

SPEA UNDERGRADUATE HONORS THESIS

Repairing the Harm

Restorative Justice and its Implications on the
Criminal Justice System

Natalie Hogan

Spring 2013

Lisa-Marie Napoli

Adjunct Faculty

Abstract

The United States' current criminal justice system is retributive in nature; this means it focuses on punishment as the best solution to crime. The criminal justice system has a rich history, and while it does provide many benefits to American citizens, there are many drawbacks to the system. Some of these disadvantages include: harsh punishments for petty crimes; an extremely high incarceration rate; lack of reform in American prisons; and parties that are left with unmet needs in the adversarial court system. These disadvantages are particularly amplified with youth.

Restorative justice is an alternative dispute resolution theory that attempts to repair the harm caused by criminal behavior. Two of its goals are to transform the wrong behavior and to provide healing for the victim, offender, and community alike. Research shows that restorative justice can be very successful and can be a useful alternative to standard jail sentences in which healing and transformation are typically absent. Small focus group interviews with volunteers and mediators from the Community Justice and Mediation Center (CJAM) in Bloomington, IN also provide an insightful perspective about the effectiveness and potential of restorative justice particularly in regards to juvenile cases. This thesis aims to make a case for the increased use of restorative justice programs, in schools and in the courts, with youth and juvenile cases in order to prevent these children from entering the school-to-prison pipeline. It will ultimately argue for a re-evaluation of the retributive criminal justice system as there is proof that punishment is not the best solution to crime because desired results, such as rehabilitation, are not very likely to be achieved.

Table of Contents

Abstract i

Table of Contents ii

Introduction 1

The Criminal Justice System..... 3

 History 3

 Benefits 4

 Drawbacks..... 6

Restorative Justice 9

 History 9

 What is Restorative Justice? 10

 Principles of Restorative Justice 11

 Victim-Offender Mediation..... 13

 Local Practice: Victim-Offender Mediation..... 15

 Limitations 19

Conclusion..... 21

Bibliography 22

Introduction

It would be rather surprising if in passing one had not heard the phrase “an eye for an eye,” and while its origins predate the Bible¹, its interpretation in today’s world is still very relevant. It is especially pertinent in the United States because the principle that backs this notorious saying goes hand-in-hand with the theory of retributive justice. Retributive justice is essentially the backbone of the current criminal justice system, and it revolves around the idea that proportionate punishment is the best resolution to crime. This means that if a crime is committed, the punishment should be of equal severity as the offense. Obviously there are many theories of justice, and it can be difficult to determine which theory is the most appropriate response to crime.

This leads into an alternate theory of justice known as restorative justice. Restorative justice can be viewed as a stark contrast to retributive justice much like Mahatma Gandhi’s famous quote, “An eye for an eye makes the whole world blind,” is a stark contrast to “an eye for an eye.” Gandhi’s expression encompasses the theory of restorative justice perfectly. Rather than punishing for wrongdoings, restorative justice aims to repair the harm caused by criminal behavior. It is a very different approach to justice because it focuses on the needs of the victims and offenders, and in the adversarial court system, the underlying needs of victims and offenders are usually left unaddressed.

So, why are varying theories of justice important to consider? One reason is that children and youth can be dramatically affected by the school-to-prison pipeline, which is a national trend whereby “children are funneled out of public schools and into the juvenile and criminal justice

¹ "Hammurabi's Code: An Eye for an Eye." *Ancient Civilizations*. Independence Hall Association, n.d. Web. <http://www.ushistory.org/civ/4c.asp>.

systems.”² In today’s society, it is very common for students to experience “harsh and punitive disciplinary policies”³ that greatly resemble punitive measures of the adversarial court system. However, restorative justice practices have become “a prominent alternative” that allow participants to “explore the power of restorative justice to build community, develop understanding among students and between students and teachers, and lead to healing and personal growth.”⁴ Enabling this kind of personal development at a time when human beings are still developing and very impressionable can greatly reduce their chances of being funneled into the juvenile and criminal justice systems later in life.⁵ If there is a possibility of improving the lives and futures of younger generations, then considering other theories of justice is, without a doubt, important.

This thesis begins by exploring the history, the advantages, and the disadvantages of the current criminal justice system. It will then delve into the theory of restorative justice by giving its history, its principles and values, and some of its advantages and disadvantages as well. Now it is important to remember that restorative justice is a different way of thinking about justice because it is a theory. So, in order to understand what an example of restorative justice looks like in action, a description of victim-offender mediation will be given. This will all be done in the context of examining juvenile cases, as research has proven that younger offenders are more likely to experience healing and transformation through restorative justice than adults. Finally, this thesis will detail local Bloomington, Indiana, restorative justice professionals’ take on restorative justice and its potential for the future.

² Bahena, Sofía. *Disrupting the School-to-Prison Pipeline*. Cambridge, MA: Harvard Educational Review, 2012. Print. Pg. 1.

³ Bahena, Sofía. Pg. 76.

⁴ Bahena, Sofía. Pg. 76.

⁵ Bahena, Sofía. Pg. 1.

The Criminal Justice System

History

Naturally, when the colonial settlers arrived in America, they brought along with them many ideas from Great Britain, and its criminal justice system was no exception.⁶ This adapted criminal justice system was based almost entirely on English common law, which dates back to the eleventh century. Common law is also referred to as case law and is based on the doctrine of *stare decisis* (precedent); this means that laws are developed through court decisions rather than through legislatures or by executive decree. English common law also helped to set the stage for not only trials by juries but the adversarial system that still exists today.⁷ The colonists also retained the three most important pieces of the British criminal justice system which included the police, the courts, and the corrections.

For the police forces, “the early New England colonists appointed or elected sheriffs to maintain the general peace.”⁸ The courts in pre-revolutionary America adopted many laws of Great Britain, and the current American court system is laid out by the Constitution of the United States. Finally, and probably most importantly, there is the corrections aspect of the criminal justice system which has relied on punitive measures in order to correct behavior since Colonial times. During the 1800s, criminals were imprisoned and “the idea of reforming criminals took hold.”⁹ By the mid-1800s, the ideas of rehabilitation and deterrence were most dominant, and even today, our system attempts to rehabilitate those offenders who will eventually be released back into society as civilians.

⁶ "History of the American Criminal Justice System." *Anthem College Online*. N.p., n.d.

<http://anthemcollege.edu/criminal-justice-school/history-of-the-american-criminal-justice-system/>.

⁷ Darko, Richard. "Development of American Law." SPEA-V 220 Class Lecture. SPEA, Bloomington. 23 Aug. 2011. Lecture.

⁸ "History of the American Criminal Justice System."

⁹ "History of the American Criminal Justice System."

Benefits

Because our criminal justice system is rooted in procedural fairness as established by the Constitution, it is no surprise that there are many benefits related to the adversarial method of resolving disputes. Why else would there be such a high number of lawyers in this country? Firstly, there is the Bill of Rights. One right it guarantees is the right to due process which ensures that a person gets his or her day in court. Another right it maintains is that those charged with crimes have the right to a speedy and public trial held before a jury in which the jury is responsible for determining whether the accused is innocent or guilty. These two rights, along with the right to remain silent in order to avoid self-incrimination and the right to an attorney, are immediately made aware to suspected criminals being held in police custody upon their initial arrest. These rights, called *Miranda* rights, were a matter of debate in *Miranda v. Arizona*, a Supreme Court case in which the Supreme Court held that all criminal suspects being charged with crimes should be read their rights, and if these are not read then there would be a direct violation of rights guaranteed by the Bill of Rights.¹⁰ Americans are typically very protective of their rights, and if they are infringed upon, it is never a good situation; so, it is very important that the criminal justice system upholds these standards in every criminal proceeding from the initial arrest until the final case ruling.

Another advantage of the criminal justice system is the ability to appeal to an appellate court within 30 days after the trial court's entry of final judgment. The appellate court is unable to conduct another trial from the beginning but instead reviews the case to determine if there were any procedural errors made or if such an arbitrary decision was made that it cannot be the result of a reasoned decision. The reviewing court is also able to "consider the matter anew...and

¹⁰ Whitlatch, James L., J.D. "Introduction to the American Legal System." SPEA-H 441 Class Lecture. SPEA, Bloomington. 3 Sept. 2012. Lecture.

substitute its own judgment for that of the lower court.”¹¹ The court of appeals then has the power to affirm, modify, or reverse the trial court’s decision and remand the case for a new trial. This capability to appeal is definitely an advantage as it ensures procedural fairness for all parties involved. If the livelihood of a human being is a stake and an error may have occurred at the trial level, then the ability to review the case further is extremely vital.

Another benefit to the criminal justice system is its role in public safety. When Lyndon B. Johnson addressed Congress in 1965 about law enforcement and the administration of justice, he wanted to ensure that criminal justice reform revolved around the idea of “enforcing the standards of conduct necessary to protect individuals and the community.”¹² To this day, the police and the courts are responsible for keeping dangerous or otherwise harmful criminals off of our streets in the name of public safety. While the justice system may not always be perfect, the fact remains that the public generally has a “deep fear of crime”¹³ and it relies on this system to lessen that fear of crime.

Finally, adjudication, as a component of the criminal justice system, can often be a preferred method of resolving disputes and for that reason is another advantage. The adversarial court system is typically the most appropriate method of dispute resolution when the following factors are considered: whether or not the claim is Constitutional; if the matter is of life and death; if setting precedent or legal reform is a desired result; if one of the parties is severely disempowered and needs protecting; or if the issue is of broad, public concern.¹⁴

¹¹ Whitlatch, James L., J.D.

¹² Johnson, Lyndon B. "Special Message to the Congress on Law Enforcement and the Administration of Justice." Washington, D.C. 8 Mar. 1965. Address.

¹³ Clear, Todd R. "Criminology and Criminal Justice." *The Big Society in the Context of a Changing Justice System* 12 (2012): 500-05. *Academic Search Premier*. Web. Pg. 503.

¹⁴ Napoli, Lisa-Marie, Ph.D. "Court-Connected ADR & Legal Implications." SPEA-V 435 Class Lecture. SPEA, Bloomington. 13 Nov. 2012. Lecture.

Clearly, this is a brief overview of some of the primary benefits of the United States' criminal justice system, and while there are obvious reasons why our justice system can be praised, there are also many drawbacks which will be highlighted in the section below.

Drawbacks

Recently, one disadvantage to the justice system is a trend in handing out harsher punishments for petty crimes. In the past, appellate courts would generally default to sentences “within the statutory range established by the legislature for a particular offense.”¹⁵ Lately, however, “legislatures continue to ramp up criminal penalties for newsworthy crimes...with the result that prison populations, and the taxpayer's bill, have skyrocketed.”¹⁶ This current inclination to hand out excessive sentences that do not coincide with the crime relates directly to two other shortcomings of the criminal justice system: the severe overcrowding of prisons and jails and the extremely high incarceration rate in the United States.

Over the past few decades, there has been an incredible spike in the number of incarcerated persons in the United States. In 1980, there were approximately 475,000 people in prisons or jails, and by 1990, there were roughly 1.15 million people incarcerated. The most astonishing aspect of this extreme spike is that there was no correlation between the crime rates and the number of people that were being jailed.¹⁷ So, despite the fact that crime rates were relatively unchanging during the 1990s, incarceration rates were skyrocketing. More recently, the end of 2008 yielded around 1.6 million prisoners.¹⁸ To put these staggering statistics into

¹⁵ Dionne, Lee. "Let the Punishment Fit the Crime: Should Courts Exercise the Power of Appellate Sentence Review in Cases Involving Narcotics and Other Stigmatized Crimes?" *The Journal of Criminal Law & Criminology* 99.1 (2009): 255-85. *Academic Search Premier*. Web. Pg. 255.

¹⁶ Dionne, Lee. Pg. 255.

¹⁷ "The Punishing Decade: Prison and Jail Estimates at the Millennium." *Justice Policy Institute* (2000): 1-7. http://www.justicepolicy.org/uploads/justicepolicy/documents/punishing_decade.pdf.

¹⁸ Sabol, William J., Ph.D., Heather C. West, Ph.D., and Matthew Cooper. "Prisoners in 2008." (2009): 1-46. U.S. Department of Justice. <http://bjs.gov/content/pub/pdf/p08.pdf>.

perspective, from 2009 to 2011, the United States experienced a drop in the overall incarceration rate but still remains as the country with the highest incarceration rate in the world.¹⁹

So, is all of this jail time achieving its desired goal of criminal reform? Sadly, no; the lack of reform that occurs in the prison system is yet another disadvantage of the criminal justice system. While there are plenty of inmates that leave prison with good intentions of turning their lives around, there are many released from jail that end up being even better criminals or simply back in handcuffs. A study conducted by sociology professor, Donald T. Hutcherson II, examined the legal and illegal incomes of those that have been incarcerated before and after their time spent in prison. Hutcherson made the hypothesis that if jail time truly does reform criminals, then the illegal earnings of those former inmates should go down after serving their sentences. However, Hutcherson found that “spending time in prison leads to increased criminal earnings. On average, a person can make roughly \$11,000 more [illegally] from spending time in prison versus a person who does not spend time in prison.”²⁰ This study suggests that criminals learn to be better criminals while in prison as many young inmates spend a lot of time with “older, seasoned veterans” who essentially show them the ropes on how to get away with crime.

Recidivism, or the tendency to relapse into a previous condition, especially criminal behavior,²¹ goes hand-in-hand with criminal reform, but it is not being significantly reduced after spending time in prison. It is often difficult to reintegrate into civilian life, and that is due in part to jobs not being readily available or given to those with a criminal record.²² It should not come

¹⁹ Jimroglou, Krissi. "U.S. Prison Count Continues to Drop." *The Pew Charitable Trusts*. N.p., 8 Mar. 2013. <http://www.pewstates.org/news-room/press-releases/us-prison-count-continues-to-drop-85899457496>.

²⁰ Vedantam, Shankar. "When Crime Pays: Prison Can Teach Some To Be Better Criminals." *NPR*. NPR, 01 Feb. 2013. <http://www.npr.org/2013/02/01/169732840/when-crime-pays-prison-can-teach-some-to-be-better-criminals>.

²¹ "Recidivism." *Merriam-Webster*. N.p., n.d. Web. <http://www.merriam-webster.com/dictionary/recidivism>.

²² MacDonald, Heather. "Post-Prison Reform." Manhattan Institute for Policy Research, 15 June 2003. http://www.manhattan-institute.org/html/_nypost-post_prison_reform.htm.

as a surprise that employers are not too keen on hiring ex-offenders, but this creates a troubling situation for inmates that are released from prison who are truly seeking to reconcile their past actions and move forward. In relation to handing out harsher punishments for petty crimes, this is also a sticky situation for those who are jailed for minor offenses as they inevitably will be labeled as an ex-criminal.

A final disadvantage deals with parties in adversarial disputes that are often left with unmet needs. As discussed earlier, the United States' justice system is retributive in nature, and punishments for crimes are readily handed out by judges and juries who hear cases every day. However, this theory of justice is leaving aggrieved parties with unfulfilled needs. Firstly, litigation often leads to a loss of psychological ownership of the dispute that is crucial for parties to feel if true healing is desired.²³ Apologies are rarely given, and the understanding of why what happened actually happened is minimized, and the parties are left with unsatisfied needs. For example, in medical malpractice cases, patients who suffer from medical negligence are confused due to a lack of communication between him or herself and the physician, and ADR processes, such as restorative justice, can help clear up any previous miscommunications. There is also the opportunity for an apology, and "researchers have found that after a medical error, patients expect an apology and most physicians want to apologize but worry about an admission of legal liability."²⁴ In this example specifically, patients are taking their claims to court in hopes to gain closure and healing, but adjudication is unable to meet those desires. This idea is certainly not limited to only medical malpractice cases as it can be applied to other adversarial court disputes as well.

²³ Napoli, Lisa-Marie, Ph.D. "Process Selection." Bloomington. 27 Nov. 2012. Lecture.

²⁴ Hyman, Chris S., Carol B. Liebman, Clyde B. Schechter, and William M. Sage. "Interest-Based Mediation of Medical Malpractice Lawsuits: A Route to Improved Patient Safety?" *Journal of Health Politics, Policy and Law* 35.5 (2010): 797-828. EBSCO. Web. Pg. 822.

In the grand scheme of things, it seems that any theory of justice will have its advantages and disadvantages, but there is one last item to consider in regards to this retributive theory of justice that has shaped the United States criminal justice system. These negative aspects are particularly amplified with youth because of their impressionable young age. That is why it is vital to allow the younger generations of this nation to engage in more restorative, rather than retributive, procedures. Not only will they gain a sense of self and understanding at a younger age, but this will also assist in disrupting the school-to-prison pipeline phenomenon.

Restorative Justice

History

Before commonplace theories of justice in the United States emerged from European nations, indigenous tribes of America valued the community over the individual, and restorative justice practices were the standard of justice. One idea that captures the essence of Native American justice is how it was “rooted in notions of relationship and dialogue rather than adversarial dispute, harmony and balance rather than proof and guilt, and renewal rather than punishment.”²⁵ This quote not only describes how the Native Americans viewed justice, but it also accurately depicts the present day view of restorative justice and its principles. However, with the growth of the United States, the federal government made substantial efforts to limit the powers of Native Americans tribes, and as a result, the restorative justice systems of these tribes were diminished. It is interesting to note that at the same time that policies were enacted to “limit Indigenous governments and peoples from using their traditional methods for responding to

²⁵ Carol A. Hand, Judith Hankes & Toni House (2012): Restorative justice: the indigenous justice system. *Contemporary Justice Review: Issues in Criminal, Social, and Restorative Justice*, 15:4, 449-467. Pg. 449.

disputes and infractions...conflict and violence within Indigenous communities”²⁶ increased. It is no coincidence that as more retributive practices infiltrated the Native American justice system, the more violence and conflict that emerged. Before these restorative justice values were weakened, community harmony and peacekeeping was the norm.

The more recent history of restorative justice can be summed up in a short anecdote. In 1974, two Mennonites came across a case that involved two juveniles that caused over \$2000 worth of damages and vandalism to 22 different victims. The judge in their hearing instructed the boys, along with the two Mennonite men, to go out and ask the victims what they needed as restitution for the damages they had caused. These two men really had no idea what they were doing, but they essentially spearheaded the new wave of restorative justice and developed restorative justice programs based off of these two juveniles.²⁷ This was the first time that models of restorative justice, such as victim-offender mediation, began to be used in conjunction with the criminal justice system.

What is Restorative Justice?

So, what exactly is restorative justice and how can it be defined? Simply put, restorative justice is not just any one program but rather a theory of justice that “emphasizes repairing the harm caused or revealed by criminal behavior.”²⁸ Howard Zehr, a pioneer and visionary in the field of restorative justice, offers a very succinct definition in his book, *Changing Lenses*, which “provided the conceptual framework for the movement and has influenced policymakers and

²⁶ Carol A. Hand, Judith Hankes & Toni House. Pgs. 457-458.

²⁷ Stutzman, Lorraine S., and Howard Zehr. "A Brief History of the Victim-Offender Mediation and Restorative Justice Movements." Lecture. Strasburg Mennonite Church, Strasburg, PA. 27 Feb. 2012. [Http://www.youtube.com/watch?v=rgTqTcJPILI](http://www.youtube.com/watch?v=rgTqTcJPILI). Web.

²⁸ "What Is Restorative Justice?" *Restorative Justice Online*. N.p., n.d. Web. <http://www.restorativejustice.org/university-classroom/01introduction>.

practitioners throughout the world.”²⁹ According to Zehr, “Restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.”³⁰

Before moving forward, one of the most important considerations that sets restorative justice apart from typical retributive methods is that restorative justice does not view crime as an act against the state but rather “as an act against individuals and their community.”³¹ This distinction is why restorative justice asks different questions such as what happened, whose obligations are these, and what needs to be done to right the wrongs.³² These questions focus on the needs of the victims and offenders. Along these same lines, restorative justice is “grounded in the belief that those most affected by crime should have the opportunity to become actively involved in resolving the conflict.”³³ Conversely, in an adversarial court setting, questions regarding the needs of the two parties are not asked and instead the questions revolve around what happened and what will be a suitable punishment.

Principles of Restorative Justice

Like many theories of justice, restorative justice can be identified by the unique principles that form its foundation. These principles were touched on briefly in the section above, but this section aims to delve deeper into each one. The first principle addresses the idea that crime causes harm and justice should focus on repairing that harm. While it is often very

²⁹ Umbreit, Mark S., Betty Vos, Robert B. Coates, and Elizabeth Lightfoot. "Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls." *Marquette Law Review* 89.2 (2005): 251-304. *Academic Search Premier*. Web. Pg. 256.

³⁰ Zehr, Howard. *Changing Lenses: A New Focus for Crime and Justice*. 1990. Pg. 130.

³¹ Price, Marty, J.D. "Personalizing Crime." *Dispute Resolution Magazine* Fall 2001. <http://www.vorp.com/articles/justice.html>.

³² *What Is Restorative Justice? Director of SFU's Centre for Restorative Justice Explains*. Dir. Brenda Morrison. Simon Fraser University, n.d. Web. <<http://www.youtube.com/watch?v=sE8TDzIR2tg>>.

³³ Umbreit, Mark S., Betty Vos, Robert B. Coates, and Elizabeth Lightfoot. Pg. 255.

common in today's society to think that offenders should suffer themselves for the harm they cause, this principle of restorative justice instead suggests that offenders should be held accountable for their actions. This is a very significant concept, because yes, while it is true that an offender might break a law, certain activities are criminalized not because they cause harm to the state but because they cause harm to an individual or a community.³⁴

The second principle of restorative justice involves the parties affected by the offense. It is a commonly-held belief among restorative justice experts that those most closely involved in the offense should be able to participate in its resolution. Involved parties may include the victims, offenders, and the family members and friends of both the victim and offender. Community and government representatives may also participate should they also have a stake in the outcome.³⁵ Participation by the parties is theoretically voluntary, but they should strongly consider participating if given the chance, because their participation, or lack thereof, can drastically alter the result of the restorative justice practice. Offenders are usually more likely to participate in restorative justice programs in order to avoid going to court, whereas victims tend to be more apprehensive about agreeing to proceed with these measures as they may be embarrassed or unwilling to face their offender.³⁶ Restorative justice experts note that it is more common that juveniles are remanded to restorative justice processes by court order or their parole officer, and the families of juveniles participate in these processes more often than in adult cases.³⁷

³⁴ "Key Principles of Restorative Justice." *Restorative Justice Online*. N.p., n.d. Web. <http://www.restorativejustice.org/university-classroom/01introduction>.

³⁵ "Key Principles of Restorative Justice."

³⁶ Lumbley, Nancy, Nick Philbeck, and April Dyar. "CJAM Interview." Personal interview. 21 Mar. 2013.

³⁷ "CJAM Interview."

The third, and final, principle of restorative justice has to do with the community role. This principle is based on the notion that it is the responsibility of the government to maintain order and of the community to build peace. Should a situation arise in which the government needs to step in to maintain order, it absolutely should; it is also responsible for monitoring the processes for resolving crime. This is particularly important because even if one chooses an alternative to the adversarial court system, the rights of the parties must be protected as it is the law, and it is the responsibility of the government to ensure rights are being protected. The community role is of equal importance because if the community is able to restore healthy, respectful relationships among its members, then the need for government intervention will be lessened as these types of relationships often harbor a more peaceful community environment.³⁸

Victim-Offender Mediation

There are many examples of restorative justice programs, and some of them include: victim-offender mediation, conferencing, circles, victim assistance, ex-offender assistance, restitution, and community service. Victim-offender mediation is one of the most common types, and understanding one type of restorative justice can help to give the whole concept of restorative justice more clarity. Victim-offender mediation (VOM) differs from regular mediation because there is a victim, an offender, and often an imbalance of power as the victim usually feels violated or wronged in some way.

First and foremost, victim-offender mediation is a voluntary restorative justice process that provides the victim an opportunity to meet his or her offender in a “safe and structured setting”³⁹ in which a trained and neutral mediator is present. The mediator plays an integral role in VOM, and the mediator’s most important tasks include, but are not limited to: “(1) facilitating

³⁸ "Key Principles of Restorative Justice."

³⁹ "Restorative Justice Briefing Paper." (n.d.): 1-4. Centre for Justice and Reconciliation, Nov. 2008. Web. Pg. 1.

the dialogue between the victim and offender; (2) making the parties feel comfortable and safe; and (3) assisting the parties in negotiating [a] restitution plan.”⁴⁰ Victim-offender mediation involves a meeting “between the victim and offender during which the parties talk about the incident and often come to an agreement as to how the offender is to make amends to the victim.”⁴¹ One of the goals of victim-offender mediation is to encourage “the offender to learn about the crime’s impact and to take responsibility for the resulting harm.”⁴²

Before any of the aforementioned takes place, however, there are certain pre-steps that the mediator must go through in an attempt to guarantee that the VOM will be productive and possibly successful. The mediator regularly reaches out to victims to gauge whether or not they are in a stable psychological place to come in for a victim-offender mediation session. Often times, the victim does indeed want to share his or her story with someone because the opportunity to do so has not yet been available. After listening to the victim, the mediator might stress to the victim that VOM is an opportunity to understand why the situation occurred, and that it could be a wonderful opportunity to ask any lingering questions he or she might have for the offender. The mediator never coerces the victim to do anything but acts as a useful resource for the victim instead.⁴³ The mediator contacts the offender as well and goes through very similar steps to determine if the offender is in a position to meet with his or her victim in an environment free from hostility. During these pre-mediation conversations, the mediator acts as a primary resource for the participants and ensures that neither party is revictimized during the process

⁴⁰ Choi, Jung J., and Michael J. Gilbert. "'Joe Everyday, People off the Street': A Qualitative Study on Mediators' Roles and Skills in Victim-offender Mediation." *Contemporary Justice Review* 13.2 (2010): 207-27. *Academic Search Premier*. Web. Pg. 210.

⁴¹ Uotila, Erika, and Saija Sambou. "Victim-Offender Mediation in Cases of Intimate Relationship Violence--Ideals, Attitudes, and Practices in Finland." *Journal of Scandinavian Studies in Criminology and Crime Prevention* 11 (2010): 189-207. *Academic Search Premier*. Web.

⁴² "Restorative Justice Briefing Paper." Pg. 1.

⁴³ "CJAM Interview."

because the aim is to heal and not to reopen old wounds. The pre-mediation discussions with both parties are very important because VOM is often a preferred method when repairing the relationship between the two parties is important, and when the future of the relationship is at stake, careful pre-planning is imperative.⁴⁴ For example, in many juvenile cases, if the victim and offender attend school together, it is important to heal that relationship because the two will often be in the same location.⁴⁵

Local Practice: Victim-Offender Mediation

Part of the research done for this thesis included a small focus group interview with April Dyar, Nancy Lumbley, and Nick Philbeck and was conducted on March 21, 2013, in Bloomington, Indiana, at the Community Justice and Mediation Center (CJAM). This section evaluates local restorative justice experts' opinions and thoughts on restorative justice programs like victim-offender mediation.

One of the first topics discussed dealt with why and how restorative justice practices are successful. Nancy Lumbley said that first of all, the success of a restorative justice program is contingent upon two main items. The first is the willingness of the victim to enter the process, and the second is the willingness of the offender to accept responsibility for whatever action he or she has done. If the case is remanded to CJAM, the court or probation officer will first look at top criminal factors to determine if going through restorative justice measures will be successful or not. They can look at things like the current standing or the history of the offender, and Nancy explained that the outlook of success for juveniles who have already dropped out of school or those with a weak support system is poor. Another reason restorative justice practices are

⁴⁴ Napoli, Lisa-Marie, Ph.D. "Restorative Justice and VOM." SPEA-V 435 Class Lecture. SPEA, Bloomington. 9 Oct. 2012. Lecture.

⁴⁵ "CJAM Interview."

successful is because there is honest conversation that develops, and it focuses on the offender just as much as the victim. Nick Philbeck stated that because the conversation is focused around the act or decision and not the offender as a person, CJAM is able to avoid making the offender feel like a bad person. The conversation that takes place allows the victim and offender to hear each other's side of the story, and this is very useful, because often times, victims gain a brand new, less negative perception of their offender.

Finally, Nancy and Nick agreed that the most successful restorative justice sessions occur when there is a sincere sense of ownership in the outcome. Arrangements that are created by, rather than forced upon, the participants are extremely effective because the opportunity for blaming the criminal justice system or other entity for the outcome is taken away. Since the mediators do not give advice or push the participants in any sort of direction, the participants are able to take complete ownership of the outcome of the process, and these kinds of agreements have much higher success and follow-through rates.

The next part of the interview revolved around relationships and their restoration through restorative justice procedures. Nancy mentioned that victim-offender mediation is most appropriate when the relationship between the victim and offender is important; she added that a pre-existing relationship might not have even existed, but if the two participants are together in a mutual environment often, then creating and maintaining a healthy relationship is crucial. The Criminal Justice and Mediation Center is centered on the idea of the relationship. Nick said that because life essentially focuses on the relationships we maintain with others, everything that occurs at CJAM concentrates on relationships. For example, the professionals at the Center focus on relationships between the victims and offenders as well as the relationships between the families and friends of the participants. Not only this, but CJAM evaluates its relations with the

criminal justice system, because one of the Center's primary goals is to fill in the pieces that the criminal justice system is unable to address, such as personal relationships.

Obviously, these experts spend their time engaging in alternative dispute resolution processes, such as victim-offender mediation, because they truly do believe it is a much better alternative to the criminal justice system. Nick mentioned that he believes serving prison time teaches the offender nothing about his or her choices and decisions and why those choices might not have been the best. An interesting point that he then brought up was that the criminal justice system teaches offenders to "reject the rejecter." From the perspective of an offender, the state is rejecting him or her; so, a natural reaction is to then reject the state. The offender might later gain a negative feeling toward those who continually administer punishment, and all of a sudden the offender is an adversary of the state, which is ironic considering one of the principal goals of the criminal justice system is to teach the offender to value the state. Nancy added that restorative justice is a better alternative to traditional retributive methods because at any point, the victim and offender have the ability to stop the process and choose another resolution route. Not only this, but the chances of repeating the same behavior are greatly reduced when a participant goes through a process of self-reflection and makes real, conscious decisions. While giving decision-making power to the participants is vital, sometimes it is difficult with probated cases because the tendency to view CJAM as a punitive measure is escalated.

Along the same lines, probated cases can be somewhat delicate, because these cases generally involve juveniles. Nancy explained that the juvenile justice system is very different from the criminal justice system experienced by adults, and Nancy and Nick's expert points of view on the matter support the argument that restorative justice is most appropriate for juvenile cases. For example, it is typical for probation officers to send their youth cases to CJAM instead

of putting them on formal probation, but it is much more difficult to do this with adults because their sentences are generally heavier. Nick mentioned that it is much simpler to focus on school and family guidance rather than assisting adults in finding jobs for example. CJAM's professionals are simply not equipped for tasks like that due in large part to the lack of monetary support given by the state. This inability to assist adults in this manner leads to a more interesting question that the criminal justice system is attempting to solve: how can offenders become productive citizens in society?

Many restorative justice studies have been driven by the desire to answer this very question. In the past few decades, people were being sent into the prison system at unprecedented rates, and now that many of these ex-offenders are being released into society, the government does not know how to handle this huge influx of people. There just are not enough programs available to effectively assist in reintegrating this group of people into society, and this can lead to economic strain. This economic realization is being coupled with the understanding of the social impact of jail time, and the failures of the criminal justice system are being exposed. So, if more people are realizing the negative impacts of prison time, where does the future of restorative justice lie?

The CJAM experts were able to share their opinions about its future. Nancy emphasized the money aspect. She said that as long as these programs could be proven to save the state money, then that is when restorative justice might really start to take hold. Nancy certainly was not as optimistic about the potential progression for Indiana because she noticed that the state legislature was only thinking about lessening sentences for lesser crimes because of the lack of prison space and not because of the negative social impacts of jail time. Nick added that even though there has been plenty of research done that proves restorative justice is less costly, more

positive, and produces lower recidivism rates, the need for a climate change in the United States is still imperative. For example, in other countries where criminal justice is restorative rather than punitive, schools follow suit; this is an excellent example of how the school-to-prison pipeline can be disrupted, but it has to be a top-down movement for it to be most effective. The experts are hopeful that in the next ten to twenty years, there will be a combination of restorative and retributive theories in practice. They recognize that the court system will not completely give up retributive practices, but that it might begin implementing more restorative justice practices. Again, before real changes occur, a paradigm shift in the thinking of the general public and the country's policymakers must happen; the thinking has to evolve from punishing offenders to restoring offenders and creating productive citizens, and it is places like CJAM that work with retributive systems in order to help shine a light on the need to respect offenders and value how they move forward after committing a crime.

Limitations

Naturally, there are limitations and criticisms of the theory of restorative justice. For one, restorative justice programs are not necessarily equipped to handle all types of criminal offenses. For example, for an individual with a drug addiction, restorative practices are not the most appropriate resolution method because many facilities do not have the necessary resources, staff, or money required to help curb a powerful addiction.⁴⁶ Restorative justice measures might be able to address the residual effects of the drug problem, but it is not the ideal solution for addressing the actual problem.

In the framework of dealing with juveniles, most experts believe that restorative justice practices alone are simply not enough. "Parent involvement is important to the creation and

⁴⁶ "CJAM Interview."

success of [Restorative Justice] Programs”⁴⁷ and a strong family presence in a child’s life is extremely important in ensuring that restorative justice processes are successful. As well as family, a child’s school system plays an important role in juvenile cases. There is an unparalleled amount of violence in the United States school system, and this adds to “the problem of violence in society [and] has become one of the most pressing educational issues.”⁴⁸ It is crucial for schools to reform their disciplinary measures to include fewer punitive and more restorative approaches to misbehavior; this reform can help in disrupting the school-to-prison pipeline.

Another criticism is that restorative justice, if forced upon participants, can encroach on an individual’s Constitutional rights including due process and the right to a speedy trial if convicted of a crime. This is a more minor criticism, but it is still relevant, because if one gets too caught up in the adversarial court system, the benefits of restorative justice are lost. Others have also questioned that while in theory, restorative justice may be practical, they wonder if it will actually work in practice. There are many instances and studies that have been done that show the success of restorative justice programs in practice,⁴⁹ but the greater concern revolves around large-scale implementation of restorative justice as an alternative form of resolution. As mentioned earlier, this doubt stems from the need for a cultural paradigm shift of thinking about justice in the United States. As long as the policymakers and leaders of this nation keep the retributive justice system as the norm, there will always be pushbacks and limitations to any alternate form of justice.

⁴⁷ Bahena, Sofia. Pg. 250.

⁴⁸ Bahena, Sofia. Pg. 7.

⁴⁹ “CJAM Interview.”

Conclusion

Many experts in the field of restorative justice are hopeful for its continued growth and implementation, especially in local communities and schools across the United States. However, many do agree that for more impactful, structural change in the criminal justice system, a new way of thinking must be implemented from the top down. Obviously, this will require American policymakers to examine more closely and re-evaluate the current criminal justice system while comparing the aspects of the retributive system to the components of a restorative system. If programs are implemented and supported by local and state governments effectively, the potential for restorative justice success is great especially with respect to juveniles. If youth are able to enter into restorative justice programs while in school and at a young age, the possibilities of evaluating their choices and learning from their mistakes are boundless. Learning valuable life lessons like that through restorative justice can further reduce a juvenile's risk for committing harmful acts later in their lives. Restorative justice truly has the power to create real change whereas punitive measures do not boast the same kind of healing and relationship-restoring. Finally, the following quote from Howard Zehr, who is considered to be the father of restorative justice, truly sums up the overall meaning of this unique approach to justice:

“Restorative justice is done first of all because it is the right thing to do: victims’ needs *should* be addressed, offenders *should* be encouraged to take responsibility, [and] those affected by an offense *should* be involved in the process.”⁵⁰

⁵⁰ *The Little Book of Restorative Justice*. Pg. 8.

Bibliography

- Bahena, Sofía, North Cooc, Rachel Currie-Rubin, Paul Kuttner, and Monica Ng. *Disrupting the School-to Prison Pipeline*. Cambridge, MA: Harvard Educational Review, 2012. Print.
- Carol A. Hand, Judith Hankes & Toni House (2012): *Restorative justice: the indigenous justice system*. *Contemporary Justice Review: Issues in Criminal, Social, and Restorative Justice*, 15:4, 449-467. Pg. 449.
- Choi, Jung J., and Michael J. Gilbert. "'Joe Everyday, People off the Street': A Qualitative Study on Mediators' Roles and Skills in Victim-offender Mediation." *Contemporary Justice Review* 13.2 (2010): 207-27. Academic Search Premier. Web.
- Clear, Todd R. "Criminology and Criminal Justice." *The Big Society in the Context of a Changing Justice System* 12 (2012): 500-05. Academic Search Premier. Web.
- Darko, Richard. "Development of American Law." SPEA-V 220 Class Lecture. SPEA, Bloomington. 23 Aug. 2011. Lecture.
- Dionne, Lee. "Let the Punishment Fit the Crime: Should Courts Exercise the Power of Appellate Sentence Review in Cases Involving Narcotics and Other Stigmatized Crimes?" *The Journal of Criminal Law & Criminology* 99.1 (2009): 255-85. Academic Search Premier. Web.
- "History of the American Criminal Justice System." Anthem College Online. N.p., n.d. <<http://anthemcollege.edu/criminal-justice-school/history-of-the-american-criminal-justice-system/>>.
- Hyman, Chris S., Carol B. Liebman, Clyde B. Schechter, and William M. Sage. "Interest-Based Mediation of Medical Malpractice Lawsuits: A Route to Improved Patient Safety?" *Journal of Health Politics, Policy and Law* 35.5 (2010): 797-828. EBSCO. Web. Pg. 822.

Jimroglou, Krissi. "U.S. Prison Count Continues to Drop." The Pew Charitable Trusts. N.p., 8 Mar. 2013. <<http://www.pewstates.org/news-room/press-releases/us-prison-count-continues-to-drop-85899457496>>.

Johnson, Lyndon B. "Special Message to the Congress on Law Enforcement and the Administration of Justice." Washington, D.C. 8 Mar. 1965. Address.

"Key Principles of Restorative Justice." Restorative Justice Online. N.p., n.d. Web. <<http://www.restorativejustice.org/university-classroom/01introduction>>.

Lumbley, Nancy, Nick Philbeck, and April Dyar. "CJAM Interview." Personal interview. 21 Mar. 2013.

MacDonald, Heather. "Post-Prison Reform." Manhattan Institute for Policy Research, 15 June 2003. <http://www.manhattan-institute.org/html/_nypost-post_prison_reform.htm>.

Napoli, Lisa-Marie, Ph.D. "Court-Connected ADR & Legal Implications." SPEA-V 435 Class Lecture. SPEA, Bloomington. 13 Nov. 2012. Lecture.

Napoli, Lisa-Marie, Ph.D. "Process Selection." SPEA-V 435 Class Lecture. SPEA, Bloomington. 27 Nov. 2012. Lecture.

Price, Marty, J.D. "Personalizing Crime." Dispute Resolution Magazine Fall 2001. <<http://www.vorp.com/articles/justice.html>>.

"Recidivism." Merriam-Webster. N.p., n.d. Web. <<http://www.merriam-webster.com/dictionary/recidivism>>.

"Restorative Justice Briefing Paper." (n.d.): 1-4. Centre for Justice and Reconciliation, Nov. 2008. Web.

Stutzman, Lorraine S., and Howard Zehr. "A Brief History of the Victim-Offender Mediation and Restorative Justice Movements." Lecture. Strasburg Mennonite Church, Strasburg, PA. 27 Feb. 2012. <<http://www.youtube.com/watch?v=rgTqTcJPILI>>. Web.

"The Punishing Decade: Prison and Jail Estimates at the Millennium." Justice Policy Institute (2000): 1-7. <http://www.justicepolicy.org/uploads/justicepolicy/documents/punishing_decade.pdf>.

Umbreit, Mark S., Betty Vos, Robert B. Coates, and Elizabeth Lightfoot. "Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls." *Marquette Law Review* 89.2 (2005): 251-304. Academic Search Premier. Web.

Uotila, Erika, and Saija Sambou. "Victim-Offender Mediation in Cases of Intimate Relationship Violence--Ideals, Attitudes, and Practices in Finland." *Journal of Scandinavian Studies in Criminology and Crime Prevention* 11 (2010): 189-207. Academic Search Premier. Web.

Vedantam, Shankar. "When Crime Pays: Prison Can Teach Some To Be Better Criminals." NPR. NPR, 01 Feb. 2013. <<http://www.npr.org/2013/02/01/169732840/when-crime-pays-prison-can-teach-some-to-be-better-criminals>>.

What Is Restorative Justice? Director of SFU's Centre for Restorative Justice Explains. Dir. Brenda Morrison. Simon Fraser University, n.d. Web. <<http://www.youtube.com/watch?v=sE8TDzIR2tg>>.

"What Is Restorative Justice?" Restorative Justice Online. N.p., n.d. Web. <http://www.restorativejustice.org/university-classroom/01introduction>.

Whitlatch, James L., J.D. "Introduction to the American Legal System." SPEA-H 441 Class Lecture. SPEA, Bloomington. 3 Sept. 2012. Lecture.

Zehr, Howard, and Ali Gohar. *The Little Book of Restorative Justice*. Intercourse, PA: Good Books, 2003. Print.

Zehr, Howard. *Changing Lenses: A New Focus for Crime and Justice*. 1990.