasingly long prison terms for repeat offenders have not been found to

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1. Image: Prisoner Population Rate UN HDR 2007 2008.PNG, available at [http://en.wikipedia.org/wiki/Image:Prisoner\\_population\\_rate\\_UN\\_HDR\\_2007\\_2008.PNG](http://en.wikipedia.org/wiki/Image:Prisoner_population_rate_UN_HDR_2007_2008.PNG) (citing <http://hdr.undp.org/en/reports/global/hdr2007-2008>) (last visited Dec. 18, 2008).

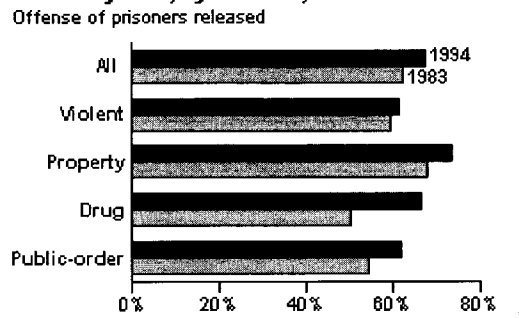
2. See JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 30 (3rd ed. 2003).

3. Kent Greenwalt, *Punishment*, in DRESSLER *supra* note 2, at 37.

reduce crime rates to the extent predicted, although some reduction has been achieved.<sup>4</sup> More generally, one meta-analysis involving over a hundred studies with 442,471 offenders associated longer periods of incarceration with an increase in recidivism.<sup>5</sup>

In a fifteen-state study conducted in 1994, over two-thirds of released prisoners were arrested within three years; the 67.5% of prisoners rearrested in the 1994 study reflected a 5% increase over the 62.5% rearrested in a 1983 eleven-state study.<sup>6</sup>

**Percent of released prisoners rearrested within 3 years, by offense, 1983 and 1994**



The re-arrest rate for violent offenders remained relatively stable, while increased rates were seen for property offenders, drug offenders and public-order offenders:

- 2.1% change from 59.6% to 61.7% in 1994 for violent offenders
- 5.7% change from 68.1% to 73.8% for property offenders
- 7.6% change from 54.6% to 62.2% for public-order offenders
- 16.3% change from 50.4% to 66.7% for drug offenders.<sup>8</sup>

4. *Id.* (citing James Austin, John Clark, Patricia Hardyman & D. Alan Henry, *The Impact of "Three Strikes and You're Out,"* 1 PUNISHMENT & SOCIETY 131 (1999)); see Michael Vitiello, *Punishment and Democracy: A Hard Look at Three Strikers' Overblown Promises*, 90 CALIF. L. REV. 257 (2002) (reviewing FRANKLIN E. ZIMRING, GORDON HAWKINS, & SAM KAMIN, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA (2001)).

5. James Bonta, Rebecca Jesseman, Tanya Rugge and Robert Cormier, *Restorative Justice and Recidivism: Promises Made, Promises Kept?*, in HANDBOOK OF RESTORATIVE JUSTICE 108, 110-11 (Dennis Sullivan & Larry Tifft eds., 2006); see P. SMITH, C. GOGGIN and P. GENDREAU, THE EFFECTS OF PRISON SENTENCES AND INTERMEDIATE SANCTIONS ON RECIDIVISM: GENERAL EFFECTS AND INDIVIDUAL DIFFERENCES (2002) (discussing instance in which persons serving longer sentences were associated with a recidivism rate of +3%).

6. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, REENTRY TRENDS IN THE U.S.: RECIDIVISM, available at <http://www.bjs.ojp.usdoj.gov/content/pub/pdf/reentry.pdf> (last visited Dec. 18, 2008) (Two studies provide the closest national recidivism rates in the United States; one tracked 108,580 state prisoners released from prison in eleven states in 1983, while the other one tracked 272,111 prisoners released from prison in fifteen states in 1994. The number of prisoners tracked represents two-thirds of all prisoners released in the United States for that year).

7. *Id.*

Similar recidivism rates have been found in more recent state-by-state studies.<sup>9</sup>

These recidivism statistics make clear one point: offenders are not being deterred from further criminal activity by the threat of incarceration. With its primary focus on incapacitating offenders to prevent further crime, the American penal system has largely been unable to facilitate long-term behavioral changes in offenders. As a result of collateral consequences, the penal system often acts as a conduit to further criminal acts by those same offenders.<sup>10</sup> Underlying most criminal activity, however, is a moral problem that cannot be addressed by simply locking someone away—that the offender disregards the harm his actions cause to others.

Embedded in those same recidivism statistics is one key to unlocking the door leading away from repetitive criminal activity: older offenders tend to stop committing crimes. One study found that “young offenders were more likely to reoffend than older inmates,”<sup>11</sup> while another found the

8. *Id.*

9. THE CONNECTICUT GENERAL ASSEMBLY, OFFICE OF PROGRAM REVIEW AND INVESTIGATIONS, YEAR 2001 STUDIES: RECIDIVISM IN CONNECTICUT (2001), *available at* <http://www.cga.ct.gov/pri/archives/2001ricreportchap4.htm> (last visited Dec. 18, 2008) (discussing a 2001 study of 4,006 inmates released from prison in 1997 found that 69% were rearrested within three years); *see* PRESS RELEASE, ILLINOIS DEPARTMENT OF CORRECTIONS, SHERIDAN NATIONAL MODEL DRUG PRISON & REENTRY PROGRAM: WORKING TO REDUCE A LEADING CAUSE OF CRIME IN ILLINOIS, (2004), *available at* [http://www.idoc.state.il.us/subsections/assistant\\_director/Sheridan%20-%20Press%20Paper%20January%202004\).doc](http://www.idoc.state.il.us/subsections/assistant_director/Sheridan%20-%20Press%20Paper%20January%202004).doc) (last visited Dec. 18, 2008) (In a January 2004 press release regarding the re-opening of a state prison, Illinois reported a 53.3% recidivism rate for drug offenders and a 60.1% recidivism rate for property offenders); *see* THE JUDICIAL COUNCIL, CRIMINAL RECIDIVISM IN ALASKA (January 2007), *available at* <http://www.ajc.state.ak.us/reports/1-07CriminalRecidivism.pdf> (last visited Dec. 18, 2008) (reported rates of recidivism by felony offenders in 1999 within three years of release as: 67% for property offenders, 61% for driving offenders, 60% for violent offenders, and 52% for drug offenders); FLORIDA DEP'T OF CORRECTIONS: RECIDIVISM REPORT (2001), *available at* <http://www.dc.state.fl.us/publ/recidivism/2001/index.html>, (last visited Dec. 18, 2008) (reported a general recidivism rate of 33.8% after 24 months of release for all offenders since 1993); *see* STEPHEN STEURER, LINDA SMITH, AND ALICE TRACY, MARYLAND STATE DEP'T OF EDUC., CORRECTIONAL EDUCATION PROGRAM, THE THREE STATE RECIDIVISM STUDY (1997), *available at* <http://www.dpscs.state.md.us/publicinfo/publications/pdfs/three-state-recidivism-study-summary.pdf> (last visited Dec. 18, 2008) (a study of the impact prison educational programs had on recidivism rates of 1,000 offenders in each state—Maryland, Minnesota and Ohio—released between Summer 1997 and Winter 1998 reported rearrest rates of 48.4% for participants and 55.9% for non-participants).

10. *See* Matthew W. Meskell, *The History of Prisons in the United States From 1777 to 1877*, 51 STAN. L. REV. 839 (1999) (reviewing the early history of American penal systems; *see also* Norman A. Carlson, *Corrections in the United States Today: A Balance Has Been Struck*, 13 AM. CRIM. L. REV. 615 (1976) (gives a more modern review of American penal systems). *See* Saby Ghoshray, *America the Prison Nation: Melding Humanistic Jurisprudence with a Value-Centric Incarceration Model*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 313 (2008) (discussing collateral consequences experienced by offenders after their term of incarceration is over).

11. RECIDIVISM IN CONNECTICUT, *supra* note 9.

“factors most closely related to increased recidivism were the offender’s age and indigent status.”<sup>12</sup> While age cannot predict with certainty whether the offender will reoffend, the studies do provide hope that as offenders mature and begin to understand the consequences of their actions they will choose a law-abiding path for their lives. A 2006 study on crime through the life-course—i.e., throughout the course of an offender’s lifespan—supports this hope; the study found that desistance of criminal activity “occurs as a consequence of ‘identity shifts’ for some offenders, leading to new ways of viewing key lifestyle choices (including work, family, drug use, and criminality).”<sup>13</sup> These identity shifts occurred through the experience of key turning points in the offender’s life-course, such as: 1) marriage; 2) work; 3) military; and 4) residential relocation.<sup>14</sup>

The current penal system creates a perpetual cycle of pain for everyone involved with the crime. First, an offender inflicts pain upon society through his criminal behavior. Then, society returns that pain by throwing the offender in prison. When the offender is released from prison, he is often denied employment and housing. Unable to support himself with a legitimate job, the offender often returns to criminal behavior to repeat the cycle. The effects of this cycle are not limited to the offender and the particular victim of his crime—e.g., the specific person he robbed—but the entire community, including: the offender’s family, the victim’s family, and their neighbors and friends. Throwing the offender in prison serves the purpose of preventing him from committing another crime while he is incarcerated, but completely ignores the need of the greater community to move beyond that single criminal incident and live peaceably together.

A civilized society is one that shows evidence of moral and intellectual advancement through humane, ethical, and reasonable characteristics.<sup>15</sup> Throughout history civilized societies have created laws to manage the expectations and behaviors of each citizen by laying out the rules by which the society operates. Violations of those rules are then punished. As mentioned above, the United States utilizes incarceration as its primary form of punishment. But, a civilized society founded upon principles of individual liberty, such as the United States, must then be concerned with the morality of its punishment methods because incarceration is in direct conflict with the preservation of individual liberty. “Since punishment involves pain or deprivation that people wish to avoid, its intentional

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12. CRIMINAL RECIDIVISM IN ALASKA, *supra* note 10.

13. James M. Byrne & Faye S. Taxman, *Crime Control Strategies and Community Change—Reframing The Surveillance vs. Treatment Debate*, in FEDERAL PROBATION, June 2006, available at [http://findarticles.com/p/articles/mi\\_qa4144/is\\_200606/ai\\_n17182912/?tag=content;coll](http://findarticles.com/p/articles/mi_qa4144/is_200606/ai_n17182912/?tag=content;coll) (last visited Sept. 26, 2008).

14. *Id.*

15. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (2006), available at <http://dictionary.reference.com/browse/civilized> (last visited Dec. 18, 2008).

imposition by the state requires justification.”<sup>16</sup>

This paper first examines the two primary justifications for punishment in a civilized society: 1) utilitarianism, which justifies punishment for the purposes of deterrence and rehabilitation, and 2) retributivism, which justifies punishment for the purpose of restoring the societal balance disturbed by the offense. Then this paper discusses how utilitarianism, unlike retributivism, cannot be reconciled with the principles of liberty. Finally, this paper examines how modern retributivism, under the guise of ‘restorative justice’ methodology, can help to end the cycle of pain caused by the current United States penal system by facilitating community-building, reconciliation, healing and peacemaking through the use of circle conferences.

## II. JUSTIFICATIONS FOR PUNISHMENT

Before a society can decide *how* to punish, it must first decide *why* to punish. Therefore, before discussing what form punishment should take, the following question must be answered: “what is the general justifying aim of the criminal justice system?”<sup>17</sup> In any enterprise the goals of the endeavor must first be established to inform the choice among available options that could be used to achieve the desired result. But there may be multiple goals that need to be considered. From a fundamental perspective, one goal of creating the United States of America was to preserve the individual liberty interests of its residents.<sup>18</sup> This over-arching goal must therefore inform subsequent policy goals of the country, including determining the goals of punishment in the criminal justice system.

Throughout history two philosophies have dominated the debate regarding punishment justification: utilitarianism and retributivism.<sup>19</sup> In its simplest form, utilitarianism justifies punishment because punishment serves a useful purpose for society—e.g., that it may deter criminal behavior.<sup>20</sup> In this respect utilitarianism is forward-looking because it attempts to prevent criminal behavior, which will be a benefit to society, and justifies whatever form of punishment accomplishes that goal of deterrence.<sup>21</sup> In contrast, retributivism justifies punishment on the premise that the offender deserves punishment for violating the law—i.e., that violating the law merits punishment.<sup>22</sup> In this respect retributivism is backward-looking because it waits until a crime has been committed before

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16. Kent Greenwalt, *Punishment*, in DRESSLER, *supra* note 2, at 31.

17. DRESSLER, *supra* note 2, at 32.

18. See THE DECLARATION OF INDEPENDENCE (U.S. 1776).

19. Kent Greenwalt, *Punishment*, in DRESSLER, *supra* note 2, at 32.

20. *Id.*

21. DRESSLER, *supra* note 2, at 33.

22. Kent Greenwalt, *Punishment*, in DRESSLER, *supra* note 2, at 32.

punishment may be justified.<sup>23</sup> But retributivist theory, unlike utilitarianism, only justifies punishment in proportion to the crime—i.e., what the offender deserves.<sup>24</sup>

### A. Utilitarianism

Utilitarianism is premised on the belief that “[n]ature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do, as well as to determine what we shall do.”<sup>25</sup> From this premise utilitarianism evaluates an action’s utility by its tendency to “augment or diminish the happiness of the party whose interest is in question.”<sup>26</sup> Therefore, from the utilitarian viewpoint, the general goal of all law is to augment the total happiness of the community, which requires exclusion of anything that may diminish happiness, such as crime.<sup>27</sup>

But punishment may also diminish happiness so it should only be used, according to utilitarians, to prevent a greater harm than it causes.<sup>28</sup> Therefore the calculation is, “whether an act or social practice is morally desirable depends upon whether it promotes human happiness better than possible alternatives.”<sup>29</sup> This calculation results in four instances when punishment should not be inflicted:

1. Where it is *groundless*: where there is no mischief for it to prevent; the act not being mischievous upon the whole;
2. Where it must be *inefficacious*: where it cannot act so as to prevent the mischief;
3. Where it is *unprofitable*, or too *expensive*: where the mischief it would produce would be greater than what it prevented;
4. Where it is *needless*: where the mischief may be prevented, or cease of itself, without it: that is, at a cheaper rate.<sup>30</sup>

In each of these four instances where punishment should be avoided the net cost of the punishment, in terms of pain inflicted, outweighs any gain in happiness as a consequence of the punishment.

23. DRESSLER, *supra* note 2, at 33.

24. MARTINE P. GOLDING, *PHILOSOPHY OF LAW* 85 (1975).

25. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, reprinted in DRESSLER, *supra* note 2, at 34. Utilitarianism is sometimes referred to as ‘consequentialist’ or ‘instrumentalist.’ *Id.* at 32. Various forms of consequentialism have existed since Plato, (see Golding, *supra* note 24, at 72) but modern utilitarianism is often credited to Bentham. Frederick Rosen, *CLASSICAL UTILITARIANISM FROM HUME TO MILL* 28 (Routledge 2003).

26. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, reprinted in DRESSLER, *supra* note 2, at 34.

27. *Id.*

28. *Id.*

29. Kent Greenwalt, *Punishment*, in DRESSLER, *supra* note 2, at 35.

30. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, reprinted in DRESSLER, *supra* note 2, at 35.

This calculus illustrates the utilitarian view that punishment is not a good in itself, but that it is justified by reference to the good consequence of it—e.g., the reduction of crime it presumably brings about.<sup>31</sup> There are essentially four good consequences of punishment that utilitarians ordinarily accept: 1) general deterrence, 2) individual deterrence, 3) incapacitation and other forms of risk management, and 4) reform.<sup>32</sup>

Utilitarianism finds morality in the result of punishment, not in the methods of punishment.<sup>33</sup> In this respect punishment is unrestrained so long as it results in a higher rate of good consequences to society than bad consequences. But this very lack of restraint leads to two very disconcerting results: 1) punishment of the innocent and 2) overly-harsh sentences.<sup>34</sup> Because utilitarianism is unconcerned with the actual guilt of a person and instead focuses upon the effect of punishment, it “seems to allow ‘framing’ innocent persons in the name of deterrence” or other results producing more happiness within society.<sup>35</sup> Consider the following scenario:

An especially violent murder occurs in a small, racially divided community. The victim is white and, although there is no hard evidence to prove it, a rumor quickly spreads that the killer was black. As the result of racist activity by white supremacist groups, a white mob threatens to enter the community and kill innocent African-Americans and burn down their homes in order to exact vengeance. The town sheriff realizes that she lacks adequate personnel to stop the mob. She is convinced, however, that if she arrests an African-American for the crime and promises a quick trial, the mob will be satisfied. Therefore, she arrests and frames a homeless black man with a prior record of violent criminal activity. As predicted, the mob is satisfied; the man is subsequently tried, convicted, and punished for the crime.<sup>36</sup>

And justice is served in a utilitarian society. When the desired moral result is achieved there is no reason to confine punishment to the guilty party. Another illustration of this point is that “[m]ost parents would be just as deterred from committing crimes if they knew that the threatened consequences would be imposed on their children instead of themselves.”<sup>37</sup> But even if sometimes punishing the innocent is justified, it is done at the price of giving up a principle that should ordinarily prevail and that appears to have value independent of utilitarian considerations: justice.<sup>38</sup>

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31. GOLDING, *supra* note 24, at 72.

32. Kent Greenwalt, *Punishment*, in DRESSLER, *supra* note 2, at 35–36.

33. *Id.* at 35.

34. GOLDING, *supra* note 24, at 75.

35. *Id.*

36. DRESSLER, *supra* note 2, at 38–39.

37. GOLDING, *supra* note 24, at 75.

38. *Id.* at 80.



Similarly, utilitarianism permits punishment out of proportion to the gravity of the offense because the seriousness and triviality of offenses are defined only relative to the suffering society is willing to inflict to stop them.<sup>39</sup> "In selecting the punishment for a given type of crime we are expressing a preference for . . . one state of affairs to another; i.e., that the marginal increment of mischief inflicted on offenders is preferable to the mischief that would otherwise be suffered by the community."<sup>40</sup> Consider the following scenario:

Your neighbor steals apples off your apple tree. In a utilitarian society his punishment may be to have his hands cut off and posted on your fence with a sign that says: "All thieves will have their hands cut off." The act of cutting off his hands is justified by society's desire to deter others from also stealing your apples. It does not matter that cutting off your neighbor's hands will cause him more harm than you suffered through the loss of the apples.

Again, because utilitarians view the proper result of punishment as the sole moral consideration, "it does not matter whether punishment is proportional to the guilt of the criminal or not."<sup>41</sup> But this theory is averse to a sense of justice; it does not contain the necessary reference to concepts of guilt, moral accountability, desert or blameworthiness, all of which are elements of the concept of punitive justice.<sup>42</sup> "When we cease to consider what the criminal deserves and consider only what will cure him, we have tacitly removed him from the sphere of justice altogether."<sup>43</sup>

### B. Retributivism

Retributivism is a distinctly different justification for punishment than utilitarianism in that retributivists believe "the moral desert of an offender is *sufficient* reason to punish him."<sup>44</sup> Unfortunately retributivism is often misunderstood through the bad reputation it has collected over the years as only concerned with revenge, retaliation and *lex talionis*, an eye for an eye.<sup>45</sup> But "vengeance *aims* at personal satisfaction" while punishment "is expressive of moral indignation."<sup>46</sup> Both may be misdirected, but

39. *Id.* at 78.

40. *Id.*

41. *Id.* at 76 (citing Paley's *Principles of Moral and Political Philosophy*, in Edmund L. Pincoffs, *THE RATIONALE OF LEGAL PUNISHMENT* 18 (Humanities Press 1966)).

42. *Id.*

43. DRESSLER, *supra* note 2, at 38 (quoting C.S. Lewis, *The Humanitarian Theory of Punishment*, in *CONTEMPORARY PUNISHMENT: VIEWS, EXPLANATIONS, AND JUSTIFICATIONS* 194 (R. Gerber & P. McAnany eds. 1972)).

44. Michael S. Moore, *The Moral Worth of Retribution* (1987), in DRESSLER, *supra* note 2, at 39.

45. *Id.*

46. GOLDING, *supra* note 24, at 88.

“retributivism insists that punishment should be inflicted only on the culpably guilty, lest a grave injustice be done to the one who receives its brunt.”<sup>47</sup>

Immanuel Kant, the quintessential classical retributivist, warned that “[n]o punishment, no matter from whom it comes, may be inflicted out of hatred. Hence men have a duty to cultivate a *conciliatory spirit*. But this must not be confused with *placid toleration* of injuries, renunciation of the rigorous means for preventing the recurrence of injuries by other men.”<sup>48</sup> It flows from this conciliatory spirit that retributivism is concerned with preserving the societal balance disturbed by criminal offenses, which requires the offender to be punished in proportion to the harm he caused. “When a wrongdoer is made to suffer in an amount equal in severity to the gravity of his deed, his punishment is not only just in relation to him but also restores the moral balance that existed prior to his wrongful act.”<sup>49</sup>

Underlying this close connection between punishment and desert is the premise that the offender must first be guilty of an offense and also culpable.<sup>50</sup> This means that “the individual has broken the law under conditions that characterize his illegal act or omission as blameworthy—i.e., he has no justification or excuse.”<sup>51</sup>

Juridical punishment can never be administered merely as a means for promoting another good either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted *has committed a crime*. For one man ought never to be dealt with merely as a means subservient to the purpose of another . . . He must first be found guilty and *punishable*, before there can be any thought of drawing from his punishment any benefit for himself or his fellow-citizens.<sup>52</sup>

It is the moral culpability of the offender that gives society the duty to punish him.<sup>53</sup>

This duty to punish can only be properly understood in the context of a society that recognizes individual freedom and the limits thereto, which provide the conditions justifying coercion.<sup>54</sup> “Punishment is in fact characterized as a ‘one-sided use of coercion’ in which a man’s sense of

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47. *Id.*

48. *Id.* at 88–89 (quoting IMMANUEL KANT, *THE DOCTRINE OF VIRTUE: PART II OF THE METAPHYSICS OF MORALS* (M. J. Gregor trans.) (Harper Torchbooks 1964)).

49. *Id.* at 97.

50. *Id.* at 85.

51. *Id.*

52. IMMANUEL KANT, *THE PHILOSOPHY OF LAW* (W. Hastie trans.) (1887), *reprinted in* DRESSLER, *supra* note 2, at 40.

53. Moore, *in* DRESSLER, *supra* note 2, at 40.

54. GOLDING, *supra* note 24, at 90.

honor and dignity as a free being is hurt.”<sup>55</sup> So use of coercion must be authorized in some manner.<sup>56</sup>

Retributivists start from the premise that, “as free beings, men have the right to realize their freedom in action.”<sup>57</sup> Recognition of this right requires each man to respect the same right in others, “for no one can in fairness claim a right to act on the basis of his own free choice unless he concedes a similar right to others.”<sup>58</sup> But every man acting on his freedom will eventually cross paths with another man’s freedom.<sup>59</sup> Thus, a society of free men must establish a system in which the rules create a mutuality of benefit and burden where the benefits of noninterference from others are conditioned on the assumption of the burden to refrain from interference with others.<sup>60</sup>

Punishment is justified in this system because “it is only reasonable that those who voluntarily comply with the rules be provided some assurance that they will not be assuming burdens which others are unprepared to assume.”<sup>61</sup> Additionally, it is only fair for a system in which benefits and burdens are equally distributed to have a mechanism designed to prevent unequal distribution.<sup>62</sup> An offender deserves punishment, then, for he has something that does not rightfully belong to him: the benefits of society without the burden of self-restraint.<sup>63</sup> “Justice—that is punishing such individuals—restores the equilibrium of benefits and burdens by taking from the individual what he owes, that is, exacting the debt.”<sup>64</sup>

### *C. Restorative Justice—The New Retributivism*

In the 1970s a seemingly new type of theory of punishment, called restorative justice, emerged from experiments in the Mennonite community in Ontario, Canada, and later in Indiana.<sup>65</sup> These experiments utilized victim-offender encounters that led to broader community programs, which later served as models for programs around the world.<sup>66</sup> In contrast to classical retributivism—which starts from a place of logical deductions

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55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. Herbert Morris, *Persons and Punishment*, in DRESSLER, *supra* note 2, at 44.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 11 (Good Books 2002). Zehr is generally regarded as the ‘grandfather’ of the modern restorative justice movement; he directed the first victim offender program in the U.S. and is one of the developers of the modern concept of restorative justice. *Id.* at 74.

66. *Id.*

regarding the nature of society and the relationships between society's citizens—restorative justice proponents begin from a religious perspective of inter-relatedness to justify punishment.<sup>67</sup>

Put simply, restorative justice is based on the following five premises: 1) that all people are connected to each other in a web of relationships; 2) that relationships imply mutual obligations and responsibilities; 3) that crime is a violation of people and of interpersonal relationships; 4) that these violations create additional obligations; and 5) that the central obligation of society is to put right the wrongs created by crime.<sup>68</sup> “Restorative justice requires, at minimum, that we address victims’ harms and needs, hold offenders accountable to put right those harms, and involve victims, offenders, and communities in the process.”<sup>69</sup> Anchoring this goal of punishment—to restore the societal balance—is the concept of respect.<sup>70</sup> “Respect reminds us of our interconnectedness but also of our differences. Respect insists that we balance concern for all parties.”<sup>71</sup> Differences are appreciated through an understanding of particularity because it respects the individuality and worth of each person.<sup>72</sup>

Howard Zehr recognizes that restorative justice is not a new concept and that it owes “a great deal to earlier movements and to a variety of cultural and religious traditions.”<sup>73</sup> Restorative justice practices in North America evolved from the concept of tribal justice in Native America and New Zealand,<sup>74</sup> similar practices have also been recognized in some African tribes.<sup>75</sup> Tribal justice, in essence, focuses on community building and peacemaking through communication to restore balance within the community.<sup>76</sup> “Communicative processes keep alive the feelings of unity and relational continuity and growth that harms and conflict disrupt and threaten to sever.”<sup>77</sup> Despite Zehr’s initial efforts to distance restorative justice principles from retributive philosophy, he now recognizes that both essentially proceed from the same justification of punishment but diverge in the application of punishment:

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67. *Id.* at 19.

68. *Id.* at 19–20.

69. *Id.* at 25.

70. *Id.* at 36.

71. *Id.*

72. *Id.* at 35.

73. *Id.* at 11; see Michael L. Hadley, *Spiritual Foundations of Restorative Justice*, in HANDBOOK OF RESTORATIVE JUSTICE *supra* note 5, at 174, 174 (a comprehensive discussion of the connection between religious traditions and restorative justice).

74. *Id.* See also HANDBOOK OF RESTORATIVE JUSTICE, *supra* note 5, at 147, 147–150.

75. See Artika Tyner, *Restorative Justice: A Dream of Restoration and Transformation*, HEARSAY, Fall 2008, at 11, available at <http://www2.mnbar.org/sections/new-lawYERS/hearsay-index.asp>. See also HANDBOOK OF RESTORATIVE JUSTICE, *supra* note 5, at 147, 147–150.

76. Tyner, *supra* note 75, at 11.

77. HANDBOOK OF RESTORATIVE JUSTICE, *supra* note 5, at 147.

Both retributive and restorative theories of justice acknowledge a basic moral intuition that a balance has been thrown off by a wrongdoing. Consequently, the victim deserves something and the offender owes something. Both approaches argue that there must be a proportional relationship between the act and the response. They differ, however, on the currency that will fulfill the obligations and right the balance.<sup>78</sup>

However, this perceived divergence is based on the erroneous view that retributivism is simply concerned with inflicting pain on the offender in proportion to the harm caused.<sup>79</sup> As discussed in the previous section, retributivism is concerned with restoring the societal balance, but it does not necessarily mandate a specific form of punishment, such as infliction of pain. An untainted understanding of classical retributivist theory leads to the conclusion that restorative justice is simply a modern incarnation of retributivism that is free from the negative reputation attached to it over the years.

*D. Retributivism provides the justification most compatible with a free society*

It is the absence of any limitation to punishment, along with the absurdity of punishing innocent persons, which makes utilitarianism incompatible with the principles of liberty fundamental to the American system of government. The United States Constitution and Bill of Rights specifically contain provisions designed to protect citizens against wrongful convictions<sup>80</sup> and specifically requires punishment in at least relative proportion to the offense by prohibiting excessive fines, excessive bail and cruel and unusual punishments.<sup>81</sup> A form of utilitarianism that would adhere to these restrictions essentially loses its usefulness because it loses the ability to employ whatever method achieves its goals. Additionally, such restraints contradict the fundamental principle of utilitarianism—that the end justifies the means. Limiting the means may result in never accomplishing the goals.

Retributive punishment is morally consistent with the American

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78. ZEHR, *supra* note 65, at 59.

79. *Id.*

80. U.S. CONST. amend. V (requires due process of law before deprivation of life, liberty or property, as well as a Grand Jury indictment before trial of capital offenses); U.S. CONST. amend. VI (provides accused persons with the right to a speedy, public trial, the right to confront accusers, the right to be tried by a jury of peers, the right to be informed of the nature of the nature and cause of the accusation, and to have compulsory process for obtaining witnesses and counsel in his favor); U.S. CONST. art. III § 3, cl. 1 (required treason convictions to be attained only by the testimony of two witnesses); and U.S. CONST. art. I § 9, cl. 2 (prohibits Congress from declaring anyone guilty of a crime without a trial).

81. U.S. CONST. amend. VII.

premise of individual liberty and responsibility, and should therefore inform policy decisions regarding how punishment is meted out. Moreover, because retributivism already limits itself to punishment proportional to the harm caused by the offense and does not allow punishment of innocent persons, the moral foundation of retributivism is not shaken by allowing “[t]hat inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice . . . .”<sup>82</sup> Additionally, retributive punishment is respectful of the offender’s individual liberty because it defers

to an individual’s free choice by connecting punishment to a freely chosen act violative of the rules. . . . Punishment of a truly culpable individual, therefore, is seen as a way of respecting the wrongdoer’s personhood (‘you made a free choice, now you must live with the consequence’); it is also a way for the wrongdoer to pay his debt to the community and return to it in moral equilibrium.<sup>83</sup>

Retributivism, especially in its modern incarnation as restorative justice, presents the best opportunity for offenders to limit how far punishment may infringe on their liberty while, at the same time, repairing the harm caused by their offense, thus fulfilling the goals of both the American system of liberal government and retributive punishment. So, having established *why* to punish—restoration of societal balance within a context of liberty maintenance—the question becomes *how* to punish. Consistent with retributivist principles, restorative justice methods have been successful around the world in working to restore that balance within society in varied instances and should be used wherever possible in lieu of incarcerating offenders.

### III. CIRCLE CONFERENCES AS AN ALTERNATIVE TO INCARCERATION

The modern restorative justice movement has extended retributivist theory to include practical ways of determining what type of punishment is deserved in a particular situation.<sup>84</sup> Generally, three distinct models have emerged: victim-offender conferences, family-group conferences and circle conferences.<sup>85</sup> Each of these models share an important feature in that they include an encounter between key stakeholders (or surrogates), such as

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82. Alexander Hamilton, *The Federalist No. 78* (1788), reprinted in *THE FEDERALIST: A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES* 495, 502 (Robert Scigliano ed., Modern Library 2001) (1888).

83. Herbert Morris, *Persons and Punishment*, in DRESSLER, *supra* note 2, at 45; see also Mireille Hildebrandt, *Restorative Justice and the Morality of the Fair Trial: A Reply to Brochu*, in PUNISHMENT, RESTORATIVE JUSTICE AND THE MORALITY OF LAW 89, 95–96 (Erik Claes, Rene Foque & Tony Peter eds., 2005).

84. ZEHR, *supra* note 65, at 35.

85. *Id.* at 44.

victims, offenders, community members and criminal justice personnel.<sup>86</sup> Additionally, restorative justice interventions have been associated with reductions in recidivism for an average of seven percent of participants across all models.<sup>87</sup>

These restorative justice models essentially differ in the number and category of participants: 1) victim-offender conferences primarily involve victims and offenders, although their families may be allowed to participate in a lesser role, but participation by community members is not allowed; 2) family-group conferences enlarge the role of family and other supporters of both the victims and offenders but typically prohibit general community participation; and 3) circle conferences further enlarge the sphere of participants to include community members as significant contributors in the process, as well as penal system officials.<sup>88</sup> This paper will focus on the process and utilization of circle conferences as an alternative to traditional incarceration and probation punishment methods.

#### *A. General Overview of Circle Conferences*

Circle conferences “use structure to create possibilities for freedom: freedom to speak individual truth, freedom to drop masks and protection, freedom to be present as a whole human being, freedom to reveal our deepest longings, freedom to acknowledge mistakes and fears, [and] freedom to act in accord with our core values.”<sup>89</sup> The structural elements of a circle conference include: 1) the circle itself, which symbolizes shared leadership, equality, connection, and inclusion; 2) objects placed in the middle of the circle to symbolize shared values and common ground; 3) ceremony at the beginning and end of each circle to mark the space and time of the circle as apart from the ordinary pace of life; 4) a talking piece; 5) circle keepers; 6) guidelines; and 7) consensus decision-making.<sup>90</sup> These elements are intentionally included in the process to facilitate creation of space in which all participants may feel safe to be their most authentic self and are thus open to the restorative process.<sup>91</sup>

In most circle conferencing programs offenders are referred to the

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86. *Id.* at 44–45.

87. Bonta et al., *HANDBOOK OF RESTORATIVE JUSTICE*, *supra* note 5, at 108, 115 (Individually, victim–offender conferences showed an effect on eight percent of participants, family–group conferences showed an effect on nine percent of participants, and circle conferences showed an effect on eleven percent of participants; in reference to the overall effect rate of seven percent, which is lower than each individual conference effect rate, the study included other types of programs using the restorative justice label that are not traditionally considered restorative justice programs in and of themselves, such as the use of restitution or community service punishments without corresponding conference participation).

88. ZEHR, *supra* note 65, at 47–51.

89. KAY PRANIS, *THE LITTLE BOOK OF CIRCLE PROCESSES* 11 (2005).

90. *Id.* at 11, 33.

91. *Id.* at 11.

program from within the criminal justice system, such as by: the police, the prosecutor, the probation officer, the court or even by prisons.<sup>92</sup> However, the specific type of circle will dictate the precise method of referral, as well as who may participate.<sup>93</sup> Circle conferences may be used for a variety of purposes, including: 1) sentencing circles that are used to determine sentences in criminal cases; 2) healing circles that are sometimes used as preparation for sentencing circles; 3) reintegration circles that are used to help juveniles and adults returning to the community from correctional facilities; 4) circles to resolve workplace conflicts; and 5) circles designed to facilitate community dialogue.<sup>94</sup>

Circle conferences are lead by facilitators who, unlike arbitrators, do not have the power to impose settlements.<sup>95</sup> Instead, one or two circle keepers serve as facilitators to guide the process of allowing each participant to explore facts, tell their stories, ask questions, express their feelings and work toward mutually acceptable outcomes.<sup>96</sup> In addition to setting the ground rules for the process to help create an environment where all participants may feel safe to speak honestly and openly, circle keepers often articulate a set of values at the beginning of the process, which typically emphasizes respect, the inherent value of each participant, integrity and the importance of speaking honestly from the heart.<sup>97</sup> Circle keepers do not control the flow of discussion or direct the group toward a particular outcome, but they may stimulate the discussion through questions or topic suggestions.<sup>98</sup>

Participants sit in a circle and pass a talking piece.<sup>99</sup> Only the person with the talking piece may speak, which ensures that each participant has an uninterrupted opportunity to express their thoughts.<sup>100</sup> The talking piece is passed continuously around the circle throughout the entire process, but no one is required to speak each time the talking piece turns to them.<sup>101</sup> These encounters provide an opportunity for the harm to be articulated by the victims, both the particular and general victims—as opposed to the current criminal justice system which utilizes procedures by which legal professionals do the talking as spokesmen for the community as the victim-persona—and for the wrong-doing to be acknowledged by the offender.<sup>102</sup>

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92. ZEHR, *supra* note 65, at 46.

93. *Id.* at 50.

94. ZEHR, *supra* note 65, at 50; PRANIS, *supra* note 89, at 16–17.

95. ZEHR, *supra* note 65, at 45.

96. *Id.* at 45, 51.

97. ZEHR, *supra* note 65, at 51; PRANIS, *supra* note 89, at 12.

98. PRANIS, *supra* note 89, at 12.

99. ZEHR, *supra* note 65, at 51.

100. *Id.*

101. PRANIS, *supra* note 89, at 12.

102. ZEHR, *supra* note 65, at 51.



The exchange in circle conferences is critical to facilitate the healing and restoration of all participants.

Because community members are directly involved in the process, discussions tend to be more wide-ranging than in other conferencing models and may include “situations in the community that are giving rise to the offense, the support needs of victims and offenders, the obligations that the community might have, community norms, or other related community issues.”<sup>103</sup> Additionally, emotional and spiritual reflections from the speaker’s perspective are welcome in the circle.<sup>104</sup> The process “assumes that conflicts and difficulties have emotional and spiritual content for participants and that effective resolutions require exploring the emotional and spiritual content as well as the physical and mental content.”<sup>105</sup>

Relationship-building is an indispensable aspect of the circle process and must precede any discussion of the task itself.<sup>106</sup> Most of the time in the circle may be spent in creating the foundation for an authentic dialogue regarding the conflict before that dialogue can effectively begin.<sup>107</sup> One community member in a circle for a person who committed a crime observed:

What I gotta do to keep what I got is to give it away. I need to be in Circle. When I’m by myself, it doesn’t go so good. People come together and work together to try to help each other. Gotta give it away to keep it. It’s just the way it works.<sup>108</sup>

This observation cuts to the heart of the circle process; as a community each member needs the person for whom the circle is formed just as much as that person needs the community participants to maintain societal balance. “In many circles the most important outcome is not what consensus agreements may be reached, but rather what new understandings, new respect, and new relationships are formed.”<sup>109</sup>

Outcomes are reached through consensus decision-making.<sup>110</sup> “Consensus does not require enthusiasm for the decision or plan, but it does require that each participant be willing to live with the decision and support its implementation.”<sup>111</sup> Consensus building reinforces the importance of recognizing the impact each person’s behavior has on others.<sup>112</sup> Outcomes

103. *Id.*

104. PRANIS, *supra* note 89, at 29.

105. *Id.* at 12.

106. *Id.* at 13.

107. *Id.*

108. *Id.* at 26–27.

109. Barry Stuart & Kay Pranis, *Peacemaking Circles: Reflections on Principal Features and Primary Outcomes*, in HANDBOOK OF RESTORATIVE JUSTICE, *supra* note 5, at 129.

110. PRANIS, *supra* note 89, at 13.

111. *Id.*

112. *Id.* at 26.

are then designed to restore the balance disrupted by the offense and may include restitution, community service, or a formal apology.<sup>113</sup> In some instances it may also be useful to design an outcome that utilizes some of these forms of punishment in conjunction with or parallel to prison sentences.<sup>114</sup> For example, an offender may recognize his own need for therapy to arrive at a place where he will be able to control impulses that he admits present dangers to others. In such a situation it may be beneficial to incapacitate the offender through incarceration while he receives the treatment to prevent additional harm to the community while he learns to control those harmful impulses. There may be other situations where incarceration is appropriate as well; the point here is that restorative justice practices need not always exclude incarceration from the outcome.<sup>115</sup>

#### *B. Considerations for Implementing Circle Conferences within the Criminal Justice System*

As described above, circle conferencing processes may be adapted to many uses but generally take a common form when applied within the context of a conventional criminal justice system as an alternative to traditional punishment methods of incarceration and probation. This commonality proceeds from an understanding that restoration is not an event but is a process that must include all of the following components: 1) an assessment of suitability of the participant and the specific offense; 2) preparation of participants for the entire process; 3) a full circle gathering; and 4) follow-up.<sup>116</sup> When all stages of the process are engaged, the full power of the circle conference, sometimes referred to in the context of operating within the criminal justice as ‘sentencing circles’ or ‘peacekeeping circles,’ may be unlocked for the benefit of the entire community.<sup>117</sup>

The entire circle conferencing process typically begins with an offender’s willingness to plead guilty to an offense, to participate in a circle conference and to accept the outcome of the circle conference.<sup>118</sup> Because acknowledgement of wrong-doing is a key component to the circle conferencing process, an offender must be a willing participant.<sup>119</sup> This requirement necessarily limits the application of circle conferencing processes to offenders willing to take responsibility for their actions.<sup>120</sup> The alternative is to force offenders to admit guilt—a practice that undermines

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113. ZEHR, *supra* note 65, at 45–46.

114. *Id.* at 13.

115. *Id.*

116. Stuart and Pranis, in *HANDBOOK OF RESTORATIVE JUSTICE*, *supra* note 5, at 125.

117. *Id.*

118. Jim Adams, *Circle of Justice*, STAR TRIBUNE, Aug. 18, 1998, at B1.

119. ZEHR, *supra* note 65, at 46.

120. *Id.*

the offender's freedom to choose the course of his life. Moreover, forced participation of any type of restorative justice practice has been shown to have little to no impact on recidivism rates.<sup>121</sup> "There is evidence to indicate that court-ordered [restorative justice] programs have no impact on recidivism. Programs that operate in a non-coercive environment and that attempt to involve victims and community members in a collaborative manner produce the largest effect size estimates."<sup>122</sup> For these reasons, then, circle conferences should not be viewed as a potential wholesale replacement of the current criminal justice system, but should instead be utilized to a greater degree in conjunction therewith.

Circle conferences require much preparation before they can be successfully convened. Preparation will include both logistical considerations and ensuring all participants understand the expectations of the process.<sup>123</sup> Logistical considerations for the circle keeper or planner include: 1) identifying potential participants with varying viewpoints; 2) identifying the circle keeper(s); 3) choosing a time and place for the circle conference to be held, keeping in mind considerations of warmth, adequate space, hospitality, and accessibility; 4) extending invitations to participants with an explanation of the topic, the purpose and nature of the process; 5) choosing a talking piece that will have meaning for the participants and encourage respectful discourse during the circle conference; 6) planning the opening ceremony to set the tone of the circle conference; 7) determining whether refreshments will be served and making arrangements for such; and 8) drafting questions to facilitate acquaintanceship among participants and to engage dialogue on the topic of the circle conference.<sup>124</sup> Logistical planning for the circle conference is largely the same as planning most other meetings; whereas the crucial aspect of preparation for the circle conference comes in preparing the participants for the experience.

Many aspects of the circle conferencing process will be unfamiliar to most participants—including the offender, direct victim, family and friends of each, other community members, justice system representatives, and other resource professionals—so it is necessary to prepare them for the experience.<sup>125</sup> A trained circle keeper may meet with all of the participants individually, in small groups or as a large group, to discuss how the circle conference process will work.<sup>126</sup> It is essential to the process that participants understand that the circle keeper is not in a position of power

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121. Bonta, et al., in *HANDBOOK OF RESTORATIVE JUSTICE*, *supra* note 5 at 117.

122. *Id.*

123. See PRANIS, *supra* note 89, at 51–52; see also Adams, *supra* note 118 at B1.

124. PRANIS, *supra* note 89, at 51–52.

125. PRANIS, *supra* note 89, at 15–16.

126. Adams, *supra* note 118 at B1.

over any of them, and that each participant is equally responsible for the process because “[s]hared ownership fosters shared accountability not just to the agreement but to all other participants.”<sup>127</sup> This equality of power within the circle is another feature of restorative justice practices that is often overlooked by traditional criminal justice processes—even by those programs purportedly based upon restorative justice principles; consider the following scenario:

Staff in a juvenile correctional facility, upon learning about Peacemaking Circles, suggested that the groups they do with youth are the same as Circles. In a subsequent training with youth in that facility, the youth were asked if the Circle was the same as their groups. They answered with an emphatic “NO.” The youth identified power considerations as a key difference. In their groups, the facilitator is judging and evaluating their behavior and level of participation. The facilitator has specific expectations about what the youth should say or not say. Under those circumstances, the youth frequently do not feel safe to speak their truth. . . The youth were very aware that in group they are not all equal, which is a core prerequisite of Circles.<sup>128</sup>

Preparation of participants before the circle conference will need to introduce the concept of equality among all participants, but will likely not be truly understood until the circle conference is convened and each participant experiences that equality. Additional preparation to bring all participants together from a place of openness and willingness to understand other perspectives may include holding a separate healing circle for the victim and a circle of understanding for the offender before bringing all parties together in the larger circle.<sup>129</sup>

The third step in the overall process is to convene the circle.<sup>130</sup> Consensual outcomes may not be reached at the initial circle gathering, nor are they necessary; it is more important that a foundation be laid for building relationships that make later outcomes possible.<sup>131</sup> Circle conferences maintain the flexibility to conduct multiple gatherings due to reliance on the conceptualization of the circle conference as a process instead of an event.<sup>132</sup> “The circle process affords enormous scope for adapting the process to fit the particular circumstances of each case. As the circle process digs deeper into underlying causes of conflict, the innate flexibility of a circle process enables new issues to be addressed and all new

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127. Stuart and Pranis, in *HANDBOOK OF RESTORATIVE JUSTICE*, *supra* note 5, at 130.

128. PRANIS, *supra* note 89, at 60–61.

129. *Id.* at 16.

130. *Id.* at 52.

131. Stuart and Pranis, in *HANDBOOK OF RESTORATIVE JUSTICE*, *supra* note 5, at 129.

132. *Id.* at 125.

interests to be included.”<sup>133</sup> Understanding the flexibility inherent to the circle conferencing process removes the pressure to numbly follow a set of procedures to a specific outcome and encourages full participation in the process. However, a road-map directing the flow of the circle conference is useful to ensure that all goals are met. Here is one example of a talking circle conference format from the perspective of the circle keeper(s):

1. Arrive early to set up the circle and any refreshments;
2. Greet participants as they arrive;
3. When everyone is present, invite them to take a seat in the circle;
4. When everyone is seated, welcome and thank them for coming;
5. Conduct the opening ceremony;
6. Share again the purpose of the circle;
7. Introduce the talking piece and explain how it will be used;
8. Develop guidelines for the group by using the talking piece to give each participant an opportunity to identify the promises they would like from the other participants for making the circle a place to speak their truth; record the suggested guidelines and read the completed list to the group before passing the talking piece around the circle to gain consensus for the list or make modifications;
9. Explain any time constraints and ask participants to keep them in mind and to take responsibility for ensuring everyone has an adequate opportunity to speak;
10. Send the talking piece around the circle for introductions; ask a specific question for each participant to answer in addition to stating who they are;
11. Begin the dialogue about the topic with a question inviting participants to share their thoughts and feelings about the issue;
12. Continue to pass around the talking piece to discuss emerging threads of conversation as time permits;
13. Offer closing remarks that summarize the experience from your perspective or as related to the topic, and thank everyone for participating;
14. Conduct a closing ceremony that marks the end of the process, reminds people of their interconnectedness and emphasizes positive potential.<sup>134</sup>

The fourteen steps described above comprise the essential elements of any type of circle conference.<sup>135</sup> When utilizing the circle conference to arrive at

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133. *Id.*

134. PRANIS, *supra* note 89, at 52–54.

135. *Id.* at 55.

an outcome the dialogue portion of the conference is more structured, for example the victim may be given the opportunity to decide whether to speak first or to allow the offender to tell his story first before proceeding around the circle to hear the perspectives of other participants.<sup>136</sup> Participants are encouraged to describe the situation from their own perspective and to also discuss their feelings about their own behavior and how the behavior of others affected them personally.<sup>137</sup> After a few initial rounds of discussion of the incident, the discussion then focuses upon repairing the harm and gaining consensus on an outcome.<sup>138</sup> Many important issues are discussed during circle conferences that require a significant commitment of time and effort by all participants before a consensus is reached. If a consensus cannot be reached by the circle conference participants then some programs allow a judge to impose a sentence.<sup>139</sup>

Regardless of the outcome, follow-up is a necessary component of the entire process and may include further circles or specific monitoring and reporting requirements.<sup>140</sup> “Outcomes in circles depend principally upon the new relationships, new levels of understanding and trust that call on all participants to be accountable by doing their part to implement the agreement.”<sup>141</sup> Diligence in honoring the agreement is crucial to offenders wishing to avoid additional sanctions because they will likely face harsher treatment if they fail to meet the terms of the agreement.<sup>142</sup> “Follow-up circles provide the time to test the foundations of new perspectives, time to enable all participants to act on their promises to the circle. Promises when honored are instrumental in reinforcing significant changes in perspective.”<sup>143</sup> Follow-up with all participants helps maintain the restored balance for the community, as well as each participant, not just the offender.

#### IV. CONCLUSION

The most consistent justification for punishment under a liberal government is classical retributivism, which is concerned only with the goal of restoring societal balance. In utilizing retributivism’s modern incarnation as restorative justice, circle conferences facilitate healing and the restoration

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136. Minn. Dep’t of Corrections, *Facilitating Restorative Group Conferences Participant’s Guide Lesson 5: Further Development of Conferencing Skills* 5.6–5.7 (Jan. 2003), available at <http://www.corr.state.mn.us/rj/facilityconference/2003/PG%205%20-%201-03.pdf>.

137. *Id.* at 5.11.

138. *Id.* at 5.11–5.12.

139. Adams, *supra* note 118 at B1.

140. Stuart and Pranis, in *HANDBOOK OF RESTORATIVE JUSTICE*, *supra* note 5, at 130.

141. *Id.*

142. Adams, *supra* note 118 at B1.

143. Stuart and Pranis, in *HANDBOOK OF RESTORATIVE JUSTICE*, *supra* note 5, at 130.

of balance to a community affected by criminal behavior. This methodology has a greater potential to change offenders' lives in a positive way that will initiate their own desire to change their behavior than traditional incarceration and probation models have been able to achieve.

Circle conferences are effective in facilitating individual change because they are "based on an assumption of positive potential: that something good can always come out of whatever situation we are in."<sup>144</sup> Circles provide a safe place to face the shame and fear of losing love or respect that create enormous barriers to acknowledging harm we have caused others.<sup>145</sup> "In a Circle we acknowledge our mistakes *and* we hold ourselves and each other in compassion. . . . That compassion and the connection we feel to others create an environment in which we can face the painful reality of our impact on others."<sup>146</sup> But because forced acknowledgement of wrong-doing cannot be reconciled with a premise of individual liberty, circles must remain a voluntary option for offenders wishing to avoid or limit incarceration.

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144. PRANIS, *supra* note 89, at 67.

145. *Id.* at 68.

146. *Id.*