

**Appraising Surge In Legal Scholarship Regarding Restorative Justice And  
Discovering Lenses To South: Is Global Criminal Justice Necessarily Different  
From United States Ideal?**

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## Introduction

2004 scholarship showed uncommon interest in restorative justice, sparking the conceptual curiosity behind this paper: to study recent articles from the most prestigious journals, identify prevalent values,<sup>2</sup> and contrast them with those describing interest in restorative justice throughout the Southern Hemisphere. For reasons elaborated throughout this article, most pieces published in 2004 contain material regarding community practice in the South,<sup>3</sup> as well as author description of underlying values. A natural question arising from these articles is whether the growing interest in restorative justice has resulted from newly emerging international systems as well as domestic criminal law. Much modern criminal activity, such as terrorism, knows no border, requiring transnational, and often international, response.<sup>4</sup> 2004 scholarship reveals not only interest but fascination with restorative justice resulting from evolving international procedures. In fact, international process may explain the majority of scholarly interest. Several articles critique truth and reconciliation processes throughout the South,<sup>5</sup> as well as global reparations.

The most tragic of loss and brutal injustice, whether domestic or international, sparks our deepest passions while carving lasting trauma. In the face of overpowering

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<sup>2</sup> Values articulated are simply stated, and sometimes summarized, with acknowledgment given to those stated several times. Descriptors' frequency was noted in reviewing articles.

<sup>3</sup> This paper is a modest attempt to review emerging interest in restorative justice; not an anthropological work of community dispute resolution around the world. Such a life-time study would be an invaluable scholarly contribution to restorative justice.

<sup>4</sup> Eric Luna, *A Place For Comparative Procedure* 42 BRANDEIS L. J. 277, 278 (2003/2004).

emotional reaction, all agree, scholar and community alike, within the United States (hereinafter “US”) and around the world, that we first and foremost must find a way to objectively manage violence while publicly acknowledging wrongdoing. In response to 2004 scholarship, this article urges future scholars to tackle this pragmatic task as well as debate philosophical difference. Societies require concrete answers to several yet answered questions about the actual impact of retributive and restorative approaches to crime. What options are truly proving themselves as most viable in preventing and reducing violence?

Thus this paper aspires to stress actual practice, in addition to description of outside observers, in an attempt to capture the “living” values of Southern cultures and emerging international community. Envisioned is concrete foundation for further understanding the much articulated North/South divide. Admittedly published descriptions of practice are dependent on author perspective. Community practice choices, though, even when described through outside filters, provide some insight into local community values. Discerning “core values” is most challenging with international process since its mechanisms have been created as much to respond to practical challenges as principles. Administrative approaches blend traditional reparative and authoritative, “quasi-legal,” determinations with elements of restorative justice.

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<sup>5</sup> Only now is truth and reconciliation being tried in the United States, as part of the Greensboro Truth and Reconciliation Project. Thus no comparative data exists---yet.

For the purposes of this article, international is defined in modern terms. Rather than the traditional, narrow and literal definition of international as between nation-states, here the scope of international criminal, human rights and humanitarian law,<sup>6</sup> is encompassed. Crimes against humanity like torture and persecution are included.<sup>7</sup> While the truth and reconciliation efforts scrutinized in this article may initially appear domestic, or within a discrete nation-state's legal and political process, the issues, as defined by law, elevate these forums to the international level. States, however, are the responsible forum of first resort in enforcing international law.<sup>8</sup>

There is a second discrete group of articles from early 2004 that is strongly value-based but focused on restorative justice within the U.S. This group appears to assume that restorative justice necessarily requires mercy and forgiveness.<sup>9</sup> This assumption may be one example of how international restorative justice impacts domestic debate, since amnesty has been one controversial approach to truth and reconciliation.<sup>10</sup> Some believe treating offenders and victims with moral parity is necessary for future societal harmony.<sup>11</sup> At least one author posits options as limited to complete amnesty, selective

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<sup>6</sup> STEVEN R. RATNER and JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 10 (2d 2001).

<sup>7</sup> International customary law provides the bulk of guidance in determining criminal responsibility for systemic atrocities with a nexus to armed conflict. *Id.*

<sup>8</sup> Ratner and Abrams, *supra* note 6 at 160.

<sup>9</sup> Juan Mendez "argues that the most extreme form of tokenism in transitional justice is to set up a truth commission as an alternative to criminal prosecution, rather than as a step toward accountability. Aeyal M. Gross, *The Constitution, Reconciliation, And Transitional Justice: Lessons From South Africa and Israel*, 40 STAN. J. INT'L. L. 45, 83, n. 13 (2004). Mr. Mendez's arguments indirectly advocate the practice of restorative justice within the United States, where offenders declare themselves accountable. Class lecture, 2004. Restorative Justice, Straus Institute for Dispute Resolution.

<sup>10</sup> Ratner and Abrams, *supra* note 6.

<sup>11</sup> Penelope E. Andrews, *Reparations for Apartheid's Victims: The Path to Reconciliation?* 53 DEPAUL L. REV. 1155, 1159 (2004).

amnesty, or traditional prosecution “strictly according to the law.”<sup>12</sup> Equating restorative justice with mercy may also reflect contemporary events within the United States, specifically, the Illinois death penalty pardons and growth in faith based (“forgiveness”<sup>13</sup>) prison units.<sup>14</sup> One author acknowledges though that “pure forgiveness” may not be sought as much as pragmatic reconciliation.<sup>15</sup> The truth, explored later in this article, is that forgiveness, mercy and moral parity are ideas related to restorative justice but not equivalents.<sup>16</sup>

Both groups of recent articles come together surprisingly, despite dramatic difference in espoused values, through acknowledging their gross inability to actualize ideals. Ironically all of the 2004 scholarship reviewed here, while arguing extreme value dichotomy in the abstract, pragmatically builds a case for restorative justice, at least when practiced according to its true principles and not misunderstanding. In response, this article’s central premise is that, regardless of philosophical difference, societies, both North and South, need credible alternatives, or additions, to traditional legal systems capable of effectively addressing overwhelming conditions. Preserving impartial legal institutions must be primary. Restorative justice may prove to be not only plausible but critically necessary, for upholding the best of legal tradition. It deserves an opportunity to prove itself.

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<sup>12</sup> Gross, *supra* note 9 at 47.

<sup>13</sup> While leaders in restorative justice do not necessarily equate faith and forgiveness, popular perception may.

<sup>14</sup> Lynn S. Branham, *Go And Sin No More: The Constitutionality Of Governmentally Funded Faith-Based Prison Units*, 37 U. MICH. J. L. REFORM 291(2004). Research shows reduced recidivism from faith based intervention. Class lecture, *supra* note 9.

<sup>15</sup> *Id.*

<sup>16</sup> Comments from Professor Daniel Van Ness, September 2004.

Needless to say, legal incapacity is compounded with mass atrocities. International institutions are inevitably overwhelmed. Perhaps as a result, and an interesting twist given the U.S.'s strong influence on international forums, international piloting of restorative justice will pioneer integration domestically.

Once again, this article asserts that all legal systems, domestic and international, are in desperate need of trustworthy options to help preserve the best of legal traditions. Given maturing interest in restorative justice, examining its practice more closely, from a pragmatic perspective, is now both possible and wise.

Section I of this article briefly reviews core values articulated by traditional legal systems around the world. It includes debate over values within the United States. It introduces restorative justice as a distinct paradigm.

Section II attempts to discern values underlying community practice of restorative justice throughout the South. Scholars highlight East Timor, Rwanda, Sierra Leone and South Africa. Practitioner research regarding recent interest in several Latin American countries is also referenced.

Section III reviews the scholarly values articulated in analyzing the practices described in section II. Scholars promote retributive values, seeing them demonstrated in

emerging international criminal process, desired in certain communities for revenge, and necessary to maintain legal authority and deter crime. Yet these same scholars simultaneously present a rich and varied analysis of the values underlying restorative justice.

Section IV scrutinizes the quasi-legal international process being labeled as restorative. Attempts to blend traditional approaches with systemic reparations create many practical problems, blurring lines between retribution and restoration. Nevertheless values are espoused for hybrids as well and acknowledged here as deserving scrutiny. Blending retributive and restorative process may prove necessary for international justice.

Section V identifies the legal challenges faced by both North and South independent of values and ideals. Societies are increasingly overwhelmed. Pragmatic alternatives to comprehensive traditional process are undeniably necessary.

Section VI reviews 2004 scholarship regarding restorative justice within the United States. The bulk unnecessarily equates restorative justice with mercy and forgiveness. Intractable dilemmas between two rejected extremes result, since the retributive system is acknowledged as grossly flawed while unconditional mercy utopian.

Section VII responds with a proposal that restorative justice be allowed to prove itself. While demonstrating its authentic potential, restorative justice can relieve legal

systems of less important cases. Traditional systems will then be free to rectify failings and strengthen capacity to realize cherished ideals.

Section VIII concludes with reviewing case study data from East Timor's truth and reconciliation process. East Timor emulates a hybrid of retributive and restorative ideals and practices within the emerging international system of justice for widespread and horrendous war crimes. As a pioneer, it raises several questions for scholarly study.

I. **Values Underlying Traditional And Restorative Justice Transcend Debate As Long-Cherished Ideals.**

The espoused virtues of traditional justice will be briefly summarized here to provide context for understanding scholarly and Southern interest in the alternative of restorative justice. For example, American criminal procedure is recognized for "providing constitutional protections not merely to the in-groups of society, but also to social outcasts, minorities, the poor and the weak, buttressed by the convention of judicial review."<sup>17</sup> Optimally comparing criminal procedure from various countries illuminates values held by diverse cultures.<sup>18</sup> Even within the United States, however, this task is involved, as commentators assert differing values: order and crime control, with a secondary value of efficiency, versus the due process protections mentioned above, seeking to honor individual dignity and protect from State power abuse.<sup>19</sup> Globally, there are several traditions purportedly reflecting different value priorities. Common and civil

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<sup>17</sup> Luna, *supra* note 4 at 280.

law are the institutions receiving most scholarly interest, though Islamic law is now gaining attention. Common law esteems judicial precedent to promote equivalent treatment and incremental change through accurate case by case determination. Civil law promotes comprehensive codes and the ideal of ready lay access.<sup>20</sup> Different adjudication styles prevail, with common law countries often promoting procedural fairness as their primary value, and truth viewed as emerging through adversarial competition according to strict rules, including the presumption of innocence, before impartial decision makers. Another commentator, however, identifies the U.S. desire to control and “worship of proceduralism.”<sup>21</sup> The more cynical frames as “command-and-control strategies that consist largely of assembly-line justice.”<sup>22</sup> One civil law commentator describes retributive philosophy as “positively medieval...confronting offenders with the errors of their ways, sometimes with the victims present, in belief that, faced with the impact of their crimes on others, they will be shocked or shamed into behaving better.”<sup>23</sup> Civil law societies are described as preferring objective truth over procedural fairness, achieved through an inquisitorial approach and allowing more victim involvement.<sup>24</sup> One possible explanation for radically different approaches is that the United States is comfortable with engaging police in its adversarial procedure, as the State views itself as the victim of crime. Countries like Great Britain, however, shun pressure by the police that historically resulted in abuses and coerced confessions. Yet

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<sup>18</sup> *Id.* Though the risk exists that dichotomous analysis and rhetoric may also blind recognition of shared values.

<sup>19</sup> Luna, *supra* note 4 at 281.

<sup>20</sup> *Id.*

<sup>21</sup> Luna, *supra* note 4 at 286.

<sup>22</sup> Stephanos Bibas and Richard A. Bierschbach, *Integrating Remorse And Apology Into Criminal Procedure*, 114 YALE L. J. 85, 88 (2004).

<sup>23</sup> Philip Johnston, Home Front (10/01/2005).

<sup>24</sup> Luna, *supra* note 4 at 285. Professor Luna analogizes the systems as football versus soccer.

U.S. procedural protections are simultaneously posited as venerating individual freedom and limiting State power.<sup>25</sup> “Retribution demands that an offender receive the punishment he deserves, no more and no less.”<sup>26</sup> Ideally, reason counters emotions so that punishment is impartial.<sup>27</sup>

Restorative justice presents a completely different paradigm. It is defined by one leader in the field as

a systematic response to wrongdoing that emphasizes healing the wounds of victims, offenders, and communities caused or revealed by crime. Practices... reflecting restorative purposes will respond to crime by: 1) identifying and taking steps to repair harm, 2) involving all stakeholders,<sup>28</sup> and 3) transforming the traditional relationship between communities and their governments in responding to crime.<sup>29</sup>

The basic values of restorative justice can be summarized as encounter, inclusion, amends, or offender responsibility, and reintegration (of all concerned).<sup>30</sup> These values will be elaborated and clarified throughout this article.

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<sup>25</sup> *Id.*

<sup>26</sup> Stephen P. Garvey, *Is It Wrong To Commute Death Row? Retribution, Atonement, And Mercy*, 82 N. C. L. REV. 1319 (2004).

<sup>27</sup> *Id.*

<sup>28</sup> Stakeholder is broadly defined to include “any group or individuals who can affect, or is affected.” Caroline Neligan, INCREASING ACCOUNTABILITY THROUGH EXTERNAL STAKEHOLDER ENGAGEMENT 4 (2003).

<sup>29</sup> Lynette Parker, *Restorative Justice: A Vehicle for Reform?*, paper presentation, 2004, Annual Meeting of Latin American Studies Association, Las Vegas, Nevada, citing Van Ness, Daniel W. *Justice that Restores: From Impersonal to Personal Justice*, 23 SOCIAL WORK. 93-109 (2004). This definition

## II. Southern Communities Value And Seek Restorative Justice.

An ever present challenge, domestically and even more so globally, particularly in attempting to discern underlying cultural values, is assessing actual practice through publication of espoused ideals. Fortunately, though, five of the 2004 articles reviewed for this article describe actual community practice. Author Naomi Roht-Arriaza, of *Reparation Decisions and Dilemmas*,<sup>31</sup> and Lynette Parker, of Prison Fellowship International, provide the most description of grassroots practice with restorative justice in the Southern Hemisphere. Roht-Arriaza details public dispute resolution in East Timor and Rwanda. Parker describes restorative justice throughout Latin America.

This section introduces Southern values from three distinct regions through retributive and restorative frameworks. A few critical emerging questions are identified. Later in this article, the most prevalent themes will be identified and analyzed in conjunction with scholarly values.

### A. East Timor

Restorative justice in East Timor emerged as part of the United Nations' administration of an innovative Commission for Reception, Truth and Reconciliation:

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suffices for this article, which reviews scholarship focused on criminal justice. The field of restorative justice, however, extends to schools, organizational conflict, family disputes and business.

<sup>30</sup> Class lecture, *supra* note 9.

<sup>31</sup> Naomi Roht Arriaza, *Reparation Decisions and Dilemmas*, 27 HASTINGS INT'L & COMP. L. REV. 157 (2004).

“twenty-five to thirty regional commissioners, who are persons of high moral caliber selected by a representative panel on the basis of over three hundred recommendations.”<sup>32</sup> Offenders with less serious charges, like theft and minor assault--- mostly low-level members of militia, could initiate a meeting with their victims and local community members through request to the Commission and approval of the Office of Prosecutor General. The parties discussed the crime with the aim of reaching agreement and proposing how the perpetrator could make an act of reconciliation, such as community work, restitution, or public apology. Once the process was completed, the district court entered an order that the offense could not be pursued criminally or civilly. If the offender breached the reconciliation agreement, however, a new criminal offense emerged, punishable by imprisonment, fine, or both.

By June 2003 eight hundred and sixty offenders approached the Commission. Two hundred one processes occurred. The Commission worked with victims and communities to prepare for what was called both a hearing and a “community reconciliation process.” Traditional lawgivers, symbols and rituals united with panels of community elders, victims and assembled villages. With the regional commissioner facilitating, “those seeking reintegration tell their story and respond to questions.”<sup>33</sup> Victims had the option to respond. Panels conferred and recommended reparations.

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

Negotiation ensued until all were satisfied. At one process, everyone embraced after traditional ceremonies.<sup>34</sup>

An outside observer,<sup>35</sup> present during one particular process, reports that community members gave this process “real meaning” as “deeply embedded in local culture and custom.”<sup>36</sup> He perceived restorative justice allowing them to publicly acknowledge what had occurred in that community and resolve “the rift that had divided them.”<sup>37</sup>

Did resolving the rift restore or make the victims whole? We do not know. Whether the above was truly restorative, in both process and outcome is uncertain. While offenders and victims met, and included concerned community members—apparently all stakeholders; then purportedly negotiated amends, questions arise about how much the appointed court, or arbitrators, made decisions for victims, offenders and community. We also do not know whether offenders were actually reintegrated as contributing members of their societies and whether the above process had any impact on government relationships. (See Section VIII for further description and analysis of East Timor’s case study).

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<sup>34</sup> Roht Arriaza, *supra* note 31 at 174. Examples of popular community service include repairing schools and churches—at least once with victim and offender working together.

<sup>35</sup> An interesting question is how non-governmental organizations fit into conceptions and actualities of restorative justice in circumstances like those described here. At what point and by whom are they acknowledged as community members? From Evenson’s description, their values espoused regarding traditional and restorative justice represent the entire retributive-restorative continuum as well.

<sup>36</sup> *Id.*

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

## **B. Africa: Rwanda, Sierra Leone and South Africa**

Roht-Arriaza also relates the gacaca system in Rwanda---indigenous dispute resolution, or traditional justice, with reconciliation negotiated by village elders, victims, perpetrators and community members.<sup>38</sup> A modified system is being used given local courts' inability to address their enormous backlog of suspects accused of genocide, with over 130,000 in jail. According to Roht-Arriaza's account, however, the preferred, or valued, approach, at least espoused by the post-genocide government, is punishment rather than restoration---except when members of the government's own ethnic group are accused of war crimes, raising the daunting question of how to counter government power abuse in selective use of retributive and restorative justice.<sup>39</sup> It is unknown from her account whether victims, offenders and community members share the government's desire for punishment or hold more restorative values.

The modified compromise allows for all offenders,<sup>40</sup> except for leaders and organizers of genocide, to appear before gacaca courts. Lay judges are elected at the village level as persons of integrity. If offenders chose to proceed, assembled villagers may testify. While this modified process is quasi legal and allows for sentencing of jail time or restitution, offenders are also free to apologize and make acts of contrition for victim acceptance. If the suspect confesses, half of the sentence may be converted to

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<sup>38</sup> Roht Arriaza, *supra* note 31 at 173.

<sup>39</sup> Aneta Wierzynaska, *Consolidating Democracy Through Transitional Justice: Rwanda's Gacaca Courts*, 79 N.Y. U. L. Rev. 1934 (2004).

community service. For lesser offenders, the entire sentence may be served with community service.

Roht-Arriaza perceives community members as wanting justice, truth and a place to tell their stories.<sup>41</sup> Community has further initiated symbolic acts of reconciliation, such as traditional and religious ceremonies, including consecrating the site of mass killing and erection of memorials. More than once, offenders have asked their communities for forgiveness and been received by traditional leaders.

Author Wierznaska also describes Rwanda's gacaca process as restorative even though the government has granted authority to order retribution within the process.<sup>42</sup> It is community based and encourages community to voice their concerns openly.<sup>43</sup> Wierznaska observed gacaca and reports great value placed on "the accused's admissions of guilt and on expressions of shame and regret."<sup>44</sup>

The above process is restorative in its apparent inclusiveness of all stakeholders, encounter between offenders and victims, and offender accountability. Whether harms are repaired, amends negotiated, government relationships transformed, and victims or

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<sup>40</sup> Interestingly, when ex-combatants were surveyed about this process, one asked that the Special Court educate the public about "the bad people," seeing himself as a victim and not one of the "bad". The largest consensus among ex-combatants appears to be behind prosecution of commanders.

<sup>41</sup> Elizabeth M. Evenson, *Truth And Justice In Sierra Leone: Coordination Between Commission And Court*, 104 COLUM. L. REV. 730, 733 (2004).

<sup>42</sup> Wierzynaska, *supra* note 39 at 1942.

<sup>43</sup> Wierzynaska, *supra* note 39 at 1934.

<sup>44</sup> Wierzynaska, *supra* note 39 at 1945.

offenders reintegrated into villages as contributing members are questions still to be answered.

Sierra Leone's Lome Peace Accord provided for a truth and reconciliation commission. It articulates the restorative justice values of storytelling for both victims and perpetrators, facilitating reconciliation and healing, as well breaking the cycle of violence and rehabilitating victims.<sup>45</sup> No information was found, however, to discern whether government relationships were transformed, all stakeholders, particularly community members, included, and offenders reintegrated into communities.

South Africa's Truth and Reconciliation process provides much material for attempting to identify underlying values.<sup>46</sup> The African concept of "ubuntu"<sup>47</sup> is often used to articulate community values. It purportedly stands for acknowledging community interconnectedness, with corresponding shared responsibility to extend respect to all.<sup>48</sup> Ubuntu sounds like the restorative justice values of solidarity and respect: "treating all with dignity and respect."<sup>49</sup>

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<sup>45</sup>Evenson, *supra* note 41 at 740.

<sup>46</sup>Some criticize as only purportedly inclusive, excluding many victims and beneficiaries of apartheid. Gross, *supra* note 9 at 92.

<sup>47</sup>Nina, Daniel, *Beyond Mediation: How South Africa's 'other mediation' is challenging conventional models* at <http://ccrweb.ccr.uct.ac.za/two/1/p22.html>.

## E. Latin America: Chile, Argentinian, El Salvador, Guatemala and Columbia

A study of victims and family members from Chile, Argentina, El Salvador, and Guatemala<sup>50</sup> identifies their values as 1) official and societal acknowledgment of the wrong done against them, 2) restoration of victims' good names, 3) knowledge of the offender's identity and method, 4) justice, and 5) moral reparations.<sup>51</sup> Lynette Parker is a restorative justice specialist working throughout Latin America. Writing in 2002, she describes the values underlying Latin America's interest in restorative justice, specifically those shown in Argentina, Brazil, Chile, Costa Rica, and Mexico. The top motivator she reports reflects concern for victims, with community involvement and alternatives to untrustworthy, inhumane legal systems as close seconds.<sup>52</sup>

Writing in 2004 Parker adds Columbia to the above list and describes the values of community organizations<sup>53</sup> promoting restorative justice as: 1) transforming violence in schools and other "localized cultures of violence"<sup>54</sup> through building cultures and communities of peace and responsibility, 2) creating transparent processes and greater access for justice, while 3) satisfying the needs of victims and offenders.<sup>55</sup> Parker cites

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<sup>48</sup> *Id.*; Andrews, *supra* note 11 at 1165, n. 15. Class lecture, *supra* note 9.

<sup>49</sup> Class lecture, *supra* note 9.

<sup>50</sup> "...as well as South Africa."

<sup>51</sup> Roht Arriaza, *supra* note 31 at 166.

<sup>52</sup> Lynette Parker, *The Use of Restorative Practices in Latin America*, paper presentation, 2002. Third International Conference on Conferencing, Circles and Other Restorative Practices. Minneapolis, Minnesota; *see also* Price, Marty, *Restorative Justice Warmly Received in Mexico*, ADR REPORT (1999); *Reforms Create Open Door for Restorative Justice in Chile* at <http://www.restorativejustic.org/rj3/Feature/Feb02/Chile.htm>.

<sup>53</sup> Described are non-governmental organizations, law schools and universities, and churches. Parker, *supra* note 52.

<sup>54</sup> Parker, *supra* note 29. Likewise, Rwanda's restorative justice process is strongly promoted as necessary for preventing future interethnic violence. Wierzynska, *supra* note 39.

<sup>55</sup> *Id.*

dramatic examples of the underlying desire for change, such as a former gang member seeing the popular movie Gandhi, negotiating ceasefires with rivals, and devoting himself to mediating with victims and offenders of crime<sup>56</sup> While apparently preventative rather than restorative, a Mexican group serving crime victims, and later a Catholic church, exemplify the broader community desire to transform violence. They advocate mediation<sup>57</sup> and other alternative dispute resolution<sup>58</sup> as non-violent means to resolve local conflict in “one of the most violent neighborhoods in Guadalajara.”<sup>59</sup>

Most striking in the first cited study from Latin America is victims’ widespread desire to secure their children’s education.<sup>60</sup> Likewise Parker’s research emphasizes communities’ desire to create viable futures independent of government. Does the absence of government from the Latin vision of restorative justice reflect the government’s controversial reputation for providing broad and blanket amnesty for perpetrators within truth and reconciliation process?<sup>61</sup> Or perhaps though restorative justice’s ideal envisions transformation of government-community relationships, notoriously corrupt Latin justice has completely eroded citizen faith.

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<sup>56</sup> *Id.*

<sup>57</sup> Mediation is one form of ADR. In the simplest terms, a third party, or mediator, assists parties negotiate resolution. *See e.g.* John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?* 24 FLA. L. REV. 839 (1997), *citing* CHRISTOPHER MOORE, *MEDIATION PROCESS* 8, 41, 53 (2d ed. 1996).

<sup>58</sup> Alternative dispute resolution encompasses a broad continuum of response to conflict that falls between avoidance and escalation. LINDA R. SINGER, *SETTLING DISPUTES: CONFLICT RESOLUTION IN BUSINESS, FAMILIES AND THE LEGAL SYSTEM* (Westview Press 1994).

<sup>59</sup> Parker, *supra* note 29.

<sup>60</sup> *Id.*

<sup>61</sup> Ratner and Abrams, *supra* note 6.

### **III. The Latest Scholarly Values Encompass Both Retributive And Restorative Justice.**

The same scholars cited in Section II, describing widespread community practice of restorative justice, integrate their own values throughout analysis of restorative justice. Interestingly, all espouse a mix of retributive and restorative elements. Does this hybrid reflect scholarly confusion about the restorative paradigm or more complex realities? How will this blending impact future justice around the world, particularly truth and reconciliation and emerging international institutions?

#### **A. Asia: East Timor**

Author Roht-Arriaza promotes East Timor's restorative process. She stresses value when 1) offenders and victims must somehow co-exist in relatively intact communities, 2) power disparities are minimal, and 3) the state and perpetrators cannot pay monetary compensation. She further recognizes the emphasis on moral reparations, recognition of harm to the whole community as well as particular victims, victims' ability to confront offenders, perpetrators' public atonement for wrongs, and the community's involvement in storytelling, resolution and reintegration.<sup>62</sup>

#### **B. Africa: Rwanda**

Likewise Roht-Arriaza supports Rwanda's quasi-legal restorative process as 1) repairing at least some of the harm, 2) allowing public truth telling, 3) facilitating encounter between offender and victim, and 4) providing opportunities for apology by the

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<sup>62</sup> Roht Arriaza, *supra* note 31 at 175.

offender and acceptance by the victim. Optimally, she views Rwanda's process as fostering reintegration into communities and social reconstruction.<sup>63</sup>

Wierzynska advocates engaging the people of a post conflict society "directly in justice processes that engender civic behaviors in order to develop the necessary citizen base for an integrated democracy."<sup>64</sup> She believes that empowered citizenry is absolutely necessary for preventing reoccurring violence. She also sees the hybrid gacaca process as bridging critical gaps between government and citizens and the two warring ethnic groups.<sup>65</sup> Whether these relationships will be transformed according to restorative ideals is yet to be seen. Wierzynska also values the gacaca process for reintegrating both perpetrators and victims into their society through reconciliation.<sup>66</sup>

In contrast, traditional prosecution through the International Criminal Tribunal for Rwanda is seen as holding the leaders and instigators of genocide accountable.<sup>67</sup> Aspired here is deterrence.<sup>68</sup>

### **C. Africa: Sierra Leone**

Author Evenson, in describing Sierra Leone's process, strongly prefers traditional prosecution. Still she elaborates the values she perceives with restorative justice,

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<sup>63</sup> *Id.*

<sup>64</sup> Wierzynska, *supra* note 39 at 1935.

<sup>65</sup> Wierzynska, *supra* note 39 at 1936.

<sup>66</sup> Wierzynska, *supra* note 39 at 1939.

<sup>67</sup> *Id.*

concurring in most ways with Roht-Arriaza and Wierynska. She includes truth telling, acknowledgment, accountability (including institutional), reconciliation, tension reduction, or catharsis, offender reintegration (with possible eventual forgiveness), broad social participation, insight necessary to prevent future violence, and civic/social transformation.<sup>69</sup> Then Evenson articulates her own values, blending restorative and retributive: accountability, deterrence and punishment, establishing public history, or record, healing, reconciliation, social movement, and reintegration, particularly of ex-combatants.<sup>70</sup>

In comparing the two lists, it appears that Evenson, in favoring retribution, puts most of her faith in punishment as the means necessary to deter crime. She also questions restorative justice's record-keeping, or ability to document history. Evenson further infers that retribution is essential for healing.

Another article, however, also assessing Sierra Leone, stands in direct contrast to Evenson's perspective. It expressly advocates constraining both bureaucratic authoritarianism and victim vengeance. It further recognizes restorative justice's potential for "drawing out" the best of human nature, including secondary victims, along with promoting common good, emotional expression, and healing.<sup>71</sup> In describing the values behind Sierra Leone's process, reiterated are the importance of reconciliation, or

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<sup>68</sup> *Id.*

<sup>69</sup> Evenson, *supra* note 41 at 737.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

repairing harm to live in peace with each other, respect for cultural traditions, and offender and community involvement, encompassing victims and families.<sup>72</sup>

Examining these critical differences from an empirical rather than values perspective would do much to advance both retributive and restorative justice. Is actual healing most powerfully facilitated by retribution, restoration, or a combination of both? What most effectively deters crime as well as prevents future violence? Is history, or public record, advocated to this end? If so, what is the most fair, impartial, or inclusive, means to truth telling? Which truths are most essential to record? And last, but not least, in light of 2004 scholarship as a whole, is this truly a debate between retributive and restorative justice, or, in actuality, between offender accountability and offender amnesty, or no accountability at all, for the sake of other interests?

#### **D. Africa: South Africa**

Professor Andrews posits South Africa's process as "looming large" for restorative justice and articulates values of social reconstruction and nation building, racial healing, harmony and reconciliation, symbolic movement towards accountability and victim storytelling. She further lauds the importance of engaging the broader South African community as witnesses confronting pain together, creating history from the stories of victims and offenders, providing catharsis, and facilitating transition from

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<sup>72</sup> Ganda, Ambrose, *New Emphasis Should Be On Making Up, Not Breaking Up The Nation's People* 2 Focus at <http://www.focus-on-sierra-leone.co.uk/Issues%20of%20Peace%20and%20Reconciliation>.

authoritarian to democratic rule.<sup>73</sup> Andrews perceives the “open display of pain and trauma on the part of victims and victims’ families” as a ritual and metaphor “for the society moving toward healing and reconciliation, and lauds the resultant “vibrant and vigilant civic culture.”<sup>74</sup> She views truth and reconciliation as primarily victim centered, allowing “victims to tell their stories unencumbered by legal methods such as cross-examination.”<sup>75</sup> Others agree, positing enhanced dignity for the citizen victim.<sup>76</sup>

Once again, however, several authors, including Andrews, describe a strong community tension throughout South Africa between values of forgiveness and revenge.<sup>77</sup> Still others argue that local communities’ desire for retributive justice was prevalent and disregarded.<sup>78</sup> If this is so, the question arises whether satisfying the desire for revenge, by itself, justifies retribution?

## **E. Latin America**

Latin American practitioner Parker also reports her own values, stressing inclusion, community level solutions, and access to resources.<sup>79</sup> Reparations provide a sense of future for younger generations and embody societal recognition and atonement

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<sup>73</sup> Andrews, *supra* note 11 at 1157; Gross, *supra* note 9 at 47.

<sup>74</sup> Andrews, *supra* note 11 at 1165.

<sup>75</sup> Andrews, *supra* note 11 at 1158.

<sup>76</sup> Andrews, *supra* note 11 at 1165.

<sup>77</sup> Andrews *supra* note 11 at 1161.

<sup>78</sup> Andrews, *supra* note 11 at 1168, n. 59; Gross, *supra* note 9 at 82, n. 149. While recent scholarship rarely references such retributive community spirit outside of the United States, apparently some of Latin America joined in the outcry against the Illinois death penalty pardon.

<sup>79</sup> Roht Arriaza, *supra* note 31 at 166.

for harms.<sup>80</sup> Moral reparations in particular satisfy: 1) felt need for storytelling, 2) prevention of future harms, 3) justice, 4) public acknowledgment, 5) accountability--- removal of offenders from positions and other structural reform, 6) victim assistance, 7) culturally appropriate procedures, 8) public memory and remembrance, 9) reintegration of victims, and 10) social reconstruction/development.<sup>81</sup> Most recently, Parker has stressed the role restorative justice can play in catalyzing critical government reform--- perhaps in response to the widespread alienation acknowledged earlier. She advocates bridging the government-civil society divide, acknowledging specific ways governments, like the Colombian National Congress and Chilean legislature, international development organizations, and regional groups, like the Organization of American States, have supported restorative efforts.<sup>82</sup>

## **F. International**

Evenson, analyzing Sierra Leone's process, sees "prosecution preference" academically and internationally, as exemplified by former Yugoslavia's process and the International Criminal Court, with punishment as the predominant goal.<sup>83</sup> As mentioned earlier, Evenson apparently believes that the traditional approach deters. She relates fear that circumventing punishment diminishes legal authority.<sup>84</sup> Evenson sees community involvement through media coverage of trials.

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<sup>80</sup> Roht Arriaza, *supra* note 31 at 157.

<sup>81</sup> Roht Arriaza, *supra* note 31 at 158 and 162.

<sup>82</sup> Parker, *supra* note 29 at 7, 11 and 12.

<sup>83</sup> Evenson, *supra* note 41 at 736.

<sup>84</sup> Evenson, *supra* note 41 at 743, n. 11.

She is supported by Wierzynska's analysis of Rwanda's international criminal court. Wierzynska posits traditional prosecution as reinforcing democracy through fostering respect for rule of law and human rights.<sup>85</sup> She goes on to argue that international tribunals enhance legitimacy of new governments through creating moral distance from criminal elites.<sup>86</sup>

At the same time, a movement within reparations discourse, regarding communities affected by genocide or massive conflict, "reparations as development," recognizes the restorative value of more intimate community involvement.<sup>87</sup> Acknowledged is community wide harm and need for repair. Advocated is grassroots participation in defining priorities. The nation building required after international crimes, such as apartheid and human rights violations of military dictatorships, democratically embraces citizens' role.

#### **IV. International Restorative Justice Assumes Quasi Legal Process, Causes Predictable Problems; Yet Also Creates Value.**

While the scholars cited throughout this article assert scrutiny of what they name restorative justice, their primary focus is truth and reconciliation with more administrative and quasi legal elements and less community involvement. Interestingly, some scholars use restorative justice "language" to describe the virtues of the traditional retributive legal system. For example, Roht-Arriaza lauds Alien Victim Tort Claims

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<sup>85</sup> Wierzynska, *supra* note 39 at 1938.

<sup>86</sup> *Id.*

actions for human rights violations as giving victims a public opportunity for storytelling, publicizing harm to the wider community and recognizing harm.

### **A. Blending Traditional And Restorative Justice Creates Complications.**

Several international agreements recognize victims' rights.<sup>88</sup> Emphasis on government implementation, however, has repeatedly resulted in disillusionment. Resources for reparations are limited. Quasi legal process requires a limited and easily identifiable group of victims. Discerning appropriate collective reparations is challenging.<sup>89</sup> So is the task of distinguishing between various degrees of harm. The truth commissions of South Africa, Guatemala, El Salvador and Panama have all recommended extensive reparations but been slow to act.<sup>90</sup>

Some regional and international courts have powers that arguably allow partial restorative justice through redress in addition to compensation.<sup>91</sup> Victims may approach the International Criminal Court, for example, and claim rehabilitation and other forms of remedy.<sup>92</sup> Though the above sounds like a direction towards restorative justice, acknowledged is lack of access for many victims who do not understand traditional legal procedure.<sup>93</sup> Scholars fear uncaring bureaucrats will retraumatize victims.<sup>94</sup>

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<sup>87</sup> Roht Arriaza, *supra* note 31 at 169.

<sup>88</sup> *See, e.g.*, Roht Arriaza, *supra* note 31, Appendix.

<sup>89</sup> Roht Arriaza, *supra* note 31 at 162.

<sup>90</sup> An interesting alternative with potential is proposed preferential access to vital services for victims or opportunities like micro credit—an option to relying on government. Roht Arriaza, *supra* note 31 at 174.

<sup>91</sup> Roht Arriaza, *supra* note 31 at 160.

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

<sup>93</sup> *Id.*

Practically a hybrid and dual track quasi legal process creates problems. Public disclosure in truth commissions may undermine prosecution. What if each body reaches a different conclusion about accountability?<sup>95</sup> If truth commissions are quasi legal, those judged arguably deserve appeal and review.

**B. International Crimes, However, May Require and Societies May Be Served By Combining Retributive And Restorative Justice.**

“To our knowledge... this intriguing fusion of mediation and punishment has gone largely unnoticed by the academic literature.”<sup>96</sup> Complex challenges arise when attempting restorative justice with international crime--challenges not often faced domestically. Preliminary determination of victims, perpetrators and harm can greatly limit the confronting of structural violations. In South Africa, as one instance, while apartheid is defined as a crime against humanity under international law, the truth and reconciliation commission focused on individual acts of gross violations of human rights, thus “sparing” examination of systemic crime (and accountability).<sup>97</sup> Lines between offenders and victims are often blurred, as many offenders are also victims<sup>98</sup>. Determining beneficiaries of international crime evokes questions about the role and responsibility they should have in reparations and reconciliation. In South Africa, beneficiaries implicated transnational corporations. Thus the question of who is to be

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<sup>94</sup> Roht Arriaza, *supra* note 31 at 166 and 174.

<sup>95</sup> Evenson, *supra* note 41 at 760.

<sup>96</sup> Bibas and Bierschbach, *supra* note 22 at 96.

<sup>97</sup> Andrews, *supra* note 11 at 1159.

reconciled is far more reaching and tough in scale. Repairing the harm with long standing systemic crimes is likely to take generations.<sup>99</sup> In case of war and mass dislocation, there is often no community remaining for reintegration.

The above challenges appear to be compounded by the international community's efforts at creating quasi legal restorative justice. Author Evenson, for example, views truth commissions (transitional justice) as primarily legal, emphasizing evidence, witnesses and other legal elements instrumental to creating historic record, along with the goals of punishment, remedy and institutional reform, while also using the language of restorative justice, accountability and reconciliation, to describe goals. Building a society capable of preventing future crime is prioritized.<sup>100</sup> She represents the perspective that transitional justice's primary mechanism for effectively confronting human rights violations is prosecution, with truth commissions only necessary, or of value, when prosecutions are barred or impractical. Values beyond punishment are recognized but seen as secondary. This perspective appears more likely to view truth commissions as authoritarian bureaucratic mechanisms used to respond to overwhelming conditions, with efficiency and fairness first and foremost, rather than more inclusive community negotiated process. Evenson herself explains the interest in truth and reconciliation is predominantly practical. Systems are overwhelmed with potential prosecutions. Resources are scarce.<sup>101</sup>

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<sup>98</sup> Evenson, *supra* note 41 at 740.

<sup>99</sup> Andrews, *supra* note 11 at 1160.

<sup>100</sup> Evenson, *supra* note 41 at 730.

<sup>101</sup> Evenson's perspective might seem logical at first glance. It fails, however, to consider systemic offense, myopically assuming individual culpability alone, as if international crimes equate with domestic. This perspective intrigues, particularly in the context of Evenson's article, Sierra Leone, where she

Author Andrews notes the inherent dilemma in combining fact finding, or “evidentiary” investigation, with victim storytelling and healing.<sup>102</sup> She names four kinds of truths: forensic, narrative, social dialogue, and healing, or restorative, with only forensic, or factual, determined through traditional legal process and compromising the other truths.<sup>103</sup> On the other hand, she sees potential benefit from hybrid process in educating the broader public and providing critical transition to democracy.<sup>104</sup>

Yet another writer argues persuasively that rule of law itself requires elements of restorative justice in transitional societies. Moving towards more inclusive participatory decision making optimally encompasses negotiation and drafting of constitutions, as occurred in South Africa.<sup>105</sup> Otherwise those previously excluded may perceive mere continuation of power elites imposing their will. “Democratic transitions are best understood as a ‘dangerous hour. With the collapse of authoritarian regimes, there emerge new nations full of needs...and full of rage.’”<sup>106</sup>

To counter this, or broaden community access and inclusive narrative, public voice was invited and meetings were scheduled throughout South Africa. Anyone could

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acknowledges “long-simmering resentment against government elites for their perceived exploitation of the country’s resources at the expense of the general population.” Interestingly, while her description calls to mind the U.S. courts, author Evenson does not anticipate guilty pleas with truth commissions. Evenson, *supra* note 41.

<sup>102</sup> Andrews, *supra* note 11.

<sup>103</sup> *Id.*

<sup>104</sup> Andrews, *supra* note 11 at 1156.

<sup>105</sup> Gross, *supra* note 9 at 50.

<sup>106</sup> Susan Opatow, POST-CONFLICT JUSTICE (2002) (quoting Nancy Scheper-Hughes, *Undoing: Social Suffering and the Politics of Remorse in the New South Africa*, SOCIAL JUSTICE 116 (1998) ).

submit objection. Accountability was sought through asking the Constitutional court to certify the resultant agreement.<sup>107</sup> At the same time, public acknowledgment of offenses and creation of a history, or record, were promoted, along with victim reparations.<sup>108</sup> Whether this example of combining retributive and restorative elements will prove optimal is still being scrutinized.

Wierzynska also stands for hybrid process after analyzing Rwanda's needs. She sees blending restoration and retribution uniquely strong through its combining indigenous, or community, process and state involvement; thus building a "critical communication bridge between the people and the State that did not exist before."<sup>109</sup>

While 2004 scholars critiquing truth and reconciliation uniformly advocate retributive justice, they simultaneously laud the fundamental values underlying restorative justice—in process and outcome. First and foremost, they stress the importance of community involvement, emphasizing social reconstruction and democratic nation-building. Aspired are reintegration and prevention of violence. Some understanding of injustice and its roots is advocated to "not repeat the past."<sup>110</sup> Victim stories and offender responsibility are viewed as primary vehicles. Select scholars actually see restorative justice as necessary to comprehensive truth-telling.

Clarifying responsibilities about what has happened is a necessary but not sufficient

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<sup>107</sup> Gross, *supra* note 9 at 52.

<sup>108</sup> Gross, *supra* note 9 at 55.

<sup>109</sup> Wierzynska, *supra* note 39 at 1942.

<sup>110</sup> Susan Opatow, *Psychology of Impunity and Injustice: Implications for Social Reconciliation*, POST-CONFLICT JUSTICE (2002).

condition for obtaining truth. At both the individual and collective levels, the capacity for being *moved* ethically and emotionally must be recovered. This restoration of responsiveness can only happen when all social groups, especially those previously silenced, marginalized or excluded, have legitimate voices in the public sphere. Truth will be achieved only when literally everyone knows and acknowledges what happened during the military regime. Once truth is established, a generalized mourning process can take place, alleviating the victims of their suffering and the rest of the society of their guilt.<sup>111</sup>

Secondary, but repeated by several authors, is the importance of recognizing harm to communities, as well as victims, transforming relationships with government, healing, and repair of harm.

## **V. North And South Unite In The Face Of Overwhelming Legal Need**

While several authors reviewed here espouse the virtues of prosecution and punishment, a common theme throughout 2004 is acknowledging most countries lack the

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<sup>111</sup> *Id.*, citing David Becker, et. al., *Therapy with Victims of Political Repression in Chile: The Challenge of Social Reparation*, 46 J. SOC. ISSUES 133 (1990).

resources needed to pursue a comprehensive adversarial process reflecting U.S. ideals.<sup>112</sup>

The international community is even less likely to fill this gap.

In the twentieth century alone there have been 33 million military deaths, 205 million victimization deaths, and an unknown number of people who have survived enslavement, torture, and rape... As former United Nations High Commissioner for Human Rights Jose Ayala Lasso has stated 'a person stands a better chance of being tried and judged for killing one human being than for killing 100,000.'<sup>113</sup>

Even if the international community somehow strengthens its capacity, fierce and widespread global opposition to the U. S. death penalty, particularly with juveniles, indicates sharply conflicting values and philosophies---not only between the U.S. and South<sup>114</sup> but the U.S. and most of the world. Almost nowhere is the passion for punishment more popular than the U. S. Yet 2004 scholars critiquing the U.S. itself assert that the U. S., despite comparatively vast resources, falls far short of its own ideals. From the perspective of most recent scholarship, legal crisis joins North and South.

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<sup>112</sup> *Id.*

<sup>113</sup> Susan Opatow, *Psychology of Impunity and Injustice: Implications for Social Reconciliation*, POST-CONFLICT JUSTICE (2002); see also Roger Alford, *On War As Hell*, U. CHI. J. INT'L. 207 (2002) ("The great irony of war is that the more catastrophic and widespread its destructive consequences, the less likely that those caught in its path will ever be repaid for their injury. There simply is not enough salve to heal the wounds of war.")

<sup>114</sup> John Charles Boger, *Foreword: Acts Of Capital Clemency: The Words And Deeds Of Governor George Ryan*, 82 N. C. L. REV. 1279 (2004). Mexico and South Africa were some of the Southern countries congratulating Governor Ryan and offering "warm support" for his pardon.

Much of the interest in restorative justice for the first months of 2004 was in response to the Illinois death penalty pardon. The rationale behind this pardon was gross systemic error.<sup>115</sup> In one national survey, twenty six percent of respondents said they had ‘very little’ or no confidence in the U.S. legal system.<sup>116</sup> While U.S. law espouses equal protection and fairness, racial bias permeates enforcement.<sup>117</sup> Some state that U.S. crime is increasing, not decreasing, as punishment intensifies.<sup>118</sup> Others assert that reported crime is decreasing and actual crime is either stable or decreasing.<sup>119</sup> The two perspectives come together, however, in agreeing that the U.S. legal system itself is overwhelmed, along with those surveyed around the world.<sup>120</sup>

The 2004 discussion strongly indicts retributive justice, especially the United States’ ability to deliver justice in line with espoused ideals when sentencing the death penalty. The U.S. Supreme Court decision of *McCleskey v. Kemp* is stressed.<sup>121</sup> Despite “extensive empirical evidence” of systemic flaws, the *McCleskey* Court

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<sup>115</sup> *Id.*

<sup>116</sup> Carolyn Copps Hartley and Carrie J. Petrucci, *Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work and Law*, 14 WASH. U. J. L. & POL’Y 133 (2004).

<sup>117</sup> In the U.S., for example, African American youth, who commit about the same amount of violent crime as Caucasian youth, are four times more likely to be arrested. Monya M. Bunch, *Juvenile Transfer Proceedings: A Place For Restorative Justice Values*, 47 HOW. L. J. 909, n. 10 (2004).

<sup>118</sup> *Id.*

<sup>119</sup> Whether restorative justice reduces crime is also being scrutinized. Research to-date shows the type of crime committed is key. Intriguing, particularly within the context of truth and reconciliation and international crimes, in some studies, violent offenders are less likely to reoffend after restorative justice than non-violent offenders. In a study from Australia, violent offenders and drunk drivers reduced repeat crime but shoplifters did not. In a study from Canada, significant reduction in family violence, particularly child and domestic abuse, was found. Several studies show reduced juvenile recidivism. Theo Gavrielides, *A reply to Mr. Philip Johnston’s article “A quick fix for crime doesn’t pay,”* (January 12, 2005).

<sup>120</sup> For some reason, in the U.S. judges not trained in mediation are attempting to rectify this crisis themselves rather than partner with qualified impartial. “Criminal mediation is an emerging reality, for better or worse.” Judicial “muscle mediation”, however, risks widespread involuntary waiver of constitutional rights. Bunch, *supra* note 117.

<sup>121</sup> Boger, *supra* note 114 at 1284.

prioritized ineffectual law enforcement,<sup>122</sup> over “perfect justice”, or a police over just state. Given the inherent racial bias repeatedly documented with capital punishment, Weisberg goes so far as to say that the U.S. is violating its own constitutional principle against arbitrary and capricious punishment.<sup>123</sup>

## **VI. Restorative Justice Cannot Automatically Be Equated With Forgiveness.**

Several scholars frame the Illinois pardon in contrast to what they called retributive justice and equate restorative justice with mercy.<sup>124</sup> Mercy is emphasized even though the pardoning governor of Illinois explained his actions, not as compassionate, but responsive to “his mounting distress with the error and capriciousness that he had found in Illinois’ ‘deeply flawed’ criminal justice system.”<sup>125</sup> In apologizing for systemic failures, arguably the State of Illinois admitted culpability—that it was likewise an offender. Nevertheless, American jurisprudence frames the debate as mercy and “the question is always what is wrong with mercy, rather than when mercy might be justified or even obligatory.”<sup>126</sup> Rather than viewing forgiveness as sought by certain offenders as they are moved by remorse--- but not necessarily given, restorative justice is viewed as synonymous with mercy.

(J)ustice itself is defined in terms of an active extension of mercy to, and between, victim, offender, and community, each helping the others through the process of making things right

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<sup>122</sup> The modern U.S. legal system is described as “a system of crime control through the use of severe penalties.” Boger, *supra* note 114 at 1290, n. 65. Yet research increasingly documents the ineffectiveness of this dream. *See, e.g.*, Bunch, *supra* note 117.

<sup>123</sup> Robert Weisberg, *Apology, Legislation and Mercy*, 82 N. C. L. REV. 1415, 1421 (2004).

<sup>124</sup> Boger, *supra* note 114 at 1291.

<sup>125</sup> Boger, *supra* note 114 at 1279.

<sup>126</sup> Weisberg, *supra* note 123 at 1416.

again...The momentum of the restorative encounter thus takes advantage of the good nature of the victim and community, riding on the strange but compelling power of the combined discomfort and euphoria we feel over the sinner who repents.<sup>127</sup>

International process reinforces the association between restorative justice and forgiveness. Dom Carlos Felip Ximenes Belo, Nobel Peace Laureate, for example, is quoted as he describes East Timor's process.

We should all give recognition to the Commission for Reception, Truth and Reconciliation because it will give us the opportunity and space to sit together and speak the truth and be reconciled. In humility we shall offer all our shortcomings and sins and ask for forgiveness from our political foes.<sup>128</sup>

Offenders admitting culpability and seeking forgiveness, however, must be recognized as qualitatively; even radically, distinct from the broad amnesty some truth investigations have given throughout Central and Latin America, the Caribbean and some African countries.<sup>129</sup> Most restorative justice cannot be equated with impunity, or exemption from accountability.<sup>130</sup>

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<sup>127</sup> *Id.* The author quoted, Acorn, seems to relish her disdain. for restorative justice, which she associates with mercy. Only a few words are quoted here.

<sup>128</sup> (emphasis added) CAVR UPDATE (October-November 2003) available at <http://www.easttimor-reconciliation.org>.

<sup>129</sup> Ratner and Abrams, *supra* note 6 at 153.

<sup>130</sup> Opotow, *supra* note 113 at 202.

Impunity does occur when international crimes are not investigated or otherwise addressed—ignored for political reasons or neglected due their overwhelming number.<sup>131</sup> Chile is one example: “imposed silence on a world of poverty, pain, injustice, and persecution.”<sup>132</sup>

Restorative justice, in contrast, seeks offender accountability and breaking of community-victim silence. Offender admission of wrong is fundamental. One of restorative justice’s core operational values is active responsibility.<sup>133</sup>

Yet international crimes, particularly war crimes, raise unique challenges. Apartheid governments and warring factions, for example, may demand amnesty as a condition ending violent and oppressive conditions.<sup>134</sup> How the international community balances such demands during negotiations with justice, restorative and retributive, is a question at the heart of its future credibility.

Whatever the explanation, inversely correlating all of restorative justice with mercy fuels gross misassumptions. Outsiders learn that alloffenders are necessarily

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<sup>131</sup> Opotow, *supra* note 113. (Elaborating three types of impunity, structural, strategic and psychological/political, with “manipulation of fear, distrust, and isolation among citizens to crush hopes for freedom, social equality, or justice.”)

<sup>132</sup> *Id.*

<sup>133</sup> Class lecture, *supra* note 9.

<sup>134</sup> Opotow, *supra* note 113.

released from moral accountability.<sup>135</sup> Restorative justice is consequently attacked for encroaching on the making of formal criminal systems around the world.<sup>136</sup>

Ironically, offender remorse may play as great a role with traditional prosecution as it does with restorative justice. Expressed contrition strongly influences offender sentencing, reducing years and the likelihood of the death penalty.<sup>137</sup>

## **VII. Can The Most Popular Values Expressed By North And South Create A Working System That Honors All Ideals?**

Reviewing 2004 scholarship inspires a modest proposal. Why not reserve the best of our prosecutorial process, civil and common law, domestic and international, for our most important, high profile cases and give offenders willing to admit culpability, along with the victims and community interested in encounter, the opportunity to discern restorative justice's best practices, particularly with less serious offenses?<sup>138</sup> The undisputable pragmatic reality within the North is not a question between retributive and restorative justice but between restorative justice and plea bargaining. Rather than intellectually discard options all legal systems, North and South, desperately need, this survey asks: Can we create a procedurally fair system that balances structure and

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> Bibas and Bierschbach, *supra* note 22 at 88.

<sup>138</sup> Professor Luna suggests that the U.S. might benefit from studying restorative justice in foreign context, specifically to learn less costly alternatives to our current prison system, reduce recidivism through a more humane approach, and develop alternatives that resonate with Islamic values such as victim restitution and forgiveness. Isn't the least costly what most effectively deters?

flexibility,<sup>139</sup> taps the strengths of restorative justice, while preserving the best of tradition?<sup>140</sup> Being willing to explore restorative justice’s potential may slow erosion of our most highly held legal principles for the most significant and weighty cases and survival of what we have spent centuries building— legal systems themselves.

Restorative justice recognizes the moral harm resulting from loss of trust in one’s governmental ability to protect, or secure public safety and order. Procedural justice research concludes “people are (most) concerned about their long-term social relationships with the authorities or institutions acting as third parties.”<sup>141</sup>

Citizens want their empowered leaders to be truly impartial.<sup>142</sup> Fairness of procedure is valued more than outcome.<sup>143</sup> When the State and enforcement of its laws can be trusted, citizens are motivated to follow.

The question of trust joins governments and communities around the world. Government mistrusts community self determination, while communities mistrust government justice. Can we face our shared mistrust by mutually exploring whether all may be able to contribute what the other cannot, through corresponding complementary, rather than exclusive, roles?

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<sup>139</sup> Class lecture, *supra* note 9.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

No persuasive argument arises from recent articles for overburdening our systems with less consequential cases. Acknowledging the overriding role of government with criminal harm does not need to unnecessarily burden institutions or limit restorative justice. Victims and communities are better positioned than government to take the time needed to fully explore, discern and repair harms, particularly systemic

When offered the opportunity, many victims and offenders wish to try restorative justice.<sup>144</sup> The more emotionally upset the victim, the more they want to meet the offender.<sup>145</sup> Some bring civil litigation to this end. In one study, one-fourth of families suffering prenatal injuries sued physicians to force honest disclosure.<sup>146</sup> With sexual assault, many civil claimants seek an opportunity to be heard, validated and receive an apology.<sup>147</sup> Victims of crime want information about their case, an opportunity to tell offenders how their crime impacted them, hear offenders answer their questions and understand why the crime occurred, as well as an apology and emotional healing.<sup>148</sup>

Restorative justice may prove superior to traditional justice in the following ways. Research to-date shows recidivism is reduced with juvenile crime. Future crime is less serious. Eighty-two percent of victims participating in mediation see criminal justice as fair, compared to fifty-six percent going through traditional process.<sup>149</sup> Seventy-eight

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<sup>143</sup> Hartley and Petrucci, *supra* note 116 at 140.

<sup>144</sup> Bibas and Bierschbach, *supra* note 22 at 85.

<sup>145</sup> Bibas and Bierschbach, *supra* note 22 at 94.

<sup>146</sup> Bibas and Bierschbach, *supra* note 22 at 95.

<sup>147</sup> *Id.*

<sup>148</sup> Bibas and Bierschbach, *supra* note 22 at 101.

<sup>149</sup> Bibas and Bierschbach, *supra* note 22 at 99.

percent of victims are satisfied after mediation, compared to fifty-six percent of victims after traditional proceedings. The most satisfied victims were more likely to feel their opinions had been considered and that the offender had been held accountable.<sup>150</sup> Last but not least, “empirical studies of restorative justice programs show that they control crime at least as well, if not better than, traditional criminal justice.”<sup>151</sup>

The impassioned debate regarding apology may tip the scale towards a hybrid blending. Despite passionate critique and resistance, remorse and forgiveness are acknowledged as powerful actions, even rituals, strongly linked with reconciliation.<sup>152</sup> They, like restorative justice, can facilitate necessary healing; repair damage and relationships.<sup>153</sup> Bibas and Bierschbach argue that victims equate sincere apology with traditional justice.<sup>154</sup>

International scholars advocate that process be assessed on a “case-by case” basis, with a range of options available.<sup>155</sup> Transplanted legal process has shown enhanced effectiveness when thoughtfully and creatively “blended” with existing systems.<sup>156</sup>

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> Bibas and Bierschbach, *supra* note 22 at 85.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* Yet Bibas and Bierschbach also exemplify those uncomfortable aligning with restorative justice. They go so far as to see offender remorse and apology as promoting truth-telling within traditional prosecution. *Id.*

**IX. The Commission for Reception, Truth and Reconciliation in East Timor Provides A Case Study For Assessing Hybrid Process, Or The Best Of Traditional And Restorative Justice.**

East Timor's Commission for Reception, Truth and Reconciliation (hereinafter "CAVR") was established to investigate numerous allegations of crimes against humanity<sup>157</sup> occurring during its long period of civil war.<sup>158</sup> East Timor's process can only be described as a unique hybrid of traditional and restorative justice. Reconciliation hearings, rather than meetings, were held between offenders, victims and community members.<sup>159</sup> Investigations and statements, sounding much like trial preparation, occurred.<sup>160</sup> Reconciliation is described in terms that resonate with traditional legal approaches. "(True) reconciliation...calls for detailed examination of how these tragic events occurred, in terms of truth, justice and responsibility."<sup>161</sup> Some of the hearings sound like trials. For example, seventeen survivors, witnesses and family members of victims testified regarding the civilian massacres that occurred in Timor-Leste between 1974 and 1999.<sup>162</sup>

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<sup>155</sup> Opatow, *supra* note 113 at 212.

<sup>156</sup> *Id.*

<sup>157</sup> "(B)ecause international law does not 'incorporate' all human rights law, the acts constituting crimes against humanity will generally be those characterized by the directness and gravity of their assault...As for the definition of each act, e.g., 'torture' or 'rape', in some instances, states may have an agreed upon definition in an international convention, though their definition...could be broader or narrower than other international definitions." Ratner and Abrams, *supra* note 6 at 69.

<sup>158</sup> The International Military Tribunal at Nuremberg Charter first created individual criminal responsibility for laws and customs of war as well as crimes against humanity. Ratner and Abrams, *supra* note 6 at 6. Several subsequent conventions have solidified. Examples of war crimes include mistreating prisoners of war, taking hostages and attacking civilians and innocents not engaged in combat. Ratner and Abrams, *supra* note 6, Chapter 4.

<sup>159</sup> CAVR UPDATE available at <http://www.easttimor-reconciliation.org> 2.

<sup>160</sup> *Id.* Alternatively, this was viewed as topical research of political imprisonment and torture, political conflict, massacres, killing and disappearances, women and conflict, children and conflict, and international actors. A human rights database was created. CAVR UPDATE, *supra* note 159 at 4.

<sup>161</sup> CAVR UPDATE, *supra* note 159 at 37.

<sup>162</sup> CAVR UPDATE, *supra* note 159 at 10.

Furthermore, the conclusions of the Commission stress that reconciliation must also be based on justice.<sup>163</sup> It then makes a statement that reminds the reader of the values behind the United States legal system. (See section I).

Justice and the law must be applied equally to all people, it must make no difference if they are powerful or not. And justice must only be applied to individuals who broke laws made by parliament. Force, or punishment, or the mechanisms of justice can never be applied to groups because of different beliefs of those groups, or because they oppose those in power. This is an important lesson from our past.<sup>164</sup>

Likewise the importance of truth telling is emphasized.<sup>165</sup>

Yet East Timor's process left victims with the responsibility of approaching government for traditional justice. The Commission had no mandate to deliver retributive justice, only investigate and recommend.<sup>166</sup> The earlier mentioned East Timor-Leste hearing did not attempt to be comprehensive. Its stated purposes were publicizing lesser known crimes, honoring specific victims and survivors,<sup>167</sup> public

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<sup>163</sup> CAVR UPDATE, *supra* note 159 at 28.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* Traditional prosecution is occurring with the Serious Crimes Unit in response to several instances of massacre. Sometimes, though, traditional prosecution is promised but never delivered. Experts are advocating for international tribunal prosecution of the crimes against humanity.

<sup>167</sup> *Id.* CAVR UPDATE, *supra* note 159 at 25.

education on human rights and “reconciliation through truth.”<sup>168</sup> It is acknowledged that such hearings were symbolic and representative rather than comprehensive. While great efforts were purportedly made to accommodate all victims who expressed interest, reports infer that many did not participate.<sup>169</sup>

An Urgent Reparations Program aimed to identify particularly vulnerable victims of human rights violations so they could receive immediate support.<sup>170</sup> Efficient reparations, or response to desperate victim need, seemed to be the most important value here. Need reflects development. Reparations prioritize education, small business start-up, as well as health care.

The importance of reconciliation is stressed, again and again.<sup>171</sup> Restorative values are recognized, including understanding, or learning from the past, acknowledging wrongs, assuming responsibility and reaching out across divisions.<sup>172</sup> Aspired was healing of wounds, recognition of victims, and building of a new nation.<sup>173</sup> In some instances, misunderstandings of allegiance needed to be corrected to rehabilitate names and give victims the ability to reintegrate into their communities.<sup>174</sup>

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<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> CAVR UPDATE, *supra* note 159 at 5.

<sup>171</sup> CAVR UPDATE, *supra* note 159 at 11.

<sup>172</sup> *Id.*

<sup>173</sup> CAVR UPDATE, *supra* note 159 at 12.

<sup>174</sup> CAVR UPDATE, *supra* note 159 at 47.

This hybrid blending appears to be deliberate in recognition of benefits. Two types of justice are mentioned—the justice of the state and “this other justice.”<sup>175</sup>

The words of Mr. Aniceto Guterres Lopes, CAVR Chairperson and a leading Timorese human rights lawyer, elucidate. He emphasizes the strong desire to learn from past violence so it is never repeated, along with the importance of proceeding in a way that does not leave “a residue which continues to support hatred and division.”<sup>176</sup> He uses the language of restorative justice and identifies its role in promoting the painful decision to open old wounds so they might actually heal. Lopes sees healing as requiring listening to victims so that “just once they have the opportunity to tell their terrible story.”<sup>177</sup>

In twelve reported community reconciliation hearings, fairly equivalent numbers of offenders and victims were present, along with community, in all but two.<sup>178</sup> It sounds like community members and victims were invited to give testimony so their participation was self-initiated, or voluntary.<sup>179</sup>

In one reported process, repair of actual harm appears to have been negotiated between victims and offenders. Fourteen offenders were present; ten victims. The

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<sup>175</sup> CAVR UPDATE, *supra* note 159 at 14.

<sup>176</sup> CAVR UPDATE, *supra* note 159 at 11.

<sup>177</sup> *Id.*

<sup>178</sup> CAVR UPDATE, *supra* note 159 at 3.

<sup>179</sup> CAVR UPDATE, *supra* note 159 at 25.

offenders apologized and agreed not to reoffend. Five offenders stealing animals made amends by giving six animals to the victims. Another who stole a bike made symbolic amends with antique coins.<sup>180</sup>

In the eleven other reported processes, however, while offenders apologized and agreed not to repeat their offense, not enough detail is provided to discern whether victims negotiated repair of harm with offenders. Community service is reported, but sounds much like court ordered restitution.<sup>181</sup> Victims did, however, express specific desires: that massacred victims be honored,<sup>182</sup> suffering of widows, orphans and elderly be recognized,<sup>183</sup> communities educated and helped to realize their potential, and once again, that the government ensure “future generations do not suffer such terrible experiences.”<sup>184</sup>

Some of the process, like the Hearing on Internal Political Conflict, occurred at political and collective, rather than community and personal levels. Former political leaders publicly admitted responsibility for atrocities and apologized.<sup>185</sup> Rogerio

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> CAVR UPDATE, *supra* note 159 at 13.

<sup>183</sup> CAVR UPDATE, *supra* note 159 at 15.

<sup>184</sup> CAVR UPDATE, *supra* note 159 at 19.

<sup>185</sup> Interesting challenges arise with alleged international complicity in crimes against humanity. Human rights attorney and CAVR chairperson, Aniceto Guterres Lopes, began the Public Hearing on Self-Determination and the International Community emphasizing that “positions taken by international institutions during the twenty-four years of the conflict were central to what happened in Timor.”

Adelino Gomes, ‘A lesson in humanity,’ CAVR Hearing on Internal Political Conflict, Dili, (15-18 December 2003) available at <http://www.easttimor-reconciliation.org/adelinoGomesOnCAVRHearing.html>. Several countries failed to uphold their human rights obligations pursuant to the United Nations charter. The United Nations itself failed to respond

Labato, for example, admitted his crime and violation of human rights with a prisoner of war.<sup>186</sup> Some asked for forgiveness.<sup>187</sup> The presence of victims at such a hearing on war crimes and crimes against humanity is given, since often the offenders who testify are also victims. Furthermore, victims who had not offended testify about experience and knowledge of human rights violations. Once again, though, here there is no evidence that the two groups negotiated amends or repair of harm.

Innovative victim support occurred during East Timor's process, but if anything it reflected traditional legal values of creating historic and public record rather than the restorative justice encounter model. Several healing workshops were held for survivors of severe human rights violations. Included were group counseling and creative modes of expressing feelings and experiences. Stated priorities were to create a safe, supportive and respectful forum for sharing and make public record.<sup>188</sup>

Forgiveness is explicitly promoted, again blending restorative and retributive elements.

Forgiveness in a political context...is an act that joins moral truth, forbearance, empathy, and commitment to repair a fractured human relation. Such a combination calls for a collective turning from the past that neither ignores past evil nor excuses it, that neither overlooks justice nor reduces justice to revenge, that insists on the

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proactively. James Dunn, an Australian government official, testified that "true reconciliation...includes those governments who accommodated these crimes against humanity, as well as the perpetrators." CAVR UPDATE, *supra* note 159.

<sup>187</sup> CAVR UPDATE, *supra* note 159.

<sup>188</sup>(emphasis added) *Id.*

humanity of enemies even in their commission of dehumanizing deeds, and that values the justice that restores political community above the justice that destroys it.<sup>189</sup>

Community members were quite engaged in seeking full disclosure from offenders about their activities.<sup>190</sup> Elders sanctified proceedings with rituals according to local traditions.<sup>191</sup> Community leaders stated a willingness to reintegrate offenders (former militia members) if they spoke honestly about the past.<sup>192</sup> Victims of human rights violations likewise shared their stories.<sup>193</sup>

East Timor's hybrid is a fascinating recipe blending restorative and retributive ingredients. Does it forecast the future of international practice or represent a rare experiment? Interested victims and community are included, heard and honored. Offender admission of responsibility and expression of remorse is primary. Encounter occurs. Healing and reconciliation appear foremost. Yet repair of harm, or amends, are rarely negotiated. Transforming relationships between community and government is not even mentioned, while the traditional values espoused by common law are: fair and equal treatment of all, with protection against abuse of power. Reintegration of all concerned and healing of wounds present questions for future study.

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<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> CAVR UPDATE, *supra* note 159 at 6.

<sup>192</sup> *Id.*

<sup>193</sup> CAVR UPDATE, *supra* note 159 at 4.

## Conclusion

Scholarly interest in restorative justice during 2004 prompts myriad questions for future study. Undeniably, support for restorative justice is growing worldwide—both among scholars and communities. Societies ravaged by war and genocide cannot afford to fixate on the past at the cost of their future. International prosecution may establish critical norms yet fail to assist those who are harmed. Is it just and fair to use this tragedy for future generations and disregard the present? Essential nation-building through reconstruction is one of the most lauded reasons for embracing restorative justice with international crimes.

We are just beginning to discern whether key differences exist between values domestically and internationally. Does it make a difference that many of the crimes discussed are international: gross violations of human rights, crimes against humanity, apartheid....? Will international restorative justice spur a shift in support of restorative justice within the U.S. or increase resistance? How do we repair harm when the State is offender?<sup>194</sup> When racism is perpetuated by the legal system whose procedural fairness we revere?

Realistically, international reconciliation is radically distinct in scope---not merely cases being assessed, with closure, but complex societal conditions requiring

extended effort and capacity building, democratic and institutional, with reflective evaluation over time. Nevertheless clear themes emerge, bridging North and South, as well as domestic and international systems. For example, 2004 scholars commonly express belief that punishment deters. Yet unfulfilled rhetoric regarding punishment continues as legal systems, particularly international, face overwhelmingly caseloads.

In response, scholars promote restorative justice. Social reconstruction leads their list. Lebanon, like East Timor, is using cross-community dialogue, not just in truth and reconciliation process, with the hope of democratic nation-building, but in the process of post war reconstruction itself.<sup>195</sup> Reintegration, mostly offender but also victim, and community involvement, are closely intertwined and correspondingly valued in scholarly analysis of restorative justice's contribution.

Some go so far as to assert that restorative justice facilitates retributive ideals, such as comprehensive truth telling or needed transformation of government relationships. Others advocate the importance of recognizing and repairing; even healing, harm to communities and victims.

We must rely on future scholars to rationally guide us in discerning the most viable options for actualizing cherished ideals. 2004 scholarship shepards the way,

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<sup>194</sup> The Illinois pardon reveals that State apology may be well-received in the South, perhaps most of the world, while condemned in much of the United States.

illuminating pivotal questions. Is healing exceedingly facilitated by retribution, restoration, or a combination of both? Does inclusive negotiation of amends further integration and optimally lasting institutional reform? Is the forensic, or legal, determination of truth imminently more factual than restorative narrative or does restorative process enhance truth telling?

Establishing public record, a written history of atrocities, is another theme in 2004, also providing reasoned justification for traditional methods. Can restorative justice find ways to respond to this legitimate human need?

While scholarly values are easier to discern than community in the 2004 pieces reviewed, both are worth mentioning. Southern communities appreciate respect for cultural customs, restoration, and reconciliation integrating storytelling, public acknowledgment, and offender request for forgiveness. Latin countries in particular wish to support victims.

The retributive voice is nonetheless equally strong. Desire for revenge is mentioned simultaneously with the importance of creating moral distance from criminal elites. Needed institutional reform is also asserted as rationale for maintaining retributive traditions.<sup>195</sup> The most pronounced reasons behind advocating retributive approaches,

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<sup>195</sup> Institute of World Affairs, COMMUNITY-BUILDING IN POST-WAR LEBANON: A PROJECT TO ENHANCE ETHNIC TOLERANCE AND CIVIC IDENTITY (best citation available).

<sup>196</sup> It is worth noting that South Africa is widely recognized for using restorative justice to this end.

however, are beliefs that punishment increases respect for legal authority and both deter crime.

This is the cardinal issue: what most effectively deters crime and prevents future violence. All come together in recognizing the need for viable alternatives to this end. Legal systems, domestic and international, are increasingly overwhelmed. Restorative justice is just beginning to show its role. As its effectiveness is scrutinized, a golden opportunity exists to note and build on the best of both paradigms--- in the service of justice, ideally and diversely defined.

Perhaps...it is time to question our glorification of [attack] as the best, if not the only, means of inquiry...What's wrong is that it obscures aspects of disparate work that overlap and can enlighten each other...What's wrong is that it obscures the complexity of research...What's wrong is that it implies that only one framework can apply, when in most cases many can.

If you limit your view of a problem to choosing between two sides, you inevitably reject much of what is true, and you narrow your field of vision to the limits of those two sides, making it unlikely you'll pull back, widen your field of vision, and discover the paradigm shift that will permit truly new

understanding.<sup>197</sup>

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<sup>197</sup> HAROLD SAUNDERS, A PUBLIC PEACE PROCESS: SUSTAINED DIALOGUE TO TRANSFORM RACIAL AND ETHNIC CONFLICTS 248 (citing DEBORAH TANNEN, THE ARGUMENT CULTURE: FROM DEBATE TO DIALOGUE) (1999).