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**FULL CIRCLE: INCORPORATING ASPECTS OF
RESTORATIVE JUSTICE PRINCIPLES FROM GERMANY
INTO AMERICA'S JUVENILE JUSTICE SYSTEM**

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“But to punish and not to restore, that is the greatest of all offences.”^{††}

INTRODUCTION

We have a problem in the United States: the juvenile incarceration rate is the highest among . . . developed nations.¹ Since the 1990s, the juvenile justice system in America, from a global context, has followed a more punitive trajectory in dealing with young offenders, in comparison to international trends.² Indeed, internationally, countries are seeking to incorporate the United Nations Convention on the Rights of the Child (CRC), which “requires states to use alternatives to incarceration whenever possible . . . [and] prioritizes rehabilitation over retribution.”³ Currently, the United States has not ratified the CRC.⁴

In the United States, one “of the primary criticisms of juvenile

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^{††} ALAN PATON, TOO LATE THE PHALAROPE 264 (1953).

¹ Sandra Newcombe, *The DOJ Comes to Town: An Argument for Legislative Reform When the Juvenile Court Fails to Protect Due-Process Rights*, 44 U. MEM. L. REV. 921, 925–26 (2014). I acknowledge that not all juveniles who go through the American system are incarcerated. The principles discussed in this Article should therefore be applied to those who are.

² Beth Caldwell, *Globalization and Juvenile Life Sentences: Creating Meaningful Opportunities for Release for Juvenile Offenders*, 2014 J. INST. JUST. & INT'L STUD. 1, 2.

³ *Id.* at 1–2.

⁴ *Id.* at 1.

incarceration . . . [is] its inability to effectively address recidivism.”⁵ The national recidivism rate in the United States has at times exceeded 50%.⁶ By contrast, there is evidence that “restorative justice [programs] tend to decrease” recidivism levels.⁷ Restorative justice is a “model[] of conflict resolution” that treats crime as an opportunity and “emphasizes healing rather than punishment.”⁸

While restorative justice may be effective, this Article asserts that the answer to America’s incarceration problem is not *replacing* the current system with one based on restorative justice, but rather *incorporating* restorative justice principles into our system. After all, punishment is not bad in and of itself. Indeed, punishing criminals “treats [them] as . . . dignified human being[s] by responding to [their] conduct in a way that respects [their] choice to engage in wrongful behavior.”⁹ Punishment in the form of retribution is “intended to vindicate the value of the victim denied by the wrongdoer’s action.”¹⁰ However, the success of restorative justice at preventing future crimes and its satisfaction rates, both of which will be discussed in this Article, cannot simply be ignored. Restorative justice involves both the offender and the victim and searches for solutions for reconciliation,¹¹ which can be very beneficial for our system. In short, the point of this Article is that a proper approach to juvenile detention involves both punishment and restoration.

This Article is divided into four parts. Part I will explain both the theories of retributive justice and restorative justice, so that the reader will understand the underlying rationales of both. Part II briefly discusses the development of the juvenile justice system in the United States and the current status of juvenile law therein. Part III will look at how restorative justice has developed in Germany, and Part IV will

⁵ Judy C. Tsui, *Breaking Free of the Prison Paradigm: Integrating Restorative Justice Techniques into Chicago’s Juvenile Justice System*, 104 J. CRIM. L. & CRIMINOLOGY 635, 641 (2014).

⁶ Connie de la Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U. S.F. L. REV. 983, 1022 (2008). See generally MATTHEW R. DUROSE ET AL., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS (2014), <https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf> (conducting a study from 2005 to 2010 which found high rates of recidivism for offenders).

⁷ Tsui, *supra* note 5, at 641.

⁸ Paul Clark, *Restorative Justice and ADR: Opportunities and Challenges*, 44 ADVOCATE, Nov. 2001, at 13, 13.

⁹ David A. Starkweather, *The Retributive Theory of Just Deserts” and Victim Participation in Plea Bargaining*, 67 IND. L.J. 853, 855 (1992).

¹⁰ Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1686 (1992).

¹¹ See Mary Ellen Reimund, *Mediation in Criminal Justice: A Restorative Approach*, 46 ADVOCATE, May 2003, at 22, 22 (discussing how reconciliation can be achieved from various means such as restitution and mediation).

evaluate how principles of restorative justice from Germany could potentially be incorporated into United States law to supplement punishment.

I. THEORIES OF RETRIBUTION AND RESTORATIVE JUSTICE

In order to lay a foundation for the rest of this Article, it is important to first discuss what is meant by the theories of retributivism and restorative justice.

A. Retributivism

The criminal theory of retribution generally focuses on “revenge for the past violation of a law.”¹² Typically, it is concerned with punishing a past offense rather than deterring a future one.¹³ The retribution sought in a criminal case may be viewed as “social condemnation” of a criminal’s act and an affirmation of appropriate social norms.¹⁴ The position of retributivism is that “punishment is necessary,” as society must mete out some kind of “retribution against [lawbreakers].”¹⁵ Punishment, rather than being valuable as a deterrent, is valuable in and of itself, as the person who has “committed a crime . . . simply deserve[s] to be punished,” and there is no further justification needed.¹⁶

This theory has been around for quite some time. From ancient times until the middle ages, numerous “criminal justice systems were . . . [built around a] concept of retribut[ion].”¹⁷ It can also be found in both “biblical and Talmudic forms of justice.”¹⁸

Those who argue in favor of this theory have said that punishment is not a means of “promoting another [g]ood,” but rather is “to be pronounced over . . . criminals proportionate to their [deeds].”¹⁹ Furthermore, it has been argued that crimes must “be negated in order to re-establish equivalence” within a society, and that can only be done through punishment.²⁰

B. Restorative Justice

While the theory of retributivism is much more focused on past

¹² Maria Foscarinis, *Toward a Constitutional Definition of Punishment*, 80 COLUM. L. REV. 1667, 1679 (1980).

¹³ *Id.*

¹⁴ *Id.* at 1681.

¹⁵ Matthew Haist, *Deterrence in a Sea of “Just Deserts”: Are Utilitarian Goals Achievable in a World of “Limiting Retributivism”?*, 99 J. CRIM. L. & CRIMINOLOGY 789, 793 (2009).

¹⁶ *Id.* at 793–94.

¹⁷ *Id.* at 795.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

actions, restorative justice looks more towards the future.

Like retributivism, restorative justice has pre-modern roots; indeed, there is evidence of restorative justice in ancient “Greek, and Roman civilizations” and in Eastern traditions.²¹ It is extremely difficult to find a definition of restorative justice that is universally recognized.²² John Braithwaite, a major figure in the modern movement for restorative justice, has stated: “[R]estorative justice is about restoring victims, restoring offenders, and restoring communities.”²³ It has been viewed as the “new lens’ through which to view crime.”²⁴

Restorative justice involves the offender, as well as his or her victim, and members of the community that were harmed by the offense.²⁵ While it can embrace outcomes related to the past, it is largely future oriented, and is intended to address the needs of all involved.²⁶ It refers to “a variety of methods designed to help” those involved “take a pro-active approach to crime and engages them” in a “healing process.”²⁷ These methods include: “restorative school discipline and anti-bullying programs, truth and reconciliation commissions, peace-making circles, community justice programs, family-group conferencing, sentencing circles and victim-offender mediation/dialog.”²⁸ The last of these methods will be discussed at length in this Article.

A key to restorative justice is that it does not hold the State to be the “primary victim” of a crime; rather, it sees crime as being committed “against individual[s].”²⁹

C. Summary

In light of the explanations given above, the differences between a retributive approach to justice and a restorative approach is that the former focuses on past actions, while the latter is much more future oriented. It is conceded that there is overlap in some cases; retribution can prevent future crime through incapacitation, deterrence, and even

²¹ Stephen P. Garvey, *Restorative Justice, Punishment, and Atonement*, 2003 UTAH L. REV. 303, 304.

²² *Id.*

²³ JOHN BRAITHWAITE, RESTORATIVE JUSTICE & RESPONSIVE REGULATION 11 (2002); see also Garvey, *supra* note 21, at 304–05.

²⁴ Hadar Dancig-Rosenberg & Tali Gal, *Criminal Law Multitasking*, 18 LEWIS & CLARK L. REV. 893, 903 (2014) [hereinafter *Multitasking*].

²⁵ Garvey, *supra* note 21, at 305.

²⁶ See *Multitasking*, *supra* note 24, at 921.

²⁷ Ken Haldenstein, *Integrative Law: Law As A Healing Profession*, 40 WESTCHESTER B.J. 35, 39 (2015).

²⁸ *Id.*

²⁹ Mark S. Umbreit et al., *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 255 (2005).

reform.³⁰ Likewise, as mentioned above, restorative justice can embrace outcomes related to past actions.³¹ However, generally speaking, and for the purposes of this Article, retributivism focuses on past events while restorative justice focuses on the future.

Having laid this foundation, this Article will now consider the history of juvenile justice in the United States.

II. HISTORY OF JUVENILE JUSTICE IN THE UNITED STATES

“Until the early nineteenth century,” youths were treated much like adults for criminal offenses.³² If children were found to be “criminally responsible,” then they were subject to the same punishments as adults, including the death penalty.³³ As a result, “[j]udges sometimes dismissed charges and juries occasionally acquitted young offenders to avoid imposing excessively harsh sentences.”³⁴ In order to avoid actions such as these and to avoid losing control over youth, reformers in the East Coast created institutions wherein age segregation was incorporated.³⁵ As time passed, these institutions expanded, reaching the Midwest by the middle of the nineteenth century.³⁶ Despite this, however, states continued to treat children in the same manner as adults.³⁷

Towards the end of the nineteenth century, the Progressive Movement recognized that children required special treatment, as they were more vulnerable than adults.³⁸ The Progressives believed that, due to “their age and immaturity, children were . . . less culpable than adult[s] . . . and [were] more likely to respond [in a favorable manner] to rehabilitative treatment.”³⁹ They envisioned a system that would provide young criminals with the “least restrictive environment” and where the “best interests of the child” were taken into consideration.⁴⁰

The first juvenile court in the United States was opened in Cook County, Illinois in 1899. This court was established with the purpose of

³⁰ See Scott A. Schumacher, *Magnifying Deterrence by Prosecuting Professionals*, 89 IND. L.J. 511, 539–40 (2014).

³¹ *Multitasking*, *supra* note 24, at 921.

³² BARRY C. FELD, CASES AND MATERIALS ON JUVENILE JUSTICE ADMINISTRATION 1 (4th ed. 2013).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Jennifer D. Tinkler, *The Juvenile Justice System in the United States and the United Nations Convention on the Rights of the Child*, 12 B.C. THIRD WORLD L.J. 469, 476 (1992).

³⁹ *Id.*

⁴⁰ *Id.*

“secur[ing] guidance and care for” those brought before it.⁴¹ Ultimately, its goal was to “best serv[e the child’s] welfare.”⁴² “This purpose . . . [became] the foundation of our juvenile justice system,” and, although the United States is not a party to the CRC, this purpose is consistent with “the ideals [that are] expressed [within that] Convention.”⁴³ Similar courts were established in other states, and by the end of World War II, juvenile courts had been established in each state.⁴⁴

Being originally centered on reformation, these courts were seen as “benign, nonpunitive, and therapeutic.”⁴⁵ The Progressives wanted to use a “scientific preventative approach” in lieu of punitive measures.⁴⁶ Thus, it appears that the system they envisioned had similar goals as those of restorative justice – rather than focusing on the past actions of the juvenile, it was much more concerned with his or her future well-being.

However, “[b]y the mid-1960s, it had become clear to many that the separate criminal justice system established solely for the adjudication of juveniles had fallen short of its stated goals.”⁴⁷ At the time, the growing numbers of offenders were overburdening the system, and as such, individualized treatment was no longer an option.⁴⁸ The extremes that had been seen in the pre–progressive era (i.e., either letting a juvenile off or subjecting him or her to an adult sentence) began to re–surface, as juveniles received either a “slap on the wrist” or were sent to [juvenile] institutions” potentially for years.⁴⁹ The treatments that the juveniles received would typically not reflect “their individual need[s]” and would not be tailored to the nature of their crime.⁵⁰ Furthermore, juveniles received “no follow-up treatment [designed] to prevent recidivism.”⁵¹

It was around this time that the Supreme Court of the United States decided a number of cases, such as *Kent v. United States*,⁵² *In re*

⁴¹ *Id.* at 476–77.

⁴² *Id.*

⁴³ *Id.* at 469, 474, 476–77.

⁴⁴ C. Antoinette Clarke, *The Baby and the Bathwater: Adolescent Offending and Punitive Juvenile Justice Reform*, 53 KAN. L. REV. 659, 667 (2005).

⁴⁵ Tinkler, *supra* note 38, at 477 (quoting Barry C. Feld, *The Punitive Juvenile Court and the Quality of Procedural Justice: Disjunctions Between Rhetoric and Reality*, 36 CRIME & DELINQ. 443, 444 (1990)).

⁴⁶ Clarke, *supra* note 44, at 668.

⁴⁷ *Id.* at 669.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* (quoting Jennifer M. O’Connor & Lucinda K. Treat, Note, *Getting Smart About Getting Tough: Juvenile Justice and the Possibility of Progressive Reform*, 33 AM. CRIM. L. REV. 1299, 1304 (1996)).

⁵² *Kent v. United States*, 383 U.S. 541 (1966).

Gault,⁵³ and *In re Winship*,⁵⁴ that dealt with the issue of constitutional rights in the context of juvenile law.⁵⁵ Cases such as these held that juveniles retained their constitutional rights.⁵⁶ These decisions had a tremendous impact on juvenile court process.⁵⁷ In holding that the juvenile justice system had to use constitutional standards in adjudicating juvenile offenders, the Court transformed the system into a “wholly-owned subsidiary of the criminal justice system.”⁵⁸

From around the time of these decisions through 1990, juvenile arrest rates quadrupled, and the arrest rate of juveniles for violent crimes from 1987 until 1991 grew twice as fast as those of adults for similar offenses.⁵⁹ The 1990s brought with it numerous school shootings, including that of Columbine High School in Colorado.⁶⁰ In reaction, lawmakers adopted a more retributivist posture towards juvenile offenders, with many arguing that punishments “must have sufficient ‘teeth’ to be meaningful punishments for juveniles whose . . . life circumstances may already have hardened them against the negative consequences of their actions.”⁶¹ “[B]etween 1992 and 1997, an overwhelming number of states modified their juvenile laws and procedures in order to make their juvenile justice systems more punitive in nature.”⁶² Many states also “lowered the age at which a juvenile could be transferred to [an] adult court,” and “[o]thers expanded the list of crimes . . . [that permitted] a juvenile . . . [to] be transferred.”⁶³ Judicially, judges increasingly focused on the deserts of the child in determining their sentence rather than focusing on the child’s best interests.⁶⁴

It is plain from this history that the juvenile justice system in

⁵³ *In re Gault*, 387 U.S. 1 (1967).

⁵⁴ *In re Winship*, 397 U.S. 358 (1970).

⁵⁵ Clarke, *supra* note 44, at 669–70.

⁵⁶ *Id.* at 670.

⁵⁷ *Id.* at 672.

⁵⁸ *Id.* at 673 (quoting Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 73 (1997)).

⁵⁹ *Id.* at 674; see also Richard E. Redding, *Juveniles Transferred to Criminal Court: Legal Reform Proposals Based on Social Science Research*, 1997 Utah L. Rev. 709, 762 (“Between 1965 and 1990, juvenile violent crime arrests quadrupled and murder arrest rates increased six-fold.”); Hunter Hurst, III, *Crime Scene: Treating Juveniles as Adults*, TRIAL, July 1997, https://www.thefreelibrary.com/_/print/PrintArticle.aspx?id=19634470 (“[B]etween 1987 and 1991, the arrests of juveniles for violent offenses (murder, forcible rape, robbery, and aggravated assault) grew twice as rapidly as arrests of adults.”).

⁶⁰ See *id.* at 674–75.

⁶¹ *Id.* at 675 (alteration in original) (quoting Redding, *supra* note 59, at 761).

⁶² Patrick N. McMillin, *From Pioneer to Punisher: America’s Quest to Find Its Juvenile Justice Identity*, 51 HOUS. L. REV. 1485, 1503 (2014).

⁶³ *Id.*

⁶⁴ *Id.* at 1504.

America has incorporated retributivist principles and those similar to restorative justice. But, by and large, it seems that, rather than incorporate both of these theories simultaneously, the system has swung like a pendulum from one to the other. At its incorporation, the juvenile justice system was based on benevolent ideals, but in the wake of Supreme Court decisions that made “juvenile courts look more like adult” courts and decades of juvenile violence, the nation “demanded [that] more punitive measures” be taken.⁶⁵ Both legislatures and courts obliged the national demand.⁶⁶

Our system must increasingly incorporate both retributivism *and* restorative justice. Such a system will address the criminal actions of juveniles in the past, as well as help avoid repetition of the incriminating behavior in the future, thus bringing the offender full circle back into society.

III. RESTORATIVE JUSTICE IN GERMANY

A. *Restorative Justice Internationally*

While this section will focus primarily on restorative justice in Germany, it is important to take note of the international scope of the practice. Restorative justice movements have emerged as a means of reform in numerous countries in response to harsh retributive treatment carried out in the name of the State.⁶⁷ A good example of this is the “Truth and Reconciliation Commission . . . [that was] launched [in South Africa] in 1995 by the . . . government under Nelson Mandela.”⁶⁸ This commission sought to provide closure for both the victims and perpetrators of apartheid.⁶⁹

As far as juvenile justice is concerned, the theory of restorative justice has spread its influence worldwide, informing systems in “Australia, Canada, Hong Kong, Israel, New Zealand, South Africa, and much of Western Europe.”⁷⁰ “New Zealand [was] the first country to use the legislation to [specifically] re-orient . . . their juvenile justice system” to a mostly restorative justice based system.⁷¹

Though any of the other nations mentioned herein would likely provide a good model for comparison and potential incorporation, I have chosen Germany because of the extensive legislation and developments

⁶⁵ *Id.* at 1505.

⁶⁶ *Id.*

⁶⁷ Jennifer S.F. Lim, *Arguing for Restorative Justice as an Alternative to Mass Incarceration*, L.A. LAW., Mar. 2014, at 36, 36.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ T. Bennett Burkemper, Jr. et al., *Restorative Justice in Missouri's Juvenile System*, 63 J. MO. B. 128, 130 (2007).

⁷¹ *Id.*

in that nation in regards to restorative justice programs within juvenile law. Germany has some of the “best developed . . . legal regulations [regarding] restorative justice” in the world,⁷² and furthermore, its programs could likely be incorporated into the juvenile programs of the United States.

B. Restorative Justice in Germany

Juvenile law “in Germany is federally regulated.”⁷³ In Germany, much like in the United States, the focus in juvenile justice shifted “between rehabilitation and punishment” for much of the twentieth century.⁷⁴ Shortly after the First World War, Germany enacted laws that were centered on rehabilitation and punishment, as demonstrated by the Juvenile Welfare Act of 1922 (which was concerned with the care of juveniles in need) and the Juvenile Justice Act of 1923 (which dealt with juvenile delinquents).⁷⁵ During the era of the Second World War, however, “the Nazi party mandated punitive measures in the youth justice system.”⁷⁶ Afterward, there were reform efforts in the 1960s to address the imprisonment of juveniles, but these reforms were abandoned in the 1970s.⁷⁷

“In the 1980s . . . German social workers and legal personnel initiated ‘reform through practice’ by . . . developing community-based programs [and alternative sentencing, which] enabled courts to reduce incarceration.”⁷⁸ These programs enabled authorities to issue “intermediate sanctions” in the place of detention and shifted “formal proceedings to [various levels of] diversion.”⁷⁹ Since then, the practice of diverting juveniles has expanded, and by 2006, diversion rates had reached 69%.⁸⁰ “By expanding alternatives to imprisonment for young adults, the German youth justice system decreased the rate of youth imprisonment by 40 percent between 1983 and 1990.”⁸¹

In Germany, one of the main sources for juvenile law is the Juvenile

⁷² Frieder Dünkel & Andrea Păroșanu, *Germany*, in 1 EUROPEAN RESEARCH ON RESTORATIVE JUVENILE JUSTICE 75, 79 (Adélaïde Vanhove & Giulia Melottieds., 2015).

⁷³ *Germany*, JOHN JAY COLL. CRIMINAL JUSTICE RESEARCH AND EVALUATION CTR. CITY UNIV. OF N.Y. (Aug. 29, 2012), <http://jjcompare.org/2012/08/29/germany/>.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* The different levels of diversion involved “complete diversion without intervention, diversion through non-legal entities (parents, school), diversion with intervention (apology, community service, fine), and diversion following court proceedings.” *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

Justice Act (JJA).⁸² The JJA “is applicable on juveniles 14 to 18 years old, and, - under certain circumstances - on young adults, aged 18 to 21 years.”⁸³ Under it, diversion from imprisonment is “given [top] priority,” but if diversion is not a suitable option, other measures are available.⁸⁴ One of these other measures that was initiated in 1990 was an educational measure called victim-offender mediation [(VOM)].⁸⁵

VOM was a part of the “development of restorative justice in Germany,” which can be described as a “bottom-up movement.”⁸⁶ Initiators of this movement included “prosecutors, judges, criminologists and social workers, legal aid services, youth court assistance, NGOs and youth welfare departments.”⁸⁷ The initial VOM projects “were established in the mid-1980s, focusing especially on juvenile and young adult offenders.”⁸⁸ These “pilot projects” yielded “promising experiences.”⁸⁹ As a result, VOM projects grew in number throughout the remainder of the decade and were incorporated into juvenile law in 1990.⁹⁰ VOM “positively affected the mediation offerings throughout Germany and led to the expansion of mediation facilities.”⁹¹ It led to such an expansion that “[a] survey conducted during the years 1993/1994, showed that victim-offender mediation was offered almost everywhere in Germany.”⁹² A further 1996 survey showed a 63% increase in VOM projects from 1992 until 1995;⁹³ this was around the same time that juvenile systems in America were becoming more punitive.

By 2013, VOM “[had] been nationwide established” throughout Germany, “both in the areas of juvenile and adult criminal law.”⁹⁴ In the years before this, “restorative justice approaches, including mediation and restitution, [had] been implemented into German criminal law.”⁹⁵ VOM “can be ordered [in the form of] an educational measure” by a

⁸² Andrea Pärsonu, *Final National Report of Germany: Restorative Justice in Germany*, at 2, Specific Programme Criminal Justice European Comm’n (2013), http://3e-rj-model.web.auth.gr/files/national_reports/Germany.pdf.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 3; Otmar Hagemann, *Restorative Justice: Concept, Ideas and Impediments*, in *RESTORATIVE JUSTICE – A EUROPEAN AND SCHLESWIG-HOLSTEINIAN PERSPECTIVE* 34, 44 (Lummer et al. eds., 2011).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 3–4.

⁹² *Id.* at 4.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

judge, or it could be applied as an “independent sanction . . . in the form of restitution” (either financially or through unremunerated work).⁹⁶ If mediation between the victim and offender is successful, or if “serious efforts towards reconciliation” are made, the prosecutor may dismiss the case with the permission of a juvenile judge.⁹⁷ If the case is one involving “formal charges,” then “the juvenile judge will dispense of the court action.”⁹⁸

VOM involves giving victims the opportunity “meet their offender, in a safe and structured setting, and engage in a mediated discussion of the crime.”⁹⁹ “[M]ediation is [typically] practiced by [either] [S]tate-run or private [organizations].”¹⁰⁰ Usually, non-profit organizations that perform “private mediation” are given priority; however, “the local Youth Departments (Jugendgerichtshilfe, ‘youth court associates’) [also] provide mediation services.”¹⁰¹ “[T]he majority of facilities offering [VOM]” are either “fully or partly specialized.”¹⁰² In a VOM session, a “settlement discussion between the perpetrator and the victim” will take place.¹⁰³ “[I]n two-thirds of cases [that utilize VOM the settlement discussion] takes place” with a mediator present, and in the remainder “other forms of [reconciliation] are used, [such as] . . . alternating discussion between the mediator and the [individual parties].”¹⁰⁴ A survey done in 2005 indicated that in 47.6% of cases that used VOM resulted in an apology, and 16.2% resulted in damages being received.¹⁰⁵ Only in about 5% of cases were no action agreed upon.¹⁰⁶

Within Germany, the “general trend” in sentencing juvenile offenders “is one of refraining from using custodial sentences, which account for roughly 1-2% of all formally and informally sanctioned 14-20-years-old offenders.”¹⁰⁷ Since the year 2000, “between 20,000 and 30,000 cases were meditated,” with roughly two-thirds of the annual caseloads

⁹⁶ *Id.* at 5.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ VICTIM-OFFENDER MEDIATION, NAT’L INST. JUSTICE (Dec. 5, 2007), <http://www.nij.gov/topics/courts/restorative-justice/promising-practices/pages/victim-offender-mediation.aspx>.

¹⁰⁰ Dünkel & Păroșanu, *supra* note 72, at 76.

¹⁰¹ *Id.*

¹⁰² *Id.* at 77.

¹⁰³ JORG-MARTIN JEHL, FEDERAL MINISTRY OF JUSTICE, CRIMINAL JUSTICE IN GERMANY 40 (5th ed. 2009), http://www.bmj.de/SharedDocs/Downloads/EN/StudienUntersuchungenFachbuecher/Criminal_Justice_in_Germany_Numbers_and_Facts.pdf?__blob=publicationFile.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 40 tbl.8.

¹⁰⁶ *Id.*

¹⁰⁷ Dünkel & Păroșanu, *supra* note 72, at 77.

involving youthful offenders.¹⁰⁸ These cases are not limited to non-violent offenses – indeed, in 1995, shortly after the VOM legislation was enacted, roughly “70 percent of both adult and juvenile cases in [VOM] were violent crimes.”¹⁰⁹

Given the numbers of youth who are going through mediation, one must ask if they are effective. Studies on recidivism have indicated that juveniles have responded positively to VOM.¹¹⁰ A study done in 2001 demonstrated that “offenders who [had] participated in [VOM] showed a recidivism rate of 56%,” compared to a rate of “82% . . . [for those who had been] formally sanctioned.”¹¹¹ A further study in 2002 demonstrated that those who had been involved with VOM had a lower recidivism rate than those who had not participated in VOM.¹¹² By 2007, more than half of offenders in Germany who received “alternate treatments” such as VOM did not engage in further criminal activity, whereas more than 70% of juveniles who were “placed in correctional facilities [were eventually] arrested again.”¹¹³ Other statistics from around this time period have shown that only about “[30%] of the young offenders [in Germany] . . . committed repeat offenses.”¹¹⁴

Aside from the evidence indicating that VOM programs result in a smaller recidivism rate, there are other benefits that have arisen from such programs. For example, more recent studies than those mentioned above have indicated high levels of satisfaction with the overall mediation.¹¹⁵ Victims have responded “positive[ly] to the possibility [of having] direct contact with the offender and explain[ing] the consequences of the offense.”¹¹⁶ Additionally, the offenders themselves have had a positive response to having “the opportunity to explain their [actions] personally to the victim,” and have taken “the chance to resolve

¹⁰⁸ *Id.* at 78.

¹⁰⁹ Leena Kurki, *Restorative and Community Justice in the United States*, 27 CRIME & JUST. 235, 240 (2000).

¹¹⁰ *Cf.* Pârşonu, *supra* note 82, at 14.

¹¹¹ *Id.* at 15. This is not unique to Germany – in Canada, “restorative justice programs [involving VOM also] resulted in a lower recidivism rates.” Cecilia B. Paizs, *Using Mediation in Criminal Matters*, 48 MD. B.J. 36, 38 (2015).

¹¹² Pârşonu, *supra* note 82, at 15.

¹¹³ See Sean Sinico, *In Germany, Focus on Preventing Not Punishing Youth Crime*, DEUTSCHE WELLE (June 10, 2007), <http://www.dw.com/en/in-germany-focus-on-preventing-not-punishing-youth-crime/a-2810444>.

¹¹⁴ THE LAW LIBRARY OF CONGRESS, GERMANY: CHILDREN’S RIGHTS 95 (2007), <https://www.loc.gov/law/help/child-rights/pdfs/ChildrensRights-Germany.pdf>. While these statistics are somewhat outdated, at the time this Article was written, there had not been a “systematic and nationwide” evaluation within Germany regarding the effects of programs such a VOM on recidivism rates, and clear assessment is difficult due to things like selection bias. Dünkel & Pârşanu, *supra* note 72, at 78.

¹¹⁵ See Pârşonu, *supra* note 82, at 15.

¹¹⁶ *Id.*

the conflict and to apologize.”¹¹⁷ Typically, “the relationship between [the] victim and offender significantly improve[d] . . . after a face-to-face meeting.”¹¹⁸

It is thus clear that, as opposed to the more retributive system in the United States, Germany’s system is much more rehabilitative in nature. Generally, a juvenile is imprisoned when it is clear other “measures will not suffice to reform” them, or when the offense is so serious in and of itself that it merits punishment.¹¹⁹

As this section has shown, the practice of restorative justice through VOM is well-established in Germany. This program has had some success in preventing recidivism, and both victims and offenders have had positive responses to the ability to meet face-to-face. The next section will consider whether such a rehabilitative system can be incorporated into the more retributive system in the United States.

IV. INCORPORATION OF VOM IN THE UNITED STATES

As this Article has shown, the juvenile justice system in the United States has undergone retributivist changes in recent decades,¹²⁰ and critics complain that our system does not accurately address recidivism, which has exceeded 50% at times.¹²¹ What is the answer to these problems? Should we completely shift to a pure restorative justice model? If that is the case, what should we do with the theories of those who argue the benefits of retributivism?¹²²

The answer seems to be that both theories have their strong points, and an effective system would be one that incorporates both. Thus, juvenile justice systems should incorporate both retributivist and restorative justice models into their operations. This section will consider whether such a system is possible in the United States, what the benefits of such a system would be, and whether it would be advisable to simply replace our current, more retributive system with one based entirely on restorative justice.

A. *Is a Restorative Justice Program Like VOM Possible in a Retributive System?*

The previous section demonstrated that VOM in Germany has had success in both reducing recidivism rates and providing services with which both offenders and victims are satisfied. Could such a system be incorporated in the United States?

¹¹⁷ *Id.* at 15–16.

¹¹⁸ *Id.* at 16.

¹¹⁹ JEHLE, *supra* note 103, at 36.

¹²⁰ *See supra* text accompanying notes 61–63.

¹²¹ *See supra* text accompanying note 6.

¹²² *See supra* text accompanying notes 10, 15–20.

One of the benefits of restorative justice programs like VOM is that they can be used with offenders “serving prison sentences.”¹²³ In Germany, prison laws within the federal states provide for “victim-oriented, reparative and reflective measures to play a more prominent role in individual sentence and regime planning.”¹²⁴ Programs centered on restorative justice have “been implemented . . . [with] the aim of compensating the victim[s] and restoring [them]” and as a means of “resolving conflicts . . . in cases of intra-prison conflicts between prisoners and/or staff members.”¹²⁵

There are already restorative justice programs in the United States. For example, Tennessee, like Germany, has “enacted a series of statutes . . . to formalize the VOM process and integrate it into their criminal justice system.”¹²⁶ The implementation of VOM has earned the praise of the Tennessee Judiciary, who have “lauded VOM centers” for their mediation work with juveniles, which had a “resulting reduction in ‘minor criminal cases litigated in courtrooms,’ . . . and an expected decline in recidivism rates for juveniles.”¹²⁷ Tennessee is not alone – Georgia has also “established a statutory scheme for VOM in juvenile cases.”¹²⁸ However, despite the existence of such programs, America’s systems are by and large punitive in nature, which “has resulted in an increased reliance on juvenile detention.”¹²⁹ While there are certainly restorative justice programs in the United States, most are “only available to juveniles convicted of . . . nonviolent . . . crimes.”¹³⁰ Furthermore, they have not been able to “substantially influence the juvenile justice system because they lack legislative attention and financial resources.”¹³¹

Juveniles in detention are already offered a number of different assistance programs. For example, Alcoholics Anonymous helps young offenders who struggle with alcohol related problems.¹³² Christian ministries such as Youth for Christ offer their services in juvenile

¹²³ Dünkel & Păroșanu, *supra* note 72, at 76.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Clynton Namuo, *Victim Offender Mediation: When Divergent Paths and Destroyed Lives Come Together for Healing*, 32 GA. ST. U. L. REV. 577, 587–88 (2016) (citing TENN. CODE ANN. §§ 16-20-101–106 (2009)).

¹²⁷ Namuo, *supra* note 126, at 589.

¹²⁸ *Id.* at 586.

¹²⁹ See Mark R. Fondacaro et. al., *The Rebirth of Rehabilitation in Juvenile and Criminal Justice: New Wine in New Bottles*, 41 OHIO N.U.L. REV. 697, 707 (2014).

¹³⁰ Courtney Amelung, *Responding to the Ambiguity of Miller v. Alabama: The Time Has Come for States to Legislate for a Juvenile Restorative Justice Sentencing Regime*, 72 MD. L. REV. ENDNOTES 21, 36–37 (2013).

¹³¹ *Id.* at 37.

¹³² See ALCOHOLICS ANONYMOUS WORLD SERVS., CORRECTIONS WORKBOOK 15 (1995).

detention centers, caring for the offenders' spiritual needs.¹³³ Other programs offer mentoring services to juveniles.¹³⁴ Programs such as Sports for Juvenile Justice in Pennsylvania, whose partners include the U.S. Attorney's Office of the Eastern District of Pennsylvania and local courts, work to involve "at-risk youth" into "sports-based youth programs."¹³⁵ Additionally, there are programs that assist juvenile delinquents who suffer from mental health disorders,¹³⁶ and there are those that provide vocational training.¹³⁷ Thus, there are already a number of programs within our country that work to provide a number of services to juvenile offenders, encompassing their physical, mental, educational, and spiritual needs.

Given the fact that there are already a number of programs in our juvenile justice system and that states are already legislating restorative justice programs for juvenile offenders, it appears that our current system, although certainly more punitive in nature than those in countries like Germany, would be more than capable of accommodating restorative justice programs such as VOM on a large scale. This Article will now consider what the benefits of such a system would be.

B. *The Benefits of Restorative Justice*

Having concluded that a restorative justice system such as the one in Germany is possible in the United States, we must consider whether or not it would be beneficial to incorporate such a system. Although there are a number of different restorative justice programs that could be used,¹³⁸ as this Article has focused on VOM in Germany, the benefits of VOM specifically will be considered.

In the first place, VOMs usually end with a restitution agreement, which can often serve as "the most tangible symbol of conflict resolution and a focal point for accountability."¹³⁹ Furthermore, "VOM focuses on

¹³³ See *Juvenile Justice Ministry*, YOUTH FOR CHRIST, <http://www.yfc.net/jjm> (last visited Mar. 13, 2017).

¹³⁴ See, e.g., Michael A. Jones et al., *Juvenile Detention and Mentoring*, GLOBAL YOUTH JUST., http://www.globalyouthjustice.org/uploads/Juvenile_Detention_ad_Mentoring_TA.pdf (last visited Feb. 28, 2017) (describing mentoring programs in a variety of settings in the juvenile justice system).

¹³⁵ KAREN OKIGBO & YEWEN SEASON WANG, SPORTS FOR JUVENILE JUSTICE iii (2013), <http://ostrc.org/doclibrary/documents/FY2013-SJJFormativeEvaluation-Final.pdf>.

¹³⁶ See NAT'L MENTAL HEALTH ASSOC., MENTAL HEALTH TREATMENT FOR YOUTH IN THE JUVENILE JUSTICE SYSTEM 1 (2004), https://www.nttac.org/views/docs/jabg/mhcurriculum/mh_mht.pdf.

¹³⁷ See NAT'L EVALUATION & TECH. ASSISTANCE CTR., JUVENILE JUSTICE EDUCATION 1 (2011), <http://www.neglected-delinquent.org/sites/default/files/NDFactSheet.pdf>.

¹³⁸ See *supra* text accompanying note 28.

¹³⁹ MARK UMBREIT & MARILYN PETERSON ARMOUR, RESTORATIVE JUSTICE DIALOGUE 126 (2011).

opening a dialogue between a victim and an offender to promote . . . [both] healing and . . . accountability.”¹⁴⁰ Although it requires the consent of the victim in order to take place, data has shown that “many victims want to participate,” even in the case of serious offenses.¹⁴¹ As previously mentioned, participants in VOM have responded positively to the process.¹⁴²

A significant factor to take into account is the effect that VOM has on recidivism rates. As discussed above, research in Germany has shown that the recidivism rate for those who participate in VOM is lower than those who have been formally sanctioned.¹⁴³ Indeed, studies conducted over the last quarter century in both Europe and North America have shown that VOM tends to lead to “significantly lower recidivism rates.”¹⁴⁴ One of the reasons for this is that offenders are discouraged from “detach[ing] from their past . . . [actions] . . . and “are [instead] required to take responsibility for their acts and participate in a program in which they [face] . . . confrontat[ion] by their victims.”¹⁴⁵ A “basic rationale” behind VOM is that “a community that focuses more on the rehabilitation of an offender [in lieu of] his punishment provides strong social support, leading to lower levels of [recidivism].”¹⁴⁶

Another benefit of VOM is the way that it involves the victim in the process. A complaint about retributivist systems is that their emphasis is on the violation of the laws of a State and excludes others affected by crimes, such as victims and their families and communities.¹⁴⁷ As VOM fosters confrontation between the victim and offender by incorporating aspects of restorative justice, such as VOM, the State will be dealing with both the fact that the offender has broken the law and the fact that the offender has harmed others. The fact that victims must voluntarily agree to VOM¹⁴⁸ does not diminish this – by merely extending an invitation to participate, the State would be acknowledging that the victim has suffered harm.

Given the benefits of programs like VOM listed herein, such as reduced recidivism rates, our juvenile justice system would be well

¹⁴⁰ Namuo, *supra* note 126, at 583.

¹⁴¹ *Id.* at 584.

¹⁴² See *supra* text accompanying notes 115–118; see also Namuo, *supra* note 126, at 585 (noting that “victims and offenders who participate report overwhelmingly positive experiences.”).

¹⁴³ See *supra* text accompanying notes 111–114.

¹⁴⁴ Namuo, *supra* note 126, at 578–79.

¹⁴⁵ Russell E. Farbiarz, *Victim-Offender Mediation: A New Way of Disciplining America's Doctors*, 12 MICH. ST. U. J. MED. & L. 359, 369 (2008).

¹⁴⁶ *Id.*

¹⁴⁷ See Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 227.

¹⁴⁸ VICTIM-OFFENDER MEDIATION, *supra* note 99.

served by incorporating them on a large scale into our current, more punitive programs.

C. *Why Not Abandon Retributivist Systems Altogether?*

The previous subsection demonstrated that restorative justice programs such as VOM have tremendous potential for our juvenile justice system. Given the benefits of restorative justice, one may be tempted to advocate for the position that retributivist systems such as that in our juvenile justice system should be abandoned altogether. This subsection will discuss why this is not a proper response.

Professor S. Ernie Walton, the Director of the Center for Global Justice, Human Rights, and the Rule of Law in Virginia Beach, argues that punishment is necessary for justice to prevail in a society: “For justice to take place, we must first understand the primary goal of the government in doing justice. That role is to punish offenders. Justice always requires punishment.”¹⁴⁹ In regards to replacing retributive systems with others that are based on restorative justice such as VOM, Professor Walton stated that, “just because something is successful does not mean that it is right. If we skip over the primary role of the government in doing justice, the long-term results will not be successful.”¹⁵⁰

When the State punishes, it is “reducing the criminal's rights and powers to roughly the same degree that he previously reduced the victim's rights and power when he committed the crime.”¹⁵¹ Punishments need not be overly harsh – indeed, a central tenant of retributivism is that punishments must be proportional to the offense.¹⁵² However, “[a]ccording to Immanuel Kant, in order to behave morally, [a] people must adhere to a social contract[, and] . . . [p]unishment is . . . [society's] retribution for having broken that . . . contract.”¹⁵³ Juveniles are a part of society, and thus, they should be exposed to the consequences of breaking the social contract to which we all must adhere. The criminal justice system is “meant to ‘help’ [juvenile] defendants” not through

¹⁴⁹ Interview with Professor S. Ernie Walton, Director, Center for Global Justice, Human Rights, and the Rule of Law, in Virginia Beach, Va. (Mar. 17, 2016).

¹⁵⁰ *Id.*

¹⁵¹ Ken Levy, *Why Retributivism Needs Consequentialism: The Rightful Place of Revenge in the Criminal Justice System*, 66 RUTGERS L. REV. 629, 655 (2014).

¹⁵² See Russell L. Christopher, *Death Delayed Is Retribution Denied*, 99 MINN. L. REV. 421, 436 (2014) (demonstrating that Immanuel Kant, a leading figure in retributivism, put forward the idea that punishment must be proportional).

¹⁵³ Carl Emigholz, *Utilitarianism, Retributivism and the White Collar-Drug Crime Sentencing Disparity: Toward a Unified Theory of Enforcement*, 58 RUTGERS L. REV. 583, 603 (2006).

putting them through a “program, but by punishing them.”¹⁵⁴ “The goal of punishment . . . [is to undue a] criminal’s bold and unjust assertion of his own will, . . . [and it] assures society . . . [that all laws are to be observed and] that crime does not pay.”¹⁵⁵

Author Michael S. Moore, in his article *Justifying Retributivism*, wrote that the most important justification of punishment is actually a moral one.¹⁵⁶ As Moore views it, punishment should be inflicted on wrongdoers, not because good results will flow from it, but simply because wrongdoers deserve it.¹⁵⁷ This is a rather simple justification for keeping punitive measures in our system; however, it is important. If we combine retributivism and restorative justice in our system, then we can show juveniles that we value their futures, but we also want them to understand the concept of just deserts.

As mentioned at the beginning of this Article, retributivism focuses more on past actions, while restorative justice looks more towards the future.¹⁵⁸ However, when dealing with a crime, we are dealing with both the past and the future. In dealing with the future, we want to ensure that the juvenile does not repeat his or her offenses and hopefully that they will be reconciled with their victims. However, it is also important that past actions are addressed because laws were broken, and people were harmed. The law is designed to help those who commit these wrongs, by breaking the offender, through punishment, of his desire to be a law in and of himself. If we neglect punishment, we are, in effect, neglecting justice.

CONCLUSION

This article has explored the theories of retributivism and restorative justice, reviewed the history of juvenile justice in the United States, examined the use of restorative justice programs like VOM in Germany, and discussed how those principles could be incorporated into the United States. Hopefully, it has shown that punitive measures can deal with what juveniles have done in the past, while restorative justice can help him or her avoid such mistakes in the future by encouraging them to take responsibility for their actions and to make amends with their victim. Furthermore, restorative justice opens the door for potential healing for victims of crimes by allowing them to confront their offender. By incorporating both punitive measures and restorative justice into our system on a larger scale, we can deal with both the

¹⁵⁴ C.f. Gerard V. Bradley, *Retribution: The Central Aim of Punishment*, 27 HARV. J.L. & PUB. POL’Y 19, 20 (2003).

¹⁵⁵ *Id.* at 23.

¹⁵⁶ Michael S. Moore, *Justifying Retributivism*, 27 ISR. L. REV. 15, 22 (1993).

¹⁵⁷ *Id.* at 49.

¹⁵⁸ See *supra* text accompanying notes 12–30.

juvenile's past and future, and hopefully we will see more and more juveniles returned to society having been justly punished, yet fully restored in their relationships with their victims. In returning them to society in this manner, we would therefore be able to say, in the words of Aslan from C.S. Lewis's *Chronicles of Narnia*: "Here is your brother . . . there is no need to talk to him about what is past."¹⁵⁹

¹⁵⁹ C.S. LEWIS, *THE LION, THE WITCH AND THE WARDROBE* 153 (HarperCollins 1994) (1950).