

# Introduction: The Utah Restorative Justice Conference

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The United States maintains a criminal justice leviathan without equal. Even a cursory statistical review bears out the uniquely American problem of crime and punishment: Almost 29 million persons (or households) were victimized in 1999, of which nearly 7.4 million involved crimes of violence such as rape and robbery.<sup>1</sup> The inevitable aftermath, of course, is a massive number of arrests—nearly 14 million criminal suspects in 2000<sup>2</sup>—numbers that have actually *improved* over the past decade.<sup>3</sup>

The resulting pressure placed on the judicial system and correctional facilities is twofold: the sheer number of criminal defendants processed each year and the lengthy sentences served by those eventually found guilty. Nearly a million people are convicted of state felonies each year,<sup>4</sup> two-thirds of whom are incarcerated for their crimes, serving an average of more than three years behind bars.<sup>5</sup> Another 68,000 convicted defendants are sentenced in the federal system,<sup>6</sup> with three-quarters of these offenders imprisoned for a mean sentence of nearly five years.<sup>7</sup> The net result is more than 6.5 million people under correctional

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<sup>1</sup>BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2001, at 188 tbl.3.1, 191 tbl.3.4, 212 tbl.3.41 (Kathleen Maguire & Ann L. Pastore eds., 2002) [hereinafter 2001 SOURCEBOOK]. As might be expected, those groups most susceptible to victimization are minorities, the poor, the young, and those who live in urban areas. *E.g.*, *id.* at 190 tbl.3.3., 193 tbls.3.6, 3.7, 194 tbls.3.8, 3.9, 195 tbls.3.10, 3.11, 196 tbls.3.12, 3.13, 197 tbl.3.14, 198 tbl.3.15, 202 tbl.3.23, 203 tbls.3.24, 3.25, 204 tbls.3.26, 3.27, 205 tbls.3.28, 3.29. For instance, black children and Native Americans of all ages have a better than one-in-ten chance per year of being a victim of violence, *id.* at 195 tbl.3.11, 196 tbl.3.13, while almost a quarter of all African Americans, Hispanic Americans, and low-income households suffer property crime like burglary and larceny in a given year. *Id.* at 202 tbl.3.23, 203 tbls.3.24, 3.25, 205 tbl.3.28.

<sup>2</sup>*Id.* at 342 tbl.4.1. Like their victims, offenders are disproportionately young minorities. *E.g.*, *id.* at 345 tbl.4.4., 352–53 tbl.4.7, 356–58 tbl.4.10, 360–62 tbl.4.12, 449 tbl.5.50.

<sup>3</sup>*E.g.*, *id.* at 188 tbl.3.1, 189 tbl.3.2, 192 tbl.3.5., 343 tbl.4.2, 351 tbl.4.6, 371 tbl.4.17, 372 tbl.4.18, 375 tbl.4.20, 376 tbl.4.21, 379 tbl.4.23, 381 tbl.4.27.

<sup>4</sup>*E.g.*, *id.* at 444 tbl.5.42.

<sup>5</sup>*Id.* at 446 tbls.5.45, 5.46.

<sup>6</sup>*E.g.*, *id.* at 416 tbl.5.19.

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

supervision in the United States, nearly 2 million of whom are incarcerated in state or federal institutions.<sup>8</sup>

Whatever the benefits of mass incapacitation, the statistics show a disturbing rate of recidivism among released inmates,<sup>9</sup> and in turn, the cost to support America's criminal justice system, from arrest to incarceration, seems pretty ominous: \$146.6 billion in 1999, or \$521 for every single person in the United States.<sup>10</sup> To place this all in context, America comprises about five percent of the human population but incarcerates one out of every four prisoners in the world, giving the United States by far the highest incarceration rate on the planet.<sup>11</sup> One astute commentator put it this way:

If you erected a razor wire fence around both North and South Dakota and counted every living man, woman, and child within that perimeter . . . as prisoners, it still would not equal the current jail and prison population. One could then erect a second razor wire fence around the entire state of Wyoming . . . and still it would not total the current incarcerated population.<sup>12</sup>

In terms of expenditures, our ostensibly future-oriented government, one committed to technological advancement, spends more than twice as much on all aspects of the justice system as on scientific research and development.<sup>13</sup> Or from a comparative perspective, the United States spends about the same amount on corrections alone as the entire gross domestic product of New Zealand.<sup>14</sup> But the price of warehousing prisoners (about \$30,000 per year for each inmate) and other quantifiable expenses do not include the incommensurable yet very real costs of

<sup>8</sup>*Id.* at 478 tbl.6.1, 486 tbl.6.12. Not surprisingly, a disproportionate number of those under the government thumb are young, undereducated minorities. *E.g., id.* at 417 tbl.5.20, 445 tbl.5.43, 455 tbl.5.59, 455 tbl.5.60, 484 tbl.6.9, 478 tbl.6.2, 486 tbl.6.13, 490 tbl.6.17, 499 tbl.6.29, 510 tbl.6.47, 511 tbl.6.48.

<sup>9</sup>*E.g., id.* at 506 tbl.6.42, 507 tbl.6.43, 508 tbl.6.44, 509 tbls.6.45, 6.46, 520 tbl.6.63, 521 tbl.6.64.

<sup>10</sup>*Id.* at 2 tbl.1.1, 11 tbl.1.6.

<sup>11</sup>See THE SENTENCING PROJECT, U.S. PRISON POPULATION—TRENDS AND IMPLICATIONS 1 (2003), available at <http://www.sentencingproject.org/brief/pub1044.pdf>; L. Randall Wray, *A New Economic Reality: Penal Keynesianism*, 43 CHALLENGE 31, 32 (2000).

<sup>12</sup>J.C. Oleson, *The Punitive Coma*, 90 CAL. L. REV. 829, 835 n.24 (2002).

<sup>13</sup>Compare 2001 SOURCEBOOK, *supra* note 1, at 2 tbl.1.1 (reporting government expenditures of \$146.6 billion for justice system in 1999), with U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2000, at 603 No.978 (reporting government expenditures of \$67.9 billion for research and development in 1999), available at <http://www.census.gov/prod/www/statistical-abstract-us.html>.

<sup>14</sup>Compare 2001 SOURCEBOOK, *supra* note 1, at 3 tbl.1.2 (U.S. government expenditures of \$49 billion for corrections in 1999), to <http://www.stats.govt.nz> ("Quick Facts – Economy") (gross domestic product of \$49.9 billion for New Zealand in 2000).

children growing up in fatherless homes, for instance, or crime victims being paralyzed by the fear of further violence.

This gloomy picture raises some important questions: *Can there be another approach to crime and punishment in the United States? Do the practices of other countries offer an alternative to the dismal state of American criminal justice? Or are we as a nation predestined to high crime rates, incarceration en masse, and an enormous penal tab?* With these queries in mind, the following Symposium was conceived and planned with the goal of exploring “restorative justice,” a relatively new and promising approach to the criminal sanction slowly emerging around the globe. Among other things, its advocates claim that restorative practices are more cost effective, more likely to reduce crime rates and recidivism, and more humane than traditional criminal justice, American-style. The potential result is a “win/win”<sup>15</sup> scenario, particularly for victims and offenders, many of whom are among society’s most fragile members—the young, the poor, racial and ethnic minorities, and so on.

The Utah Restorative Justice Conference brought together leading scholars and practitioners to examine restorative justice in light of our nation’s contemporary problems with crime and punishment, as well as successful restorative programs in other countries and the still embryonic movement along similar lines in the United States. Although discrepancies in definition and parameters exist, made abundantly clear during the conference proceedings, restorative justice generally can be described as an approach to criminal sanctioning that includes all stakeholders in a particular offense in a process of group decisionmaking on how to handle the effects of the crime and its significance for the future.<sup>16</sup> Substantive restorativeness contends that crime is not just an act against the state but against particular victims and the community in general, and for this reason, affected individuals, family members, and supporters are considered central to crime control and appropriate resolutions. Restorative justice thus seeks the active participation of these stakeholders to address the causes and consequences of crime.

A primary objective of restorativeness is making amends for the offending, particularly the harm caused to the victim, rather than inflicting pain upon the offender. Accountability is demonstrated by recognizing the wrongfulness of one’s conduct, expressing remorse for the resulting injury, and taking steps to repair any damage. According to restorative justice advocates, crime creates positive obligations that require affirmative action on the part of the offender—most notably, “restoring” victims to their previous status quo by

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<sup>15</sup>Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 36.

<sup>16</sup>See John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 5 (1999) (quoting definition of restorative justice formulated by Tony Marshall).

means of financial, physical, or even symbolic reparations. Some believe that restorative principles flow directly from the Bible,<sup>17</sup> while others have argued that restorativeness is merely a throwback to various notions of justice in biblical times, drawing upon the “atavistic appeal”<sup>18</sup> of Hammurabi’s Code, for instance, or *lex talionis*, the law of retaliation, often articulated in the Mosaic formula of “an eye for an eye, a tooth for a tooth.”<sup>19</sup> Many others, however, envision restorative justice as a thoughtful *secular* theory and attached set of practices, transcultural in reach and unbound to any particular denomination or religion in general.

This latter vision of restorativeness laments the barbaric<sup>20</sup> conditions of many modern prisons, with restorative practices minimizing or altogether rejecting the use of incarceration as inhumane and criminogenic. Moreover, some proponents argue that the “reintegrative shaming”<sup>21</sup> of restorative processes—bringing home the crime’s wrongfulness to the offender and then reintegrating him into the law-abiding community—can reduce the likelihood of recidivism through the power of affective bonds and dialogic persuasion, while compensating the victim and reaffirming the socio-legal norm that was violated. Various programs from around the world seem to square with this understanding of restorative justice—family group conferencing in Australia and New Zealand, circle sentencing in Canada, community reparative boards in Vermont, and victim-offender mediation throughout North America and Europe—all aimed at gathering stakeholders together to fashion appropriate resolutions for crime by means of mediated dialogue.

The first section of the Symposium provides important context and analysis of restorative justice practices. The preliminary piece comes from Heather Strang and Lawrence W. Sherman,<sup>22</sup> the administrators of a groundbreaking research

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<sup>17</sup>See JIM CONSEDINE, RESTORATIVE JUSTICE: HEALING THE EFFECTS OF CRIME 147–56 (1995); Charles W. Colson, *Truth, Justice, Peace: The Foundations of Restorative Justice*, 10 REGENT U. L. REV. 1, 4–6 (1998).

<sup>18</sup>See Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice*, 52 STAN. L. REV. 751, 754–55 (2000).

<sup>19</sup>See BLACK’S LAW DICTIONARY 913 (6th ed. 1990) (defining *lex talionis*).

<sup>20</sup>This seemed like an apropos adjective, given, for instance, the longstanding practice at Corcoran State Prison in California:

With their supervisors willfully turning a blind eye, Corcoran guards staged gladiator-style fights for years. The fights, between members of rival gangs or ethnic factions, were “staged for the amusement of correctional officers.” Inmates fought, even if they did not want to, because they knew that the guards were watching, and that they might be shot if they did not put on a good show. Even a valiant fight was no guarantee that one would not be shot.

Oleson, *supra* note 12, at 854–55 (footnotes omitted).

<sup>21</sup>This phrase was coined and defined by conference participant John Braithwaite. See JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (1989).

<sup>22</sup>Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15.

project on restorative justice in Australia known as the Reintegrative Shaming Experiments (RISE). Their article begins by detailing the estrangement of victims from the traditional criminal justice system and the false assumptions regarding the inherently retributive nature of victims and the general public. Instead, empirical evidence demonstrates that neither group is particularly punitive or vengeful—and, in fact, what victims really want is an opportunity to be informed about and participate in any decisionmaking, to receive emotional restoration and material or symbolic reparations, and to be treated with fairness and respect during the sentencing process. Strang and Sherman provide data, derived in part from the RISE project, suggesting that restorative justice not only does a better job at meeting these demands but also at assuaging victim fear and feelings of insecurity and anxiety, reducing anger and increasing sympathy and trust toward offenders, and providing closure for victims of crime. Moreover, the authors contend that restorative justice neither undermines the rights of offenders nor endangers society through increased criminality.

Like Strang and Sherman, mediation experts Kathy Elton and Michelle M. Roybal emphasize the basic desires of crime victims and the ways in which the traditional criminal justice system ignores these needs.<sup>23</sup> Drawing upon their experience as leaders of alternative dispute resolution programs in Utah’s state and federal court systems (respectively), Elton and Roybal detail the fall of the rehabilitative approach to juvenile justice followed by the rise of get-tough retributive schemes, both in Utah and the nation as a whole. These paradigms exclude important “clients” (e.g., crime victims and relevant communities), typically resulting in “mutual powerlessness” of those parties most directly affected by the crime and criminal process. Elton and Roybal then suggest how restorative justice offers a new paradigm that is more balanced in terms of participants and ultimate goals in the sanctioning process. In particular, they detail one prominent practice of restorative justice, victim-offender mediation, and the benefits that flow from face-to-face meetings and dialogue between offenders and those they have injured.

Restorative justice programs are not without practical concerns, giving reason for pause and reflection—a topic contemplated in the next two articles, beginning with a study by political scientists Susan M. Olson and Albert W. Dzur on the professional roles in restorative justice programs.<sup>24</sup> Among the underlying themes of restorativeness is the de-professionalization of criminal justice and the empowerment of private citizens drawn from the relevant community. Although it is often assumed that returning conflicts to the people, so to speak, will result in diminished control and participation of criminal justice actors such as judges

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<sup>23</sup>Kathy Elton & Michelle M. Roybal, *Restoration, A Component of Justice*, 2003 UTAH L. REV. 43.

<sup>24</sup>Susan M. Olson & Albert W. Dzur, *Reconstructing Professional Roles in Restorative Justice Programs*, 2003 UTAH L. REV. 57.

and attorneys, Olson and Dzur make the critical observation that restorative programs create a new breed of expert they call the “restorative justice professional,” often reconstructing the roles of more traditional actors in the criminal process. Based on their analysis of the Passages program in Salt Lake City and Reparative Probation Boards in Vermont, Olson and Dzur examine the unique duties placed on restorative justice professionals and, just as importantly, the tensions that arise from the competing roles played by these new experts.

In his narrative of one ambitious but ill-fated restorative justice initiative, legal historian Thomas D. Russell draws upon another vocation, that of community activist.<sup>25</sup> Following personal experiences with student rioters in Boulder, Colorado, Russell helped establish a community organization to deal with the quality-of-life problems that constantly frustrated a residential neighborhood “on the margin between town and gown.”<sup>26</sup> With the detail of a trained historian, he offers what might be the first anthropological study of restorative justice in an American community.<sup>27</sup> Russell sets the background of a dysfunctional polity through statistics and relevant events—including eight student riots over the course of four and a half years—as well as detailing the affected stakeholders, their often clashing interests, and the various antecedents to the offending behavior. He then describes restorative justice-based techniques, such as community group conferences and sentencing circles, that were employed by neighborhood residents and other stakeholders to address the nontrivial harms that were caused by seemingly low-level criminality. Ultimately, however, Russell suggests some important lessons that can be drawn from the eventual demise of the restorative justice initiative, including knee-jerk claims of vigilantism, the lack of institutional support or even antagonism, and community reluctance to enforce its own regulations.

The caveats indicated by Olson and Dzur’s study and Russell’s cautionary conclusion should temper Pollyannaish claims about restorative justice. Still, there are good reasons to be hopeful about the practice of restorativeness—given a growing body of empirical evidence that substantiates the many benefits from restorative justice-based approaches. In the next article, empiricists and social work experts William R. Nugent, Mona Williams, and Mark S. Umbreit provide a much-needed meta-analysis of the relationship between participation in

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<sup>25</sup>Thomas D. Russell, *Between Town and Gown: The Rise and Fall of Restorative Justice on Boulder’s University Hill*, 2003 UTAH L. REV. 91.

<sup>26</sup>*Id.* at 92.

<sup>27</sup>“I am not an anthropologist,” Professor Russell admits, “although I often felt like an untrained anthropologist while observing life [in the Boulder neighborhood] during 2000 and 2001.” *Id.*

restorative justice programs and subsequent criminal behavior.<sup>28</sup> The authors begin with a brief overview of one particular type of restorative program, victim-offender mediation, followed by a description of their scientific methodology in examining 15 studies involving over 9,000 juveniles at 19 different sites. In spite of material differences across these studies, such as methodological quality and disagreement on critical definitions, Nugent, Williams, and Umbreit offer statistical evidence demonstrating that restorative programs can substantially reduce the rate of reoffending as well as the severity of new crimes. The authors suggest that these findings might inspire jurisdictions across the nation to consider implementing restorative programs for juvenile offenders.

Promising news is also presented by social psychologist Barton Poulson in his review of research on the cognitive results of restorative justice.<sup>29</sup> After detailing his methodology, Poulson analyzes data from seven major studies of restorative programs, drawing out and then aggregating empirical evidence on a dozen psychological outcomes for stakeholders participating in such practices, including feelings of fairness, satisfaction, fear, and respect. Despite substantial differences across programs, the data were “remarkably consistent,”<sup>30</sup> with restorative approaches significantly outperforming the traditional court system on nearly every variable and, conversely, the traditional system unable to surpass restorative programs even once. Moreover, the article sketches potential connections between the benefits of restorative justice and the precursors of youth suicide, suggesting an interesting area for future research on how the former programs might prevent the latter tragedies. Overall, Poulson’s empirical review and the meta-analysis of Nugent, Williams, and Umbreit strongly support restorative justice as an effective alternative (or supplement) to the traditional process of punishment.

The foregoing articles provide a useful background for the next Symposium section on the theory and jurisprudence of restorative justice. The section opens with my “scene-setting article,”<sup>31</sup> beginning with a review of punishment philosophy and the relentless tribal warfare among advocates and critics of particular theories.<sup>32</sup> Part of the problem is the use of hypocritical critiques or surreal hypotheticals, which the article examines in some detail. But the struggle among punishment theorists is also a function of a much deeper problem: an

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<sup>28</sup>William R. Nugent, Mona Williams & Mark S. Umbreit, *Participation in Victim-Offender Mediation and the Prevalence and Severity of Subsequent Delinquent Behavior: A Meta-Analysis*, 2003 UTAH L. REV. 137.

<sup>29</sup>Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167.

<sup>30</sup>*Id.* at 167.

<sup>31</sup>John Braithwaite, *Holism, Justice, and Atonement*, 2003 UTAH L. REV. 389, 391 (describing Luna’s article).

<sup>32</sup>Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205.

atomistic, linear style of reasoning that forecloses any possibility of mutual agreement and compromise. After reviewing the idea of “holism,” the article suggests that an open-minded, eclectic process might admit various sanctioning theories in resolving particular cases. Although individuals may disagree on the precise *theory* of punishment, they may nonetheless agree on an appropriate *sanction* for a given crime. In particular, a procedural conception of restorative justice allows distinct voices to contribute to an appropriate outcome without necessarily assenting to the same theory. To me, at least, this deliberative process might better serve the diversity of perspectives on criminal sanctioning than the general application of any one theory of punishment.

Although finding much promise in the processes associated with restorative justice, Paul H. Robinson is troubled by the “anti-justice agenda” that seems to underpin restorativism as a philosophical justification.<sup>33</sup> One of the foremost scholars of punishment theory and a major player in modern penal code reform, Robinson speaks first to the virtues of restorative processes—their ability to bring home to the offender the wrongfulness of his conduct, to reaffirm the social norm embodied in law, to deter criminality through the incorporation of affected stakeholders (who may have an emotive force on the offender), and just as importantly, to increase the participation of such stakeholders in the sanctioning process and thus advance the perceived legitimacy of the criminal justice system. The problem is not restorative *processes*, Robinson then argues, but the normative goals of many restorative justice advocates, namely, banning all “punishment”—or at least those sanctions grounded in retributivism. Among other things, Robinson found it odd for restorativists to herald the importance of allowing victims, family members, and other stakeholders to freely express their views on crime and punishment, but then reject an opinion if it includes meting out “just deserts” for the offender. Restorative justice theory also would allow disparate treatment of otherwise identical offenders, could encourage arbitrary decisionmaking, and may pay insufficient heed to society’s overriding interest in punishing crime. Nonetheless, Robinson suggests that restorative processes *sans restorativist theory* could be valuable tools—particularly in dealing with certain types of crimes and criminals, such as low-level offenses and juvenile delinquents—so long as offenders receive the punishment they deserve, no more, no less.

Like Robinson, Stephen P. Garvey sees redeeming aspects in the restorative justice movement, although he takes a different angle in analyzing the perils of restorativism as a justification for state-imposed sanctions.<sup>34</sup> A highly regarded theorist who has examined difficult sentencing issues like capital punishment and

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<sup>33</sup>Paul H. Robinson, *The Virtues of Restorative Processes, the Vices of Restorative Justice*, 2003 UTAH L. REV. 375.

<sup>34</sup>Stephen P. Garvey, *Restorative Justice, Punishment, and Atonement*, 2003 UTAH L. REV. 303.



shaming penalties, Garvey begins by noting that some restorative justice proponents erroneously conceive of crime as material harms and nothing else. In fact, however, criminal acts do more than inflict physical injury—they also constitute “wrongs” by conveying the message that those who have been victimized are of lesser moral worth than the perpetrators. According to Garvey, merely requiring an offender to repair the material harm caused by his crime does not and cannot fix the wrong of criminality. Instead, real restoration will involve punishment as commonly understood, the intentional imposition of some type of hardship or burden on the offender as a means of censuring the wrongful act. After considering and responding to potential concerns and counterpoints, Garvey suggests that the practice of restorative justice might reflect a theory of “punishment as atonement,”<sup>35</sup> where the victim and offender go through a three-step process of admission, expiation, and forgiveness. It is this reconception of restorative justice—one that seeks the transformation rather than the elimination of punishment—that Garvey finds particularly promising.

Other conference participants were less optimistic. For instance, David Dolinko’s article isolates a number of serious intellectual flaws in restorative justice.<sup>36</sup> A noted legal philosopher and critic of retributive theory, Dolinko skillfully cuts to a set of fundamental questions that cannot be avoided by restorativists. Although the thrust of his article has relevance to the entire body of restorative justice literature, it places heavy emphasis on the scholarship of John Braithwaite, whose “work has the particular advantages of clear and thorough exposition and an engagement with traditional philosophical issues.”<sup>37</sup> Dolinko begins by questioning whether even sophisticated restorativists like Braithwaite can avoid the classic conundrum of intentionally punishing the innocent. Like other consequentialist approaches, restorativism subscribes to a ban on scapegoating only as a contingent (rather than absolute) moral value. Restorative justice would also allow, if not demand, disparate treatment of similarly situated offenders based on the “unappealing criterion of ‘equal justice’ for victims,”<sup>38</sup> opening the door to an *ad hominem* style of punishment at the direction of private, aggrieved citizens. Moreover, Dolinko challenges whether a given society’s values and practices are subject to radical change—for instance, whether the affinity for reintegrative shaming in nations such as Japan can be imported into America’s hyper-individualistic, demonstrably punitive society. Finally, it is an open question whether the mechanisms of restorative justice are properly housed in a criminal justice system. As Dolinko’s article suggests, there

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<sup>35</sup>See Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801 (1999).

<sup>36</sup>David Dolinko, *Restorative Justice and the Justification of Punishment*, 2003 UTAH L. REV. 319.

<sup>37</sup>*Id.* at 319.

<sup>38</sup>*Id.* at 333.

may be powerful reasons for denominating certain behavior a “crime,” but compensating the victim is not necessarily among them.

Robert Weisberg’s article has a narrower focus, concentrating on an insufficiently theorized problem that has been ignored or slighted by much recent scholarship: the use and abuse of the term “community.”<sup>39</sup> A prominent figure in the field of law and literature as well as on cultural issues of criminal justice, Weisberg recognizes that the perils of “community” generalize to many areas but are nonetheless acute and possibly lethal to the embryonic restorative justice movement. He begins by unpacking the term and examining its semantic forms, not merely for pedagogical purposes but to demonstrate the range of potential meanings and the concomitant confusion when “community” is deployed in public debate. Weisberg then unravels the various meanings within the restorative justice literature, pausing to note the ways in which “community” invokes disparate images without necessarily offering content to restorative principles or specific programs. “Community” can be more than a trope, however—it carries with it the danger of exploitation, providing rhetorical cover for troublesome social policies and practices. In particular, Weisberg chronicles the sad history of deinstitutionalizing psychiatric patients during the latter half of this past century. Under the guise of returning the mentally ill to their “community,” patients were tossed back to unprepared families or, even worse, left to flounder in single-room occupancy hotels in the “psychiatric ghettos”<sup>40</sup> of urban America. Weisberg thus provides the reader a powerful caveat for the future of restorative justice: Beware the melodious language of “community” and how it might conceal crucial issues that, if left unaddressed, can subvert the goals and ultimate viability of restorative justice.

The Symposium’s section on punishment philosophy is capped off, appropriately enough, by the world’s preeminent scholar of restorative justice, John Braithwaite.<sup>41</sup> In his article, Braithwaite responds to the foregoing theoretical pieces and the criticisms leveled against restorativism. Despite finding much to like about holism and atonement in the context of restorative justice, Braithwaite questions whether the values of restorativism and retributivism are truly compatible under my holistic approach, for instance, or whether Garvey’s model of atonement can provide a viable basis for criminalization. In turn, Braithwaite rejects Dolinko’s claim that restorative justice would perpetuate unequal punishment for equivalent crimes or that restorativism would allow penal scapegoating of the innocent. Among other things, restorative programs are more apt to consider important differences among cases rather than the modern style of cookie-cutter sentencing that creates an *illusion* of equality, while Braithwaite’s

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<sup>39</sup>Robert Weisberg, *Restorative Justice and the Danger of “Community,”* 2003 UTAH L. REV. 343.

<sup>40</sup>*Id.* at 366.

<sup>41</sup>John Braithwaite, *Holism, Justice, and Atonement,* 2003 UTAH L. REV. 389.

republican-based normative theory rejects out of hand (absolutely, not contingently) the idea of punishing the blameless.

Braithwaite also questions the concerns raised by Robinson, particularly his understanding of justice and the alleged demand for retribution. “Justice” need not be defined as doling out the precise punishment an offender deserves; instead, the term might include concerns of procedural and/or social justice as well as distributive fairness. And although people may well desire retribution in the first instance, this emotion is neither healthy nor unavoidable—in fact, one of the great benefits of restorative justice is its ability to break the cycle of harm infliction and thereby transcend the urge to strike back in kind. Finally, Braithwaite acknowledges Weisberg’s warning against heedless community-talk. Like Weisberg, Braithwaite believes that the phrase “community” can be quite dangerous, though it should be seen as a double-edged sword: If the term is to be misused, it is just as likely that the abuse will take the form of judges negating a restorative outcome for contravening some interest of the “community.” Nonetheless, Braithwaite commends all of the articles as important contributions to an ongoing dialogue between supporters and critics of restorative justice, with the entire collection alternating between the pro-restorativeness sanguinity of the “believing game” and the erudite cynicism of the “critique game.”<sup>42</sup>

Having described restorative practices and fleshed out the philosophical arguments for and against restorativeness, the last Symposium session employs the tools of allied disciplines to provide a broader perspective on restorative justice. In the first article, Sara Sun Beale continues her pathbreaking work on the extralegal factors that influence criminal justice policy, this time focusing on the prospects for restorative justice in America.<sup>43</sup> Beale begins by reviewing the rise of punitive sentencing schemes in the United States over the past two decades, evidenced by an increase in public support for get-tough policies and a shift from the “rehabilitative ideal” to retributive or incapacitative strategies. This history can be contrasted with the rise of restorative justice in a number of Western nations, including Australia, Canada, and New Zealand, which leads Beale to detail those contemporary ingredients that might influence a similar move in the United States. On the one hand, restorative justice could be consistent with the conservative itch to cut budgets, the liberal desire to limit the human costs of mass incarceration, and the recent reduction in public anxiety over crime and attached attitudes about punishment severity. On the other hand, however, a number of factors might push in the opposite direction: the news media’s devotion to titillating crime stories and the resulting fear inspired in the public; the interest-group patronage and demagoguery of politicians in support of get-tough penal

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<sup>42</sup>*Id.* at 389–90.

<sup>43</sup>Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413.

policies; a variety of cognitive errors by the electorate that magnify the effects of media coverage and political grandstanding; and the general legislative movement toward limited discretion in sentencing. Although the ultimate outcome remains far from clear, Beale's analysis provides a useful framework for examining the extralegal factors that may well affect the future of restorative justice in the United States.

In the next article, Darren Bush provides a first-ever law and economics critique of restorative justice.<sup>44</sup> Bush begins with a helpful overview of the law and economics literature and, in particular, its stance on crime and punishment. After discussing the traditional rationality assumption of economic analysis, Bush examines the potential penological goals of deterrence and compensation, the related differences between crime and tort, and why the criminal justice system cannot solely be concerned with victim compensation at the expense of crime deterrence. Bush then considers the relevance of these inputs for restorative justice, suggesting that restorative programs cannot fully compensate the direct victim of crime due to *ex ante/ex post* differences in valuation. Likewise, reparations become difficult to evaluate with so-called victimless crimes and when victims are hard to identify or suffer nonquantifiable injuries. The article concludes, however, that restorative justice may reduce crime and recidivism in a way not typically contemplated by law and economics scholarship: by shaping the preferences of potential criminals. Through the therapeutic tools of restorativeness, including direct contact with victims and interaction with family and community members, an offender may identify a new "choice set" that better recognizes the benefits of pro-social behavior and the costs of criminality.

Like Bush, Douglas J. Sylvester draws upon another discipline to provide a helpful critique of restorative justice.<sup>45</sup> A rising scholar in the area of e-commerce and internet law, Sylvester employs the methodology of one of his other passions, legal history. He begins with a look at the spurious historiography in the entertainment industry and its resemblance to similar perversions in the field of law. Among the most serious charges that can be leveled against the forensic deployment of history is that of "mythmaking"—creating history for the sole purpose of advancing a policy goal—a concern explored through three racially tinged cinematic productions which evince varying levels of misrepresentation (*The Birth of a Nation*, *Roots*, and *The Civil War*). After providing a typology or "rules" for historical legitimacy and the common goals served by the forensic use of history, Sylvester applies this framework to the restorative justice movement and its desire to link restorativeness to a legitimate and possibly preferable past. In their cursory analysis of acephalous and early-state societies, restorativeness often

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<sup>44</sup>Darren Bush, *Law and Economics of Restorative Justice: Why Restorative Justice Cannot and Should Not Be Solely About Restoration*, 2003 UTAH L. REV. 439.

<sup>45</sup>Douglas J. Sylvester, *Myth in Restorative Justice History*, 2003 UTAH L. REV. 471.

claim that human collectives displayed a preference for restitution over physical violence, an orientation toward the victim of wrongdoing, and an intention to restore the balance within the community. Unfortunately, much of this “history” is pruned of relevant context or rhetorically distorted from a relatively rare occurrence to an abiding practice within the relevant society. Although acknowledging a range of legitimacy in the use of history, Sylvester nonetheless concludes that restorative justice has moved dangerously close to myth by failing to recognize the inherent complexity and limitations in forensic historicism.

The final two articles address an intriguing and meaningful interdisciplinary issue for restorative justice: the place (if any) for religion in restorative programs. In his contribution, Frederick Mark Gedicks, an authority on the religion clauses of the First Amendment, begins with an overview of the many ways in which religious values and institutions can be relevant to restorative justice, from the use of theologically based (or sounding) principles in otherwise secular projects to the creation and management of restorative programs by religious organizations.<sup>46</sup> Gedicks then details a two-track theory of the Establishment Clause that oscillates between a neutrality-type analysis and one grounded in the ideal of “separation of church and state,” suggesting that the constitutionality of religiously based restorative programs will depend on which doctrinal “track” applies. Because neutrality analysis requires that a given religious activity be treated no better or worse than other religious or non-religious activities, this track would appear more accommodating to religiously based restorative justice, so long as non-religious restorative programs (if they, in fact, exist in the given jurisdiction) receive equal treatment. Gedicks notes, however, that the paradigmatic case for neutrality analysis—school voucher programs—would be difficult, if not impossible, to analogize to restorative justice projects. Moreover, sectarian restorative justice tends to introduce concerns of voluntariness and freedom from religious indoctrination. There may be difficult legal problems of church-state separation as well, with religiously based restorative programs skirting the ban on state delegations of powers to religious actors or institutions. Although an amalgam of religion and restorative justice may seem attractive to many, Gedicks openly questions whether the mixture will be dead on arrival at the courthouse steps.

The final article is authored by my colleague Daniel J.H. Greenwood, who, in addition to other academic pursuits, teaches and writes in the area of Jewish law.<sup>47</sup> Like Gedicks, he notes the connection between some sectors of the restorative justice movement and religious doctrine, in particular, Christian theology—which leads Greenwood to question whether religious values should

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<sup>46</sup>Frederick Mark Gedicks, *Restorative Justice and the Two-Track Establishment Clause*, 2003 UTAH L. REV. 523.

<sup>47</sup>Daniel J.H. Greenwood, *Restorative Justice and the Jewish Question*, 2003 UTAH L. REV. 533.

play any part in a secular criminal justice system. Foundational tracts of the Jewish tradition make clear that ultimate justice is the work of God, not men, and conversely, that individuals and groups, rather than the Almighty, must induce pro-social behavior and an aversion to criminal conduct to prevent people from “swallowing each other alive.”<sup>48</sup> Jewish law resolves this apparent paradox by establishing a criminal justice system aimed not at ultimate justice but only reduced crime. Likewise, restorative justice cannot hope to rebalance the universe or achieve personal salvation, for instance, as assumed by religiously motivated restorativeness. Instead, Greenwood argues that restorative justice and all other justifications for punishment must serve human ends, in particular, protecting society. To its advantage, restorative justice embraces principles and practices consistent with sociological theories of perceived legitimacy and criminality, and, as an aside, restorativeness conforms with the learned wisdom of Jewish communal law and its emphasis on mediated resolutions. Still, modern criminal law must be seen as legitimate in all corners of a pluralistic society in order to achieve ambitious social goals like crime reduction via deterrence, thus requiring that restorative justice avoid the moralizing of one religion or another when attempting to motivate and guide *all* citizens.

In the end, restorative justice proves to be a fascinating topic and a provocative foil for challenging contemporary crime and punishment in the United States. The Utah Restorative Justice Conference may be the first of its kind in American legal academe, providing a much-needed forum to hash out the arguments for and against restorativeness vis-à-vis traditional approaches to the criminal process. As such, the Symposium hopes to inspire further debate on restorative justice, its principles, and its practices. Restorativeness certainly has both charms and warts, but given the current state of affairs in criminal courts and correctional facilities across the nation, the potential promise of restorative justice seems well worth exploring.

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<sup>48</sup>*Id.* at 548.