

LIBERTY UNIVERSITY SCHOOL OF DIVINITY

Redemptive Penology vs. Exclusive Retributive Justice

- An Apologetic Advocacy for Redemption-Driven Restorative Penology In lieu of Pure Retributive Doctrines in the United States Federal Sentencing and Corrections Policy

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in partial fulfillment of the requirements for the conferment of

The Master of Divinity in Christian Apologetics (Academic, pre-PhD)

by

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December 11, 2018

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Abstract

Grounded on long-standing penal notions of exclusive retributivism inherited from classical theorists, Ancient Near East *lex talionis*, and theonomist penology, the United States federal sentencing and corrections system aims to administer just desert sentences on offenders, to curtail crimes. This exclusively retributive model of criminal sanction is, presumably transformative and innately capable of dispensing holistic justice to society, victims, and criminals. However, the preponderance of high rates of recidivism raises the question of whether this exclusively retributive doctrinal framework that drives the federal penology empirically results in a redemptive administration of penal justice, especially to the offender. Given the traditional dominance of the exclusive retributive model in federal penology, the recidivistic consequences raise three major issues that challenge the continued primacy of exclusive retributivism as a dominant penal doctrine in the federal criminal justice system.

First, whether exclusively retributive penal doctrines are innately redemptive for holistic, transformative outcomes, given the preponderance of recidivism trailing its application historically. Second, it inquires, comparatively, whether a restorative justice model possesses intrinsic redemptive, holistic, restorative attributes capable of mediating transformative peace, harmony, and order within the criminal justice system. Third, the thesis duly rejects the prevailing exclusively retributive scheme as inadequately equipped to redeem its subjects because while retributive penalties may be corrective, its exclusive imposition is innately non-redemptive. Contrary to the claims of exclusive retribution, the recidivism data cited here supports the notion that, post-retribution, most of the criminals are more likely than not to reoffend, even more egregiously. Thus, this thesis stands for the apologetic proposition that the redemptive penology model found within the restorative justice models is innately equipped to

holistically transform criminals, crime victims, and society under the rubric of the federal sentencing and corrections doctrines, especially when operating in tandem with retribution per se and restorative justice goals.

Introduction to the Proposal

Introduction

Peter Ludwig Berger, an Austrian-born American sociologist and Protestant theologian once remarked that, “To speak of a signal of transcendence is neither to deny nor to idealize the often-harsh empirical facts that make up our lives in the world. It is rather to try for a glimpse of the grace that is to be found ‘in, with, and under’ the empirical reality of our lives. In other words, to speak of a signal of transcendence is to make an assertion about the presence of redemptive power in this world.”¹ Hence, to exclude the principle of redemption from any given human experiential context arguably suggests an abject denial of empirical reality and unjust deprivation of that which nature and God has made possible and accessible.

In the winter of 2012, in the city of Atlanta, a determined cross-national team of Georgia state law enforcement, the Federal Bureau of Investigation (FBI), the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the United States Marshal’s Service, and the United States Attorney’s Office, had an emergency security meeting.² The outcome was the Violent Repeat Offender (VRO) program formed to stem the tide of persistent violent crimes destabilizing most of the state’s neighborhoods.³ The violent crimes were linked to the nefarious activities of repeat offenders undeterred by the exclusively retributive sentencing, reentry programs, heavy supervision and other *lex talionis*-driven punitive measures of state and federal criminal justice systems.

¹ Peter L. Berger, *Facing up to Modernity* (New York: Basic Books, 1977), 212.

² United States Attorney's Office Northern District of Georgia, “Violent Repeat Offenders Initiative,” United States Department of Justice, April 20, 2015, <https://www.justice.gov/usao-ndga/criminal-division/violent-repeat-offenders-initiative>. Accessed, October 24, 2018.

³ *Ibid.*

This frequency of criminal recidivism plaguing American society is a major flaw in exclusive retribution and *lex talionis* – driven federal and state sentencing and corrections penology doctrines.⁴ As Ryan Glen Fischer observes, even researchers are unable to account for a large percentage of observable variations in criminal recidivism patterns.⁵ Hence recidivism factors range from individual-level characteristics, multi-level sentencing and correctional policies, physio-socio-political environments, to underlying philosophical doctrines. Further, in their seminal studies of recidivism factors, Gendreau, Little, and Goggin categorized the causative factors into ‘static’ and ‘dynamic.’⁶

While adult criminal history, race, juvenile antisocial behavior, family upbringing, current age, intellectual ability, family/parent criminality, gender, and socio-economic status represent static factors, the dynamic factors include, companions, anti-social personality, social achievement, interpersonal conflict, substance abuse, and personal distress.⁷ Yet, both ‘static’ and ‘dynamic’ factors are unequivocally external to the all-pervading internal force of exclusive retribution and vengeful *lex talionis* principles which drives federal criminal penology.

Therefore, this thesis stands for the proposition that a uniquely cumulative, redemption-driven, restorative justice model, working in symbiosis with current retribution per se ideals, will

⁴ Secular in the sense of “public stage” ethical constructs not directly dictated by the church or sacred institutions. Charles Taylor, *A Secular Age* (Cambridge / Massachusetts / London: Harvard University Press, 2007), 1-4, ProQuest E-book Central Reader. Accessed, November 30, 2018.

⁵ Ryan Glen Fischer, “State Level Context and Offender Recidivism: The Impact of State Sentencing Structures,” (PhD diss., University of California, Irvine, 2007), 3, in ProQuest Information and Learning Company. Accessed, October 24, 2018.

⁶ Paul Gendreau, Tracy Little, and Claire Goggin, “A Meta-Analysis of the Predictors of Adult Offender Recidivism: What Works,” *Criminology* 34, no. 4 (1996): 575-607.

⁷ *Ibid.*, 575-600.

best result in a wholistic transformation of offenders with significant impact on prevailing recidivism patterns in the United States federal criminal justice system.

Statement of the Problem

According to Edward E. Rhine, most research scholars agree that, “As a group, offenders released from prison represent a significant risk to reoffend, regardless of the method of release, or their placement under parole supervision.”⁸ He affirms that rearrest records, reconviction, or return to prison of these ex-prisoners establish the ease with which they fail to lead law-abiding lives upon re-integration into their communities.⁹ Though some would counter that recidivism happens for all sorts of reasons, including lack of job prospects, racism, stigma of incarceration, lack of community support network, or sheer base and evil inclination of the offender, this thesis hopes to show that these external factors notwithstanding, an inherently redemptive penology approach would substantially reduce or curb the high rate of criminal recidivism.

This position is supported further by much literature that clearly show the rates of recidivism for offenders in constant rise for the past several decades.¹⁰ The rising trends is justifiably weighed against exclusive retributivism as the most prevalent penological model in the history of the federal criminal justice system. Joan Petersilia and Kevin R. Reitz concur that these findings strongly support the notion that the recurrence of high rates of recidivism of

⁸ Edward E. Rhine, “The Present Status and Future Prospects of Parole Boards and Parole Supervision,” In *The Oxford Handbook of Sentencing and Corrections*, Joan Petersilia and Kevin R. Reitz, eds., The Oxford Handbooks in Criminology and Criminal Justice (Oxford / New York: Oxford University Press, 2012), 641-42.

⁹ Ibid.

¹⁰ Ibid.

returnees has not altered across the board for many decades.¹¹ Hence this trend poses great challenges for future parolees, the community, and the legal system as a whole.¹²

Echoing similar sentiments, the Bureau of Justice Statistics, a United States federal agency which collects criminal history data from the FBI and state record repositories to study recidivism (re-offending) patterns of various offenders, released a recidivism report for 2018, covering the period 2005 – 2014.¹³ The report examines the recidivism patterns of former prisoners during a nine-year follow-up period and raises concerns over the alarming frequency of reoffending.¹⁴

Conversely, the Pew Trust compiled the most current trend on multi-state recidivism and, after analyzing current FBI crime statistics, argues for a decline in recidivism following the Bureau of Justice’s 2005 report. Per the PEW Charitable Trust data analysis, the share of people who return to state prison three years after being released — the most common measure of recidivism — dropped by nearly a quarter over a recent seven-year period in 2005 and 2012.¹⁵

Further, Pew analyzed publicly accessible data from the 23 states that reported reliable prison admissions and release data to BJS from 2005 through 2015. Among prisoners released in 2005, 48% returned to prison by the end of 2008. By comparison, among those released in those states in 2012, 37% had at least one new prison admission by the end of 2015 - which translates

¹¹ Joan Petersilia and Kevin R. Reitz, eds., *The Oxford Handbook of Sentencing and Corrections*, The Oxford Handbooks in Criminology and Criminal Justice (Oxford / New York: Oxford University Press, 2012), 642.

¹² Ibid.

¹³ Mariel Alper, Matthew R. Durose, and Joshua Markman, “2018 Update On Prisoner Recidivism: A 9-Year Follow-Up Period (2005-2014),” Bureau of Justice Statistics, <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6266>. Accessed, November 10, 2018.

¹⁴ Ibid.

¹⁵ Adam Gelb and Tracy Velázquez, “The Changing State of Recidivism: Fewer People Going Back to Prison,” The Pew Charitable Trusts, August 01, 2018, <http://www.pewtrusts.org/en/research-and-analysis/articles/2018/08/01/the-changing-state-of-recidivism-fewer-people-going-back-to-prison>. Accessed October 24, 2018.

into a drop of 23 percent.¹⁶ Both competing recidivism data will be critically examined below as the thesis argues for a penology doctrine that reduces recidivism while providing the strongest impetus for offenders to experience full transformative redemption.

Consequently, the main problem posed by the preceding recidivism data is how to curb or reverse the social, cultural, economic, psychological, and spiritual decay caused by the egregious failure of the current doctrines of exclusive retributivism and theonomist *lex talionis*. This preponderance of criminal recidivism plaguing the federal justice system represents a major flaw in the exclusive retributivist and theonomist *lex talionis* doctrines in that both are innately non-redemptive relative to the criminal, victims, and society. Therefore, to potentially correct this existential gap, this thesis will propose a cumulative redemption-driven, holistic penal framework, in which elements of retribution per se, restorative restitution, and redemptive penology coalesce to punish crimes, restore victims, and redeem criminals.

Statement of Purpose

The purpose of this thesis is twofold. First, it aims to critically examine the federal penology doctrine of exclusive retributive justice with the aim of unraveling its classical and Ancient Near-Eastern origins. Second, the thesis weighs the transformative claims and potentials of retributivism per se and exclusive retributivism against the prevailing recidivism of criminals, post-retribution. On the weight of the recidivism data, the thesis will aim to portray federal exclusive retributive penological doctrine as innately non-redemptive, given the high rate of prevailing recidivism in the federal justice system undergirded by the doctrine of exclusive retribution. Hence, the thesis will propose an alternative, ethically-sound restorative justice

¹⁶ Gelb and Velázquez, “The Changing State of Recidivism,” 1.

model potentially capable of punishing as well as holistically redeeming criminals, with the effect of recidivism rate reduction.

Arguably, *lex talionis* is causally related to exclusive retributive justice which is part of a theonomist ethical heritage championed by the Puritans and some other Founders of the American system discussed below. The theonomist penological heritage, mirrors mainstream, classical exclusive retributive principles in imposition of deserts, Hence, taken alone, theonomist *lex talionis* poses a disequilibrium to the redemption-driven restorative justice being contemplated in this paper. Thus, in distinguishing the redemption element of restorative justice, this extended essay will also refute the purely retributive rationale of theonomist penology, which is traditionally-linked to classical exclusive retributivism manifest in Ancient Near-eastern *lex talionis* from which much of biblical *lex talionis* was drawn.

Therefore, the thesis will thus examine the federal sentencing and correctional theories, plus recidivism patterns of former prisoners in the federal correctional system between 2005 and 2014. Using the recidivism data, the thesis will establish that:

1. a transformative gap exists in non-redemptive, but purely penal desert goals of an exclusive retributive justice system;
2. by contrast, given its innate reparative content, a restorative justice formula possesses more holistic and transformational goals than doctrines of pure retributive justice, in bringing together offenders, victims, community, and the justice apparatus for reparative healings, yet not primarily redemptive enough for recidivism purposes;
3. consequently, only a cumulative of retributive, restorative, and redemptive penology ideals would be able to curb prevailing recidivism patterns within the federal criminal justice system while providing redemption to offenders.

This tri-model penological approach would not only justifiably punish criminals, but would heal victims, families, and communities through formal retribution, targeted restorative justice programs, plus clearly-defined redemption programs that radically transform offenders to significantly reduce the recurring patterns of criminal recidivism.

Statement of the Importance of the Problem

With a data-driven critique of the lex talionis-colored penal ethics in federal procedural justice which primarily seeks to impose ‘desert’ punishments on criminal offenders, this thesis advocates for a redemption-driven Christian penology doctrine in which restorative justice seeks not only to primarily impose just deserts on offending criminals, but to redeem them holistically. With well-tailored redemptive programs set in motion for reproducing biblical, holistic, moral transformation of criminals under the punitive grip of the federal criminal justice policy, the high incidents of recidivism of criminals would likely be curbed. Thus, this thesis rekindles and intensifies an apologetically significant focus on the place of Christian restorative justice within the fabric of America’s federal procedural justice system, especially providing redemptive resolution to the subjects and collaterals of the recidivism problem – i.e. offenders, victims, and society.

Further, the significance of this thesis could be seen in the potential for holistically transforming the more than 1,994,000 recidivists identified in the BOJ’s report with a redemptive agenda. Moreover, reducing recidivism improves public safety, reduces taxpayer spending on prisons, and helps post-release criminals successfully resume family and community responsibilities in facilitating societal and individual peace, order, and harmony. According to

the Pew research cited above, criminal recidivism is of major concern to federal and state governments – and remains of major interest to society and policy makers.

In addition, there are complicated efforts to understand the aggregate effects of myriad federal, state, and local efforts to reduce reoffending. With heightened policies, programs, and strategies to curb recidivism at federal and state levels, it is obvious that society is searching for answers. Thus, this research is vital in that it speaks to how the present sentencing and corrections philosophy can be improved using the redemptive principles of restorative justice in order to curb the prevailing recidivism rate of offenders in the federal justice system.

Statement of Position on the Problem

Based on the cumulative evidence of relevant sources and data discussed below in this thesis, it is the view of this author that while retributive penology is necessary, an exclusively retributive justice model is incapable of infusing redemptive ideals in criminal offenders. For a penological formula with great potentials for reducing or eliminating current recidivism rates, the federal sentencing and correctional doctrines should function with the cumulative aims of retribution, restoration, and redemption in all cases.

Therefore, since restorative justice views retribution in terms of life-transforming, redemptive acts of guilt, punishment, forgiveness, restitution, and lifetime commitment to ethical living in community, it possesses superior, holistic, transformational potency for the offender, the victim, society, and the criminal justice system. Moreover, because there is, in our plural society, a ubiquitous predisposition against recurrent criminality, most people will be positively inclined to a redemptive penal framework that potentially curbs or reduces recidivism and its concomitant adverse effects on societal and individual peace, order, and harmony.

Limitations/Delimitations

This thesis is an apologetic research that examines the United States federal sentencing and corrections doctrine of exclusive retribution and the competing notion of restorative justice from the lens of a redemptive justice approach to federal penology. Specifically, the thesis aims to advance the notion that a primarily exclusive punitive approach to penology overlooks or ignores the innate propensity of humans to reoffend if not holistically redeemed and internally altered to better serve the community. Hence, the principles of redemptive and restorative justice can work best with the traditional retribution per se doctrines of the federal sentencing and corrections system to reduce the rising recidivism among offenders.

Thus, the thesis discusses recidivism in the contexts of a cumulative penological framework of retribution, restoration, and redemption in the United States federal criminal justice system. The scope does not include global, other national, regional, or narrower state and local contexts. In addition, the thesis does not attempt an exhaustive discussion of all penological or criminal justice theories, issues, related historical matters, or prison reforms. Further, though criminal recidivism is endemic in the discourse of U.S. federal procedural justice system, the thesis will focus on the most recent relevant data of recidivism pattern in the federal justice system between 2005 and 2014 as raw data that properly helps in evaluating the present effects of a purely retributive doctrine. Nonetheless, where necessary, a historical assessment of the pervasive recidivistic effects of exclusive retributive penology will be historically traced.

Also, because only the most current data is primarily relevant to changing trends, and only federal agencies possess central databases encompassing most state data, this thesis will primarily consider federal agencies-related recidivism data, but with limited and narrow allusion to state-specific recidivism repositories. Moreover, most murders, rapes, assaults, robberies and

other criminal torts are state law issues while federal justice handles mostly federal-impact offenses that provide the kind of indicia needed for measuring retribution-related recidivism within the narrow confines of underlying exclusive retribution philosophy for apologetic purposes.

Research Methods and Data Analysis

The thesis is a descriptive study of existing data, with subsequent theoretical analysis on the inter-relationships between recidivism and penal doctrines in federal criminal sentencing and corrections. Using the relevant data, the thesis will formulate a theory of how the infusion of ethical doctrines of restoration, and redemption might mitigate the recidivistic effects of exclusive retributivism. Therefore, it will access the Federal Bureau of Investigation (FBI), Department of Justice (DOJ), the Bureau of Justice (BOJ), and the databases of all relevant federal and state agencies that may have needed data of incarceration, release, intake, employment, counseling, supervision of paroled and released offenders. In addition, credible research agencies like Pew and Gallup will be explored for related recidivism data. Upon retrieval, relevant information will be compiled and assessed for potential use in the thesis.

Also, research will be conducted at the Jerry Falwell library for books on legal jurisprudence, moral philosophy, moral apologetics, Systematic theology (moral guilt; forgiveness; salvation) and ethics. Further, online academic databases like JSTOR, ATLA, and others will be researched for articles and digital books related to Christian ethics and criminal recidivism. Subsequently, all the prescribed master's thesis steps in the School of Divinity Thesis Guideline, Vyhmeister, Turabian, and course videos and materials will be followed closely at all stages of the thesis, culminating in its defense.

Chapter Summaries

Chapter one provides an overview of the proposal matter, the issue of recidivism, especially highlighting the two major research questions driving the thesis. Research question #1 considers whether classical exclusive retributivism and theonomist *lex talionis* penal ideals do possess intrinsic redemptive values predisposed towards radical transformation of offenders or if these doctrines are intrinsically flawed resulting in the preponderance of recidivism of criminals processed under those tenets.¹⁷

Based on research question #1 then, research question #2 asks whether predominantly restorative ethical ideals targeting victims, the community, and sometimes offenders, for reparation, do possess intrinsic restorative and retributive value capable of radically mediating redemptive peace, harmony, and order to the parties subject to the United States Federal sentencing and corrections scheme.¹⁸ Affirmatively, this thesis will proceed with an apologetic proposal of a distinctively Christian restorative justice paradigm as ideally redemptive and with the innate capability of reducing criminal recidivism. Restorative justice is inherently redemptive in that its ideals punishes criminals with the goal of holistically transforming the offender, victims, and societies exposed to the federal sentencing and corrections system.

In Chapter two the federal sentencing theories and corrections policies will be explored to lay the foundation for understanding the historical trajectory of the issues of recidivism. Also, the thesis will closely examine the history of the exclusively retributive and theonomic *lex talionis* penology underpinnings of the U.S. federal sentencing and corrections doctrines, plus, review its

¹⁷ Michael Kirwan, *Political Theology: An Introduction* (Indianapolis: Fortress Press, 2008), 22-27.

¹⁸ Oliver O'Donovan, "Government as Judgment," in *An Eerdmans Reader in Contemporary Political Theology*, ed. William T. Cavanaugh, Jeffrey W. Bailey, and Craig Hovey (Grand Rapids/Cambridge: William B. Eerdmans Publishing Company, 2012), 712-30.

offender reentry ideology through the lens of a Christian restorative paradigm.¹⁹ Here, the critical theories and views leading to the federal sentencing and corrections ideological framework will be weighed with prejudice to establish the need for a paradigm shift from an exclusive retributive framework to a mitigated retributive formula that incorporates redemptive and restorative justice paradigms, in view of recidivism. Lastly, after weighing the prevailing negative recidivism impact of an exclusively retributive ethics, this chapter will proffer an ethical penological paradigm with potential ameliorative redemptive impact on recidivism.

Chapter three analytically discusses the various recidivism data to trace the correlation between the goals of exclusive retributivism and theonomist *lex talionis* justice, relative to recidivistic outcomes. In this chapter, after closely examining the merits of the ethical doctrine of retributive justice per se undergirding the U.S. federal procedural justice scheme, this thesis will conclude that given the preponderance of reoffending by persons who had reentered the community under the tutelage of prevailing retributive justice programs, an exclusively retributive ideology arguably fails in its transformative agenda.²⁰ Conversely, an argument will be made for the superiority of a cumulative retributive, restorative, and redemptive ethical paradigm synergized to, not only punish crimes, but to restore victims / communities, while providing offenders with opportunities of redemptive wholeness.²¹

In Chapter Four, the thesis dwells on restorative and redemptive justices, especially, as a redemptive penological approach innately equipped to reduce or avert recidivism through

¹⁹ Janet R. Jakobsen and Ann Pellegrini, *One Nation under God: Religion and American Culture*, ed. Marjorie Garber and Rebecca L. Walkowitz (New York: Routledge, 1999), 101-12.

²⁰ Charles W. Dunn, ed., *American Political Theology: Historical Perspective and Theoretical Analysis* (New York: Praeger Publishers, 1984), 110-17.

²¹ A. James Reichley, *Religion in American Public Life* (Washington, DC.: The Brookings Institution, 1985), 9-167.

normative offender transformation. Applying logical syllogistic criteria flowing from the objective recidivism data from DOJ, FBI, Pew Foundation, recidivism experts and other governmental sources, a case will be made against continuing reliance on exclusive retributive penology and theonomist lex talionis paradigms. Further, reasoning alongside the arguments of restorative justice proponents, the author will reinforce the proposition for an ethical paradigm of restorative justice that strengthens existing traditional retribution per se sentencing and corrections principles to seek redemptive outcomes.

Further, chapter four will conclude with an overview of the proposed redemptive penology ethical framework and its practical potentials as a penological doctrine within the federal criminal justice sentencing and corrections structures. Here the author will closely examine the principal elements of restorative, redemptive, and retributive paradigms being proposed as replacement to the problematic exclusive retributive paradigm. Further, drawing from the broader Christian considerations, the discussion will be narrowed to a Christian and biblical ethical framework advancing the notions of grace, forgiveness and other elements of divine justice in a pluralistic society like the United States. Here, the exclusively retributive notions of St. Augustine, Thomas Aquinas, and the Magisterial Reformers will be weighed against biblical restorative justice principles to highlight the recidivistic effects of theonomist lex talionis ideals on the federal sentencing and corrections philosophy.²²

Additionally, this chapter will portray recidivism as not primarily a social problem, but a theological, pastoral, ethical, and apologetical problem requiring multi-faceted, broad-based,

²² Kristen Deede Johnson, *Theology, Political Theory, and Pluralism: Beyond Tolerance and Difference* (New York / Cambridge: Cambridge University Press, 2007), 140-73.

doctrinal nuance, rather than an exclusive formula.²³ On this ground, this thesis finds tremendous *locus standi* for a scholarly theological review of a predominantly exclusively retributive justice paradigm.²⁴

Moreover, it recaps relevant recidivism data, factors, measurements, and evaluations from agencies, experts, scholars, and sources on the issue of recidivism for *a fortiori* stand on the infusion of redemptive and restorative ideals into the prevailing retributive justice model. Since a cumulative redemptive, restorative and retributive justice paradigm will be innately disposed to redemptive wholeness for offenders and their victims / families, this chapter will adduce the landmark propositions of St. Augustine's City of God, plus Marshall, Kleinfield and other authorities advocating the redemptive primacy of restorative and non-lex talionis-driven retributive justice.²⁵ The key distinctives, origins, intents, methods, results, and potential effects of the proposed cumulative penal model will be logically articulated.

Also, the transformative and affirmative effects of a Christian redemptive ethical paradigm on the present retributive and restorative justice formulas will reappraise and recapture the cardinal place of a balanced federal sentencing and corrections system. It concludes with the envisaged, potential effects of redemptive penology on the escalating pattern of recidivism.

Results

The thesis will conclude that given the preponderance of the endemic issue of recidivism plaguing the federal criminal justice system, the underlying exclusive retributive doctrine and theonomist lex talionis are ineffective in providing society with the peace, order, and harmony

²³ Thia Cooper, *Controversies in Political Theology*, Controversies in Contextual Theology Series (London: SCM Press, 2007), 22-27.

²⁴ Kenneth D. Wald, *Religion and Politics in the United States* (New York: St. Martin's Press, 1987), 42-51.

²⁵ Johnson, 140-73.

otherwise derivable from a cumulative retributive per se, restorative, and redemptive model. In addition, a redefinition of the federal sentencing and corrections penal doctrines to constitute a cumulative of retributive, restorative, and redemptive penology principles will substantially curb recidivism because it provides offenders with clearly defined strategies and incentives for transformative redemption. Thus, economic efficiency, social harmony, and a more efficient administration of justice is realized to the benefit of the state, victims and their families, offenders, and the community at large.

Chapter 1

The U. S. Federal Sentencing Theories and Policies – A Historical Overview

As proposed by B.J. Diggs, the traditional rationale for the existence of the state had always been that “if society is not to disintegrate or give way ... to “a state of nature,” then in addition to morality there must be a political order and a juridical system charged with the enforcement of at least the essential core of morality.”²⁶ From this intersection of ethics, politics, and law, theories historically emerged leading to the creation of divergent Western societies and systems, especially the American society and its legal system.²⁷ Classical political philosophers and theorists such as Thomas Hobbes, Locke, Hume, Kant, Weber and others advanced notions that cumulatively shaped the sentencing and corrections policies of Western societies.²⁸

Under these theories, and pursuant to its supreme authority in rule-making and enforcement, the state formulates sentencing and corrections theories and policies to attain its goal of transformative peace, harmony and order for all.²⁹ Essentially, how these theories shape the American federal criminal sentencing goals of retributive justice is inextricably linked to the recidivistic outcome under consideration in this paper.³⁰

Overview of Federal Sentencing and Corrections

²⁶ B. J. Diggs, ed., *The State, Justice, and the Common Good: An Introduction to Social and Political Philosophy* (Glenview / Brighton: Scott, Foresman and Company, 1974), 4.

²⁷ Ibid., 29-50.

²⁸ Ibid.

²⁹ John Rawls, *A Theory of Justice*, Original Edition. (Cambridge / London: The Belknap Press of Harvard University Press, 1971), 395-577.

³⁰ Timothy J. Flanagan, ed., *Long-Term Imprisonment: Policy, Science, and Correctional Practice* (Thousand Oaks / London / New Delhi: Sage Publications, 1995), 1-120.

In the comprehensive, multidisciplinary volume, the *Oxford Handbook of Sentencing and Corrections*, Joan Petersilia and Kevin R. Reitz define “Sentencing” narrowly as, “the legal process by which criminal sanctions are authorized and imposed in individual cases following criminal convictions.”³¹ The content and nature of these sanctions are defined and undergirded by certain long-standing theories and policies that are then implemented at the corrections phase.³²

Corrections, to Petersilia and Reitz, “...deals with the implementation, administration, and evaluation of criminal sentences after they are handed down.”³³ Hence, the federal corrections mainly aim to punish offenders in order prevent or deter future crimes. In the philosophies of Immanuel Kant, Emile Durkheim, St. Augustine, St. Thomas Aquinas, and predominantly exclusive retributivists discussed earlier, “punishment is both a moral and a social imperative”³⁴ – basically expected by society of all criminals.³⁵

It is the effects of these sentencing and corrections theories on “crime avoidance, victim and community restoration ... fairness, consistency, and proportionality”³⁶ that eventually drive the ultimate question of whether society, crime victims, and the criminals themselves, are re-victimized due to subsequent criminal recidivism and its collateral consequences. Pursuant to exclusive retributivism, the sentencing options may include any of, economic sanctions (fines),

³¹ Petersilia and Reitz, 3.

³² Ibid.

³³ Ibid.

³⁴ Todd R. Clear and Harry R. Dammer, *The Offender in the Community*, 2nd ed. (Belmont / Toronto: Wadsworth/Thomson Learning, 2003), 17.

³⁵ Ibid.

³⁶ Ibid., 4.

posttrial diversion, probation, home confinement, boot camp, jail term, imprisonment, and death.³⁷

Overview of Penology Theories and Doctrines

In evaluating these questions, Todd R. Clear and Harry Dammer examine the four phases in the criminal justice system – ‘legislative, apprehension, adjudication, and correctional’³⁸ – and strongly aver that the legislative phase of criminal justice is the most important because the theories and policies, upon which judges depend for sentences and corrections, are formulated by legislators who structure sentencing and corrections.³⁹

These theories and policies need to be examined if one were to properly evaluate whether they derive from purely classical exclusive retributive doctrines, theonomist *lex talionis*, or a combination of both, to warrant a conclusion that their collateral recidivistic outcomes inure against the continued imposition of exclusive retributive justice under the federal procedural justice sentencing doctrine.⁴⁰ One inquires then into the philosophical impetus of the federal legislatively-mandated exclusively punitive sentencing and corrections doctrines.

A Classical Historical Overview

According to Gordon Bakken in, *Invitation to an Execution: A History of the Death Penalty in the United States*, exclusive retributivism was prevalent in the Ancient Laws of China,

³⁷ David C. May et al., eds., *Corrections and the Criminal Justice System* (Boston / Toronto / London / Singapore: Jones and Bartlett Publishers, 2008), 205.

³⁸ Todd R. Clear and Harry R. Dammer, *The Offender in the Community*, 8-14.

³⁹ *Ibid.*, 8-9.

⁴⁰ Edward R. Maguire and David E. Duffee, eds., *Criminal Justice Theory: Explaining the Nature and Behavior of Criminal Justice*, 2nd ed., *Criminology and Justice Studies* 3 (New York / London: Routledge, 2015), 1-42.

the 18th Century BC Code of Hammurabi of ancient Babylon, and in ancient Egypt.⁴¹ Similarly, the Hittite Code, the Athenian Draconian Code, the Roman Law of the Twelve Tablets, the Mosaic Law of ancient Israel, Japanese imperial laws, the laws of many post-Roman European nations, and the American Colonies, celebrated exclusive retributive justice as a primary penal model.⁴² Britain especially sustains a long history of exclusive retributive justice legacy in its global acquisitions, which featured capital punishments, incarcerations, incapacitations, and most egregious penalties for the minutest of offences.⁴³ Most American states following freedom from European control, embraced and intensely implemented exclusive retributive justice scheme left behind by their former European overlords until late in the 19th and 20th centuries AD when penal reforms in some states and the federal system were implemented.⁴⁴

Driven by these cumulative ideals of Ancient Near-Eastern *lex talionis*, classical Platonic-Aristotelian penal ethics, and undercurrents of theonomist penological doctrines, the federal retributive justice model is designed to make whole those who have suffered unfairly by punishing wrongdoers objectively and proportionately without commensurate ransoming or redeeming goals for the offender. A great instance of *lex talionis* from the Ancient Near East is the Code of Hammurabi (1700 B.C.) found in major Near Ancient texts, including the Old Testament. James B. Pritchard confidently relates major portions of the Hammurabi Code to significant portions of the Old Testament *juris corpus*.⁴⁵ Thus, pursuant to these exclusively

⁴¹ Gordon Bakken, ed., *Invitation to an Execution: A History of the Death Penalty in the United States* (Albuquerque: University of New Mexico Press, 2010), 1-468, ProQuest E-book Central Reader. Accessed, November 30, 2018.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ James B. Pritchard, ed., *Ancient Near Eastern Texts: Relating to the Old Testament*, Third Edition with Supplement. (Princeton: Princeton University Press, 1969), 195-97.

retributivist and theonomist *lex talionis* penal ideals, the United States federal sentencing and correctional system implements correctional programs in accordance with [presumably] fair and unbiased processes without ultimately reversing the capabilities of affected criminals to reoffend. This purely retributive approach to penology constitutes a major transformative flaw in the quest for restorative ethical justice – the kind of justice that aims to make the criminal, the victims and the society redemptively whole.

Reflecting on the roots of retributive justice and its exclusive usage, Guttorm Floistad synthesizes a compendium of scholarly notions that unequivocally ground contemporary American criminal justice on the social theories and natural philosophies of classical thinkers such as Plato (429-347 B.C.), Aristotle (384-322 B.C.), Jean Bodin, Samuel Pufendorf, Hugo Grotius, and Baruch Spinoza.⁴⁶ In addition, the views of John Locke (1632-1704), Thomas Hobbes (1588-1679 A.D.), Jean Jacques Rousseau (1712-1778), Immanuel Kant (1724-1804), Ricouer, John Rawls, David Hume (1711-1776), J.S. Mill, Jeremy Bentham, Thomas Aquinas, Max Weber (1881-1961), and even Puritan theorists are of seminal, precedential value.⁴⁷

Inspired by Socrates, Plato, in his ethical and political writings of the *Republic*,⁴⁸ the *Statesman*, and the *Laws* (Nomoi), contends that conflicts should be resolved by a dialogical process that ensures justice for individuals and society in the universe.⁴⁹ Having determined that the individual and the *polis* possess the same intrinsic goods, Plato proposes a proper ordering of the elements comprising both the individual and the *polis* in order to ensure self-sufficiency in

⁴⁶ Guttorm Floistard, ed., *Philosophy of Justice* (Heidelberg / New York / London: Springer, 2015), 12:1-191, JSTOR. Accessed, October 27, 2018.

⁴⁷ Guttorm Floistard, ed., *Philosophy of Justice*, 119-23.

⁴⁸ Plato, *The Republic of Plato*, trans. F.M. Cornford (London: The Oxford University Press, 1941), 139-42.

⁴⁹ *Ibid.*

goods.⁵⁰ In the individual, Plato locates three major elements, namely, the psyche or soul (locus of pleasurable appetites), “spirited” element (locus of passions of anger, fear, etc.), and a “rational” or “reflective” element (locus of rational understanding and director of other elements).⁵¹

The *polis*, for Plato, comprises first, of an equivalent class of farmers, traders, and artisans who satisfy the appetites; followed by a warrior class that protects the *polis*; and a class of rulers who directs the others.⁵² For a virile, orderly, harmonious society, reasons Plato, each individual and societal element must be properly harnessed for excellence or virtue evidenced in temperance, courage, or wisdom.⁵³ Upon this proper functioning of the whole resides due justice for all. However, Plato grounds the potency of his ethical expectations on natural human potencies of the individual and the *polis* alone – hence natural ethics. Aristotle concurs that justice, as a good and natural right to any society, was necessary for the validity of any legal system in the community.⁵⁴ In *Nicomachean Ethics*, however, Aristotle regards the soul as the source of human sensation, desires, feelings in all animals, and the cognitive center for humans.⁵⁵ Thus, to Aristotle, humans attain soul goods when they develop right or virtuous habits which shape desires, actions and passions.⁵⁶ The *polis* or city-state and its leaders must then make the citizenry self-sufficient in goods.⁵⁷ Here the connection is established between natural and

⁵⁰ Plato, *The Republic of Plato*, 139-42.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Diggs, 7-14.

⁵⁵ Aristotle, “Book II,” in *The Nicomachean Ethics of Aristotle*, trans. R. W. Browne (London: Henry G. Bohn, 1853), xix-xxii.

⁵⁶ Ibid.

⁵⁷ Ibid.

special revelation relative to law, crime, and punishment, given that the classical notions would later find acceptance in Christian theologians like St. Thomas Aquinas who famously revives Aristotle's philosophies in Christian reflections.

To B.J. Diggs, both the classical Platonic and Aristotelian notions of state and crime remains relevant in the modern and contemporary states.⁵⁸ This is reinforced by the fact that subsequent philosophies of cosmopolitan Rome and succeeding Medieval Christianity mostly derived from classical Platonic and Aristotelian views on cooperative community justice. Also, while both Plato and Aristotle's times were in antiquity, their views were predominantly transported beyond their times and locus by the Epicureans, Stoics, Plotinus, Neo-Platonians, Cicero (106-43 B.C.), Pauline reflections, and Medieval fathers including St. Thomas Aquinas.⁵⁹

Diggs maintains that Cicero, the Roman jurist, diluted Plato and Aristotle, merging both into a compendium of natural law of reason which Rome embraced in its commonwealth to unify all its diverse global citizens.⁶⁰ Under that exclusively retributive legal universe, Christ was born, lived, died, and resurrected.⁶¹ Similarly, the early church, the apostles, apostolic fathers, up to Medieval times and beyond, functioned under the sovereignty of the exclusively retributive legal universes or its modifications.⁶²

Apostle Paul, confronting the challenges of Stoic law of nature, developed a counter concept of the 'revealed' Word of God – embodied in the church (the body of Christ).⁶³ Where

⁵⁸ Diggs, 13.

⁵⁹ Ibid., 14-15.

⁶⁰ Ibid., 17.

⁶¹ Ibid., 18.

⁶² Ibid., 18-20.

⁶³ Ibid., 17.

Stoics averred a city of Zeus, St Augustine would argue for a ‘City of God’⁶⁴; and, where pagans posited human reason as definitive for all existence, Christians adduced even the reasonings of Cicero and Plato to contend for the subjection of human reason to God.⁶⁵

In this, a clear dichotomy was drawn between non-sacred ways of attaining ethical virtue and salvation versus the Christian way – setting the stage for events that would transpire in the American continent much later. Further, in breaking [howbeit in a limited sense] from traditional Greek and Roman thoughts, Christianity signaled its redefinition of the relationship between the state and its Christian citizens.⁶⁶

A Synthesis of Medieval Christian Penological Perspectives

The emerging diversity of views among Christians on the role of the state was evidenced in the conflicts between Popes and Emperors on one hand, and the broader conflicts between empire and individual Christians – sometimes bloody.⁶⁷ Nonetheless, Diggs affirms that Christians concurred that the goods of this world were as nothing compared with the salvation to be gained only within the Church – giving the Church supreme authority over the state (Kings became subject to the Pope/bishop).⁶⁸

To Michael Kirwan, the Church found independence from the state as it affirmed its spiritual autonomy and spiritual freedom.⁶⁹ However, the enduring influences of emperors such

⁶⁴ Aurelius Augustine, “Book III; Book IV; Book V,” in *The City of God: The Works of St. Augustine*, ed. and trans. Marcus Dods (Edinburgh: T&T Clark, 1871), 1:91-227, <https://www.gutenberg.org/files/45304/45304-h/45304-h.htm>. Accessed, October 28, 2018.

⁶⁵ Kenneth D. Wald, *Religion and Politics in the United States* (New York: St. Martin's Press, 1987), 1-95.

⁶⁶ *Ibid.*, 103.

⁶⁷ Michael Kirwan, *Political Theology: An Introduction* (Minneapolis: Fortress Press, 2009), 55-106.

⁶⁸ Diggs, 17-18.

⁶⁹ Kirwan, 55-71.

as Constantine, and Charlemagne, the view of state as evil would diminish to allow for a dualistic doctrine of two cities – ‘Jerusalem’ and ‘Athens.’⁷⁰ The doctrine recognized a temporal versus an eternal city – each with distinct organization, jurisdiction, and interests – yet each individual being subject to both authorities.⁷¹

From early Christianity to the Middle Ages, this view, as captured by Saint Augustine (354-430 A.D.) in *City of God*, persisted through the intellectual formulations by Saint Thomas Aquinas (1225-1274 A.D.).⁷² Kirwan postulates that Augustine, in his argument for the necessity of discipline, stands for the proposition that the primary function of the state is dealing with the conflict and disorganization resulting from the Fall – a restraining or incapacitating function.⁷³ St Augustine cements this justification for state coercion by maintaining that, “...while they are feared, the wicked are held in check, and the good are enabled to live less disturbed among the wicked.”⁷⁴

Concurring with St. Augustine, Martin Luther navigates the state-church tension by recognizing a conflict between the City of God and the earthly city. However, distinctively, Luther resolves the tension by distinguishing between the ‘saving’ kingdom of Christ and the ‘preserving’ kingdom of the world.⁷⁵ Citizens of the ‘preserving’ kingdom recognize the persuasive authority expressed by the Sermon on the Mount and therefore need no external

⁷⁰ Kirwan, 55-71.

⁷¹ Ibid.

⁷² Diggs, 18.

⁷³ Kirwan, 24-25.

⁷⁴ Aurelius Augustine, “Book III,” 1:91-93.

⁷⁵ Martin Luther, “Temporal Authority: To What Extent it Should be Obeyed,” in *Luther's Works: Christian in Society II*, Revised by Walther I. Brandt., trans. J. J. Schindel (1523; repr., Philadelphia: Fortress Press, 1962), 45:109-21, <https://www.nlnrac.org/node/254>. Accessed, October 28, 2018.

constraints.⁷⁶ However, since they are in minority, and effective governance of the majority requires coercive measures, the rulers and magistrates need laws backed by the sword.⁷⁷ Thus, Luther proposes dualistic morality – a higher Christian ethic based on gospel standards and a lower less demanding ethic based on fear and coercion.⁷⁸ The penological notions of St. Thomas Aquinas are also notable but details do not befit the limited scope of this project.

An Overview of Modern Penological Views

In the seventeenth century, Thomas Hobbes tries to resolve this tension by proposing, in *Leviathan* (1651), the notion of an absolute, sovereign God over politics and religion.⁷⁹ This potentate acquires commonwealth power by generation, conquest, and covenant to sustain order and harmony in society.⁸⁰ For Jurgen Moltmann, this represents a ‘Covenant’ model, in which citizens enter into covenant with God and each other, versus ‘Leviathan’ in which a central governing authority restrains bad actors to prevent chaos.

Michael Kirwan likens all these divergent understandings of classical versus Christian ethics to the pagan Greek motifs of the tragedies, ‘Antigone’ and ‘Eumenides’ in which Sophocles and Aeschylus, ancient Greek playwrights, use tragic plays to depict the tension between state and religion.⁸¹ “Antigone,” written around 442 B.C. by Sophocles tells of

⁷⁶ Luther, 109-21.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Thomas Hobbes, “XVII: Of the Causes, Generation, and Definition of a Commonwealth,” in *Leviathan or the Matter Forme and Power of a Commonwealth Ecclesiastical and Civil* (Adelaide: The University of Adelaide, 2016), 17-31, <https://ebooks.adelaide.edu.au/h/hobbes/thomas/h68l/index.html>. Accessed, October 28, 2018.

⁸⁰ Ibid., 17-31.

⁸¹ Kirwan, 18-25.

Antigone, the daughter of Oedipus, who buries her brother Polynices in defiance of the laws of King Creon and the state to the contrary.⁸² She contends that she broke state law in obedience to a higher law – the justice of Zeus.⁸³ The King’s insistence on imposing the full wrath of state law on Antigone, in defiance of spiritual authorities to the contrary, results in tragic repercussions on the King’s family and entire Theban society.⁸⁴

In the *Eumenides* (the third of the triad, ‘The Oresteia’), written by ancient Greek playwright, Aeschylus, portrays Orestes being pursued to Athens by a vengeful Erinyes (the Furies) squad committed to imposing the death penalty on Orestes for matricide of his own mother, Clytemnestra.⁸⁵ Queen Athena presides over the hung jury and casts the swing vote in favor of Orestes.⁸⁶ Athena placates the furious Erinyes with Athenian citizenship honors – reasoning that societal aggression is wisely contained by engineering the ‘Furies’ to invest their energy beyond borders against external enemies, while simultaneously being a protective force (the *Eumenides* – ‘the Kindly Ones’) for society insiders.⁸⁷

Thus, the ethical tension between state and religion, and later, between the public square and sacred ethics is palpable in the above accounts. Much of these doctrines influenced the Founding Fathers of America, including Jefferson.⁸⁸ In addition, the Natural Law theories and teachings of John Locke, David Hume, Rousseau, Bentham, J.S. Mill and others influenced the

⁸² Luke Mastin, “Ancient Greece - Sophocles - Antigone,” *Classical Literature*, https://www.ancient-literature.com/greece_sophocles_antigone.html. Accessed, October 28, 2018.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ Luke Mastin, “Ancient Greece - Aeschylus - Eumenides,” *Classical Literature*, https://www.ancient-literature.com/greece_Aeschylus_eumenides.html. Accessed, October 28, 2018.

⁸⁶ *Ibid.*, 1.

⁸⁷ *Ibid.*

⁸⁸ Diggs, 23.

form of government, the source, character, and limits of the obligation to obey government.⁸⁹ For instance, Diggs posits that Locke engineered Cicero’s doctrines to establish certain “natural rights” between citizens and the government – in which Natural Law was compelled to serve a social contract and democratic tool.⁹⁰

Conversely, David Hume rejects Locke’s doctrine of self-evident moral ideals, but adopts Hobbes’ insights in establishing his rules-driven utilitarianism.⁹¹ Rousseau, on the other hand engineers both Hume and Locke to propound a common-good oriented ‘general will’ doctrine in which people obey laws because they made the laws themselves.⁹² Immanuel Kant had already posited God as the primary ethical source for society, even as J.S. Mill and Jeremy Bentham expanded utilitarian principles from which criminal justice theories would generously be drawn.⁹³

Therefore, a dual ethical framework pervaded the sixteenth and seventeenth-century European landscape from which the Puritans, Pilgrims, and Dissenters from the Church of England who shaped early American criminal justice doctrines drew from to set up a sentencing and corrections structure that constitute the subject of this paper. Kenneth D. Wald contends that the European settlers in America, though constituted of diverse denominational cultures, were determined to plant a unique Christian ethic on American soil distinct from the corrupt ethical admixtures of Europe because they did not want history to repeat itself on this side of the pond.⁹⁴

⁸⁹ Diggs, 24-25.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid., 25.

⁹⁴ Kenneth D. Wald, *Religion and Politics in the United States* (New York: St. Martin's Press, Inc., 1987), 56-59.

Converging around the Puritan concept of ‘covenant’ theology that viewed government and citizens as bonded by a voluntary agreement premised on certain inalienable rights (Genesis 12:3), they would revolt against King George III for violating those rights.⁹⁵ Thus merged a nascent self-governing state that, in addition to the covenant principle, recognized that human depravity required institutional constraints – both on the government and its citizens.⁹⁶ These constraints were founded on a Constitution based on two philosophical rationales: first, given that governments were the creations of fallible mortals, moral rectitude is not inherent in governments; second, since God was the only source of redemption, it was not the task of governments to make people good.⁹⁷

Under these assumptions, Alexander Hamilton, John Jay, James Madison, John Adams, and other founding Fathers crafted a state system that engineered the innate corruptions of humankind in the national interest.⁹⁸ As James Madison asserts in *The Federalist Papers*, “Ambition should be made to counteract ambition.... It may be a reflection on human nature, that such devices should be necessary to control the abuses of government.....In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”⁹⁹

⁹⁵ Wald, 38-45.

⁹⁶ *Ibid.*, 42.

⁹⁷ *Ibid.*, 44.

⁹⁸ *Ibid.*, 45-46.

⁹⁹ James Madison, “*The Federalist Papers* no. 51,” *The Avalon Project - Lillian Goldman Law Library*, February 08, 1788, http://avalon.law.yale.edu/18th_century/fed51.asp. Accessed, November 23, 2018.

Though secularized, argues David Kennedy, the United States federal legal culture still celebrates the inheritance of its principles and values from Judeo-Christian tradition.¹⁰⁰ Essentially, this predominantly Puritan ideological construct forms the basis of an understanding of the United States federal sentencing and corrections doctrine as operational within the criminal justice system. David C. May et al maintains that all branches of the United States federal system are engaged in the task of criminal justice pursuant to governmental role of maintenance of law and order in society.¹⁰¹ The criminal justice system operates at the federal, state, and local levels of the legislative, judicial, and the executive branches of government with various degrees of complexities.¹⁰² As noted earlier, this paper focuses on the narrow area of the federal sentencing doctrine of exclusive retribution and its recidivistic consequences.

Pursuant to its exclusively retributive and just deserts goals, federal ‘corrections’ is composed of jails, prisons, and community correctional services.¹⁰³ To incapacitate offenders, jails hold pretrial detainees, those awaiting transfer to another institution, and offenders sentenced in misdemeanors for not more than one year.¹⁰⁴ Prisons, on the other hand, are used for the incapacitation of persons convicted of serious crimes.¹⁰⁵ Community corrections manages criminals with the goal of reducing institutional confinements through community supervision imposed pursuant to the federal sentencing and corrections doctrinal guidelines.¹⁰⁶

¹⁰⁰ David Kennedy, “Losing Faith in the Secular and the Culture of International Governance,” in *One Nation under God: Religion and American Culture*, ed. Marjorie Garber and Rebecca L. Walkowitz (New York / London: Routledge, 1999), 120-21.

¹⁰¹ David C. May et al., eds., *Corrections and the Criminal Justice System* (Boston / Toronto / London / Singapore: Jones and Bartlett Publishers, 2008), 78-475.

¹⁰² *Ibid.*, 5.

¹⁰³ Clear and Dammer, 8-9.

¹⁰⁴ *Ibid.*, 8.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

Chapter 2

U.S. Federal Sentencing and Corrections: A Doctrinal Overview

Evaluation of the Federal Sentencing and Corrections Structure

Clear and Dammer recognize the four phases of the criminal justice system – legislative, apprehension, adjudication, and correctional phases.¹⁰⁷ As already noted above, the legislature (i.e., Congress) structures the sentencing system to constrain the choices available to judges and correctional administrators. Historically, between the 1930s and mid-1970s the federal government maintained the indeterminate sentencing system that allowed judges to impose penalty ranges with parole eligibilities for offenders.¹⁰⁸

Indeterminate sentencing featured three variations, namely, discretionary, presumptive, and guideline sentencing schemes.¹⁰⁹ Discretionary sentencing provides judges with wide latitude of choices from probation, prison sentence, and length of sentence.¹¹⁰ Presumptive sentencing on the other hand gives judges specific “ordinary” sentences to be imposed, with exceptional findings of aggravating or mitigating factors.¹¹¹ The guideline scheme gives judges a suggested hybrid sentence from which to choose – with options to depart only if reasons are provided in the judgment record.¹¹²

Converse to the indeterminate sentencing, in determinate sentencing, the offender’s sentence was fixed at time of sentencing contingent upon the penalty imposed by the judge.¹¹³

¹⁰⁷ Clear and Dammer, 9-14.

¹⁰⁸ *Ibid.*, 9.

¹⁰⁹ *Ibid.*, 10.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.*, 11.

¹¹³ *Ibid.*

Mandatory sentencing was another variation of determinate sentencing and imposed specific mandated sentence for specified crimes.¹¹⁴ Discretionary sentencing is also a feature of the criminal justice system that provides judicial discretion to judges to impose sentences based on the offender's crime, intent, amount of harm on victim, victim's role, offender background, rehabilitation potential, and other factors.¹¹⁵

Arguably, sentence disparities resulted, and Congress responded with laws to manage those disparities and any changes in crimes.¹¹⁶ Some of those Congressional reactionary laws include the Three-Strike Laws (which require life imprisonment for three violent felonies or drug offenses).¹¹⁷ The federal government also enacted the Truth in Sentencing law in 1984, to ensure offenders serve the actual sentences imposed rather than a grossly reduced version based on 'good behavior and parole.'¹¹⁸ This was further boosted in 1994 by the Federal Violent Crime Control Act which earmarked four billion dollars to incentivize states to adopt the truth-in-sentencing laws.¹¹⁹

Further, the federal government and some states developed Sentencing Guidelines in 1978 to curtail the sentencing discretion of judges by specifying the presumptive sentence.¹²⁰ Based on a grid system of two scores, the sentencing scheme considers the seriousness of an offense and the likelihood of the offender's recidivism.¹²¹ Following the guideline then, the

¹¹⁴ Clear and Dammer, 11.

¹¹⁵ Ibid., 10.

¹¹⁶ Ibid.

¹¹⁷ Ibid., 11.

¹¹⁸ Ibid., 12.

¹¹⁹ Ibid.

¹²⁰ Ibid., 13.

¹²¹ Ibid.

police must apprehend offenders based on justifiable probable cause for the adjudication phase to process for the correctional phase.¹²²

Clear and Dammer recognize five main community corrections strategies which deserve mention for purposes of recidivism interrelatedness.¹²³ Probation is a sentence and status in which a crime convict is allowed freedom to reside in the community contingent upon refrainment from further crimes.¹²⁴ Norval Morris and Michael Tonry propose an intermediate sanction between probation and prison (fines, restitution, community service, electronic monitoring, heightened reporting, etc.).¹²⁵ Other strategies include, early release or parole – with supervision, and diversion, which seeks to move an offender away from the formal criminal justice system.¹²⁶ The question of the underlying rationale for these correctional and sentencing measures still needs to be addressed. The main issue here is whether the exclusive imposition of jail, prison, and traditional probation are the best ways to meet our moral and social obligation to punish but redemptively restore offenders and heal all impacted by the offender’s bad behavior.

Exclusive Retributive and Desert Objectives of Corrections

While corrections and sentencing primarily aim to punish offenders and prevent crimes, Richard S. Frase grounds their rationale on theories of proportionality and desert causally-linked to exclusively retributive classical notions discussed above.¹²⁷ On the moral justification for

¹²² Clear and Dammer, 15.

¹²³ Ibid.

¹²⁴ Ibid., 16.

¹²⁵ Ibid.

¹²⁶ Ibid., 16-17.

¹²⁷ Richard S. Frase, “Theories of Proportionality and Desert,” in *The Oxford Handbook of Sentencing and Corrections*, ed. Joan Petersilia and Kevin R. Reitz (Oxford / New York: Oxford University Press, 2012), 132-47.

societal expectations that criminals be punished, philosopher, Immanuel Kant and sociologist Emile Durkheim mutually share the notion that punishment is “both a moral and a social imperative” through which society declares an act forbidden.¹²⁸ To Kant, law-abiding societies “disclaim the law breaker and affirm the morality of their own legal compliance”¹²⁹ by the imposition of punishment on the offender. Emile Durkheim contends for a more pragmatic purpose exemplified by “conscience collective” – “a collective social sentiment in favor of community norms and values.”¹³⁰ Undoubtedly, Kant and Durkheim are right that punishment is both a moral and social imperative necessary for the preservation of community values. But one may not conclude from this general rule that Kant suggests an exclusive retributive penology.

To explore the necessity of punishment further, a classic study of punishment in Puritan societies in early America by Kai Erikson revealed the impact of public penalties in uniting and establishing social solidarity among the groups.¹³¹ This collective social sentiment toward community norms and values relates back to the retributivism of St. Thomas Aquinas mostly derived from classical Aristotelian desert theories – thence to related Platonic notions.¹³² These links suggest strong historical traditions of the imposition of strict [and sometimes liberal] punishments to preserve commonly shared ethical values. However, one also underscores the exclusive use of retributive punishments as a predominant penal measure.

¹²⁸ Clear and Dammer, 17.

¹²⁹ Ibid., 18.

¹³⁰ Ibid.

¹³¹ Frase, 131-32.

¹³² Peter Karl Koritansky, *Thomas Aquinas and the Philosophy of Punishment* (Washington: Catholic University of America Press, 2012), 103-32, <https://www.jstor.org/stable/j.ctt3fgq22.8>. Accessed, November 12, 2018.

Frase highlights ‘positive’ and ‘negative’ versions in which ‘positive’ retributivism aims to equate the severity of punishment to the offender’s degree of blameworthiness or “moral desert,”¹³³ while ‘negative’ retributivism or ‘modified just desert’ aims to “use retributive proportionality principles to set upper limits on the severity of punishment.”¹³⁴ Affirmatively, this paper does not unduly seek to impeach the traditional imposition of retribution per se, which applies proportionality to make the punishment fit the crime.

The issue here is whether the ‘positive’ goals of state-imposed exclusive retributive punishment is a sufficient rationale for the imposition of punishment. In other words, does a purely strict and exclusive retributive goal that lacks redemptive value for the offender benefit society in the long-run given the inevitable recidivist results shown by the various reoffender data discussed below? Further, a pertinent question for lex talionis-driven retributivism is whether its proponents do not radically alter the scope of justice by pursuing primarily an exclusive punitive penology to the detriment of restorative and redemptive principles equally capable of administering equitable justice and reducing collateral costs of an exclusive model? (1 Timothy 1:15).¹³⁵

Analysis of Retributive Penology and Lex Talionis

Arguably, theonomist penology, [causally connected to exclusive retributivism through mutual interest in just deserts], would argue that retributive principles preeminently dominate penology in Scripture and therefore reflects an essential element of societal structure and order

¹³³ Frase, 131.

¹³⁴ Ibid.

¹³⁵ Unless otherwise noted, all biblical passages referenced are in the *English Standard Version* (Wheaton, IL: Crossway, 2008).

required by an absolute God. In addition, theonomy avers that exclusive retributive principles explicitly and implicitly overlap with other non-retributive punishment theories, and thereby the question of a redemptive approach is foreclosed.¹³⁶

However, these arguments are defeasible in that exclusive retributivism of the *lex talionis* kind had been proven historically ineffective as shown above. Also, considering the preponderance of very high rates in the recidivism of exclusively punished offenders within the federal criminal justice system, exclusive retributivism fails to curb crimes. In addition, as will be seen in the critical analysis below, pure exclusive retributive penology does not guarantee law-abiding outcomes, and, the plural nature of American society naturally requires a cumulative redemptive approach in lieu of a pure theonomist *lex talionis* model.

Further, the common features of exclusively retributive punishment theories portray these theories as intrinsically non-redemptive. For instance, as articulated by Frase, exclusive retributivism is concerned only with calibrating the offender's punishment according to his past criminal acts, and without consideration of future impacts of the punishment on the offender.¹³⁷ Similarly, it examines the offender's degree of blameworthiness for past criminal acts focused primarily on present punitive sentencing. An evidence of this function is discussed in the federal Sentencing Guideline referenced above, which permits substantial punitive sentences based on prior convictions.¹³⁸ Moreover, exclusive retributive punishment theories may assess the offender's blameworthiness based on the nature and seriousness of the harm caused or threatened, and the offender's degree of culpability in committing the crime – i.e. degree of

¹³⁶ Frase, 132.

¹³⁷ *Ibid.*, 133.

¹³⁸ *Ibid.*

intent (*mens rea*), good or bad motives, role in the offense, subject to any defenses (mental illness, insanity, diminished capacity, and so on).¹³⁹

In short, one could reasonably infer from these features that exclusive retributivism lacks intrinsic redemptive value to the offender because it seeks only to punish the offender according to the dictates of ‘just desert’ and *lex talionis* tit for tat. Understandably, scholars are split on whether retribution represents a positive or negative justice criterion. This paper does not oppose the application of normative retribution per se which is found both within restorative and redemptive penologies, because of the nuanced interpenetration of these principles in symbiotic penology. However, a penology formula of exclusive retributivism which actively punishes without regard to restorative and redemptive potentials raises questions as to its positive versus negative effects on sentencing and corrections.

The positive or “defining” theory of Andrew Von Hirsch avers that retribution should “define the degree of punishment severity as precisely as possible; offenders should receive their just deserts, no more and no less, and offenders of differing blameworthiness should be punished in direct proportion to their relative desert.”¹⁴⁰ Here, Von Hirsch’s approach would rightly permit “crime-control, budgetary, or other non-retributive values”¹⁴¹ to affect severity of punishment. Though this positive view of retribution per se makes minimal to zero provision for holistic redemption of the offender, impacted victim, and society, yet it correctly argues against exclusive retribution.¹⁴²

¹³⁹ Frase, 133.

¹⁴⁰ Ibid.

¹⁴¹ Ibid., 134.

¹⁴² Ibid.

Conversely, the notion of negative or “limiting” retributivism championed by Norval Morris, places desert-based limits both on who may be punished (only the blameworthy), and how they may be punished.¹⁴³ To Morris, “not-deserved” ranges of penalties could be either unfairly severe or unduly lenient given the complexity of morally-relevant factors and lack of consensus among the diverse political and philosophical views.¹⁴⁴ In addition, Morris opposes all mandatory minimum penalties, but rather proposes desert-based limits on punishment severity for serious offenses.¹⁴⁵ Thus, Morris stands for exclusive retribution as the predominant criteria for penology and makes no room for restorative and redemptive potentials that could holistically punish crimes, restore victims / families, and provide offenders with redemptive opportunities.

Some other scholars, like K. G. Armstrong and H. L. A. Hart concur with Morris on the necessity of limiting retributivism, but on the ground of avoiding unfairly severe penalties.¹⁴⁶ Interestingly, Armstrong comes close to a redemptive argument in that he holds that the provision of the right to punish offenders does not obligate the imposition of punishment to the limits of justice in contravention of the hope of reforming the criminal.¹⁴⁷ Nonetheless, Armstrong provides a strong remonstrance that, “it is never just to punish a man more than he deserves”¹⁴⁸ – raising the issue of determination of desert (i.e. what does an offender justly deserve and what criteria justifiably determines this?). But again, the exclusively retributive imperative is palpable even in Armstrong’s view.

¹⁴³ Norval Morris, *Madness and the Criminal Law* (Chicago: University of Chicago Press, 1982), 12-58.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ Frase, 136.

¹⁴⁷ K. G. Armstrong, “The Retributivist Hits Back,” in *The Philosophy of Punishment*, ed. Harry B. Acton (London: St. Martin's Press, 1969), 155-56.

¹⁴⁸ *Ibid.*, 155.

Similarly, H. L. A. Hart rejects retributivist notions that hold appropriateness or fitness to crime as probative of maximum punishment limits.¹⁴⁹ Hart joins Morrison and other proponents of an asymmetric approach to strict desert limits. Frase counters that strict retributive version is ineffective because of the need to encourage and reward defendant cooperation; need for flexibility in responding to offender non-cooperation or recidivism risk; and need to economize and prioritize due to scarce correctional resources.¹⁵⁰ Again, while Frase is presumably amenable to the proposed cumulative penal approach, a constant factor in the varieties of scholarly notions here on exclusive retributive justice is an apparent lack of explicit offender-focused redemptive propositions.

Many other theorists reject the limiting retributive model as imprecise-desert theories that yield unfair results; too lax to prevent punitive escalations; or as lacking appropriate standards to measure desert ranges.¹⁵¹ Paul Robinson criticizes Morris, Armstrong, and Hart's precise-but-asymmetric version as contrary to basic public policy that responds to natural public demands for the severe punishment of offenders.¹⁵² Thus, Robinson justifies exclusive retributive penology on the grounds of presumed public desire for the proverbial 'pound of flesh' from offenders. However, Robinson's *argumentum ad populum* is a fallacious ground to support exclusive retribution just because popular will supports a claim is irrelevant to its truthfulness.

¹⁴⁹ H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Oxford University Press, 1968), 237-39.

¹⁵⁰ Frase, 135.

¹⁵¹ *Ibid.*, 136.

¹⁵² *Ibid.*

The Federal Sentencing Guideline – An Overview

Petersilia and Reitz suggest that the federal Sentencing Guidelines, as a human instrument, may still permit equally culpable offenders to receive disparate severity of punishment, thus impacting retributive proportionality.¹⁵³ Yet, in response to changing public attitudes to retribution, the Guidelines adopted Morris' precise-asymmetric model to narrow sentence ranges, avoid severity, and reduce unfairness.¹⁵⁴ However, pursuant to the redemptive approach being proposed in this paper, it is arguable that the public cares only about matching punishment to desert and achievement of effective crime control in a cost-effective manner without regards to offender redemption, given the paramount place occupied by the recidivism issue in current public discourse on the impact of criminal reoffending. Further, it could be argued that the reduction of unfairness should necessarily encompass restoring victims / families and providing offenders opportunities of redemption.

Views that most closely approach the rationale for redemptive and restorative penology are those of Antony Duff's "communicative" theory and Herbert Morris's "paternalistic" notions. Both Duff and Morris adduce non-retributive theories that incorporate elements of retributive proportionality.¹⁵⁵ Duff portrays punishment as conveying society's 'censure' of criminals and fosters a dual dialogical scheme that incentivizes offender remorse, apology, and penance.¹⁵⁶ Similarly, Morris argues that punishment furthers intrinsic "goods" in which offenders recognize the wrongfulness of their acts, feel guilt, repent, desire to make amends,

¹⁵³ Petersilia and Reitz, 136.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid., 137.

¹⁵⁶ Ibid.

commit to a future of no crime, and emerge as a strong moral force in community.¹⁵⁷ Hence both theories incorporate retributive elements that regard offender blameworthiness as determinative of the degree of censure and repentance in a case.¹⁵⁸

Converse to Duff and Morris, proponents of sentencing uniformity theorize that similarly-placed offenders should receive non-disparate severity of punishment.¹⁵⁹ Again, for emphasis, this exclusively retributive theory of punishment generally aims to punish the offender and deter others from engaging in similar forbidden acts. However, as already emphasized here, notions like sentencing uniformity is innately non-redemptive, but simply aims to punish crimes and criminals - both probably viewed in abstract terms. By contrast, Duff and Morris come closest to redemptive penology and a cumulative penal paradigm.

Theonomist Retributivism – An Overview

A religiously-themed version of exclusive retribution is the *lex talionis*-driven penology of most theonomist retributivists which argues for a return to “God’s law” as the only perfect standard of righteousness for civil ethics.¹⁶⁰ Theonomy simply means, “God’s law” – and was part of a development in the traditional classical tension between religion and the non-sacred state over the source of law or authority.¹⁶¹ Theonomic ethics is held as the “cornerstone” of Christian Reconstructionism within the Reformed tradition founded on the theological premises

¹⁵⁷ Petersilia and Reitz, 137.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*, 137-38.

¹⁶⁰ Greg L. Bahnsen, *Theonomy in Christian Ethics*, 3rd ed. (Nacogdoches: Covenant Media Press, 2002), xxvi-xxix.

¹⁶¹ *Ibid.*, xxiii.

of Calvinistic soteriology, covenantal theology, postmillennial eschatology, presuppositional apologetics, and of course, theonomic ethics.¹⁶²

Theologian, Greg L. Bahnsen in his study of *Theonomy in Christian Ethics*, raises the issue of the tension between theonomy (God's law) and autonomy (self-law).¹⁶³ To Bahnsen, "modern autonomous man is aided and abetted in his apostasy from God by the antinomianism of the church, which, by denying God's law, has, in theology, politics, education, industry, and all things else, surrendered the field to the law of the fallen and godless self, to autonomy."¹⁶⁴ Hence, Bahnsen concludes that because God is absolute, the "Word of God, contained in the Scriptures of the Old and New Testaments" is "the only rule of faith and life" for all matters, secular and sacred in the universe – without exceptions.¹⁶⁵

Many Christian ethicists, including Meredith G. Kline reject theonomist views as erroneous,¹⁶⁶ while others like J. G. Child and Carl F. H. Henry view it in good light. Henry commends theonomy, arguing that, "By a wealth of biblical data Greg L. Bahnsen establishes that God's commands impose universal moral obligation; that God's ethical standards ought universally to inform civil legislation; that civil magistrates are ideally to enforce God's social commands and that Christians are involved in covenantal use of divine law."¹⁶⁷ As summarized by

¹⁶² Bahnsen, xv.

¹⁶³ Ibid., xxiii.

¹⁶⁴ Ibid., xxvi.

¹⁶⁵ Ibid., xv.

¹⁶⁶ Meredith G. Kline, "Comments On an Old-New Error: A Review Article," *Westminster Theological Journal* 41, no. 1 (Fall, 1978): 173.

¹⁶⁷ Carl F. H. Henry, *God Who Stands and Stays (Part Two)*, God, Revelation and Authority (Waco: Word Press, 1983), 6:447.

Kline, in *Theonomy in Christian Ethics*, Bahnsen resumes the principles of Rousas J. Rushdoony's *The Institutes of Biblical Law*.¹⁶⁸

To Kline, the theonomist thesis is that “the Mosaic law, more or less in its entirety, constitutes a continuing norm for mankind and that it is the duty of the civil magistrate to enforce it, precepts and penalties alike.”¹⁶⁹ Kline rejects theonomy as an ‘obfuscation’ of the typological nature of the Old Testament relative to the New, and a simplistic imposition of Chalcedon’s equation of ancient Israeli theocratic law with modern state law.¹⁷⁰

Essentially, as portrayed by Bahnsen, theonomic ethics reasons from salvation by grace alone for a Christian world and life view regulated by sola scriptura (Scripture alone).¹⁷¹ Also, standing on covenant theology, theonomy rejects the abrogation of Old Testament law but contends for its continuity in the New Testament and contemporary times through the principles adduced by Jesus Christ.¹⁷² In addition, theonomy denies relativism, and holds to absolute truth and advances universal justice on biblical principles alone.¹⁷³

On the law, theonomy rejects legal positivism, but favors the notion of a “law above the (civil) law” to protect against the tyranny of rulers and anarchy of reformers.¹⁷⁴ And, since Christ is Lord of the universe, all earthly leaders are subject to Christian laws found in the Old and New Testaments as overarching justice standards.¹⁷⁵ Hence, theonomists demand moral responsibility

¹⁶⁸ Kline, 173.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Bahnsen, 1-262.

¹⁷² Ibid., 1-8.

¹⁷³ Ibid., xxvii-xxviii.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

from all earthly magistrates [as God’s avengers of wrath] to obey the revealed standards of justice in the Mosaic law.¹⁷⁶ But, is it feasible or even possible to compel all twenty-first century global leads to convert to Bahnsen’s God and Scripture to effectuate a Christian-only global order?

Nonetheless, these theonomistic principles are geared towards shaping a theonomist extremely retributive penology that “has the effect of purging the land of evil and restraining others from committing similar crimes”¹⁷⁷ as literally drawn from biblical Old Testament precedents. In theonomist retributive penology, the controlling principles include, absolute divine demand commanded under penal sanctions.¹⁷⁸ Bahnsen contends that “appropriate” penalty for all infractions must be imposed in cause-effect manner, otherwise, the law is merely a suggestion.”¹⁷⁹

In fact, dual sanction must be imposed – one before the magistrate (as a social misdeed), one before God Himself (as a sin) – since in Bahnsen’s hamartiology, “all crime is sinful, not every sin is a crime.”¹⁸⁰ Hence, for instance, if one runs a stop sign (a state misdemeanor), it qualifies as a dual infraction (as a sin also) in Bahnsen’s theonomy. Thus, the offender must be punished before a civil magistrate and before God himself – a reprehensible unjust model unprecedented in the annals of civilized justice systems, but popular in pagan appeasement models.¹⁸¹

¹⁷⁶ Bahnsen, xxviii.

¹⁷⁷ Ibid., 431.

¹⁷⁸ Ibid., 421-22.

¹⁷⁹ Ibid., 421.

¹⁸⁰ Ibid., 422.

¹⁸¹ Ibid., 422-23.

Further, Bahnsen declares that the main underlying principle of scriptural penology (whether civic or criminal) is not reformation or deterrence, but “justice” characterized by a weird principle of “equity.”¹⁸² Theonomist “equity” simply means no crime receives a penalty which it does not warrant, because unequivocally, God’s law has inbuilt justice pedigree encapsulated in the principle: “an eye for an eye, and a tooth for a tooth.”¹⁸³ Here then is the point of the infusion of lex talionis into the evangelical American mainstream that shapes extremely exclusive punitive conservative notions of contemporary corrections.

This is an express repudiation of restorative justice (and its mitigatory concomitant of restitution) by theonomist penology, and therefore antithetical to the very ethical principles of divine equity which theonomist penology claims to represent or champion. Significantly, while an argument could be made that God’s justice is retributive, however, divine penology is not exclusively retributive. Divine retributive justice has been historically shown as redemptive, restorative, not arbitrary, prejudiced, impulsive, but morally attuned to punish crimes, heal victims and impacted community (Psalms, 7:7; Micah 6:8; Rom. 2:1-6; 2 Tim. 4:8). Yet, God is Love (1 John 4:8) and pours out justice even to specifically redeem offenders (Amos 5:24; Zech. 7:9).

Contrary to the redemptive motif of divine penology, theonomist penology is grossly akin to the “just deserts”¹⁸⁴ of the current exclusively retributive sentencing and correctional doctrines of the federal criminal justice system. Hence, one could justifiably conclude that theonomist penology, by its own admission, is non-redemptive because its goal is purely punitive lex talionis

¹⁸² Bahnsen, 423-24.

¹⁸³ Ibid., 423.

¹⁸⁴ David C. May et al., eds., *Corrections and the Criminal Justice System* (Boston / Toronto / London / Singapore: Jones and Bartlett Publishers, 2008), 207-09.

– an inequitable principle repudiated expressly by Jesus Christ in the Gospels (Matt. 5:23-26, 38; John 19:11).¹⁸⁵

In pursuing exclusive punishments, theonomist penology would impose capital punishments on: murder [regardless of degrees] (Exod. 21:12; Num. 35:31); adultery and unchastity (Lev. 20:10; Deut. 22:21, 23); sodomy, bestiality, homosexuality (Lev. 18:22-23; Exod. 22:19); incest, rape, sabbath-breaking, kidnapping, apostasy, witch-craft, and on such vague notions as blasphemy, and many more Old Testament ritual and cultural violations.¹⁸⁶ The rationale is an absolutist interpretation of Judaic divine protectionism in which offenders who manifest irreverence for God, life, truth, family, sex, property, or authority, must be retributively punished without exceptions.¹⁸⁷

The theonomist *lex talionis* penology approach is distinctively a hardline penology that shares ideological similarity with modern radical, fundamentalist, Muslim Shariah Law, since Shariah penology innately seeks to impose exclusively retributive *lex talionis* justice. In addition, a vital push back against Bahnsen is that pure, exclusive retributive justice has its basis neither in Christ nor in Paul because these principal architects of Christianity possessed no earthly political realms, responsibilities, or territorial domains requiring penal measures for dissenters, opponents, detractors and/or criminals. Similarly, punishing criminals for the sole purpose of imposing just desert is diametrically opposed to the redemptive and restorative nature of Jesus’s advocacy for the “vilest” offenders of his time. Conversely, intrinsic in the theology of Christ is an inherent redemption-driven restorative clemency (John 3:16), and, where he proposed punishment, it was not exclusively retributive, but with caveats for redemption and restoration (Luke 13:1-9).

¹⁸⁵ Bahnsen, 423.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*, 431.

Further, the post-conversion Apostle Paul, apart from his didactic derivations of *lex talionis* from his Jewish roots as evidenced in his pre-conversion attacks against Christians, has no practical post-conversion precedence as an actor in, or proponent of institutional exclusive retributive penology (1 Thes. 5:9-10). Factual records indicate that despite his periodic outbursts against his enemies and detractors, Paul always harped on the redemptive and restorative forgiveness of his foes and ethical violators of church norms – degrees of criminality notwithstanding (2 Cor. 7:5-16).

For instance, to the Corinthians, after imposing a disturbing verdict of handing an offender over to “Satan” for extreme retributive justice, later recanted the measure, replacing it with ameliorative restorative advocacy (1 Corinthians 5). Arguably, Paul recanted because of the godly sorrow or repentance displayed by the offender (2 Cor. 2:1-11, NKJV), nonetheless, the underlying restorative and redemptive intent is palpable. And, more significantly, being himself a victim of Roman exclusive retributive justice which eventually had him criminally sanctioned, incapacitated, and killed, Apostle Paul’s penal remonstrances are best understood within redemptive - restorative justice ideals than as exclusively retributive sanctions (Phil. 1:18b-26).

The question therefore is, what is the derivative origin of the much-vaunted, and zealously defended, exclusive retributive penal doctrines that shaped the United States federal sentencing and corrections penology? The answer possibly lies in the historical milieu of past pagan nations, Christianized European nations, the post-Reformation challenges of political governance of city-states by ill-equipped people of faith, a large retinue of classical, medieval and modern theorists, and the impetus from Ancient Near-Eastern *lex talionis* divinized from the Old Testament Jewish model among others. If so, is exclusive retributivism and *lex talionis* justified as the primary penal doctrines in the face of overwhelming recidivistic outcomes?

Further, in opposition to theonomist *lex talionis*, if a ‘neither-nor’ dispensational approach is introduced in the analysis, the theonomist penological ideal per se is obviated because “God” is properly removed from “law” and this renders theonomist penology moot for all intents – the temporal being severed from the eternal (state vs religion dichotomy). Thus, given its innate exclusivist *lex talionis* inclination, theonomist penology finds rapprochement with exclusivist retributive justice in that both seek primarily to punish the offender to satisfy the “tit for tat” rule of justice. Notwithstanding, an argument could be made for retribution per se in that Jesus affirms some core elements of the Law (Matt. 5:17), because the Law is deemed holy, righteous, and good (Rom. 7:12). Moreover, some retributive notions in the Mosaic Law were justifiable norms that set Israel apart as a ‘light’ to other nations. However, even though these theological points are laudable and tenable, they nonetheless reinforce, rather than negate the intrinsic exclusively retributive nature of theonomistic penology.

Notably, the revised federal Model Penal Code sentencing provisions adopted Minnesota’s limiting retributivism [favored by most states] as its theoretical model and guidelines¹⁸⁸ – thus applying the end-benefits analysis discussed below. One should note here that this is one of the ways that the exclusively retributive penological doctrines created by narrow interests at local jurisdictions sustainably invade the federal sentencing culture to impose narrowly tailored exclusive retributive models. Notwithstanding, since prevailing recidivistic effects of such exclusively retributive and theonomist *lex talionis* render retributivism redemptively-ineffective and socially costly, an approach capable of redemptive impact on offenders is needed to punish offenders, but with minimal or reduced recidivistic results.

¹⁸⁸ Frase, 146.

Therefore, viewed as a philosophy of justice, theonomist penal retribution is exclusive in origin, and if seen as a strategy for justice, it lacks an innate redemptive goal, and hence is inadequate as a doctrine of justice under the federal criminal justice system. Hence, restorative justice, as part of the redemptive penology model would create a necessary balance that caters to the societal need for retribution, restoration, and redemption, with minimal recidivistic costs.

Non-Retributive, Utilitarian Objectives of Punishment

As pointed out above, Clear and Dammer distinguishes between the exclusively retributive and non-retributive functions of sentencing and corrections.¹⁸⁹ To Petersilia and Reitz, the non-retributive functions are utilitarian or consequentialist. In addition to focusing on the future prevention of crimes, these principles consider the effects of the proposed sentence on the offender, would-be offenders, society, and at what cost.¹⁹⁰ Further, aimed at maintaining a safe society, these federal sentencing and corrections policies aim to deter crimes with threats of punishment in addition to actual exclusive penal retributions.¹⁹¹ Some of the techniques the system employs in attaining these goals include, general or special deterrence (individual or specific), incapacitation, rehabilitation, and restoration.¹⁹² Traceable to ancient philosophical roots, these principles employ utilitarian proportionality criteria to weigh against punishment goals.¹⁹³

¹⁸⁹ Clear and Dammer, 18-20.

¹⁹⁰ Frase, 138-47.

¹⁹¹ Ibid., 138.

¹⁹² May et al., 204-19.

¹⁹³ Frase, 139.

Incapacitation aims to prevent crime by placing limiting controls upon the offender to curtail their physical capabilities to reoffend.¹⁹⁴ Incapacitation methods include physical incarceration, electronic monitoring, medication with drugs such as Antabuse (which makes an alcoholic violently sick upon ingestion of alcoholic substance).¹⁹⁵ One objection to imprisonment of a potential non-recidivist is the accompanying waste of costly prison resources, plus possibility of increasing public risk due to bitterness of the parolee against society for his or her incarceration.¹⁹⁶ Also, since these external measures lack any redemptive goal, an offender may adamantly go through the system with diehard determination to reoffend anyway – having been adversarially pitched against society through incapacitation measures.¹⁹⁷ Hence, an exclusive imposition of incapacitation alone cannot be adequate in deterring crimes or reducing recidivism.

Rehabilitation on the other hand aims to prevent crime by changing an offender's motivation to criminality through some form of treatment – medical, psychiatric, sociological and so on.¹⁹⁸ Rehabilitation techniques may range from the provision of job trainings, jobs, education; to programs aimed at altering the pattern of an offender's thoughts, emotions, reasoning.¹⁹⁹ However, given data that tends to support heightened recidivism even among allegedly rehabilitated offenders, experts are at a loss on how to find a permanent “magic bullet” innately capable of changing offenders irreversibly.²⁰⁰ According to Clear and Dammer, more recent theories contemplate ‘salience of treatment’ that asks, “what works with whom under

¹⁹⁴ Clear and Dammer, 18-19.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid., 19.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid., 19-20.

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

what conditions?” instead of “what works?”²⁰¹ Hence the principle of a cumulative penological framework is reinforced by the admission that rehabilitation, used as an exclusive penological model, fails to resolve resurgent recidivism in federal sentencing and corrections.

As the oldest correctional method rooted in Judeo-Christian religious and ethical thought that traces back to Middle Eastern civilization, restoration has become the new paradigmatic alternative being pushed for integration into contemporary federal sentencing and corrections policy.²⁰² Ancient Middle Eastern religious ethics and the First Century Christianity held that offenders could atone for their sins and be restored to community life if they made reparation or restitution for their misdeeds and commit to a non-recidivism lifestyle (Exod. 22:1, 4, 7; Lev. 6:5; Num. 5:7). Featuring penitence, expiation, and forgiveness, restoration is central to both Judaism and Christianity (Psalm 51; Isaiah 53; John 1; John 3; Col. 2; Eph. 4:28; 1 John 1).²⁰³

Further, restorative or ‘community’ justice is the new movement that seeks to restore these Judeo-Christian ideals against a predominantly exclusive retribution and theonomist *lex talionis* penal system.²⁰⁴ It brings offenders, victims, and community members together for synergy on ways the offender may repay the victim and society for the crime.²⁰⁵ Premised on the belief that stronger community links curtail crimes, restoration aims to reestablish cohesive, peaceful, productive relationships between offenders and their communities.²⁰⁶

Restorative justice has been practiced in reconciliations in post-Apartheid South Africa, post-Military dictatorship killings in Ghana, in the U.S. state of Vermont, where offenders

²⁰¹ Clear and Dammer, 18.

²⁰² *Ibid.*, 19.

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*, 20.

propose to a board ways they plan to make restitution to crime victims and society.²⁰⁷ The underlying elements of retributive justice include a view of crime as inter-person conflicts that harm victims, communities, and the state.²⁰⁸ In addition, it aims to create peace in communities through reconciliation of parties and reparation by the offender for injuries caused by his or her crime.²⁰⁹ Further, it facilitates the active participation in the criminal justice process by victims, offenders, and communities, in the quest for conflict resolution.²¹⁰

As previously noted at the inception of this thesis, the contention here is that strictly desert theories such as the prevailing exclusive retributive justice paradigm, ignore the redemptive principle cardinal to the recidivism issue. From an analysis of the restorative justice paradigm, one would see how the need for offender redemption could be reconciled with the strict-desert model currently being practiced in the federal sentencing and corrections system.

Balancing the Cost of Exclusive Retribution: Ends-Benefit vs. Alternative-means

In American law, the ends-benefit or “cost-benefit” analysis is employed to determine proportionality in sentencing and corrections.²¹¹ Also, in some jurisdictions, the alternative-means proportionality would require government measures to be necessary, narrowly tailored, or the “least restrictive means” in sentence impositions.²¹² These proportionality principles are intricately connected to the foundational principles of the eighteenth century philosopher, Cesare Bonesana Di Beccaria regarding the exclusive imposition of retributive penology.

²⁰⁷ Clear and Dammer, 20.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ Ibid., 19.

²¹¹ Frase, 139.

²¹² Ibid.

In his contentions against the indiscriminate death sentences and disproportionately exclusive retributive justice of his time, Beccaria generally postulated that "...there ought to be a fixed proportion between crimes and punishments..."²¹³ such that criminal penalties are proportional to the seriousness of the crime as measured by the harm done to society.²¹⁴ Beccaria proposed that the legislature promulgate a "mathematical" scale corresponding to a possible human scale of criminal punishments in descending order to avoid unjust, non-proportional administration of justice.²¹⁵ Essentially, Beccaria was concerned with an exclusively retributive penological model that primarily imposed punitive justice without regard to offender redemption. An instance of such non-proportional justice is found in Victor Hugo's *Les Misérables*, where Jean Valjean stole some bread for his starving sister's family and was punitively incarcerated for five years for such minor infraction. The arresting officer, Javert, being an overzealous exclusive retributivist, would seek nothing else but punitive retributive incarceration.

Subsequently, the famous English jurist, William Blackstone agrees with Beccaria's principle of proportionality in *Commentaries on the Law of England*.²¹⁶ Extending the proportionality ideals in his utilitarian doctrines, Jeremy Bentham adduces multiple reasons for proportionality, premised on public resource allocation.²¹⁷ He avers in his fourth rule that, "the

²¹³ Cesare Beccaria, *An Essay on Crimes and Punishments: With a Commentary by m. De Voltaire*, A New Edition Corrected. (Albany: W. C. Little & Co, 1872), 17-18, http://files.libertyfund.org/files/2193/Beccaria_1476_EBk_v6.0.pdf. Accessed, November 4, 2018.

²¹⁴ *Ibid.*, 17.

²¹⁵ *Ibid.*

²¹⁶ William Blackstone, *Commentaries on the Law of England in Four Books: Notes selected from the editions of Archibald, Christian, Coleridge, Chitty, Stewart, Kerr, and others, Barron Field's analysis, and additional notes, and a life of the author by George Sharswood*, ed. George Sharswood, Vol. 1 - Books I and II. (Philadelphia: J. B. Lippincott Company, 1893), 30-90, http://files.libertyfund.org/files/2140/Blackstone_1387-01_EBk_v6.0.pdf. Accessed, November 4, 2018.

²¹⁷ Jeremy Bentham, "Part Third - Of Punishments: Chapter II - Proportion Between Offences and Punishments," in *Theory of Legislation*, trans. R. Holdreth (London: Trubner & Co., 1864), 324-27, https://ia600301.us.archive.org/2/items/legislation00bentuoft/legislation00bentuoft_bw.pdf. Accessed, November 5, 2018.

greater an offence is, the greater reason there is to hazard a severe punishment for the chance of preventing it,”²¹⁸ however, cautions Bentham, proportionality should guide the imposition of punishment because, “the evil of the punishment [should not exceed] the evil of the offence.”²¹⁹ In addition, Bentham follows Beccaria and Blackstone in rejecting disproportionate sentences and recommends that the legislature provide incentives higher than mere punishments for recidivism effects.²²⁰

To Bentham, “If a man is determined to act by a fear superior to the heaviest legal punishment, or by the hope of a preponderant good, it is plain that the law can have little influence over him.”²²¹ Essentially, Bentham supports punishment, but not the exclusively pure retributive kind, for the sake of extracting the recriminative “pound of flesh” from an offender, but rather a proportional exercise of justice for all parties – the offender, the victim, and society. The issue for proportionality includes marginal deterrent effect of punishments relative to offense severity plus redemptive effect that reduces the potential for recidivism.²²²

A sad note on Bentham’s deterrence-based infliction of punishment is its rationale. While exclusive retribution would punish both to express society’s moral disapproval of crimes and to seek just desert retribution, Bentham would punish to achieve total pleasure and less total pain – at lower costs. Though subtly nuanced, Bentham seems not to argue that the offender be punished even if total community happiness would not be augmented, yet he argues against punishment where inefficacious, unprofitable, or too expensive. This thesis disagrees with

²¹⁸ Bentham, 326.

²¹⁹ *Ibid.*, 325.

²²⁰ *Ibid.*, 328.

²²¹ *Ibid.*, 323.

²²² Frase, 139.

Bentham on these grounds because criminal behavior necessarily demands punishment for reasons other than costs to community or provision of greater happiness. Such utilitarian penology would generally promote injustice where such would augment popular good, as well as ignore criminality for the same reasons. What this thesis contends against is principally, exclusive practice of retributive justice without the ameliorating principles of restorative and redemptive justice.

Retribution and utilitarian theories possess operational differences in that while retribution focuses on the intrinsic good of punishment per se measured against the harm caused or threatened by an offender, utilitarian theories tend to concur but would want the punishment to prevent future crimes by the offender or others. In addition, “Retributive theory punishes in direct proportion not just to the actual or threatened harms associated with the offender’s crime(s) but also to his culpability (intent, role in the offense, etc.).”²²³ This thesis rejects the exclusive employment of these retributive and utilitarian rationales, especially Bentham’s ends-justify-means’ philosophy, but stands with Francis Hutcheson.²²⁴

Also, culpability factors are irrelevant unless related to future deterrent benefits of punishment.²²⁵ For instance, how dangerous is the offender, and is he or she deterrable? What is the benefit in punishing offenders who could be redeemed in some other ways? While this thesis does not subscribe to the aforementioned utilitarian and exclusively retributive ideals, it is instructive to consider the “undesirable collateral consequences”²²⁶ of exclusively retributive punishment as in the loss of marginal deterrence or reverse deterrence effect, especially where

²²³ Frase, 140.

²²⁴ Francis Hutcheson, *A System of Moral Philosophy*, 2nd ed. (Cambridge: Cambridge University Press, 2015), 1042, <https://doi.org/10.1017/CBO9781139583695>. Accessed, December 4, 2018.

²²⁵ Bentham, 140.

²²⁶ Ibid.

exclusive retribution employs just desert primarily.²²⁷ For instance, if “three strikes” punishment imposed automatically on habitual offenders inspires criminals to kill victims, potential witnesses, or arresting/prosecuting officers rather than face the rigor of punishment, then, on a balancing scale, the collateral benefits of such doctrine is questionable.²²⁸

Hence, it is probably necessary in this case to recommend an efficiency model of alternative-proportionality that uses less costly or less burdensome means to punish crime by following Beccaria and Blackstone’s notions of seeking and using mild means where possible, to achieve the same end.²²⁹ The issue then is whether a cumulative redemptive, restorative, and retribution per se penological formula suffices as an efficient ‘mild means’ since it would cater to all parties in a given scenario, with minimal recidivistic costs?

In summary, Richard S. Frase concludes that all American jurisdictions, in adopting the revised Penal Code, accept and practice a hybrid proportionality model of sentencing / corrections which feature limiting retributivism, ends-benefit proportionality, and alternative-means proportionality as deserved punishment models.²³⁰ Yet, as seen in the foregoing analysis of each model, an exclusively retributive doctrine or principle is lacking in the articulation of these correctional doctrines. And, in the absence of a clearly-defined operational redemptive principle in the federal sentencing and correctional doctrines of the United States Penal Code, criminal offenders would lapse into reoffending habits as evidenced by the following critical studies of recidivism patterns within the federal criminal justice system.

²²⁷ Bentham, 140-41.

²²⁸ May, et al., 225-26.

²²⁹ Ibid., 141.

²³⁰ Ibid.

Chapter 3

Analytical Overview of Federal Corrections Recidivism Data

As defined by Merriam-Webster online, “Recidivism” in a medical sense, is “a tendency to relapse back into a previous condition or mode of behavior.”²³¹ Literally, it implies falling back into recurrent bad behavior. However, in a legal context, ‘recidivism’ is “relapse into prior criminal behavior pattern.”²³² Allen R. Beck stipulates that politicians, statisticians, correctional administrators, criminal justice professionals and experts employ diverse criteria in studying and reporting recidivism data, resulting in dissimilarities of views on recidivism.²³³

Consequently, Beck views recidivism as “a fruit salad concept in the criminal justice world” which should be analyzed based on the diversity of elements, applicable time frame, and complexity of related information.²³⁴ Essentially, in some jurisdictions such as Florida, recidivism involves only the return to prison or new sentence to community supervision for a new offense, while Colorado’s definition includes technical violators.²³⁵ Similarly, some jurisdictions include misdemeanors, any chargeable behavior, while others may discount serious crimes that do not involve re-incarceration.²³⁶

²³¹ A. E. Kadzin, “Recidivism: Definition of Recidivism,” Merriam-Webster, <https://www.merriam-webster.com/dictionary/recidivism?src=search-dict-box>. Accessed, November 6, 2018.

²³² Ibid.

²³³ Allen R. Beck, “Recidivism: A Fruit Salad Concept in the Criminal Justice World,” *Justice Concepts Incorporated* (May 2001): 1-4.

²³⁴ Ibid.

²³⁵ Ibid., 2.

²³⁶ Ibid.

Further, Beck notes that time frames for calculating recidivism differ from jurisdiction to jurisdiction.²³⁷ Thus, interpreting recidivism data at the state or local level requires comparative analysis of inter-jurisdictional data and programs. However, for this thesis, the federal criminal justice definition and data system retains primary relevance because it is the central focus of this project. But in contemplating recidivism data, one should not view the data in abstract terms, rather the recidivism data is here analyzed as the inevitable outcome of a tradition of exclusive retributivism in the federal criminal justice system.

Recidivism Data Analysis

Federal recidivism studies show that of the over 1.6 million men and women incarcerated in state and federal prisons yearly, about 700,000 are released each year.²³⁸ Of these, a study of prisoners released in fifteen states in 1994 found that 67.5 percent were rearrested and over 52 percent of those returned to prison within three years.²³⁹ Hence, Thomas P. Lebel and Shadd Maruna, after carefully studying this trend, arrive at the dismal conclusion that, “It is a well-known fact that many returning prisoners will recidivate.”²⁴⁰ These offenders were processed under the prevailing doctrine of exclusive retributive penology, so the issue revolves around the efficacy of an exclusively just desert penology in curbing recidivism.

While the high rates of recidivism is an open-secret, David C. May, et al maintains that “the usual public and political response is not to call for more resources but instead for a “no-

²³⁷ Beck, 2.

²³⁸ Thomas P. Lebel and Shadd Maruna, “Life on the Outside: Transitioning from Prison to the Community,” in *The Oxford Handbook of Sentencing and Corrections*, ed. Joan Petersilia and Kevin R. Reitz (Oxford / New York: Oxford University Press, 2012), 657.

²³⁹ Ibid.

²⁴⁰ Ibid.

nonsense,” “zero tolerance” approach that will lead more ex-prisoners”²⁴¹ back to prison, even for technical violations, resulting in what Stephen Richards labels a “perpetual incarceration machine”²⁴² that recycles offenders. Undeniably, there are many important causative factors inextricably linked to criminal reoffending, such as reentry shock, unemployment due to criminal (‘ex con’) stigma, race, gender and class disparities, housing difficulties, family and/or community rejection, substance abuse lure, improper parole supervision, or downright criminal inclination of the offender.²⁴³ However these external factors were not at the very foundation of doctrinal sentencing and corrections, but at the fringe of the criminal justice system.

Hence, no attempt is being made in this thesis to trivialize the recidivist potency of any of these factors, yet the contention is that recidivism prevails despite all the complex and concerted exclusively retributive punishments, just desert impositions, deterrence and incapacitation, plus rehabilitations projects, half-hearted restitution and restoration attempts within the federal criminal system.²⁴⁴ Why is the current federal philosophy of corrections not overwhelmingly successful in curbing recurrent recidivism despite its exclusively retributive penological model?

Again, to answer this question, one adopts an apologetic perspective that considers the underlying exclusive retribution logic of the federal sentencing and corrections penology. Presumably, this exclusively retributive model assumes that offenders would be “corrected” upon passage through the imposition of penal sentencing and corrections programs. Arguably, if a greater percentage of offenders that fulfil the dictates of exclusive retributivism emerge recidivistic at the end of the justice tunnel, a legitimate issue of apologetic proportions is raised.

²⁴¹ May, et al., 460.

²⁴² S. C. Richards, J. Austin, and R. S. Jones, “Kentucky's Perpetual Prisoner Machine: It's About Money,” *Review of Policy Research* 21 (2004): 93-106.

²⁴³ Lebel and Maruna, “Life on the Outside,” 660-71.

²⁴⁴ Ibid.

This standpoint is supported by the view of most criminal justice researchers and experts that a lack or presence of recidivism is indicative of correctional effectiveness or lack thereof.²⁴⁵

Consequently then, according to the U.S. Justice Department, an estimated total of 503,800 ex-prisoners were paroled during 2005.²⁴⁶ More than 45 percent were classified successful parolees while more than 38 percent were returned to prison facilities for new offenses or technical violations; about 14.8 percent received unsuccessful discharges for offenses not warranting reincarceration.²⁴⁷ Thus, almost 53 percent of the 2005 parolees received unsuccessful discharge.²⁴⁸

Also, in 2002, the U.S. Justice Department released a follow-up study of 272,111 released prisoners from 15 states in 1994. By 1997, 67.5 percent of the ex-convicts had been rearrested for various felonies and misdemeanors, 46.9 percent reconvicted of a new crime, and 51.8 percent returned to prison for new crimes or technical violations.²⁴⁹ More than 30 percent of the ex-convicts were rearrested in the first six months, and more than 44 percent within a year.²⁵⁰ This betrays the claimed potency of federal sentencing and corrections in the absence of a transformative redemptive option.²⁵¹ Also, with regards to distributive analysis: property crimes offenders were re-arrested at a higher rate of 73.8 percent; 66.7 percent for drug offenses; 61.7 percent for violent crimes.²⁵²

²⁴⁵ May, et al., 460.

²⁴⁶ Ibid., 460-61.

²⁴⁷ Ibid., 460.

²⁴⁸ Ibid.

²⁴⁹ Ibid., 461.

²⁵⁰ Ibid.

²⁵¹ Ibid.

²⁵² Ibid.

In addition, rearrest rates were disproportionately high among men, African Americans, younger persons, and persons with longer prior legal records.²⁵³ The most significant argument to be raised against both the Bureau of Justice and Pew Research recidivism data is that they show the results from corrections programs operating pursuant to current retributive and restorative penal doctrines. Since the status quo determines these outcomes, we examine most of the related factors for objective critique of those penal doctrines whose implementation results in so much re-offending by offenders.

Dynamic Factors in Recidivism

According to Edward E. Rhine, most research scholars agree that, “As a group, offenders released from prison represent a significant risk to reoffend, regardless of the method of release, or their placement under parole supervision.”²⁵⁴ He affirms that rearrest records, reconviction, or return to prison of these ex-prisoners establish the ease with which they fail to lead law-abiding lives upon so-called re-integration into their communities.²⁵⁵

Though some would counter that recidivism happens for all sorts of reasons, including lack of job prospects, racism, stigma of incarceration, lack of community support network, or sheer base and evil inclination of the offender, this paper would show that these factors notwithstanding, an inherently redemptive penology approach, of the Christian restorative kind, would help to curb the high rate of criminal recidivism. This position is supported further by

²⁵³ May, 461.

²⁵⁴ Edward E. Rhine. “The Present Status and Future Prospects of Parole Boards and Parole Supervision,” In *The Oxford Handbook of Sentencing and Corrections*, Joan Petersilia and Kevin R. Reitz, eds., The Oxford Handbooks in Criminology and Criminal Justice (Oxford / New York: Oxford University Press, 2012), 641-42.

²⁵⁵ Ibid.

studies that clearly show the rates of recidivism for offenders in constant rise for the past several decades.²⁵⁶

Joan Petersilia and Kevin R. Reitz concur with Rhine that these findings strongly support the notion that the recurrence of high rates of recidivism of returnees has not altered across the board for many decades.²⁵⁷ Hence this trend poses great challenges for future parolees, the community, and the legal system as a whole.²⁵⁸ Echoing similar sentiments, the Bureau of Justice Statistics, a United States federal agency which collects criminal history data from the FBI and state record repositories to study recidivism (re-offending) patterns of various offenders, released a recidivism report for 2018, covering the period 2005 – 2014.²⁵⁹ The report examines and indicts the recidivism patterns of former prisoners during a nine-year follow-up period.

Further, the report provides data on the number and types of crimes prisoners commit after release, by offender characteristics, commitment offense, whether the arrest was within or outside the state of release, and whether released prisoners had no subsequent arrests during the follow-up period.²⁶⁰ It also shows how recidivism and desistance patterns change when using longer or shorter follow-up periods, including cumulative and annual arrest percentages, year of first arrest following release from prison, and the total number of arrests of released prisoners.²⁶¹

The findings are based on data from BJS's Recidivism Study of State Prisoners Released in 2005 data collection, which tracked a sample of former prisoners from thirty states for nine

²⁵⁶ Rhine 641-42.

²⁵⁷ Ibid., 642.

²⁵⁸ Ibid.

²⁵⁹ Mariel Alper, Matthew R. Durose, and Joshua Markman, “2018 Update on Prisoner Recidivism: a 9-Year Follow-Up Period (2005-2014),” Bureau of Justice Statistics, <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6266>. Accessed, November 13, 2018.

²⁶⁰ Ibid.

²⁶¹ Ibid.

years following release in 2005.²⁶² Source data are from prisoner records reported by state departments of corrections to BJS's National Corrections Reporting Program and national criminal history records from the FBI's Interstate Identification Index and state criminal history repositories via the International Justice and Public Safety Network.²⁶³ The report highlights as follows:

- The 401,288 state prisoners released in 2005 had 1,994,000 arrests during the nine-year period, an average of five arrests per released prisoner. Sixty percent of these arrests occurred during years four through nine.
- An estimated 68% of released prisoners were arrested within three years, 79% within six years, and 83% within nine years.
- Eighty-two percent of prisoners arrested during the nine-year period were arrested within the first three years.
- Almost half (47%) of prisoners who did not have an arrest within three years of release were arrested during years four through nine.
- Forty-four percent of released prisoners were arrested during the first year following release, while 24% were arrested during year-nine.²⁶⁴

While the Bureau of Justice analytics on recidivism clearly indicate increasing patterns of criminal reoffending regardless of exclusively retributive penological impositions, a Pew research contends for fringe reduction in recidivism without minimizing the general failure of exclusive retributivism propelling recidivism.

²⁶² Alper, et al., 1.

²⁶³ Ibid.

²⁶⁴ Ibid.

Analysis of the Pew Recidivism Report

The Pew Trust compiled the most current trend on multi-state recidivism and after analyzing current FBI crime statistics, contends for decline in recidivism following the BOJ's 2005 report. The share of people who return to state prison three years after being released—the most common measure of recidivism—dropped by nearly a quarter over a recent seven-year period, according to an analysis by The Pew Charitable Trusts of federal Bureau of Justice Statistics (BJS) data on prisoners released in 2005 and 2012.²⁶⁵ Pew analyzed publicly accessible data from the 23 states that reported reliable prison admissions and release data to BJS from 2005 through 2015.²⁶⁶ Among prisoners released in 2005, 48% returned to prison by the end of 2008.²⁶⁷ By comparison, among those released in those states in 2012, 37% had at least one new prison admission by the end of 2015.²⁶⁸ That translates into a drop of 23 percent.²⁶⁹ Pew also claims that longer-term recidivism also fell.

Prisoners released in these states in 2010 were 13% less likely than the 2005 cohort to return to prison at least once by the end of the fifth year after release.²⁷⁰ Included in these numbers are people sent back to prison for a new crime or for violating the terms of their post-prison supervision. Combined, both the BOJ data and Pew statistical analysis of the report agree

²⁶⁵ Adam Gelb and Tracy Velázquez, “The Changing State of Recidivism: Fewer People Going Back to Prison,” The Pew Charitable Trusts, August 01, 2018, <http://www.pewtrusts.org/en/research-and-analysis/articles/2018/08/01/the-changing-state-of-recidivism-fewer-people-going-back-to-prison>. Accessed, October 24, 2018.

²⁶⁶ Ibid.

²⁶⁷ Ibid.

²⁶⁸ Ibid.

²⁶⁹ Ibid.

²⁷⁰ Ibid.

that a large percentage of Americans return to criminal ways post-release. Thus, this endemic problem demands scrutiny – with probable Christian holistic resolution.

Consequently, the main problem posed by the preceding recidivism data is how to reverse the social, cultural, economic, psychological, and spiritual decay caused by the egregious failure of classical exclusive retributivism and theonomist *lex talionis* penology. Apparently, exclusive retributivism combined with *lex talionis*, fails to provide holistic redemption to offenders, victims, and communities through the purely retributive penalties meted out in federal justice sentences and corrections process. Hence it is safe to conclude that the preponderance of criminal recidivism plaguing the federal justice system reveals a major flaw in classical exclusive retributive and theonomist *lex talionis* doctrines. These exclusively punitive penology approaches are innately non-redemptive to the criminal, victims, and society. Therefore, to correct this existential gap, a redemption-driven, holistic, ethical penological framework, represented by the redemptive and restorative justice models, is needed to reduce or curb the endemic problem of criminal recidivism in the United States federal justice system.

And, as shown from the foregoing researches both BOJ and Pew, this thesis demonstrates that more than half of offenders released from prison return to prison within three years – with chances of recidivism highest in the period following release.²⁷¹ Thus, ex-prisoners encounter lots of difficulties reintegrating into normal life and community functions.²⁷² Corrections and criminal justice professionals, intent upon improving reentry, have offered several suggestions to improve current recidivism rates.²⁷³

²⁷¹ May, et al., 476.

²⁷² Ibid.

²⁷³ Ibid., 477.

According to David C. May et al., these include active pro-reentry programs in the corrections stage, improved collaboration between community agencies and the criminal justice system, improvement of available support system for ex-prisoners in the community; better monitoring and parole supervision.²⁷⁴ Other possible measures suggested include the provision of affordable housing, employment, substance abuse monitoring, and many more.²⁷⁵

However, as already demonstrated above, the cumulative efforts and programs of the sentencing and corrections system of the federal criminal justice is designed to impose exclusively retributive penology without redemptive regard to offenders. To alter the increasing rates of recidivism, a core redemptive-driven doctrinal reform is needed in order to administer transformative sentencing and corrections. Hence, the principles of redemptive and restorative justice uniquely distinctive to Christianity offers such an outcome and would be considered next in the context of recidivism. Such an ethical restorative justice formula is being advocated here because the issue of criminal re-offending affects all strata of society, and is inextricably linked to the economic, social, political, and spiritual life of the community.

Primarily, since sentencing and corrections doctrines aim to shape the behavior and perspective of citizens, it is an ethical and worldview matter warranting apologetic concerns. Thus, the apologetic approach most ideal here is an objectively cumulative approach drawn from traditional retributive, restorative, and redemptive sentencing and corrections paradigms. The goal is to punish crimes, restore victims, and redeem offenders to reduce the high recidivism rates in the federal criminal justice system.

²⁷⁴ May, 477-78.

²⁷⁵ Ibid.

Chapter 4

An Overview of Restorative Justice

It has been widely suggested by most scholars that the fundamental dogma of religion innately includes punishment and reward,²⁷⁶ as much as hope for all humanity.²⁷⁷ However, Clara Sabbagh and Manfred Schmitt observe that even though punishment can address the psychological concerns over value consensus, “the salient value reaffirmation motive increases a preference for and satisfaction with more restorative approaches to justice.”²⁷⁸ Hence many in the social sciences and the criminal justice system agree that punishment, in isolation, does not constitute the most effective response to injustice.²⁷⁹ And it has been the contention of the thesis that an exclusively retributive penological formula is inadequately equipped to contain all issues affecting the major stockholders in federal sentencing and corrections.

In addition, as will be seen shortly, since the restorative justice paradigm reaffirms values with the offender rather than in spite of the offender, restorative justice may offer an acceptable cumulative partnership to retributive justice.²⁸⁰ Howbeit it is important to underscore that neither exclusive punishment nor restoration holds a monopoly on justice, nor are they necessarily the most effective or even the most ‘just’ ways to respond to transgression - as independent isolated paradigms.²⁸¹

²⁷⁶ Bentham, 434.

²⁷⁷ Jurgen Moltmann, *Ethics of Hope* [Ethik der Hoffnung], trans. Margaret Kohl (Minneapolis: Fortress Press, 2012), 39-296.

²⁷⁸ Clara Sabbagh and Manfred Schmitt, eds., *Handbook of Social Justice Theory and Research* (Heidelberg / New York / London: Springer, 2016), 251, JSTOR.

²⁷⁹ Ibid.

²⁸⁰ Ibid.

²⁸¹ Sabbagh and Schmitt, 252.

Rather, this thesis concurs with Sabbagh's and Schmitt's contention that what is needed is an integrated understanding of justice that transcends traditional distinctions between "different" justice remedies given the multifaceted nature of the federal corrections agenda.²⁸² Moreover, the recidivism data discussed above strongly indicate that even though exclusive retribution continues to be pervasively institutionalized in the federal sentencing and corrections, retribution is simply one piece of a bigger justice puzzle that should be integrated cumulatively with restorative and redemptive justice ideals.²⁸³ As Charles Colson suggests, the issue is not whether society is to punish, but how it is to punish, since Judeo-Christian ethics hold humans individually responsible, yet accountable to the community and to God (Rom. 14:12).²⁸⁴

A Historical Overview of Restorative Justice

The two major moral theories dominating the debate on restorative justice in sentencing and corrections are utilitarianism and deontology or non-consequentialism.²⁸⁵ As Enlightenment era moral theories, utilitarianism is associated with Italian philosopher Cesare Beccaria (1764), while German philosopher, Immanuel Kant is credited with non-consequentialism.²⁸⁶

²⁸² Sabbagh and Schmitt, 252.

²⁸³ Rick Sarre and Janette Young, "Christian Approaches to the Restorative Justice Movement: Observations on Scripture and Praxis," *Contemporary Justice Review* 14, no. 3 (September 2011): 245-355, <http://web.a.ebscohost.com/ehost/pdfviewer/pdfviewer?vid=8&sid=d27c240e-3757-4c5e-b6cc-b7e4a1de6574%40sessionmgr4010>. Accessed, November 12, 2018.

²⁸⁴ Charles Colson *On Justice* (Colorado Springs: NavPress, 1988), 47-48.

²⁸⁵ Lawrence W. Sherman and Heather Strang, "Restorative Justice as Evidence-Based Sentencing," in *The Oxford Handbook of Sentencing and Corrections*, ed. Joan Petersilia and Kevin R. Reitz, The Oxford Handbooks in Criminology and Criminal Justice (Oxford / New York: Oxford University Press, Inc., 2012), 220-22.

²⁸⁶ Sherman and Strang, 221-22.

Utilitarians, as already discussed above, stand for decisions that cause the greatest good for the greatest number while deontologists seek decisions based on moral culpability and desert regardless of the consequences.²⁸⁷ As a philosophy of empirical cost then, utilitarianism is concerned with protecting the rights of offenders (against torture, unfair sentences, etc.), while deontology seeks consistency in procedural and distributive justice.²⁸⁸ Thus, pure Kantian penology prioritizes the punishment of offenders to the fullest rigors of the law since mercy is inconsistent with the application of the law.²⁸⁹ In agreement with Kantian penology then, this thesis stands for retribution per se, but not an exclusive imposition of retributive penology. Also, while disagreeing with utilitarian rationale for punishment, the thesis recognizes the link between restorative principles and the quest for deterrence. Further, with regards to restorative justice, Lawrence W. Sherman and Heather Strang aver that the central question confronting policy makers is the effect of restorative justice on repeat offending.²⁹⁰

Models of Restorative Justice

The case and tenets for restorative justice is made by many scholars, including Gerry Johnstone and Daniel W. Van Ness in the *Handbook of Restorative Justice*.²⁹¹ Johnstone and Van Ness assert that the goal of restorative justice is generally to seek ways to transform how contemporary societies respond to crime and criminal behavior.²⁹² The restorative justice

²⁸⁷ Sherman and Strang, 221-22.

²⁸⁸ Ibid., 222.

²⁸⁹ Ibid.

²⁹⁰ Ibid.

²⁹¹ Gerry Johnstone and Daniel W. Van Ness, eds., *Handbook of Restorative Justice*, 1st Edition. (London: Willan Publishing, 2013), 1-68, <https://www.taylorfrancis.com/books/e/9781134015191>. Accessed, October 24, 2018.

²⁹² Johnstone and Van Ness, 1.

concept, however, is envisioned by proponents in three overlapping dimensions: “the *encounter* conception, the *reparative* conception and the *transformative* conception.”²⁹³ Before exploring these various concepts a description of ‘restorative justice’ relative to penology is necessary.

As explained by Johnstone and Van Ness, restorative justice seeks to replace the existing professionalized model of retributive or “punitive justice and control with community-based reparative justice and moralizing social control.”²⁹⁴ Thus, restorative justice stands for effective crime control, a meaningful experience of justice for victims of crime and healing of trauma which they tend to suffer, as well as for genuine accountability for offenders and their reintegration into law-abiding society.²⁹⁵

In addition, restorative justice aims for recovery of the social capital that tends to be lost when professionals manage societal problems as nuanced as penology.²⁹⁶ Further, Johnstone and Van Ness insist that restorative justice gains significant fiscal savings for crime prevention and community regeneration by eliminating the complex structures of exclusive retribution.²⁹⁷ Notwithstanding, proponents are divided on the actual nature of the transformation envisaged by the restorative justice movement.²⁹⁸ Conversely, Johnstone and Van Ness aver that a cumulative restorative approach that replaces the penal-treatment-only model is more attainable than exclusive, parochial concepts.²⁹⁹

Necessarily, the following elements innately accompany the restorative justice paradigm:

²⁹³ Johnstone and Van Ness, 1.

²⁹⁴ *Ibid.*, 5.

²⁹⁵ *Ibid.*, 45-56.

²⁹⁶ *Ibid.*

²⁹⁷ *Ibid.*

²⁹⁸ *Ibid.*

²⁹⁹ *Ibid.*, 49-55.

1. An informal process that involves victims, offenders, and others with close connection to them and the crime – seeking to know what happened, how can it be repaired, and how to prevent future wrongdoing or conflict.³⁰⁰

2. Emphasis on empowering the ordinary people impacted by the crime or wrongdoing.³⁰¹

3. Involves decision-makers to promote a non-stigmatizing, punitive approach that does not prioritize the penal goal but helps offenders to transform and truly reintegrate into the community.³⁰²

4. Encourages decision-makers to ensure restorative values of respect to others, avoidance of violence and coercion, and pursuit of inclusion rather than exclusion.³⁰³

5. Focuses on victims of crimes and reparative measures to ensure equity and justice to victims.³⁰⁴

6. Emphasis on strengthening and repairing relationships between offenders, their victims, and their community.³⁰⁵

In sum, the restorative justice model brings together as many stakeholders as possible that were impacted by a crime – offenders, victims, communities, criminal justice system.³⁰⁶ This approach had been used in Australia, New Zealand, and North America in the 1970s and late 1980s specifically in experiments with victim-offender mediation and reconciliation.³⁰⁷ But this

³⁰⁰ Johnstone and Van Ness, 49-52.

³⁰¹ Ibid.

³⁰² Ibid., 6-7.

³⁰³ Ibid.

³⁰⁴ Ibid.

³⁰⁵ Ibid.

³⁰⁶ Ibid., 8.

³⁰⁷ Ibid.

thesis contends for the integration of this model into the main corpus of the federal Model Penal Code to form an integral part of the sentencing and corrections doctrines.

In the “encounter conception” of restorative justice as proposed by Johnstone, Van Ness, and Strong a non-passive approach is employed to bring victims, offenders and others affected by the crime, into face to face discussions and decision-making for restoration and healing.³⁰⁸ State officials and the criminal justice system facilitate the meeting but remain in the background to allow those impacted to discuss appropriate satisfaction measures instead of pure, exclusive retribution against an offender.³⁰⁹

Most significantly, victims, offenders, and other ‘stakeholders’ in a criminal case can encounter one another outside highly formal, adversarial, professional-dominated settings such as the courtroom.³¹⁰ Thus, they exercise the right of meaningful direct involvement in the discussion and decision-making process impacting their lives, rather than passively watching aloof as professionals determine the fate of all involved in a case.³¹¹

Conversely, proponents of exclusive retributivism would argue that the *restorative encounter* approach would disrupt the justice machinery and probably result in “unenlightened, wrong, absurd”³¹² outcomes that negate societal interests in penal righting of wrongs. Restorative justice advocates would counter that the right of direct meaningful engagement must be respected since exclusive punishment per se does not heal or repair all criminal harms.³¹³ Moreover, restorative justice, when employed as a rehabilitative measure, possesses innate

³⁰⁸ Johnstone and Van Ness, 9.

³⁰⁹ Ibid., 8.

³¹⁰ Ibid.

³¹¹ Ibid.

³¹² Ibid., 9.

³¹³ Ibid.

potential to change offenders' attitudes and make them less likely to reoffend.³¹⁴ Some psychiatric evidence and encounter reports have shown that some psychopathic killers suffering from personal and social disorders which conditioned them to view victims in abstract terms, were repentant upon meeting victim families and hearing real life stories of crime victims and families.³¹⁵

Similarly, as a deterrent measure, restorative justice provides offenders with the rare opportunity of meeting their victims (if alive) and victim families and friends in one setting aimed to heal, repair, and restore – without mitigating the penalty for state criminal law violations.³¹⁶ And, societal norm is reinforced as the offender faces the process and people involved, to underscore the weight of norms violated.³¹⁷ Much more still, Johnstone and Van Ness adduce that encounters offer victims avenues for receiving restitution, gives them the opportunity to be involved in decisions in the aftermath of the crime, and can contribute to reduced fear and an increased sense of safety in victims.³¹⁸ Arguably, it may help them understand offenders' circumstances that led to commission of the crimes – helping society to address causative factors more deeply instead of superficially.³¹⁹

The encounter model is shared by Lawrence W. Sherman and Heather Strang who itemize six major ways that this approach had been applied in criminal cases in at least three continents: 1. Restorative Justice Conference (RJC) instead of prosecution, with cautions or no

³¹⁴ Johnstone and Van Ness, 9.

³¹⁵ Hilda Morana, Michael H. Stone, and Elias Abdalla-Filho, "Personality Disorders: Psychopathy and Serial Killers," *Revised Brazilian Journal of Psychiatry* 28, no. 2 (October 2006): 574-79, <http://dx.doi.org/10.1590/S1516-44462006000600005>. Accessed, December 4, 2018.

³¹⁶ Johnstone and Van Ness, 10.

³¹⁷ *Ibid.*

³¹⁸ *Ibid.*

³¹⁹ *Ibid.*

criminal records; 2. RJC after a guilty plea but before sentencing, as “mitigation”; 3. RJC as the process for making sentencing decisions, with court review; 4. RJC imposed by a sentence as part of probation or imprisonment; 5. RJC that precedes reentry after prison; 6. RJC and Life or Death sentences.³²⁰ With the foregoing, these transformative encounters can allow personal growth in all parties involved. Notwithstanding, Sherman and Strang sadly note that, “the movement has failed so far to reshape sentencing and corrections”³²¹ – at least in the United States. Hence the need for a cumulative approach comprising retributive, restorative, and redemptive principles.

Reparation in Restorative Justice

Next, we review Susan Sharpe’s idea of reparation as a restorative justice goal. According to Susan Sharpe, the word ‘reparation’ comes from ‘repair’ and means to fix or mend – a fairness principle of replacing what one has taken or destroyed.³²² Overlapping with the related concepts of restitution, compensation, atonement, damages and remedies, “reparation is a kind of recompense, which means to give back or give something of equivalent value.”³²³ Rooted on basic human drive to keep social balance, reparation is a fundamental mechanism by which humans seek social cohesion in attempts to redress injustice.³²⁴

³²⁰ Sherman and Strang, 215-40.

³²¹ *Ibid.*, 217.

³²² Susan Sharpe, “The Idea of Reparation,” in *Handbook of Restorative Justice*, 1st Edition., ed. Gerry Johnstone and Daniel W. Van Ness (London: Willan Publishing, 2013), 24-38, <https://www.taylorfrancis.com/books/e/9781134015191>. Accessed, November 8, 2018.

³²³ Susan Sharpe, “The Idea of Reparation,” 24.

³²⁴ *Ibid.*

To Sharpe, humans have an innate sense of direct resentment when personally harmed, vicarious resentment when related others are harmed, and an innate sense of guilt or shame in response to inverted moral scrutiny on self. On these primary attitudes are rooted human moral judgments. Thus, humans pursue justice as expressions of vengeance, retribution and repair in which “Redress is crafted by the victim when it takes the form of vengeance, by a responsible authority when the form is retribution and by the offender in the case of repair.”³²⁵

Vengeance (revenge or retaliation), just like *lex talionis*, pays back like for like, reciprocating injury for injury – mostly with violent undertones.³²⁶ Similarly, exclusive retribution seeks redress by repaying injury with injury, motivated by indignation on behalf of others; and pursuant to truth assertion, it expresses blameworthiness and responsibility.³²⁷

In concurring with Minow, Sharpe holds that the goal of retribution is not necessarily *lex talionis* tit-for-tat, but employment of “governmental administered punishment to vindicate the victim’s value.”³²⁸ And, the vengeance in this manner is not destructive because of the employment of retributive proportionality principles by a supreme governmental authority instead of direct vindictive self-service by the victim.³²⁹ Hence offenders accept as appropriate, and victim as enough, the administration of retributive justice by the criminal justice system.³³⁰

Sharpe’s optimistic view of the mutual acceptability of exclusively retributive principles by the parties impacted is arguable given the objections already raised in the discussion above on the prevailing exclusively retributive justice system under the federal system. Especially, that the

³²⁵ Sharpe, 25.

³²⁶ *Ibid.*

³²⁷ *Ibid.*, 26.

³²⁸ *Ibid.*

³²⁹ *Ibid.*

³³⁰ *Ibid.*

recurrent cycle of recidivism militates against the sufficiency of the exclusive retribution model of penology. However, Sharpe proffers yet a third primary way of redressing injustice and to reduce inequity.³³¹ Aimed at reducing suffering for the victim, the principle of reparation emanates from an acknowledgement of the wrongfulness of offender behavior and his or her desire to minimize damage to the victim.³³²

Historically, reparation or restitution had been employed by humans as a primary form of redress in place of traditional retaliatory retributivism.³³³ However, the complexities of societies birthed legal codes that applied reparation principles to measure harm and remedies.³³⁴ Sharpe notes that though reparation retains relevance in contemporary civil legal systems where monetary compensations are allotted to victims, it does not have commensurate relevance in the Western criminal justice system which primarily operates from a retributive philosophy.³³⁵

Interestingly, while Sharpe points out that reparation has become more increasingly adopted as a judicial sentencing option in recent decades,³³⁶ one wonders why the revised Model Penal Code does not prioritize reparation in its guiding tenets.³³⁷ In politics, reparation takes the form of payment of restitution, an apology, the punishment of individuals responsible, prevention of recurrence of breach of duty.³³⁸ For instance, the US government's payment to surviving Japanese Americans for internments during World War II; the British payments to

³³¹ Sharpe, 27.

³³² Ibid.

³³³ Ibid.

³³⁴ Ibid., 28.

³³⁵ Ibid.

³³⁶ Ibid.

³³⁷ "Model Penal Code: Sentencing," The American Law Institute, <https://www.ali.org/projects/show/sentencing/>. Accessed, November 8, 2018.

³³⁸ Sharpe, 28-29.

Nigeria and some African countries for colonial injustices; white South African government return of farms and payment of monies to children of deprived black landowners.³³⁹

Sharpe distinguishes material reparation which concretely addresses specific harms (tangible or intangible) from the wrongdoing, and symbolic reparation which addresses the wrongness of the bad act itself to make victims whole.³⁴⁰ Though these can overlap, reparation generally, restores people function, vindicates the innocent, locates responsibility, and provides equilibrium to victims.³⁴¹ And, as part of its retributive role [perhaps a form of restorative *lex talionis*], a court might order an offender to pay restitution for life or property destroyed in order to punish an offender, irrespective of victim's need.³⁴²

A biblical parallel here is the narrative about Jesus Christ and a convicted violent robber (Grk., *lestes*) sentenced to death by crucifixion (Luke 23:43-44). In the narrative, Jesus recognizes the retributive justice imposed by society on the robber, and would not grant him earthly reprieve, yet, he grants the robber spiritual restoration with a clement assurance of Paradisiac existence. As a restorative justice paradigm in penological construct, both material and symbolic reparation can help redress victims' wrongs by its focus on repair, vindication, location of responsibility, and the restoration of equilibrium to victims.³⁴³ Thus, the reliance on pure exclusive retribution by the federal justice system is reduced in a restorative justice paradigm.

³³⁹ Sharpe, 28-29.

³⁴⁰ *Ibid.*, 28.

³⁴¹ *Ibid.*

³⁴² *Ibid.*, 29.

³⁴³ *Ibid.*

Still, the ideas of engagement and empowerment reinforces the restorative justice argument as championed by Jennifer Larson Sawin and Howard Zehr in the *Handbook*.³⁴⁴ Tracing restorative justice origins to indigenous practices rather than biblical, Sawin and Zehr hold that restorative justice emerged as an effort to empower crime victims around the world.³⁴⁵ Sherman and Strang allude to a longer history of primate justice traceable to chimpanzees, monkeys and ancient human communities.³⁴⁶

Citing the findings of primatologist, Frans de Waal, which describes “peacemaker monkeys” encouraging winners in fights to groom the losers by a mutual picking of insects from each other’s furs, Sherman and Strang conclude that rebuilding social ties post-aggression encompasses primate behavior, including the human family.³⁴⁷ While not subscribing to this linkage of primate justice with rational human justice on grounds of sociological overreach and ethical incompatibility, one could still visualize the possibility of restorative justice beyond the confines of anthropoid society. Arguably though, knowing that reparation of criminal harms is innate to the animal kingdom gives hope that ultimately, the restorative justice approach will be prioritized above predominant retribution in the federal penology doctrines.

Initially ignored in Western nations such as the U.S. and Canada, restorative justice had begun making inroads in the work place, schools, and in mass violence contexts. A popular case study of the application of the restorative justice engagement and empowerment principles in a criminal proceeding happened in 1974 Ontario, Canada, where a judge ordered two young men

³⁴⁴ Jennifer Larson Sawin and Howard Zehr, “The Ideas of Engagement and Empowerment,” in *Handbook of Restorative Justice*, 1st Edition., ed. Gerry Johnstone and Daniel W. Van Ness (London: Willan Publishing, 2013), 41-57, <https://www.taylorfrancis.com/books/e/9781134015191>. Accessed, November 8, 2018.

³⁴⁵ *Ibid.*, 41-42.

³⁴⁶ Sherman and Strang, 218.

³⁴⁷ *Ibid.*

convicted on twenty-two counts of willful damage to make restitution and meet with impacted victims.³⁴⁸ The facilitated engagement empowered all stakeholders, especially providing the offenders with the opportunity to see their crime victims concretely, not abstractly as they would have obtained in an exclusively retributive model that has no room for restorative encounters.

Retributive vs. Restorative Justice Values

Kay Pranis articulates certain essential unique personal and process values of restorative justice.³⁴⁹ Process values are those that must characterize any restorative penal effort.³⁵⁰ To Pranis then, a restorative process must be egalitarian (affording equal voice to all), involve all interested parties (the community, the victim, the offender, the system), provide physical and emotional safety for participants, be clear and understandable, produce change in behavior, promote healing, include monitoring of agreements and evaluation of outcomes, be voluntary for participants, use consensus-based decision-making, be achievable, condemn the behavior, provide reintegration opportunities, focus on repairing the harm, provide opportunities for learning, provide rewards for positive behavior, and hold all the participants responsible for their appropriate roles.³⁵¹

Arguably, a greater percentage of the process values that Pranis' proposes are founded on biblical principles and should constitute Christian justice values that, if appropriated and applied,

³⁴⁸ Johnstone and Van Ness, 41-42.

³⁴⁹ Kay Pranis, "Restorative Values," in *The Oxford Handbook of Sentencing and Corrections*, ed. Joan Petersilia and Kevin R. Reitz, *The Oxford Handbooks in Criminology and Criminal Justice* (Oxford / New York: Oxford University Press, Inc., 2012), 59-74.

³⁵⁰ *Ibid.*, 61.

³⁵¹ Kay Pranis, 61-62.

potentially result in redemption of all in the restorative process.³⁵² However, given the imperatival nature of the justice sought, making the process ‘voluntary’ as Pranis proposes, actually defeats the purpose because some offenders may opt not to participate in order to avoid the trauma of facing their victims. Therefore, for greater recidivistic effectiveness, the process should be mandated as part of the exercise of state adjudicative authority.

Pranis also discusses personal or individual values, which are the “values that restorative processes strive to draw out of the participants.”³⁵³ The individual values are not an itemized list or criteria, but a vision of the direction the process endeavors to route all the participants – which must be grounded on respect and fostering good relationship with all.³⁵⁴ Arguably, both the process and individual values identified by Pranis aim for restorative justice, however, one wonders how the combination of these values results ultimately in reduced recidivism in the absence of a redemptive formula that aims for a permanent change of heart in the offender. It might be an exercise in futility if capital is expended in making peace without commensurate expenditure in averting future reoffending and consequent harm.

Howard Zehr, in *Changing Lenses*, argues for a sharp dichotomy between retributive penology and restorative penology.³⁵⁵ He explains that contemporary retributive justice leaves victims, offenders, and communities injured and unsatisfied as it pursues purely Kantian punitive measures against offender crimes to the detriment of biblically-rooted restorative ideals.³⁵⁶ Zehr critiques the retributive approach because it “defines the state as victim, defines wrongful

³⁵² Pranis, 61-62.

³⁵³ *Ibid.*, 63.

³⁵⁴ *Ibid.*, 64.

³⁵⁵ Howard Zehr, *Changing Lenses: A New Focus for Crime* (Scottsdale: Herald Press, 1990), 180-186.

³⁵⁶ *Ibid.*, 184.

relationship as violation of rules, and sees the relationship between victim and offender as irrelevant,”³⁵⁷ while Zehr’s restorative approach “identifies people as victims and recognizes the centrality of the interpersonal dimensions”³⁵⁸

According to Zehr, through the retributive lens, crime is defined by violation of rules; while restorative justice views crime as harm to people and relationships.³⁵⁹ Where the retribution view harms abstractly, restorative justice regards harms concretely.³⁶⁰ Also, retributive justice regards the state as victim; locates state and offender as primary parties; ignores victims’ needs and rights; disregards interpersonal dimensions; obscures ‘conflictual’ nature of crimes; considers the wounds of offenders peripheral; and defines offence in technical legal terms.³⁶¹

Conversely, restorative justice recognizes crime as causally-connected to other harms and conflicts; views people and relationships as victims; and locates victim and offender as primary parties. Also, it centralizes victim needs and rights; prioritizes interpersonal dimensions; and recognizes the ‘conflictual’ nature of crime. Further, restorative justice highlights offender wounds, and understands offence in the full context of moral, social, economic, and political contexts.³⁶²

While Zehr’s dichotomy had been employed by diverse scholars and criminologists to distinguish the pros and cons of both approaches, one concurs with Declan Roche that such neat distinction is inadequate. Moreover, Zehr suffers the risk of “distorting the real meaning of

³⁵⁷ Howard Zehr, *Changing Lenses*, 184.

³⁵⁸ *Ibid.*, 185.

³⁵⁹ *Ibid.*, 186.

³⁶⁰ *Ibid.*

³⁶¹ *Ibid.*

³⁶² *Ibid.*, 185.

retributive justice, our understanding of what modern criminal justice systems do, and also the meaning of restorative justice.”³⁶³

Inter alia, this thesis follows the prevailing Kantian - Hegelian retributive justice theory which rightfully holds that wrongdoing must be punished because the wrongful act merits condemnation and punishment, as God and society demands. Also, most scholars agree that inherent in retribution lies some modicum of restoration and vice versa.³⁶⁴ In fact, as discussed above in the review of U.S. federal sentencing and corrections doctrines, conventional criminal justice is characterized by the promotion of victim rights and restorative justice elements for a hybrid dissemination of justice, instead of traditional exclusive paradigms.³⁶⁵ Therefore, exclusive penological formulas are arguably out of sync with current realities in the federal criminal justice system which is predominantly inclined to a hybrid penological formula.

Furthermore, concurring with the hybrid penological paradigm, Charles Barton affirms that “punishment and retribution cannot be ruled out by any system of justice.”³⁶⁶ Similarly, Katherine Daly proffers an experiential argument for a hybrid system that includes some elements of retributive, rehabilitative, and restorative justice.³⁶⁷ Arguably what remains for a holistic penology is an infusion of the redemptive core being argued here, but which does not presently seem to possess a central place in the current exclusively retributive and purely

³⁶³ Declan Roche, “Retribution and Restorative Justice,” in *The Oxford Handbook of Sentencing and Corrections*, ed. Joan Petersilia and Kevin R. Reitz, The Oxford Handbooks in Criminology and Criminal Justice (Oxford / New York: Oxford University Press, Inc., 2012), 75-76.

³⁶⁴ *Ibid.*, 76-81.

³⁶⁵ *Ibid.*

³⁶⁶ Charles Barton, “Empowerment and Retribution in Criminal Justice,” in *Restorative Justice: Philosophy to Practice*, ed. H. Strang and J. Braithwaite (Aldershot: Ashgate Publishers, 2000), 55.

³⁶⁷ Katherine Daly, “Revisiting the Relationship Between Retributive and Restorative Justice,” in *Restorative Justice: Philosophy to Practice*, ed. H. Strang and J. Braithwaite (Aldershot: Ashgate Publishers, 2000), 45-59.

restorative paradigms. In concurrence with Lawrence Sherman and Heather Strang, some major conclusions follow from a foregoing evaluation of restorative justice against prevailing exclusive retributivism being practiced in the federal sentencing and corrections paradigm.³⁶⁸

First, since restorative justice conferencing (in mediations) is the most evidence-based strategy, the evidence makes it more than enough to implement restorative justice widely.³⁶⁹ Also, the approach had been shown to be especially cost-effective with regards to some of the more serious criminals, yet, any reduction in prison populations must insure incapacitation of the “worst” offenders.³⁷⁰ Further, this thesis agrees with the proposition that a person committing a notorious crime would not escape punishment simply by being subjected to a restorative or redemptive justice process, rather, exclusive retribution is mitigated by a combined redemptive-restorative measure in a “both-and” justice formula. Moreover, given that appropriate risk assessments are made to determine which offenders and offenses are eligible for any justice formula, all the stakeholders can benefit from a cumulative penology paradigm.³⁷¹ Thus, restorative and redemptive justice would work with retribution per se to punish crimes, restore victims and/or families, while providing channels of redemption to offenders in order to obviate high rates of recidivism and cut collateral costs.

An instance of the impact of cumulative penology approach is evidenced by the life of the founder of Prison Fellowship, Charles Colson, who died in April 2012. Chuck Colson, a former top aide to President Nixon was convicted in 1974 for obstruction of justice and

³⁶⁸ Sherman and Strang, 217.

³⁶⁹ Ibid.

³⁷⁰ Ibid.

³⁷¹ Ibid.

sentenced to serve time at Alabama’s Maxwell Prison.³⁷² While incarcerated, he encountered restorative justice influences and some redemptive principles which led him to personal redemption. He emerged from prison with a new mission of mobilizing broad advocacy for criminal justice reform. Colson went on to work among prisoners and won the prestigious Templeton Prize for Progress in Religion in 1993.³⁷³ At his death on April 21, 2012, he had published many books, influenced many lives, contributed to vast prison reforms, and left a great legacy of continued transformation of offenders through his Prison Fellowship.³⁷⁴ And this is just one example of how one redeemed offender could become a transformative agent throughout the criminal justice system, impacting recidivism rates, and potentially cutting economic costs.

A Cumulative Penology Approach

As deduced from the foregoing, in rejecting Zehr’s retributive / restorative justice dichotomy, R. A. Duff contends for the imposition of punitive measures on offenders for the purpose of restoration. In Duff’s penology, “restoration is not only compatible with retribution, it requires retribution as it is only retributive punishment that can help bring about restoration.”³⁷⁵ Thus, to Duff, restorative justice does not constitute an alternative to punishment, but an alternate form of punishment.³⁷⁶ Duff’s position represents a retributivist notion of restoration (a

³⁷² Chuck Colson, “Our Founder: Chuck Colson,” Prison Fellowship, last modified 2018, <https://www.prisonfellowship.org/about/chuckcolson/>. Accessed, December 3, 2018.

³⁷³ Ibid.

³⁷⁴ Ibid.

³⁷⁵ R. A. Duff, *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms*, ed. A. Von Hirsch (Oxford: Hart Publishing, 2003), 43-46.

³⁷⁶ Ibid.

retribution-driven by restoration, while Zehr stands on the extreme pole of restorative justice. Daly, on the other hand, envisages a complementarity of restoration and retribution.³⁷⁷

However, this thesis stands for a penal formula with innate redemptive values capable of effecting irreversible changes in the criminal inclinations of the offender for recidivist purposes. While Zehr's would exclusively censure offenders to placate victims, it seems more likely that Daly and Duff would deliver 'just desert' pain to the offender, but at the end, restores the offender, to destabilize the cycle of criminality. Therefore, the redemptive penological approach being proposed here finds better common grounds with Duff and Daly than with Zehr, because they are cumulative and stand for proportional just desert formula. Also, by potentially reducing recidivism, these approaches are economically efficient to the criminal justice system.

In addition to Duff and Daly paradigms, one could argue that an upgrade penology paradigm combining retributive ideals with restorative principles, but armed with clearly-identifiable redemptive intent, would most likely contribute to substantial reductions in the rising rate of recurring recidivism and its collateral costs. This redemptive paradigm inquires: how can we deliver retribution and restoration to punish crimes, restore victims / families, and redeem offenders while averting the collateral costs of unmitigated recidivism?

The President of the United States, Mr. Donald J. Trump, while signing *H.R. 5682*, the *FIRST STEP Act*, in November 2018, seems to concur with a cumulative redemptive penology when he argues that, "Americans from across the political spectrum can unite around prison reform legislation that will reduce crime while giving our fellow citizens a chance at

³⁷⁷ Declan Roche, 84-85.

redemption.”³⁷⁸ Hence, Trump’s rationale is probative to the claim that redemptive penology is a significant doctrinal issue underlying current quests for the reform of the traditional doctrines of exclusive retributive penology in federal sentencing and corrections.

Redemptive Penology: An Offender-Focused Penal Paradigm

According to John D. Harvey, in the *Eerdmans Dictionary of the Bible*, the term ‘redemption’ generally means, “Release from legal obligation or deliverance from desperate circumstances, closely connected with a payment necessary to effect that release.”³⁷⁹ Harvey further clarifies that in the Old Testament, the primary words used to express the idea of redemption are the Hebrew words *pādā* and *gā’al* (for instance, Ruth 4 – *kinsman redeemer*, Boaz), while the New Testament uses primarily cognates of the Greek terms, *lytróō* and *agorázō*.³⁸⁰ Without delving too deep into the theological implications of ‘redemption,’ the Mosaic idea is that of monetary payments required to free persons or property from certain legal obligations, war, famine, oppression, violence, iniquities, death, or adversaries in some cases.³⁸¹ Significantly, observes Harvey, God features as the primary redeemer since he is the ultimate judge (Isaiah 59:20; Jeremiah 50:34).³⁸²

³⁷⁸ Donald J. Trump, “Remarks by President Trump on H.R. 5682, the First Step Act,” The White House - Law and Justice, November 14, 2018, <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-h-r-5682-first-step-act/>. Accessed, November 16, 2018.

³⁷⁹ John D. Harvey, “Redemption,” in *Eerdmans Dictionary of the Bible*, ed. David Noel Freedman, Allen C. Myers, and Astrid B. Beck (Grand Rapids / Cambridge: William B. Eerdmans Publishing Company, 2000), BibleWorks v.10.

³⁸⁰ Ibid.

³⁸¹ Francis Brown, S. R. Driver, and Charles A. Briggs, *The Brown-Driver-Briggs Hebrew and English Lexicon: With an appendix containing Biblical Aramaic* (Oxford: Clarendon, 1907), BibleWorks, v.10.

³⁸² Harvey, 1.

Likewise, in the New Testament, redemption retains the idea of rescue from legal obligation, however, the rescuer or redeemer is Jesus Christ (Matthew 20:28; Mark 10:45).³⁸³ Apostle Paul affirms the nature of redemption as primarily flowing from Jesus Christ in a past-present-future active format focused on ongoing forgiveness of offenders at whatever level or context (1 Tim. 2:6; Gal. 3:13; 4:5; Rom. 8:23; Eph. 1:14).³⁸⁴ From this, one could reasonably infer that while the Mosaic redemption prioritized exclusive retribution and viewed redemption *de minimis*, the nascent radical approach of Christ heightened emphasis on restorative and redemptive justice to mitigate retributive just deserts per se.

Against this backdrop therefore, redemptive penology operates from the basic premise of the possibility of human transformation through pedagogical ethical formulations. In this regard, victim-focused restorative justice ideals strongly tout values of tolerance, respect, humility, compassion, selflessness, restitution, reparation, repentance, and forgiveness. In the same vein, the offender-focused redemptive penology considers the redemptive qualities of the vilest offender, psychologically, spiritually, and physically, on a case-by-case basis. The goal is to potentially curb the recidivistic impact to society, victims, and offenders, of an offender's relapse into criminal habits.

Significantly, a study of Millard J. Erickson's notions of redemption helps the author map out a possible trajectory of the redemptive penology process. First, through the lens of redemptive penology, an offender goes through state-processed retributive punishment to satisfy the need to punish crime. Subsequent to conviction and sentencing, restorative justice proposes to repair the victim and/or families primarily. Then following corrections, but prior to parole (if

³⁸³ F. Wilbur Gingrich, *Shorter Lexicon of the Greek New Testament*, ed. Frederick W. Danker, 2nd ed. (Chicago: University of Chicago Press, 1983), BibleWorks. v.10.

³⁸⁴ *Ibid.*

any), redemptive penology seeks to apply the tools of transformative psychology, spirituality, and physical / social re-engagement to navigate the offender to both self and divine redemption. Attributives of absolution, repentance, restitution, grace, forgiveness and moral transformation are mediated to participating offenders on a lifetime basis – the scope of their sentences notwithstanding. The goal is to so redemptively transform and engage an offender that he or she will not lapse to a life of crime. Thus, redemptive penology is a better solution if not the best approach that could potentially curb or eliminate future recidivism.³⁸⁵

The Redemptive Rationale

The impetus for redemptive penology is generally found in sociological contexts of human existence where “come-back” stories and redemption feats are widely popular. Whether in Greek mythologies, Asian / Chinese anthologies, American history, African folklore, or South American ancient tales, redemption is a notion with popular acclaim. However, in biblical soteriology and in the anthropologies of St. Augustine, Bonhoeffer, Luther, Barth and other great Christian theologians, the human condition is totally depraved and would need a divine Savior – even the vilest offenders in the American criminal justice system. To the issue of whether grace and forgiveness are foreclosed to some, David and Marybeth Baggett aver, “A deep existential need of human beings is to be forgiven for their wrongdoings, not to be defined by them forever.”³⁸⁶ Even where the offenders would live in perpetual guilt, having concluded on the futility of forgiveness expectations under the indictment of retributive and restorative sentences,

³⁸⁵ Millard J. Erickson, *Christian Theology*, 3rd ed. (Grand Rapids: Baker Academic, 2013), 720-44.

³⁸⁶ David Baggett and Marybeth Baggett, *The Morals of the Story: Good News About a Good God* (Downers Grove: IVP Academic, 2018), 178.

Baggett and Baggett encourage the Christian to employ ‘moral apologetics’ to make the limitless divine redemption available to all.³⁸⁷

The rationale offered by Baggett for this ‘Kantian moral faith’ is that “a central aspect of moral apologetics is the power of the Christian hope to receive the divine grace to be forgiven and to be radically changed.”³⁸⁸ The radical change that operates within an offender must not merely result in them becoming “better” men and women “but new men and women.”³⁸⁹ Hence, the focus of redemptive penology should be on how to employ the salvific elements of Christian soteriology on the human conditions being exposed in the corrections system. As already highlighted in foregoing discussions, there had been efforts and proposals on the transformation of offenders, but redemptive penology asks whether radical moral transformation of the offender into newness of existence can be attained purely on retributive or restorative justice grounds alone.

The logical inference from the analysis of both approaches above strongly indicates that a cumulative approach encompassing retributive, restorative, and redemptive justice would best administer redemptive penology, since no single exclusive approach can administer equitable justice to all without the danger of potential recidivism. Viewing the primacy of redemption through the lens of soteriology, Baggett and Baggett aver that, “Without something like forgiveness breaking the cycle of *lex talionis*, resentment, and retaliation, prospects for the future of social harmony would seem bleak indeed.”³⁹⁰ Thus, rejecting exclusive retributivism, the federal criminal justice could administer a more redemptively-equitable sentencing and

³⁸⁷ Baggett and Baggett, 178.

³⁸⁸ *Ibid.*

³⁸⁹ *Ibid.*

³⁹⁰ *Ibid.*, 181.

corrections penology through the cumulative doctrines of retribution per se, restoration, and redemption.

Synchronicity of Retributive, Restorative and Redemptive Penologies

The argument here is not the antinomian exoneration of an offender, but a sentencing and corrections assessment and routing of offenders into formal redemptive channels, especially of the ethical kind. While ethical norms are not exclusive to any worldview, substantial evidence abounds within biblical Christianity to indicate the primacy of redemption. Therefore, a synchronized penology approach involving retributive, restorative, and redemptive elements, would also reflect openness to redemptive principles from diverse ethical influences within the American national body polity. Those ethical channels could be broadened to include Judeo-Christian ethics interlaced with cardinal, functional redemptive elements from competing worldviews, given the plurality of offenders, victims, and communities impacted by the federal criminal justice penology doctrines.

Principally, the anthropological and soteriological notions of such ethical universes must be reviewed with primary focus on the realistic and functional nature of its redemptive content. With this broad-based approach, most objections and charges of ‘Christian’ proselytization, sectarian imposition, or Establishment Clause issues, are negated and potentially frustrated. For instance, great sages and theologians like St. Augustine of Hippo had postulated an anthropology that portrays the human condition as “totally depraved” and therefore in need of a sole divine ‘Savior’ in Augustinian soteriology. The monotheistic Judaic and Islamic worldviews generally

concur with Augustine on the human condition, with major disagreements about soteriology.³⁹¹

Other polytheistic worldviews, from Buddhism, Hinduism, Shintoism, to the social sciences, and much more, generally view humans as needing redemptive improvement.³⁹²

In pari passu with theistic anthropology, Bonhoeffer recapitulates the human condition as a “dialectic of concealment”³⁹³ riddled with shame, in which, “Man’s life is now disunion with God, with men, with things, and with himself.”³⁹⁴ Thus, redemption appears to have universal appeal among the various stakeholders in the federal criminal justice, without sectarian positioning per se.

In the criminal justice context, to break the cycle of potential reoffending in already-totally depraved humans would require a formalized redemptive approach that works in tandem with retributive and restorative models in tackling recidivism. Hence Bonhoeffer strongly contends that being radically changed into newness of existence is impossible unless one experiences a resurrection encounter with Jesus Christ, because “The only way to turn back is through recognition of the guilt incurred toward Christ.”³⁹⁵ To Bonhoeffer, and contrary to theonomist ethics, guilt is not just the occasional lapse of error or transgressions of an abstract law, “but the defection from Christ, from the form which was ready to take form in us and to

³⁹¹ Ernest Valea, “The Human Condition in World Religions,” *Comparative Religion*, April 24, 2015, <https://www.comparativereligion.com/man.html>. Accessed, December 3, 2018.

³⁹² *Ibid.*

³⁹³ Dietrich Bonhoeffer, *Ethics*, ed. Eberhard Bethge, trans. Neville Horton Smith (New York: Macmillan Publishing Co., Inc., 1978), 23.

³⁹⁴ *Ibid.*, 20.

³⁹⁵ *Ibid.*, 110.

lead us to our own true form.”³⁹⁶ Consequently, an offender’s acknowledgement of guilt does not arise from the experience of disruption and decay, but from a knowledge of Christ’s grace.³⁹⁷

Similarly, in Carl A. Raschke’s view, Kant himself points out the paradox that even though humans are capable of ethical contemplations, it does not imply human capability of moral actions.³⁹⁸ Interestingly, contrary to Bonhoeffer, St Augustine demands total obedience to the law as outward expressions of love to God, the chief Law Giver.³⁹⁹ However, even when the laws are breached by an offender, Philip E. Hughes concurs with Bonhoeffer on what is necessary for newness, namely, “Christian catharsis is not self-purging, getting things off one’s chest or out of one’s system...but purging by Christ’s atoning blood, which cleanses us from all sin (1 John 1:7).”⁴⁰⁰

Thus, in redemptive penology, an offender’s deep-hearted sense of guilt opens the heart for an insatiable need of divine redemption, leading to confession of sin, repentance, and peace of forgiveness of sins (Col. 1: 14, 20).⁴⁰¹ The offender grounds faith in Christ as Redeemer and Lord as the offender is inducted into the radical transformative steps of discipleship to be conformed to the image and likeness of Christ within a Church community.⁴⁰² Following this

³⁹⁶ Dietrich Bonhoeffer, *Ethics*, 110.

³⁹⁷ *Ibid.*

³⁹⁸ Carl A. Raschke, *Moral Action, God, and History in the Thought of Immanuel Kant* (Missoula: Scholars Press, 1975), 2-6.

³⁹⁹ G. R. Evans, *Augustine On Evil* (Cambridge / New York / Melbourne: Cambridge University Press, 1994), 7-18.

⁴⁰⁰ Philip Edgecumbe Hughes, *Christian Ethics in Secular Society* (Grand Rapids: Baker Book House, 1983), 88.

⁴⁰¹ Moltmann, 181-83.

⁴⁰² *Ibid.*, 182.

newness of life, where then is recidivism, since the offender becomes a “new creation” with the passage of the old criminal recidivist nature and predisposition?⁴⁰³

The inevitable response is that with the realization of the ‘new creature’ status (2 Cor. 5: 17-20), the offender becomes more socially beneficial, thereby tilting the balance of the recidivism scales because his or her life of criminality is reversed. The redeemed lives of ex-offenders such as Apostle Paul, Charles Colson, the thousands of criminals “saved” through Billy Graham’s prison crusades, and the many more redeemed through Daniel W. Van Ness’ restorative justice outreaches in prisons and beyond, testify to the operational efficacy of redemption.⁴⁰⁴

In furtherance of the potency of redemptive values, Jurgen Moltmann reasons that recidivism-reversing guilt of perpetrators is obliterated in only one way in that “God can break the fetters of guilt for what has been done and make the past no longer a weight on the present, and in this way, he can bring about a new beginning.”⁴⁰⁵ Essentially, in Moltmann’s ‘ethics of hope’ God takes the guilt of the offenders himself as he breaks them away from the bondage to systems and habits of perennial injustice to others and themselves (Isaiah 53:5).⁴⁰⁶

Thus, not only are the goals of retributive and restorative justice attained in redemptive penology, but by being reconciled to God, the offender is reconciled to society, the victim, and to self., thereby mooting future recidivism.⁴⁰⁷ Moreover, apart from the redemptive Gospel of Jesus

⁴⁰³ Moltmann, 188.

⁴⁰⁴ “Communities of Restoration,” Center for Justice & Reconciliation, <http://restorativejustice.org/we-do/communities-of-restoration/#sthash.liXjnwee.dpbs>. Accessed, November 14, 2018.

⁴⁰⁵ Ibid., 182.

⁴⁰⁶ Ibid.

⁴⁰⁷ Hughes, 88.

Christ (Romans 7: 21-25), pure retribution, rehabilitation, incapacitation,⁴⁰⁸ and reparative restorative justice acting alone, are incompetent to penetrate deep into [and cure] the human condition at its root such that future reoffending is rendered impotent.⁴⁰⁹

In a nutshell then redemptive penology formally introduces offenders into Christian ethics in which they meet God through faith in Christ and fellowship with one another, re-encounter the story of humanity, become embodied in Christ to re-enact the true human story by being commissioned to live out the true life of bearing good fruits that benefit instead of harm society and their communities.⁴¹⁰ Questions could be raised on potentially nuanced issues arising from sentencing non-Christian offenders to uniquely Christian redemptive options. However, such objections are rebuttable in that redemption by one divine Savior is a unique Christian distinctive which the justice system lacks jurisdiction to impose on, yet non-Christian criminals would benefit from radically-transformed lives of non-criminal living that helps them avoid the pains of the retributive penal system. Simply put, spend time with the LORD or do your time with the law.

Dimensions of Redemptive Penology: A *Pneumopsychosomatic* Strategy

In addition to its balancing effects on retribution and restoration, redemptive penology explores the various domains of the offender as well as society. Thus, it could be portrayed in terms of spiritual redemption, intellectual redemption, psychological redemption, and physical or bodily redemption. The uniqueness here is that in each aspect of an offender's life, the constant

⁴⁰⁸ Marijke Malsch and Marius Duker, eds., *Incapacitation: Trends and New Perspectives* (Surrey / Burlington: Ashgate Publishing Limited, 2012), 18-28.

⁴⁰⁹ Hughes, 89.

⁴¹⁰ Hauerwas and Wells, 1-519.

question is, how can this offender be redeemed in order to avert or curb potential recidivism and what elements of the Christian principles are most appropriate? Similarly, for impacted communities and societies, redemptive penology is framed in terms of social redemption, economic redemption, and political redemption using applicable redemptive principles.

Thus, redemptive penology could rightly be viewed as a *pneumopsychosomatic* penal approach because it actively targets the spirit, soul and body of individuals and society with the redemptive Gospel of Jesus Christ instead of exclusively retributive measures and methods. Essentially, the elements of redemptive penology include salvation for the offender's spirit, transformation for his or her mind, and profitable investment of their person in human good (Romans 12:1-2).

The salvation of the offender's spirit involves the critical mass of Christian anthropology and soteriology structured as an ethical framework that shapes fractured humans (the offenders) into society's new man (2 Cor. 5:17). The assumption is that offenders already convicted under retributive desert, would understand their condition best through the lens of Christian anthropology and then respond to the soteriological vision. Whether sentenced to death, for life, or for time, offenders would envision the possibility of redemption spiritually, mentally, physically, or all the above.

An apt instance of redemption penology impact is the fate of the jailed former skateboarding champion, Mark "Gator" Rogowski, currently serving thirty-one years at the J. Donovan Correctional, San Diego, California. Rogowski was very famous in the 1980s and the 1990s, and his life inspired the Helen Stickler movie, "Stoked: The Rise and Fall of the Gator,"

released in 2003.⁴¹¹ Rogowski's career ended when he was convicted for assaulting, raping, and murdering his ex-girlfriend's close friend, Jessica Bergsten in 1992. The aspect of his story that implicates redemptive penology is his pre-arrest encounter and friendship with an evangelical street preacher, Augie Constantino, who navigated Rogowski away from a life of pornography and vice. However, Rogowski had also committed the heinous murder of Bergsten during this period and had buried her in the Shell Canyon Desert.⁴¹² But, the teachings of Constantino led Rogowski to voluntarily confess his crime and to accept the full retributive impact.

In addition, he was also compelled to perform restitution for Bergsten's family by providing full disclosure to all aspects of his crime, plus economic restitution. Of significance is the court's recognition of the redemptive effects of Constantino's ethics on an otherwise "cold case."⁴¹³ Throughout the process of arrest, trial, conviction, sentencing, incarceration, and parole reviews, the door had been left open by the criminal justice system for Constantino to continue delivering redemptive ethics to Rogowski.⁴¹⁴

While this may be an isolated case, it nonetheless shows the potentials of a cumulative penology approach that punishes crimes, restores, victims / families, while providing the offenders opportunities for redemption in order to reduce offender recidivism. Even in cases where offenders are sentenced to death, the orthodox view of eternal redemption holds that the potential post-mortem redemption of their souls should not be foreclosed on grounds of the

⁴¹¹ Lola Ogunnaike, "A Skateboard King Who Fell to Earth," The New York Times Archives, August 21, 2003, <https://www.nytimes.com/2003/08/21/movies/a-skateboard-king-who-fell-to-earth.html>. Accessed, December 3, 2018.

⁴¹² Lola Ogunnaike, 1.

⁴¹³ Ibid.

⁴¹⁴ Ibid.

heinousness of the criminal act. Moreover, criminal justice recognizes that legal retribution is limited by physical death, while redemption is arguably unlimited by a death sentence.

A case in point is the tragedy of Karla Faye Tucker, the first woman executed in Texas since the Civil War.⁴¹⁵ Convicted for hacking Jerry Lynn Dean and Deborah Thomson to death with a pickax during a 1983 home robbery, she apologized to the families of her victims and became “born again” while on death row.⁴¹⁶ At her execution by lethal injection on February 3, 1998, she was only thirty-seven years old, and affirmed a resolute “joy of the Lord” as she paid the supreme penalty for her crimes.⁴¹⁷

Objectively, there are variants from the orthodox view in that some Christian thanatological and eschatological notions of hell and the afterlife variously contend either for minimal post-mortem punishments or for none. For instance, while Roman Catholic eschatology accommodates a doctrine of “Purgatory” in which offenders are purged and granted eternal divine clemency afterwards, universalists reject any punitive time in hell for offenders.⁴¹⁸ Universalism’s rationale is that whether necessarily or contingently, all humans must ultimately be reconciled to God in Heaven, because he is the source of all things and the Lord of all.⁴¹⁹ Though these unorthodox views do not represent the consensus of Christian eschatology, yet taken together, they constitute legitimate arguments for a continued offer of redemptive penology to offenders at every stage and context of the criminal justice process.

⁴¹⁵ Mary Sigler, “Mercy, Clemency, and the Case of Karla Faye Tucker,” *Ohio State Journal of Criminal Law* 4, no. 2 (2007): 455-86, https://kb.osu.edu/bitstream/handle/1811/73043/OSJCL_V4N2_455.pdf. Accessed, December 9, 2018.

⁴¹⁶ Ibid.

⁴¹⁷ Ibid.

⁴¹⁸ C. P. Ragland, “Hell,” *The Internet Encyclopedia of Philosophy*, last modified 2018, <https://www.iep.utm.edu/hell/>. Accessed, December 3, 2018.

⁴¹⁹ Ibid.

Conclusion

On the evidence of preponderant recidivism, this thesis analyzed the origins, nature, and applications of prevailing retributive and restorative penology doctrines in the United States federal sentencing and corrections system with a view to uncover cause-effect relationships. From the analysis, the thesis concluded that a transformative gap exists in the federal sentencing and corrections doctrines because the prevalence of exclusive retributive penology results in repeated cycles of offender recidivism since exclusive retributivism primarily seeks to punish crimes without regard to offender redemption.

Similarly, given that the high rates of recidivism also result in collateral costs that extends beyond the scope of the criminal justice system, the thesis showed the potentials for a cumulative approach that not only punishes crimes, but restores victims and/or their families, while providing offenders with possibilities for redemption. Further, upon balancing the economic and social costs of a hybrid penology formula against its recidivistic effects, the thesis proposes a cumulative penology model. This approach formally synergizes retributive, restorative, and redemptive ideals for the common goal of radically transforming the lives impacted by the sentencing and corrections system in a manner that not only curbs, but potentially eliminates recidivism.

Consequently, to evade a charge of lopsided and unwarranted proselytization of the federal sentencing and corrections doctrines pursuant to a redemptive penology,⁴²⁰ the thesis portrays the essential elements of redemptive penology in the spirit of Lewis B. Smedes' mere morality. Smedes distinguishes mere morality from purely proselytizing Christian ethics in that mere morality does not obligate but points humans to universal ethical principles applicable to

⁴²⁰ John Jefferson Davis, *Evangelical Ethics: Issues Facing the Church Today*, 4th ed. (Phillipsburg: P&R Publishing Co., 2015), 1-66.

humans historically.⁴²¹ As in Smedes, therefore, redemptive penology summons offenders to consider the ideals of guilt, repentance, love, respect, honesty, goodness, kindness, and such other values that inhere in cordial inter-personal relationships in human societies.⁴²²

More importantly, while most ethical values are sharply presented in the Christian context, redemptive penology's ethical postulations are generally presented as "basic component of any human sort of life,"⁴²³ and does not necessarily indicate an exclusively Christian agenda. Rather, redemption is a neutral ethical concept which is however heightened in Christian ethos. Therefore, it is more likely than not to be received in criminal justice reform conversations just as restitution and restorative concepts were widely accepted in the federal justice system.

More importantly, the thesis makes a case for the mining of relevant ethical values from all the major worldviews represented in the federal polity, and the inclusion of same as congruent redemptive principles commonly vested in the punishment of crimes, restoration of victims, and the redemption of offenders to reduce or eliminate the high rates of offender recidivism. Hence, redemptive penology should not be resisted as mere imposition of 'objectionable' Christian ideals upon nonconsenting offenders in a plural society. The supervening thought underscored by the reasoning of redemptive penology is to "... make an assertion about the presence of redemptive power in this world,"⁴²⁴ especially via a cumulative retributive, restorative, and redemptive sentencing and corrections paradigm in federal criminal justice penal doctrines.

⁴²¹ Lewis B. Smedes, *Mere Morality: What God Expects from Ordinary People* (Grand Rapids: William B. Eerdmans Publishing Company, 1996), vii – ix.

⁴²² *Ibid.*, viii.

⁴²³ Smedes, *Mere Morality*, vii.

⁴²⁴ Peter L. Berger, *Facing up to Modernity* (New York: Basic Books, 1977), 212.

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