

# FROM RETRIBUTION TO REPAIR: JUVENILE JUSTICE AND THE HISTORY OF RESTORATIVE JUSTICE

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## INTRODUCTION

In the last thirty years, restorative justice principles and practices have gained popularity in juvenile justice systems throughout the world.<sup>1</sup> Restorative justice theories have come to influence juvenile justice systems in areas such as Australia, Canada, Hong Kong, Israel, South Africa, and much of Western Europe.<sup>2</sup> In 1989, New Zealand redesigned its juvenile justice system to require programs like mediation and family group conferencing.<sup>3</sup> Since then, youth offenses have declined by approximately two-thirds in the nation.<sup>4</sup> Restorative justice is also gaining popularity in the United States, although not as quickly as it is abroad.<sup>5</sup> According to the National Survey of Victim Offender Mediation Programs in the United States conducted in 1998, at least twelve states had implemented, or were in the process of implementing,

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1. Hon. T. Bennett Burkemper Jr. et al., *Restorative Justice in Missouri's Juvenile System*, 63 J. MO. B. 128 (2007) (discussing the history and prevalence of restorative justice in juvenile justice systems). See generally Willie McCarney, *Restorative Justice: An International Perspective*, 3 J. CENTER FOR FAM. CHILD. & CTS. 3 (2001).

2. Burkemper Jr. et al., *supra* note 1, at 130.

3. *Id.*

4. *Id.* For further discussion of family conferencing and the New Zealand Model, see McCarney, *supra* note 1, at 6-8.

5. See Burkemper Jr. et al., *supra* note 1, at 130 (comparing the global evolution of restorative justice systems to the development in the United States).

systematic changes in their juvenile justice systems to incorporate restorative justice practices.<sup>6</sup>

Despite these developments, many Americans are still unfamiliar with the concept of restorative justice.<sup>7</sup> Favoring more retributive and punitive philosophies, some call it a “passing fad” or a “soft on crime” approach.<sup>8</sup> In response to such criticism, scholars have attempted to rationalize restorative justice by placing it in a broad historical context.<sup>9</sup> This Comment examines the history of restorative justice and discusses its usefulness for child advocates who wish to promote restorative justice principles in juvenile systems and codes.

### I. WHAT IS RESTORATIVE JUSTICE?

Restorative justice is a criminal justice paradigm that emphasizes restoring victims.<sup>10</sup> Like most broad paradigms, restorative justice escapes a simple definition:<sup>11</sup> it is better understood through its goals and principles and in comparison to the paradigms that precede it, namely the retributive and rehabilitative philosophies of punishment. The retributive model views crime as an offender against state power and seeks to punish the offense by inflicting proportionate harm on the offender.<sup>12</sup> It focuses heavily on the offense but largely ignores the

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6. JEAN E. GREENWOOD & MARK S. UMBREIT, NATIONAL SURVEY OF VICTIM OFFENDER MEDIATION PROGRAMS IN THE US, VOMA CONNECTIONS 1, 7, 9-11 (WINTER 1998), <http://www.voma.org/docs/connect1/connect1.pdf>.

7. See Burkemper Jr. et al., *supra* note 1, at 130.

8. See P.J. Verrecchia, *Female Delinquents and Restorative Justice*, 19 WOMEN AND CRIM. JUST. 80 (2009) (arguing that restorative justice is not soft on crime as critics contend); see, e.g., Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 423-33 (2003) (discussing the barriers to acceptance of restorative philosophies, the public misperception that punitive policies keep crime rates low, and the misplaced political rewards for advocating for punitive policies); McCarney, *supra* note 1, at 6-8 (responding to the criticism that restorative justice is a “passing fad”).

9. See *infra* Section III (analyzing competing historical accounts of restorative justice).

10. MARIAN LIEBMANN, RESTORATIVE JUSTICE: HOW IT WORKS 25 (Jessica Kingsley Publishers 2007).

11. See, e.g., *id.* (citing several abstract definitions of restorative justice); U.N. BASIC PRINCIPLES ON THE USE OF RESTORATIVE JUSTICE IN PROGRAMMES IN CRIMINAL MATTERS, U.N. ECON. & SOC. COUNCIL RES. 2002/12 (July 24, 2002) (defining a restorative justice program as any program “that uses restorative processes or aims to achieve restorative outcomes”), <http://www.pfi.org/cjr/about-cjr/un-initiatives>. Other definitions are even more watered down: “Restorative justice is a way of looking at behavior that harms through a different lens.” Burkemper Jr. et al., *supra* note 1, at 128.

12. SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 102-110 (Aspen Law and Business 7th ed. 2001) (examining the retributive philosophy of punishment); Elmar G.M. Weitekamp, *The History of Restorative Justice*, in

victim.<sup>13</sup> The rehabilitative model views crime in the context of a welfare state, and focuses on the offender rather than the offense.<sup>14</sup> This paradigm provides treatment to the offender and seeks to modify his/her behavior, but also disregards the victim and his/her losses.<sup>15</sup>

Restorative justice, however, views crime predominately as an offense against the victim.<sup>16</sup> This paradigm focuses on the specific damage caused to the victim and looks for ways to repair that harm.<sup>17</sup> Restorative justice programs promote healing and restoration for the victim, while seeking repentance and responsibility from the offender.<sup>18</sup> These goals are often pursued through a facilitated dialogue between the victim and the offender.<sup>19</sup> The offender is required to admit responsibility for the harm before any such dialogue or negotiation can begin.<sup>20</sup> Once he/she does so, restorative justice programs seek an understanding of the “whole truth” of the incident rather than just the limited legal facts relevant to secure a criminal conviction.<sup>21</sup> The processes for doing this often include mediation, conciliation, conferencing, and sentencing circles.<sup>22</sup>

## II. WHAT ARE THE ORIGINS OF RESTORATIVE JUSTICE?

There are two competing narratives of the history of restorative justice. Proponents of the first narrative describe restorative justice as a

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RESTORATIVE JUVENILE JUSTICE: REPAIRING THE HARM OF YOUTH CRIME 75 (Gordon Bazemore & Lode Walgrave eds., 1999).

13. Weitekamp, *supra* note 12, at 75.

14. *Id.*

15. *Id.*

16. MARGARET ZERNOVA, RESTORATIVE JUSTICE: IDEALS AND REALITIES 8 (Mark Findlay & Ralph Henham eds., 2007).

17. See, e.g., Burkemper Jr. et al., *supra* note 1, at 128; Gordon Bazemore & Lode Walgrave, *In Search of Fundamentals and an Outline for Systemic Reform*, in RESTORATIVE JUVENILE JUSTICE: REPAIRING THE HARM OF YOUTH CRIME 45, 48 (Gordon Bazemore & Lode Walgrave eds., 1999) (“The primary distinguishing feature of restorative justice is an effort to repair the harm crime causes.”).

18. LIEBMANN, *supra* note 10, at 33.

19. ZERNOVA, *supra* note 16, at 42.

20. Burkemper Jr. et al., *supra* note 1, at 128.

21. LIEBMANN, *supra* note 10, at 33 (describing the attributes of restorative processes and outcomes).

22. See U.N. BASIC PRINCIPLES, *supra* note 11 (defining restorative processes). See generally Paul McCold, *Primary Restorative Justice Practices*, in RESTORATIVE JUSTICE FOR JUVENILES (Allison Morris & Gabrielle Maxwell eds., 2001). A sentencing circle is a method of restorative justice in which members of the victim and offender’s community, and often the victim and members of the victim’s family openly discuss and develop a sentencing plan specific to the offender. U.S. Department of Justice, *Sentencing Circles*, <http://www.ojp.usdoj.gov/nij/topics/courts/restorativejustice/promisingpractices/sentencing-circles.htm> (last visited June 29, 2009).

relatively recent approach to criminal justice that began in the 1970s in North America, and has since become an international phenomenon.<sup>23</sup> Under this narrative, restorative justice is seen as a novel and innovative system,<sup>24</sup> which has come to influence juvenile justice systems globally over the last three decades.<sup>25</sup> Under the second narrative, restorative justice is neither new nor novel—it is an archetype of justice nearly as old as human society itself.<sup>26</sup> According to this narrative, restorative justice has been “the dominant model of criminal justice throughout most of human history for all of the world’s peoples.”<sup>27</sup> It is “the most ancient and prevalent approach in the world to resolve harm and conflict.”<sup>28</sup> While the first narrative has not been disputed, the second has been the subject of recent scrutiny and criticism.<sup>29</sup> This section examines the restorative-justice-as-ancient-archetype and discusses the criticisms of its claims.

Proponents of the second narrative claim that restorative justice began in problem solving practices of pre-state, hunter-gatherer societies.<sup>30</sup> In *The History of Restorative Justice*, Elmar G.M. Weitekamp explains that in early societies nomadic tribes responded to inter-clan transgressions through a form of restorative justice called “restitution negotiations.”<sup>31</sup> When members of an outside clan committed a crime, such as theft or homicide, clan elders facilitated

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23. Burkemper Jr. et al., *supra* note 1, at 130 (describing a brief history of the rise of restorative justice); Douglas J. Sylvester, *Myth in Restorative Justice History*, 2003 UTAH L. REV. 471, 493-94 (2003) (discussing the “admittedly recent origins” of the restorative justice movement); 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 (2005) (recounting a brief history of restorative justice beginning in the 1970s). The exact date of the founding of restorative justice as a system of institutional reform is a matter of debate—some argue that it began in 1972 in Minnesota’s Restitution Center, others when Ontario began using victim offender reconciliation programs. Sylvester, *supra* note 23, at 493. As a popular social movement, restorative justice did not gain sustainable vitality until the 1990s. John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1750 (1999).

24. Sylvester, *supra* note 23, at 494.

25. Burkemper Jr. et al., *supra* note 1, at 130.

26. John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 2 (1999).

27. *Id.*

28. LIEBMANN, *supra* note 10, at 37.

29. Sylvester, *supra* note 23, at 493.

30. *See, e.g.*, Weitekamp, *supra* note 12, at 75-83 (discussing restitution practices in pre-state societies).

31. *Id.* at 78-79. Under the second narrative, restorative justice is an umbrella term that encompasses “restitution, reparation, compensation, reconciliation, atonement, redress, community service, mediation and indemnification.” *Id.* at 75.

negotiations between the clans.<sup>32</sup> These negotiations generally ended in some form of compensation to the victim and/or to his/her clan.<sup>33</sup> These restitution negotiations prevented victims and their kin from engaging in more violent justice-seeking responses such as “blood revenge”<sup>34</sup> and retribution.<sup>35</sup> Weitekamp concludes that restitution “was probably the most common form of resolving a conflict in acephalous (pre-state) societies.”<sup>36</sup> In pre-state cultures that continue to exist, such as among Australian aboriginals, Egyptian Bedouin, and many Native American societies, restorative justice continues to be the dominant form of conflict resolution.<sup>37</sup>

Proponents of the second narrative also commonly refer to legal codes from ancient societies to support their claims about the prevalence of restorative justice in historical societies.<sup>38</sup> In *Restoring Justice*, Van Ness & Strong cite several ancient Babylonian codes, including the Code of Hammurabi (c. 1700 B.C.E.), that prescribed restitution for property offenses.<sup>39</sup> Other ancient Middle Eastern codes required restitution even in the case of violent crimes.<sup>40</sup> The Sumerian Code of Ur-Nammu (c. 2050 B.C.E.), dictates: “If a man knocks out the eye of another man, he shall weigh out 1/2 a mina of silver.”<sup>41</sup>

Proponents of the second narrative also look to ancient Hebrew law to bolster their claims.<sup>42</sup> Van Ness & Strong argue that “*shillum*,” the Hebrew word for “restitution,” comes from the same root as “*shalom*” which translates as “peace.”<sup>43</sup> According to the authors, this linguistic link supports the notion that the aim of ancient Hebrew justice was to restore peace by restoring wholeness.<sup>44</sup> Weitekamp uses more specific evidence and recounts two cases in early Hebrew literature in which restitution was used:

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32. *Id.* at 78-79.

33. *Id.*

34. Blood revenge is a term used to describe the situations in which it was socially acceptable for a clansman to kill the offender of another clansman. *Id.* at 76.

35. *Id.* at 78-79, 82.

36. Weitekamp, *supra* note 12, at 78.

37. LIEBMANN, *supra* note 10, at 37; Weitekamp, *supra* note 12, at 78-83.

38. *See, e.g.*, DANIEL VAN NESS & KAREN HEETDERKS STRONG, *RESTORING JUSTICE* 7-8 (1st ed. 1997). Weitekamp, *supra* note 12, at 83-89.

39. Weitekamp, *supra* note 12, at 83-89.

40. *See id.* (citing the Code of Ur-Nammu and the Code of Eshnunna).

41. MARTHA T. ROTH, *LAW COLLECTIONS FROM MESOPOTAMIA AND ASIA MINOR* (2d ed. 1995).

42. Charles W. Colson, *Truth, Justice, Peace: The Foundations of Restorative Justice*, 10 *REGENT U.L. REV.* 1, 7-8 (1998).

43. VAN NESS & STRONG, *supra* note 38, at 8.

44. *Id.*

The case of two men involved in a fight that resulted in non-fatal injuries to one of the men. The one who inflicted the injury was required to pay for the employment time the other man lost due to the healing process. Similarly, if an ox was known to be dangerous but the owner did not take proper precautions and the ox gored a person to death, both the ox and its owner were to be killed unless the victim's family was willing to accept reparations instead.<sup>45</sup>

These scholars also cite European sources for historical support.<sup>46</sup> The Roman Law of Twelve Tables (449 B.C.E.) required thieves to pay restitution for stolen property and included restitution as an explicit alternative punishment to certain physical offenses.<sup>47</sup> Early Germanic tribal laws allowed restitution for a broad range of crimes including homicide, and the Laws of Ethelbert, a seventh century collection of English laws, contained detailed compensation plans based on the physical harm caused to the victim.<sup>48</sup> Even Anglo-Saxon law was based on restorative justice principles.<sup>49</sup>

According to the second narrative, the dominant paradigm shifted from a focus on restitution and restoring community peace to the retributive-based system on which the common law is based on October 14, 1066, the date of the Norman invasion of England.<sup>50</sup> After the Norman invasion of England, William the Conqueror and his successors found the legal system to be an effective tool for exerting influence over the authority of the church and for replacing local systems of conflict resolution.<sup>51</sup> English monarchs began to define crime as a disruption of the "King's peace," and they fined offenders to benefit the King financially and politically.<sup>52</sup>

Under this system, a new model emerged where crime was viewed as a violation against the King and the state rather than against the

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45. Weitekamp, *supra* note 12, at 84.

46. Sylvester, *supra* note 23, at 511-12.

47. *Id.*

48. VAN NESS & STRONG, *supra* note 38, at 8.

49. LIEBMANN, *supra* note 10, at 37.

50. *See id.* (describing the changes after William the Conqueror's reign); VAN NESS & STRONG, *supra* note 38, at 8 ("For common law jurisdictions, the Norman invasion of Britain marked a turning point [in the] understanding of crime.").

51. VAN NESS & STRONG, *supra* note 38, at 9-10.

52. LIEBMANN, *supra* note 10, at 37.

victim.<sup>53</sup> The government and the offender became the primary parties to the conflict with the victim playing a secondary role. Rather than seeking to restore the victim, the system focused on maintaining the authority of the state over the transgressor by inflicting punishment which would make the offender, and others like him/her, fearful and law-abiding.<sup>54</sup> Restitution and its focus on the past harm to the victim were abandoned in favor of fines, corporal punishment, and the death sentence as the dominant responses to wrongdoing.<sup>55</sup> According to second narrative scholars, this model of punishment shaped the common law, as well as the American criminal justice system, and continues to influence them today.<sup>56</sup>

This narrative, however, has engendered legitimate criticism for its broad assertions.<sup>57</sup> Some critics argue that second narrative scholars have “mythologized” ancient problem-solving systems and historical legal codes in an attempt to create a “golden age” of criminal justice in which restoration reigned.<sup>58</sup> These critics claim that the second narrative is vastly oversimplified.<sup>59</sup> In each example in which a second narrative scholar cites restorative justice practices, they illuminate the ways that those practices existed alongside brutal and inhumane retributive justice methods.

In *Myth in Restorative Justice*, Douglas J. Sylvester reviews Weitekamp’s claims about the prevalence of restitution in pre-state societies by examining Weitekamp’s own anthropological sources.<sup>60</sup> For example, Weitekamp claims that in Eskimo culture, blood feuds and restitution were used only rarely.<sup>61</sup> However, his own source for that statement, Hoebel’s *The Law of Primitive Man*, states that the ancient

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53. VAN NESS & STRONG, *supra* note 38, at 8-10.

54. *Id.* at 9-10.

55. *Id.* at 10.

56. See LIEBMANN, *supra* note 10, at 37; VAN NESS & STRONG, *supra* note 38, at 9-10.

57. See generally Kathleen Daly, *Restorative Justice: The Real Story*, 4 J. PUNISHMENT & SOC’Y 55, 61-64 (2002) (“[A]dvocates do not intend to write authoritative histories of justice. Rather they are constructing origin myths about restorative justice.”); Sylvester, *supra* note 23 (comparing restorative justice histories to the “mythmaking” in Hollywood historical films).

58. See Daly, *supra* note 57, at 61-64 (discussing the “homogenizing” choices of restorative justice historians); see also Sylvester, *supra* note 23, at 521-22.

59. See Laura Nader & Elaine Combs-Schilling, *Restitution in Cross-cultural Perspective*, in RESTITUTION IN CRIMINAL JUSTICE: A CRITICAL ASSESSMENT OF SANCTIONS 27 (Joe Judson & Burt Galaway eds., 1977) (“[M]any of the references people make to restitution in past or contemporary societies are just plain wrong or full of misconceptions.”); see also Sylvester, *supra* note 23, at 493-522 (examining errors and omissions in restorative justice histories).

60. Sylvester, *supra* note 23, at 502-10.

61. Weitekamp, *supra* note 12, at 76.

Eskimo legal system encouraged both retaliation killing and the death penalty for sexual offenses, homicide, excessive lying, and insults.<sup>62</sup> Weitekamp also cites the practice of monetary restitution in many societies without informing his reader that physical punishment or violent retaliation was common when monetary restitution failed.<sup>63</sup> When offenders did not or could not pay the victim, they were taken into slavery or executed.<sup>64</sup> Accordingly, *the deterrent effect of slavery or physical punishment rather than the desire for restoration often drove the retribution process.*<sup>65</sup>

In light of this information, some of Weitekamp's more sweeping claims, such as "punishment—in today's sense—was the exception rather than the norm,"<sup>66</sup> and "our barbarian ancestors were wiser and more just than we are today,"<sup>67</sup> seem attenuated. According to Kathleen Daly in *Restorative Justice: The Real Story*, such "[e]fforts to write histories of restorative justice, where a pre-modern past is romantically (and selectively) invoked to justify a current practice, are not only in error, but also unwittingly" ethnocentric.<sup>68</sup>

Sylvester also scrutinizes the second narrative scholars, specifically their claim of the importance of restitution in historical legal codes.<sup>69</sup> He states that the evidence on which they draw a comprehensive conclusion about the nature of criminal justice in the past four thousand years is based on a group of codes that is too limited.<sup>70</sup> He points out that second narrative scholars ignore virtually all ancient documents and codes from Indian and Islamic law because those traditions embrace a punitive approach to crime.<sup>71</sup>

Sylvester claims that even the legal traditions to which the second narrative authors refer overlook "competing reactions to crime that either coexisted with or dominated over restitution."<sup>72</sup> The code of Ur-Nammu, for example, included provisions for death and imprisonment for many classes of crimes alongside its compensatory restorative

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62. E. ADAMSON HOEBEL, *THE LAW OF PRIMITIVE MAN: A STUDY IN COMPARATIVE LEGAL DYNAMICS* 83-99 (Harvard Univ. Press 1956).

63. Sylvester, *supra* note 23, at 503.

64. *Id.*

65. *Id.* at 503-05.

66. Weitekamp, *supra* note 12, at 82.

67. *Id.* at 82-83 (quoting HARRY ELMER BARNES & NEGLEY K. TEETERS, *NEW HORIZONS IN CRIMINOLOGY* 401 (3d ed. 1959)).

68. Daly, *supra* note 57, at 63.

69. Sylvester, *supra* note 23, at 511-16.

70. *Id.* at 512.

71. *Id.* at 515.

72. *Id.* at 513.

scheme.<sup>73</sup> Many Babylonian codes embraced talionic criminal justice and enforced rigid class, gender, and other status classifications.<sup>74</sup> The Code of Hammurabi contains the provision that “[i]f a man’s wife, for the sake of another, has caused her husband to be killed, that woman shall be impaled.”<sup>75</sup>

Sylvester also challenges the narrative scholars’ philosophical interpretation of “*shalom*,” and anecdotes from ancient Hebrew texts.<sup>76</sup> He notes that these second narrative scholars ignore the ancient Hebrew “thirty-six capital crimes” for which stoning was the preferred method of execution.<sup>77</sup> Sylvester points out that, along with some restorative provisions, the Roman Law of Twelve Tables also contained death penalties for certain crimes such as the taking of crops at night, and specifically allowed “the law of retaliation” when the victim and the offender were unable to come to a settlement.<sup>78</sup> In Germanic societies, the restitution penalty was often so costly that it was intended to shame the offender by assuring he could not pay.<sup>79</sup> These offenders were then generally put into debt-slavery.<sup>80</sup>

Thus, despite the second narrative scholars’ assertions of the ubiquity and prevalence of restorative justice, it did not exist in all societies. In those in which it did, restorative practices existed alongside violent alternatives such as mutilation, debt-slavery, and execution.<sup>81</sup> According to Sylvester, the second narrative scholars may have gone too far in their effort to legitimize restorative justice.<sup>82</sup> This does not mean, however, that juvenile justice advocates cannot use the second narrative scholars’ research effectively. The next Section examines how placing restorative justice in a broader context of criminal justice history can reconcile the second narrative and its criticisms.

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73. *Id.*

74. *Id.*

75. Code of Hammurabi, in C.H.W. JOHN, BABYLONIAN AND ASSYRIAN LAWS, CONTRACTS AND LETTERS 44-67 (1904), available at <http://avalon.law.yale.edu/ancient/hamframe.asp>.

76. Sylvester, *supra* note 23, at 512-14.

77. *Id.* at 514.

78. THE LAW OF TWELVE TABLES, tbl. VII, law IX (“When anyone breaks a member of another, and is unwilling to come to make a settlement with him, he shall be punished by the law of retaliation.”), <http://www.constitution.org/sps/sps011.htm> (last visited October 18, 2009).

79. Sylvester, *supra* note 23, at 515.

80. *Id.*

81. *Id.* at 513.

82. See *id.* at 519-22 (concluding that these histories are borderline “myths”).

### III. HOW TO USE THE HISTORY OF RESTORATIVE JUSTICE AS A POINT OF ADVOCACY FOR JUVENILE JUSTICE REFORM

In an attempt to overcome political barriers<sup>83</sup> and convince critics of the wisdom of the restorative justice approach, juvenile justice reform advocates and second narrative scholars have imposed a rhetorical element into the history of restorative justice.<sup>84</sup> But while some persuasive repackaging may have been justified, the second narrative scholars have been criticized for going too far in rewriting the history of their philosophy in an effort to legitimize it.<sup>85</sup> Despite this controversy, understanding the history of restorative justice is useful in advocating for juvenile justice reform if the second narrative and its criticisms are reconciled.

Under a new and tempered narrative, restorative justice should be seen as *a prominent method of conflict resolution* that was used alongside harsher punitive approaches throughout history. While it may not have been dominant and universal, disparate cultures across the globe saw restitution as an effective method of problem-solving and restoring community peace.<sup>86</sup> It was not until the rise of the Norman notion of crime as a “breach of the King’s peace” that offenses came to be viewed *solely* as transgressions against the state.<sup>87</sup> This revised narrative retains valuable facts about the history of restorative justice which advocates can use both accurately and effectively.

One of the most useful aspects of the new narrative is that it puts existing retributive practices into historical context. To those who would argue that a punitive “tough on crime” approach is the common-sense, traditional solution to juvenile offenses, the new narrative reveals that it is merely *one method* that was utilized throughout history.<sup>88</sup> Punishment by retribution is not the traditional, most obvious, or common sense approach. Retribution in the Western legal tradition was commonly used alongside restorative policies.<sup>89</sup> Often, retribution was only invoked when restitution was not possible.<sup>90</sup> This suggests that in

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83. See Beale, *supra* note 8, at 423-31 (discussing the political expediency of playing the “crime card”).

84. *Id.* at 521.

85. *Id.*

86. See *supra* Section III (analyzing the prevalence of restorative justice in many historical societies and codes).

87. See *supra* text accompanying note 52.

88. See *supra* text accompanying note 83.

89. See *supra* text accompanying notes 60-82 (exposing retributive methods commonly used in conjunction with restorative practices).

90. Sylvester, *supra* note 23, at 512-14.

much of Western legal history, the truly traditional approach used from pre-state hunter-gatherer clans to the Roman Empire was *restorative justice first, punitive action second*.

Juvenile justice reform advocates can also use the revised narrative to teach opponents how retribution became the dominant method of punishment in the common law. It is important that opponents understand that retribution earned its place as the controlling ideology not because it was an effective solution to restore peace or prevent crime, but because it strengthened the King's status and ability to rule England after the Norman invasion.<sup>91</sup> When the retributive "crime against the state" model is seen as a by-product of these historical consequences, it loses its status as the *way things have always been done, and therefore the best way to do things*. Therefore, removing retributive justice from its historical pedestal creates the opportunity for discourse and discussion on the benefits of a new paradigm—one that views crime as an offense against the victim. Moreover, this opportunity for discussion also allows advocates to distinguish restorative justice from the rehabilitative model, which focuses on using the state's resources to rehabilitate the offender rather than centering on repairing the harm done to the victim.

#### CONCLUSION

Restorative justice is not the law of Eden. It is not the only ancient archetype of human justice. Pre-state and early state methods of punishment are as replete with examples of brutal and oppressive retribution as they are with methods of restoring the victim. Nevertheless, restorative justice is an important and effective philosophy that is popular among juvenile justice advocates. As an important tool for reform, it is essential to understand its roots in the history of criminal justice. Even if restorative justice was not universal, it has been a prominent method of punishment in cultures throughout history. Having a full but tempered understanding of the history of restorative justice can help advocates to inform those who question its legitimacy.

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91. See *supra* text accompanying note 52.