Does Restorative Justice Have a Realistic Place in Today’s Criminal Justice System?

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The question of how to respond to criminality in the United States is changing in fascinating ways. U.S. residents and leaders realize that the era of “tough on crime”—a widely appealing catchphrase—generated disproportionate incarceration and, with it, negative fiscal and social repercussions. The state of California has budgeted more than $10 billion for corrections in 2015–2016 alone. This figure has steadily risen even after a three-panel court ordered and the U.S. Supreme Court upheld a mandatory reduction in California’s prison population to 137.5 percent capacity as a part of a public safety realignment by February 2016.¹ This and additional prisoner-reduction measures have caused major changes across the state. California has implemented Proposition 36 and Proposition 47, which amended the state’s three strikes policy and reclassified certain felonies as misdemeanors; other measures have increased opportunities to earn credits-for-time-served, expanded parole, and created reentry programs. The social effects of mass incarceration have manifested in what criminal justice policy professor Dr. Bruce Western calls “invisible,” “cumulative,” and “intergenerational” ways.² The result is a population of people who are essentially excluded from U.S. society and who view the police with deep suspicion. Efforts to reduce California’s incarcerated population have shifted greater responsibility to localities. This creates important challenges, but also opportunities to reexamine what might be called civic criminal justice reform. Restorative justice may play a role here. It is not a panacea, but restorative justice champions ideas which are inherent to civil society—honesty, accountability, and community engagement. Also, it provides an important role for victims, and costs next to nothing compared to jail and most rehabilitative programs.

Depending on how one looks at it, “restorative justice” might sound like an oxymoron. Then again it might sound redundant. Shouldn’t justice balance the scales? And on the other hand, isn’t justice already intrinsically “restorative”? The designation “restorative” has gained popularity in recent years, becoming something of a buzzword in certain circles, so the terminology has even been applied retroactively to programs that have been in place for some time. A basic explanation of restorative justice is that it seeks increased participation in the criminal justice system. Law and criminology professor Stephanos Bibas has written that the U.S. criminal justice system has become dependent on professionals to such an extent that there is now a gulf between “insiders” who have made criminal justice a career and the needs and voices of “outsiders” (i.e., victims, defendants, and the general public). The professor argues that the criminal justice system requires reform that incorporates clear and participatory procedures and reflects a moral consensus about justice.³ This is where the restorative philosophy can help.

How Is Restorative Justice Applied?

Today, rehabilitation includes sophisticated methods of evidence-based research, evaluation of offender “risk characteristics,” and cognitive behavior therapy.⁴ These are all essential tools, but restorative justice is distinguished by its emphasis not only how to respond to criminality, but who should respond to it. It summons the public voice and invites what sociologist David Garland has called “ritualized dialogue” into the criminal justice process.⁵
policing, restorative justice could allow law enforcement to work smarter rather than harder.

must make the choice to meet. A restorative response includes a dialogue between the offender and the victim, and depending on the offense, it can also include teachers, the arresting police officers, and family members. It is a chance for all parties to share their perspectives. During the meeting, it is important that the involved parties recount the harm done and damage caused and that the offender express culpability. It is critical that participants use this occasion to establish terms to help foster healing, such as an apology; restitution; or community service. If possible, another goal is to reintegrate all parties back into the community. For certain offenses, lighter sentences may be offered for participation in restorative justice, but victim-offender encounters should not encourage offenders to anticipate reduced penalties just because they choose to participate.

Things like communication, empathy, civility, and commitment—the elements of strong relationships and strong communities—cannot be realized unless people actively choose to participate in them. Restorative justice may provide this opportunity, a choice that is not axiomatic in the criminal justice system today. It provides willing victims the opportunity to express themselves to offenders in a safe environment. By encouraging active listening and understanding, it gives offenders an opportunity to apologize directly to victims for their crimes; perhaps most importantly, it also allows the opportunity for sentences to include the personal requests of victims. Under the right incentives and in the right circumstances, willing participation in such a process has the potential to build character and trust and to bring genuine healing.

Critics claim that restorative justice is a mere pretense for letting offenders off the hook. In all fairness to this grievance, some advocates of restorative justice endorse a radical interpretation: they promote an idea of justice that categorically rejects punishment. This rightly deserves skepticism. Although frequently exploited, simple dichotomies of punitive versus restorative are seriously deficient in describing justice, because justice demands both. Restorative justice is not punishment, nor does it pretend to be, but most importantly, it does not replace punishment.

What About Victims?

Victims’ voices are essential to criminal justice proceedings, but many victims do not seek the resources that are available to them and many do not trust the police. Once an initial police report is submitted, a victim’s voice steadily weakens. New research suggests that a reliable forecaster of victimization is having been a victim before. Restorative justice is one important response to growing evidence that victims’ experiences are a critical component to public safety, since restorative justice gives victims a greater voice in the criminal justice system. The process seeks to return the sense of control that many have lost during victimization, and it gives victims their voice back. Rather than hang on the periphery of the criminal justice system waiting for a morsel of justice, the victim plays a major role in righting the wrong that he or she suffered.

Monterey County, California, resident Cheryl Ward Kaiser is one victim who has attributed much of her recovery from a heinous crime to restorative justice. She believes that engaging in restorative justice can be freeing for victims and offenders, even if offenders remain in prison forever.

In 1991, five people broke into Cheryl’s home to terrorize and rob her family. One offender held her to the floor with his foot at her back, while another sexually assaulted her daughter with a shot gun and another fatally shot her husband. Her communication with the man who shot her husband was this: “I want your life to mean something, and I want you to understand that you’re living your life with my husband’s name with you. You honor my husband with what you do with your life. That’s what I want.” The man who raped her daughter was to receive 30 years to life in prison, but Cheryl delivered a victim-impact statement with the hope of increasing his sentence, arguing that the rape had escalated the crime. In her words, “I delivered the speech of my life that day. No notes… I stood at the DA’s desk and held that judge’s foot to the fire and said, ‘What if this was your wife? What if this was you? What would you want her to be standing here saying?’” The judge gave the man who raped her daughter life in prison without parole. This offender has since apologized during a formal restorative justice mediation session with Cheryl, and he also took responsibility for escalating the crime.

While Cheryl’s story is extreme, and her approach exceptional, her case is an important example that illustrates three things: (1) restorative justice allows victims to have a voice
and to participate in the criminal justice system if they want to; (2) restorative justice can happen at any stage in the criminal justice process; and (3) restorative justice need not supplant punishment.

On the other hand, lower-level and juvenile crimes especially create opportunities for civic criminal justice reform. Here, if an encounter is deemed appropriate, victims may tell their offenders how a crime affected them and their families. They may get answers to their specific questions. Importantly, the victims have the chance to be directly involved in a plan for restitution, whether the offender pays the monetary value of an irrecoverable stolen item, makes a public apology, repairs property damage, or even promises to raise his or her grades in school. The point is primarily to help the victims heal according to their specific needs. As one probation officer stated at a Restorative Justice Partners (RJP) training: "There are things the legal system cannot do which our ideals for justice nevertheless require." The stories that come from Monterey’s Victim Offender Reconciliation Program (VORP) reveal genuine interactions between juvenile offenders and their victims. There are stories of young friends whose differences erupt in physical conflict at school and frustrated victims whose car windows were accidentally broken, whose fences were purposely vandalized, or whose homes were burglarized. These victims may reluctantly meet with young offenders, but they soon realize that the offenders are genuinely remorseful. Sometimes adult victims decide to become more involved in a youth offender’s development and improvement and a positive mentorship emerges from an initially adversarial relationship. In other noteworthy cases, the parents of youth offenders involved in restorative justice become volunteer mediators once they see the impact that the program has made on their children’s lives.

Law Enforcement’s Perspective

Most law enforcement personnel view restorative justice with a jaundiced eye, seeing it as nothing more than hand-holding that does not address the real reasons for criminality, nor hold perpetrators accountable for their actions. Many regard restorative justice as the square peg of social work being forced by social justice advocates into the round hole of the criminal justice system. Retired Chief Phil Penko was one of them. He too viewed restorative justice as an escape from accountability. After all, "justice" required punishment. To Chief Penko, restorative justice was trying to replace the accountability component of the criminal justice system to which he had grown so accustomed over three decades in law enforcement.

As a newly appointed chief, Penko was assigned to the Monterey County Restorative Justice Commission as a representative for all Monterey County law enforcement. His role was to serve as the voice for law enforcement on the commission that was established and appointed by the Monterey County Board of Supervisors. Begrudgingly, Chief Penko attended the first meeting, vowing to keep his mouth shut and just fill a seat. However, after a handful of meetings, he really began to understand that his preconceived perception of restorative justice was misguided and, admittedly, ignorant. Chief Penko soon realized that including restorative justice in the criminal justice system could serve as a powerful tool of intervention.

Enforcement, prevention, and intervention are the tenets of law enforcement. The police are trained to operate in emergency situations to protect people from harm, and their jobs sometimes require them to use force. Nevertheless, enforcement has become the mainstay of modern policing at the expense of efforts toward prevention and intervention. This mindset is not only indelibly etched in the minds of those who have been in police work for a long time, but also woven into the curriculum taught at most police academies because the traditional criminal justice system is based on punishment. However, public safety requires prevention and intervention, too, and citizens expect these measures.

Many law enforcement officials understandably regard resources for prevention and intervention as “nice to have,” rather than necessities. Consequently, both are often the first programs cut from budgets during difficult financial times because a police department’s primary responsibility is to have an officer show up at a citizen’s door should he or she require police services. As staffing is cut, the low-hanging fruit are the longer-term programs that require an investment at the front end before results are realized. Enforcement—specifically arrests—brings immediate, tangible results, at least in terms of measurable outcomes. By contrast, prevention and intervention take years to produce results that are often difficult to define or measure.

This lack of definition has plagued restorative justice, too. It is not a top-down, one-size-fits-all program, and, until recently, its advocates claimed its effects were more procedural than measurable. It is, in fact, a philosophy that seeks to supplement the criminal justice system by drawing attention to the individual lives that crime and incarceration affect. It supports law enforcement officers with an opportunity to assist with intervention and prevention, thus building trust in their communities. The long-term effect of intervention and prevention is that officers will be more available to focus on truly serious crimes that necessitate punitive measures. Yet, many in law enforcement are hesitant to
True accountability requires participation in the direct effects of crime on victims, families, offenders, and the broader community.

Law enforcement officers require an awareness of the virtues of restorative justice if they are going to accept it as an option, and the success of restorative justice is dependent on the endorsement of law enforcement because police officers are a powerful and visible arm of government. The police are in a position to help this civic approach become a reality on the ground. In Monterey County, all chief law enforcement officers have received an orientation on restorative justice and how the criminal justice system is applying it in a number of ways in the county. The Monterey school resource officer has routinely applied restorative justice concepts while mediating conflict in local middle and high schools, and Chief Penko shared restorative justice success stories with his law enforcement peers in Monterey County so they could see results through practical application. The growth of restorative justice will occur only if law enforcement leaders understand its true intent and embrace its non-traditional approach.

Evidence

Restorative justice’s success is increasingly apparent in academic studies, which show evidence of increased victim satisfaction after participating in restorative justice meetings as compared with the conventional system, as well as decreased recidivism among offenders. In reference to several experiments with restorative justice conducted with Australian Police, criminologist Lawrence Sherman has noted that both the conventional and restorative methods resulted in similarly severe punishments; however, the process by which the parties involved determined those punishments was distinctively different. Sherman has written that restorative policing encounters with victims and offenders create situations in which police are given time and training to listen. The police-led conferences took an hour on average, whereas court proceedings lasted 10 minutes. During post-conference interviews, participants showed increased respect for the police and the legal system, and victims and offenders preferred the process of the conferences as compared to those who went to court.

A pilot study in 2000, published by the Judicial Council of California, showed that VORPs were found to provide higher restitution, since more offenders were ultimately required to pay, and the average amount was higher; five out of the six programs in different counties saw recidivism decrease by at least 10 percent more than did the control groups; high rates of participation were seen among both victims (67–90 percent) and offenders (61–94 percent); between 70–93 percent of offenders completed their agreements; and overall satisfaction among participants was more than 90 percent.

Existing Intervention Programs

The first VORP in California was established in Fresno in 1982 by Dr. Ron Claassen. The program focuses on face-to-face meetings between victims and youth offenders, usually occurring early on in a case, although they are not limited to the earliest stages of criminal proceedings. The Fresno VORP staff work with the Juvenile Probation Department to obtain about 350 cases a year, of which about 50 percent or 175 result in mediations. The VORP’s
staff trains about 100 volunteer mediators annually from local churches, schools, and the community to handle these cases.\textsuperscript{18}

Research suggests that effectively every state is implementing restorative justice programs at state, regional, or local levels. Thirty-three states have revised their statutes or codes to reflect restorative justice in some capacity.\textsuperscript{19} Restorative justice always constitutes intervention, but it can take place at any stage in a case: mediators can step in to help two parties come to an agreement that affects juvenile sentencing; arrangements also exist for victims and offenders in the wake of serious or even violent offenses; some programs occur after a trial is complete, inside prison, or after incarceration.\textsuperscript{20}

Perhaps unsurprisingly, many such programs exist in juvenile justice by means of court diversion programs for juvenile offenders and for victims who want to participate.\textsuperscript{21} Although many probation officers may be unaware of it, California’s Welfare and Institutions Code, which deals with juvenile crime, requires probation officers to inform victims of victim-offender conferencing, victim impact classes, the final disposition of a case, and victim restitution. Certainly, involving first-time, low-level offenders early before they enter the criminal justice system is ideal and has proven to reduce the likelihood of a repeat offense; however, there may still be opportunities to use restorative justice after juveniles have been detained. A recent report by the Office of Juvenile Justice and Delinquency Prevention from a 2012 survey shows that for the first time, local facilities (county, city, or municipal) are holding more juvenile offenders than state facilities, and 17 percent of residents were still held in facilities operating at or above their standard bed capacity.\textsuperscript{22}

Another California program is Restorative Community Conferencing (RCC), a subset of the nonprofit Community Works in the San Francisco Bay area.\textsuperscript{23} It focuses on juveniles, even after felonies. In Oakland, the RCC program diverts 100 Alameda County juveniles annually from prosecution to a program that brings them together with their victims, family members, and the arresting police officers. The juveniles’ crimes include grand theft, auto theft, credit card fraud, and battery.

Sonoma County’s Restorative Resources has developed a program called the Accountability Circle model for adult offenders between the ages of 18 and 25. The program deals with minor recidivists and was developed by the district attorney’s office and county criminal court judges. Community volunteers facilitate these conferences. Additionally, this organization is partnering with the Sonoma County Adult Probation Department to offer an adult reentry program aimed at reducing recidivism for high-risk felony offenders. Also dependent on community volunteers, this approach assists ex-offenders to reintegrate into civilian life by providing guidance to help them stay within the conditions of release.\textsuperscript{24}

In Monterey County, the County Probation Department has transferred juvenile cases deemed suitable for restorative justice to a VORP since 2009. For now, the program typically engages first-time juvenile offenders and their victims in face-to-face dialogues facilitated by trained volunteer mediators.\textsuperscript{25} While there is some selection bias, the data collected on Monterey’s program for 2011–2012 show that only 9 percent of youth who were referred to VORP recidivated, versus 65 percent of youth who went through the conventional juvenile justice system. Data from 2009–2010 shows that the cost per youth participant in VORP was just over $200, versus more than $175,000 to house a youth at a juvenile detention facility.\textsuperscript{26}

Conclusion

To be clear, restorative justice cannot by itself guarantee equity, and it does not effectively substitute for the rule of law, which seeks to ensure not only safety, but also the standards that a civil society collectively reinforces for behavior that it deems right and wrong. However, the conventional system does not currently consider individual interpretations of crime and its personal effects. The sentencing process is highly generalized, which means that important details can be lost in the administration of justice. True accountability requires participation in the direct effects of crime on victims, families, offenders, and the broader community. When the institutions that investigate crimes and prosecute offenses acknowledge these local circumstances and needs, the social repercussions of the justice system may reflect more legitimacy or public confidence in the criminal justice system and, especially, in law enforcement. Put simply, public safety and criminal justice professionals do not want to compromise public trust in the very institutions that seek to protect them. While the state holds the principal power to set standards for consistent outcomes, California faces an important challenge to focus on intervention, and what criminologist David M. Kennedy calls “moral engagement.”\textsuperscript{27} More work should be done to understand how communities can experiment with restorative justice: how it can help interested victims heal, how it can transform certain offenders, and how law enforcement can play an active and supportive role. By emphasizing public participation in the aftermath of crime and by including victims, offenders, the police, and citizen volunteers in the process, restorative
justice might be said to contribute to civic criminal justice reform and to building trusting relationships in communities affected by crime.

Notes:
2. Bruce Western, "Incarceration, Inequality, and the Prospects for Reform" (presentation, 81st Semi-Annual Meeting of the Association for Criminal Justice Research, Sacramento, California, March 26, 2015).
15. Ibid., 407.
17. Further information: 99 percent of these mediations (173) result in some kind of an agreement between the parties; about 65 percent of these will be kept; 15 percent will be partially kept. The offenders whose agreements are not carried through will be returned to probation, and the offenders will likely experience conventional criminal or civil action. VORP Conflict Resolution and Peacemaking Training Packet (Fresno, CA: VORP of the Central Valley, Inc.).


Annual Report to the Board of Supervisors, Monterey County Community Restorative Justice Commission, 2009.

It is important to note that it cannot be known how much of the success of Monterey’s VORP program is due to self-selection on the part of the participants; also, the cost to house juvenile wards across California varies widely, but the average annual cost according to the California Legislative Analyst’s Office for the 2012–2013 budget was $179,000 per ward. Restorative Justice Partners, Inc., presentation Legislative Analyst’s Office, “The 2012–13 Budget: Completing Juvenile Justice Realignment” (presentation, February 15, 2012), http://www.lao.ca.gov/analysis/2012/crim_justice/juvenile-justice-021512.aspx (accessed October 12, 2015).


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