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## The Justice Motive: Psychological Research on Perceptions of Justice in Criminal Law

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Psychological research demonstrates that people's intuitive judgments of justice differ from legal notions of justice. While several principles guide the determination of just outcomes in criminal law, psychological research indicates the existence of a retributive impulse that can dominate people's justice reasoning. To what extent will this mismatch between legal and human notions of justice affect the acceptability of criminal law reforms in the community and, ultimately, the viability of those reforms? In this chapter, I address this question in relation to restorative justice (RJ) and preventive detention. The psychological literature sheds light on the fundamental motivations driving people's decision-making about RJ and preventive detention. Understanding the factors driving community perceptions of justice is crucial in managing the long-term viability of criminal law reform.

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## I. Divergence of Legal and Community Notions of Justice

The production of a ‘just outcome’ in a criminal case, according to the process of the law, is a complex and deliberative event. When judges determine a sentence in response to a criminal offence, they are guided by several sentencing principles.<sup>2</sup> Judges may be advised or required to consider aggravating and mitigating factors, and must also consider the common law as developed by appellate courts. Judges then engage in what the High Court terms an ‘intuitive synthesis’ – an exercise in which all relevant considerations are simultaneously unified and weighed, and translated into an appropriate sentence. In addition, judges must balance individualised justice (ensuring a sentence is appropriate for the individual case) and consistency across similar types of cases.<sup>3</sup> Moreover, judges are highly specialised individuals, capable of complex cognitive undertakings, and accustomed to the particular synthesis required in sentencing according to the law.

These characteristics of judicial reasoning contrast with laypeople’s decision-making about ‘just outcomes’. To understand how just outcomes are conceptualised in the broader community, we can turn to recent psychological research on distributive justice, which divides the human response to justice-related events into two channels: heuristic and systematic processing.<sup>4</sup>

When a person considers an emotionally engaging and serious injustice, like a criminal offence, this prompts the heuristic response. The heuristic response is quick to occur, automatic and intuitive. Once a person becomes aware of an injustice, the heuristic response basically consists of an appraisal of who or what is to blame, and an underlying imperative to re-establish justice, with little or no further consideration of circumstances.

2 ‘Sentencing Bench Book’ ([2-200] Purposes of Sentencing), [www.judcom.nsw.gov.au/publications/benchbks/sentencing/purposes\\_of\\_sentencing.html](http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/purposes_of_sentencing.html); ‘Victorian Sentencing Manual’ (7.1 Sentencing purposes generally), [www.judicialcollege.vic.edu.au/eManuals/VSM/index.htm#15298.htm](http://www.judicialcollege.vic.edu.au/eManuals/VSM/index.htm#15298.htm).

3 Sarah Krasnostein and Arie Freiberg, ‘Pursuing Consistency in an Individualistic Sentencing Framework: If You Know Where You’re Going, How Do You Know When You’ve Got There’ (2013) 76 *Law & Contemporary Problems* 265.

4 Shelly Chaiken and Yaacov Trope, *Dual-process Theories in Social Psychology* (Guilford Press, 1999); Daniel Kahneman, *Thinking, Fast and Slow* (Macmillan, 2011); Melvin J Lerner, ‘The Justice Motive: Where Social Psychologists Found It, How They Lost It, and Why They May Not Find It Again’ (2003) 7(4) *Personality and Social Psychology Review* 388.

When the observer is seeing harm done to one person by another, this immediate motivation to restore justice equates to a desire for retribution: the bad person, the offender, deserves punishment. Effectively, cognitions and emotions in the heuristic response appear as a scripted package typically involving anger and the desire to punish. It often consists of simple associations of outcomes, personal characteristics, emotions, and restorative acts (e.g. bad people deserve bad outcomes). Over time, the emotions of the heuristic response dissipate to make way for a second type of processing.

The systematic response follows thoughtful consideration of the relevant circumstances of an event. This consideration is slower to occur, and includes assessments of what a person deserves, attributions of the person's responsibility and the culpability of various possible agents of the injustice, and consideration of various courses of action. The systematic response is deliberative, so it requires cognitive resources. However, cognitive resources can be limited by the situation (e.g. a person may not have the time or cognitive capacity to consider all of the circumstances), or they can be limited by the disposition of the observer in question (e.g. preference for intuitive versus deliberative reasoning is a personality dimension that varies across individuals, and shapes the degree to which people voluntarily engage in deliberative reasoning about an event).<sup>5</sup>

While judges therefore engage in a careful synthesis of factors, ensuring the systematic response supersedes the heuristic response in the determination of a just outcome in the law, the conditions to support the systematic response are by no means guaranteed when laypeople consider a just outcome outside the structures of judicial reasoning. To the extent that people do not have the time, opportunity, preference, or capacity for deliberation (or to the extent that avenues of popular discourse, such as press reporting, promote quick, emotive processing of information), the heuristic response (the initial, retributive impulse) will dominate people's decisions about just outcomes, prompting a divergence between legal and lay notions of justice.

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5 Juliette Richetin et al, 'The Moderator Role of Intuitive Versus Deliberative Decision Making For the Predictive Validity of Implicit and Explicit Measures' (2007) 21(4) *European Journal of Personality* 529.

There is certainly evidence that community sentiment about crime is dominated by retributive notions, with public demands for harsher sentences common in many parts of the world<sup>6</sup> (though the use, effects and acceptability of various forms of punishment may vary across cultures<sup>7</sup>). Research shows that we feel an emotional impulse to punish an offender when we witness an injustice,<sup>8</sup> even when doing so will be costly to us.<sup>9</sup> This retributive impulse fulfils several important social needs; for example, it levels the power imbalance caused by a transgression.<sup>10</sup> Punishment also serves an instrumental purpose – people are concerned about becoming victims of crime in future and look to punishment to reduce the likelihood of future harm<sup>11</sup> – but research shows that retribution, not behaviour control, is the dominant motivation underlying people's calls for sanctions,<sup>12</sup> and people choose to administer punishment even when they know it has limited ability to prevent future offences.<sup>13</sup>

Thus, there is often a discrepancy between the deliberative, legal notions of just outcomes formed through judicial reasoning, and the more often heuristic, retributive notions of just outcomes that dominate in the community. Whether or not we endorse it, widespread punitive sentiment can shape the design of crime control policy and the operation

6 Monica M Gerber and Jonathan Jackson, 'Authority and Punishment: On the Ideological Basis of Punitive Attitudes towards Criminals' (2016) 23(1) *Psychiatry, Psychology and Law* 113.

7 Huesmann and Podolski, 'Punishment: A Psychological Perspective' in McConville and Devon (eds), *The Use of Punishment* (Willan Publishing, 2003) 55–88.

8 Kevin M Carlsmith and John M Darley, 'Psychological Aspects of Retributive Justice' (2008) 40 *Advances in Experimental Social Psychology* 193; John Darley, 'Just Punishments: Research on Retributional Justice' in M Ross and D T Miller (eds), *The Justice Motive in Everyday Life* (Cambridge University Press, 2002) 314; Norman T Feather, *Values, Achievement, and Justice: Studies in the Psychology of Deservingness* (Springer Science & Business Media, 2006); Neil Vidmar and Dale T Miller, 'Social Psychological Processes Underlying Attitudes toward Legal Punishment' (1980) *Law and Society Review* 565.

9 Ernst Fehr and Urs Fischbacher, 'Third-party Punishment and Social Norms' (Pt Elsevier Science) (2004) 25(2) *Evolution and Human Behavior* 63; Ernst Fehr and Simon Gächter, 'Altruistic Punishment in Humans' (Pt Nature Publishing Group) (2002) 415(6868) *Nature* 137.

10 Jeffrie G Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge University Press, 1990); Vidmar and Miller, above n 8, 571.

11 Gerber and Jackson, above n 6.

12 Kevin M Carlsmith, John M Darley And Paul H Robinson, 'Why Do We Punish?: Deterrence And Just Deserts As Motives For Punishment' (2002) 83(2) *Journal Of Personality And Social Psychology* 284; John M Darley, Kevin M Carlsmith And Paul H Robinson, 'Incapacitation And Just Deserts As Motives For Punishment' (2000) 24(6) *Law And Human Behavior* 659; Robert M McFatter, 'Purposes Of Punishment: Effects of Utilities of Criminal Sanctions on Perceived Appropriateness' (1982) 67(3) *Journal of Applied Psychology* 255.

13 Robert J MacCoun, 'Drugs and the Law: A Psychological Analysis of Drug Prohibition' (1993) 113(3) *Psychological Bulletin* 497; Tom R Tyler, *Why People Obey the Law* (Princeton University Press, 2006).

of legal institutions.<sup>14</sup> In this chapter, I consider this divergence of legal and community notions of justice in light of two recent legal reforms: restorative justice and preventive detention. While each of these new paradigms changes the way in which a just outcome is determined in the law, they may not actually reduce the divergence between legal and community notions of justice.

## II. Restorative Justice (RJ)

RJ is an alternative response to crime, now integral in several legal systems worldwide.<sup>15</sup> RJ scholars assert that the traditional criminal justice system is primarily retributive, in that its central objective is to assess culpability for a crime and, if necessary, apply proportional punishment.<sup>16</sup> This justice model has been critiqued by RJ theorists for failing to address a broader range of concerns following a crime – in particular, restoration of harmed parties. RJ is fundamentally concerned with harm reparation,<sup>17</sup> and challenges the assumption underlying the traditional criminal justice system that punishment is necessary to restore justice after a crime has occurred.<sup>18</sup>

RJ is typically enacted by involving the affected parties (victims, offenders and supporters) in an interactive process. Restorative outcomes to address the harm can include compensation to the victim or sanctions that are meaningful to the offender and also benefit the victim, community or offender.<sup>19</sup> While punishing the offender can be part of a RJ outcome, it is not fundamental. Rather, what is central to RJ is the interactive process emphasising healing of stakeholders.<sup>20</sup>

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14 David Garland, *Punishment and Modern Society: A Study in Social Theory* (Oxford University Press, 1990); David Garland, *Mass Imprisonment: Social Causes and Consequences* (Sage, 2001); David Garland, 'The Culture of Control: Crime and Social Order in Contemporary Society' (2001); Nicola Lacey, *The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies* (Cambridge University Press, 2008).

15 Alana Saulnier and Diane Sivasubramaniam, 'Restorative Justice: Underlying Mechanisms and Future Directions' (2015) 18(4) *New Criminal Law Review* 510.

16 Howard Zehr, Harry Mika and Mark Umbreit, 'Restorative Justice: The Concept' (1997) 59 *Corrections Today* 68.

17 Saulnier and Sivasubramaniam, above n 15.

18 Michael Wenzel et al, 'Retributive and Restorative Justice' (2008) 32(5) *Law and Human Behavior* 375.

19 Gordon Bazemore, 'Restorative Justice and Earned Redemption: Communities, Victims, and Offender Reintegration' (1998) 41(6) *American Behavioral Scientist* 768.

20 John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002).

The RJ approach poses an interesting challenge: as noted above, the research indicates that punishment is a prime mechanism for justice restoration in response to transgressions.<sup>21</sup> In designating punishment as a (potentially) unnecessary goal of the restorative outcome, RJ clearly deviates even further from the retributive impulse than the traditional justice system, which recognises punishment as one of several core goals to be balanced in sentencing.

We may question how RJ can serve a sense of justice if it does not centralise the imposition of punishment on the offender. Overall, the research suggests that support for RJ results from a complex array of factors: the existence of some motivation to punish an offender does not necessarily preclude people's endorsements of restorative procedures<sup>22</sup> (though people view RJ as a more appropriate response to serious crime when it involves the possibility of retributive sanctions).<sup>23</sup> There are several aspects of RJ that generate strong support for the approach; for example, the opportunity for stakeholders, especially victims, to voice their concerns.<sup>24</sup> Overall, it is likely that the interactive process undertaken by participants will itself engage systematic, deliberative reasoning that will temper the retributive response.

A problem arises, however, if an individual's retributive impulse is not tempered by systematic processing, and is left unaddressed and unacknowledged; if this occurs, the retributive impulse may impact particular RJ processes as well as the broader viability of RJ as a legal reform. If the individual in question is a stakeholder in a conference (e.g. a victim or their supporter), then the person's retributive impulse may play a subtle, implicit role in the outcomes they advocate to resolve the RJ process, or in some cases may even lead to an unsuccessful process (in which an outcome cannot be agreed by all parties). If the individual in question is a community member considering the suitability of RJ as a response to crime, the retributive impulse, untempered by systematic reasoning, could lead to scepticism, reducing the likelihood that the person will participate in RJ if invited in future, as well as reducing overall support for the restorative approach in the community.

21 Carlsmith, Darley and Robinson, above n 12.

22 Saulnier and Sivasubramaniam, above n 15; Wenzel et al, above n 18.

23 Dena M Gromet and John M Darley, 'Restoration and Retribution: How Including Retributive Components Affects the Acceptability of Restorative Justice Procedures' (2006) 19(4) *Social Justice Research* 395.

24 Elizabeth Moore, *Crime and Justice Statistics: Bureau Brief*, No 77 (BOCSAR, February, 2012).

### III. Preventive Detention

Preventive detention schemes targeting sex offenders have operated in Australia since 2003, with legislation allowing community supervision or ongoing detention of offenders following the completion of their original sentences.<sup>25</sup> Generally a court decides whether to impose conditions for the supervision or detention of the offender, though there is some variation in the exact mechanisms by which this is accomplished across jurisdictions.

The primary goal of preventive detention is utilitarian: it is justified in terms of the broader interests of the community and the long-term interests of the offender. This is specifically articulated; for example, the Victorian Act states that its aim is to enhance the protection of the community and facilitate offender rehabilitation.<sup>26</sup> However, some scholars have raised concerns that imposing supervision or detention on an offender (without a fresh conviction) amounts to additional punishment.<sup>27</sup> In a case in the United States addressing civil commitment, the mechanism of preventive detention is referred to as ‘a thinly veiled attempt to seek an additional term of incarceration’.<sup>28</sup> The key question, therefore, turns on the motivations driving preventive detention decisions in practice – is preventive detention actually based on utilitarian motives (community protection and offender rehabilitation) or retributive motives (additional punishment)?

Psychological research supports these concerns, indicating that the retributive impulse impacts decision-making in preventive detention. In one study on civil commitment in the United States,<sup>29</sup> researchers presented participants with a case study describing a serious sex offender, and varied two factors in the description. The first factor, risk of recidivism, was manipulated by telling participants that an expert assessed the offender’s risk of reoffence as either high or low. (Note that this is a

25 Mickael N Bojczenko and Diane Sivasubramaniam, ‘A Psychological Perspective on Preventive Detention Decisions’ (2016) *Psychiatry, Psychology and Law* 1.

26 *Serious Sex Offenders (Detention and Supervision) Act 2009* (Victoria).

27 Bernadette McSherry, *Managing Fear: The Law and Ethics of Preventive Detention and Risk Assessment* (Routledge, 2013).

28 *Kansas v Hendricks* (US, 1997) 117 S. Ct. 2072, Brief for Respondent and Cross Petitioner at 21–22.

29 Kevin M Carlsmith, John Monahan and Alison Evans, ‘The Function of Punishment in the “Civil” Commitment of Sexually Violent Predators’ (2007) 25(4) *Behavioral Sciences & the Law* 437.

criterion on which preventive detention should be administered – when risk to the community is high, preventive detention is warranted under the legislation.) The second factor manipulated was the original sentence – participants were told that the offender had already served either a short or long sentence for his original offence. (This is not a criterion on which preventive detention should be administered – when the previous sanction is insufficient, preventive detention is not justified as a means of administering additional punishment.) After reading the description, participants were asked whether they would support civil commitment for the perpetrator. A higher risk of recidivism increased support for civil commitment; this is warranted, and aligns with the utilitarian principle that should drive preventive detention. Disturbingly, however, previous punishment also affected support for civil commitment: when the previous punishment was insufficient (a short, rather than long, sentence), support for civil commitment increased. The authors suggest that participants used civil commitment as a mechanism to correct the injustice, administering additional punishment via ongoing detention. This is not justified under the utilitarian principles of preventive detention, and appears to reflect a retributive impulse.

The conditions of Carlsmith et al's study do not replicate judicial decision-making; judges would undertake far more systematic, deliberative processing than participants in this study. But this study illuminates how people in the broader community might determine their support for preventive detention. These findings suggest the operation of a retributive impulse, and, in conjunction with the justice literature reviewed earlier, we could conclude that the less systematic processing people engage in, the more that retributive impulse will shape support for preventive detention. To the extent that retribution operates in people's reasoning about preventive detention, support for the legislation deviates from its intended, utilitarian purpose.

## IV. Conclusions

Neither RJ nor preventive detention acknowledges the retributive notions of justice people can hold. While both legal reforms uphold worthy justice goals (restoration of harmed parties in RJ and utilitarian motives to protect communities in preventive detention), failure to recognise an intuitive, retributive impulse means that this impulse may play a subtle and insidious role in the implementation of these reforms. Whether or

not it should be indulged, the retributive impulse is a human response we must study and acknowledge to ensure it is managed and tempered by deliberative reasoning, not only among legal decision-makers, but in the broader community. Contextual cues impact people's reasoning about specific situations,<sup>30</sup> suggesting that when laypeople do engage systematic reasoning to process accurate information about a particular case, their assessment of justice outcomes align more closely with those of judges; however, as noted above, the conditions to support the systematic response are by no means guaranteed when laypeople consider a just outcome outside the structures of judicial reasoning. While we need not advocate retribution in the content of legal reforms, we must recognise the retributive impulse in the process of implementing legal reforms and communicating them to the public. Failure to address this would undermine legal reforms that deviate from retributive notions.

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30 N Finkel, *Commonsense Justice: Jurors' Notions of the Law* (Cambridge, MA: Harvard University Press, 2001).

This text is taken from *New Directions for Law in Australia: Essays in Contemporary Law Reform*, edited by Ron Levy, Molly O'Brien, Simon Rice, Pauline Ridge and Margaret Thornton, published 2017 by ANU Press, The Australian National University, Canberra, Australia.

[dx.doi.org/10.22459/NDLA.09.2017.15](https://doi.org/10.22459/NDLA.09.2017.15)