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I SWEAR, IF YOU DO THAT ONE MORE TIME...
RECIDIVISM AND RESTORATIVE JUSTICE

“The stupid neither forgive nor forget; the naïve forgive and forget; the wise forgive but do not forget.”

- Thomas S. Szasz

I. Introduction

Throughout human history, there have been many different types of government, and those governments have been supported or opposed by an even greater variety of political philosophies. From the social contracts of Locke and Hobbes, to the divine right of King James and Louis XIV, the one function of government that has been consistently performed, or at least attempted, is keeping order among its citizens. The primary benefit of living under a government, be it a democratic utopia or strict authoritarian dictatorship, is that the rule of law maintains peace and controls crime. Under modern political theory, individual autonomy enters the picture, tempering efforts towards social order with a need to preserve individual liberty as much as possible. Currently, in the words of Charles Colson, “the primary purpose of all models for criminal justice is to preserve order with the minimum infraction of individual liberty.”¹ A criminal justice system does not work when criminals are running amok, nor does it work when people are thrown in jail for all violations, whether large or small. The restorative justice movement uses a more utilitarian approach to this ideal, preferring to look at whether a punishment actually produces order and general liberty, or whether it causes further violations down the road.

Jennifer Kerrigan, writing for the Campbell Law Review, provides a typical example of restorative justice. She writes,

“The middle-aged woman looks at the thirteen year old black juvenile that is sitting across the table. The juvenile she pleads with has had many altercations with her thirteen year-old stepson. He has also turned his aggression on her through verbal insults that range from profanity to the typical juvenile taunts of ‘fatty.’ Prior to this aggression, her stepson and the juvenile had been friends, and the woman had made the two children homemade slushies. Those days are in the past. Now, there are three criminal charges pending against the juvenile, which include communicating threats, simple assault, and destruction of personal property.

The woman’s eyes well up with tears, and her speech slows. She explains to him that she knows she is overweight; after all she has to look in the mirror every morning. She reviews with him the numerous times she has been there for him. She reminds him how he used to seek refuge in her house when his mother, a single mother, worked late. The juvenile looks her straight in the eye and nods his head in agreement. He then openly apologizes for calling her names.

To the outside observer…this apology may seem trivial. However, before this meeting, the juvenile had denied for months that he ever called this woman names or cursed at her. This apology is a break through. The juvenile has taken responsibility for his actions. He has also taken the first step to mending the harm with his apology. Welcome to restorative justice.”

This story, which is modeled after an actual victim-offender mediation performed at Campbell University, illustrates two key aspects of the restorative justice movement. First, it shows the great benefits reaped by a restorative approach to justice. This is a truly heartwarming tale of two people overcoming their differences and beginning to work on solving their conflict. The confrontation allows the juvenile to understand the harm caused by his actions, take responsibility for them, and begin to make amends, while the woman is able to directly receive amends for the harm done to her. Second, the story reveals the restorative justice movement’s current focus: victim satisfaction and offender rehabilitation. The story is limited to the interaction between victim and offender, while the community as a whole is left unmentioned. Who had the child

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There are three parties involved in a criminal justice system. The victim suffers direct harm from the crime. The offender committed the crime and harmed the victim. The community, or society, is tangentially harmed by the fact that a crime occurred. It is widely accepted that restorative justice results in significantly higher levels of victim satisfaction than the traditional justice system. Rather than being kept in the dark by the criminal justice system unless they are needed to testify at a trial, victims going through restorative processes are constantly involved in the proceedings. Being able to confront the person who harmed them provides more of a sense of closure and an opportunity for the victim to ask “Why me?” It is also accepted that restorative justice programs are more beneficial to the offenders, who are often able to reduce or eliminate jail time—which, as Wyoming State Representative Jeff Wasserburger put it, “only hardens them and turns them into lifelong criminals.” However, society has an interest in the outcome of every criminal justice action. Society, in this case the government, bears the costs of the criminal justice system and, by virtue of footing the bill, has a vested interest in controlling how the system works. More importantly, society is also in charge of preventing crime. It is certainly good to satisfy the victim of an assault after the fact, but, all things the same, most victims would prefer not to have been assaulted in the first place. The restorative justice movement largely disregards the interest in prevention to

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focus on the more strongly positive relationship between restorative justice and victim satisfaction or offender betterment. This paper will examine the impact restorative justice has on actually reducing the overall amount of crime by looking at recidivism rates for restorative programs, as compared to the overall recidivism rate for the United States.

II. The Problem

Since the purpose of the criminal justice system is to maintain order with minimal infringement of individual liberties, the logical first question for the current system is, “Is it working?” In the United States, the overall picture presented by crime statistics is bleak - between 1960 and 1998, crime increased nearly 300%, with violent crime increasing nearly 500%. As of 2004, one of every 138 Americans was incarcerated. The rate of incarceration that year was 724 inmates per 100,000 people – the highest in the world. If we are to judge a justice system by its ability to maintain order with minimal invasion of liberty, skyrocketing crime and incarceration rates indicate a fundamental problem. The largest problem facing the US criminal justice system is recidivism. Recidivism is studied by observing a released prisoner for typically three years after release. If the former prisoner returns to prison in that period, he has recidivated. The Bureau of Justice Statistics performed a 15 state study on recidivism in 1994. It found that of the 272,111 persons released from prisons in 1994, an estimated 67.5% were rearrested for a felony or serious misdemeanor within 3 years, 46.9% were

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6 Colson, supra, at 14.
7 Rowlison, supra, at 290.
8 Id. at 292.
reconvicted, and 25.4% re-sentenced to prison for a new crime.\(^9\) Perhaps more troubling
is that the 272,111 offenders discharged in 1994 accounted for nearly 4,877,000 arrest
charges over their recorded careers.\(^{10}\) These statistics prove that the exponential increase
in crime over the past twenty years is a result of a relatively small number of criminals
offending many times, as opposed to many people offending once and stopping.

Since recidivism is such a large problem, the criminal justice system has enacted
policies designed to prevent released inmates from returning to the prison system. These
have largely been in the form of vocational, educational, and substance abuse counseling.
Studies indicate that “having a legitimate job lessens the chances of re-offending
following release from prison. Also, the higher the wages, the less likely it is that
returning prisoners will return to crime.”\(^{11}\) A National Institute of Literacy report states
that prison educational programs reduced recidivism by 29%, while vocational training
programs reduced recidivism by 33%\(^{12}\). The report goes on to point out that community
supervision after release, combined with rehabilitation, helps to reduce recidivism.\(^{13}\) The
success of prison programs designed to facilitate the re-entry of prisoners into society,
particularly the community supervision and rehabilitation programs, indicates that a
restorative justice approach to criminal justice would likely have positive effects.

III. Theory

\(^9\) Bureau of Justice Statistics, Criminal Justice Statistics,
\(^{10}\) Id.
\(^{11}\) Reentry Nat’l Media Outreach Campaign, Education & Employment and Reentry Briefing Paper 1,
http://www.reentrymediaoutreach.org/dfs/employment_bp.pdf (last visited Jun. 5 2009)
\(^{12}\) MTC Inst., Programs that Help Inmates Stay out of Prison 6 (2003),
Jun. 5 2009)
\(^{13}\) Id.
After establishing that there is a problem with increasing crime rates and tremendous recidivism rates in the current criminal justice system, it is important to examine the alternatives – in this case, restorative justice. Restorative justice seeks to change the focus of the justice system, moving away from strict and severe penal system while promoting community involvement.\textsuperscript{14} This involves a shift in control from the government’s criminal justice system to the actual victim of the crime.\textsuperscript{15} The theory is that when offenders are forced to confront their victims and interact with them on a personal level, the interaction can change the offender and decrease her willingness to re-offend.

Restorative programs focus on three principles: (1) identifying the harms and needs, (2) acknowledging obligations, and (3) seeking engagement.\textsuperscript{16} The first principle relates to the direct impact on the victim. The victim must identify the harms caused to him by the offender, be they physical or emotional. For example, the juvenile from the story above could have a meeting with his victim that involved a discussion of the physical injuries caused by his assault, the embarrassment that arose from his threats and insults, and the fear and vulnerability that resulted from his crimes in general. Until the harms are adequately identified and expressed to the offender, there can be no movement towards repairing those harms.\textsuperscript{17}

The second principle involves taking responsibility for the stated harms. The obligations that the offender must acknowledge stem from the harms she has caused her victim. They can range from the concrete repairs, such as paying medical bills or

\textsuperscript{15} Id.
\textsuperscript{16} Howard Zehr, The Little Book of Restorative Justice 22 (2002).
\textsuperscript{17} Kerrigan, supra, at 343.
replacing damaged property, to the abstract, such as serving time in prison or doing
community service.\textsuperscript{18} The obligations may be expanded beyond just the offender to the
community as a whole. If there is a communal problem that helped to cause the
offender’s actions, then the community may also need to enact some sort of repair.
Examples would include enacting new public safety measures or addressing societal
problems with unemployment or prejudice.\textsuperscript{19} The harms must be repaired to the
satisfaction of the victim, so as to show the offender that he is responsible for his actions.
The community may also be involved, as it is an important actor in the protection of its
citizens.

The final aspect of restorative justice is the engagement of the community and its
citizens. The engagement process involves all of the people harmed by the offense,
including friends, family, and neighbors.\textsuperscript{20} The engagement itself can range from face to
face dialogue, such as in victim-offender mediation, to letters or written statements.\textsuperscript{21}

There are two major goals of the restorative process: restoring the victim and
altering the offender.\textsuperscript{22} Restoring the victim is certainly a noble endeavor, however, from
a macro standpoint, altering the offender is far more important. Given that the average
prisoner released in 1994 had committed 15-20 crimes, it stands to reason that most crime
could be prevented if first time offenders could be convinced that what they are doing is
actually wrong. If the restorative process works, then offenders can be prevented from
committing crimes in the future, thus reducing the need for victim restoration. The

\textsuperscript{18} Zehr, supra, at 24.
\textsuperscript{19} Kerrigan, supra, at 344
\textsuperscript{20} Zehr, supra, at 24.
\textsuperscript{21} Kerrigan, supra, at 345
\textsuperscript{22} Rowlison, supra, 297.
theories of reintegrative shaming and bypassed shame provide justification for how this is possible.

Reintegrative shaming theory proposes that the ideal system to prevent crime is one that “shames” an offender for committing a disapproved of act, but continues to have and show respect for her as a person. As John Braithwaite put it, “Tolerance of crime makes things worse; stigmatization, or disrespectful, outcasting shaming of crime, makes crime worse still; while reintegrative shaming, disapproval within a continuum of respect for the offender, disapproval terminated by rituals of forgiveness, prevents crime.” If the system is too tolerant of crime, then there is nothing in place to prevent it from happening. If the system is too disrespectful to the offender, then the offender has no connection with the system and sees no reason to comply. The system that works makes the offender feel shame at what he did, rather than being upset at a punishment meted out on her. The positive shaming is achieved by including a discussion of the consequences of the crime for both the victim and external parties such as the offender’s family. The conference forces offenders to confront the results of her actions head on, rather than dehumanizing her victim. The respect and support in the conference is provided by the presence of family or other groups who have strong ties of love or respect with the offender. Their presence also amplifies the shame the offender feels at her actions. The use of reintegrative shaming lead to positive results in a study involving Australian nursing homes. Homes checked by inspectors using reintegrative shaming saw an increase in compliance in a follow-up inspection two years later. Homes

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23 Braithwaite, supra, 39.
24 Id.
25 Id. at 40.
inspected using stigmatizing or tolerant inspectors saw decreases in quality.\textsuperscript{26} There is plenty of evidence to indicate that restorative justice, using reintegrative shaming, would theoretically work to decrease recidivism.

The theory of bypassed shame also provides sound theoretical support for restorative justice reducing recidivism. The theory states that shame itself, if improperly channeled, leads to more crime and that restorative justice conferences can help to properly deal with the shame offenders feel as a result of their crime.\textsuperscript{27} When a conference works properly, the cycle of shame is healthy. “When hurt is communicated, shame acknowledged by the person who caused it, respect shown for the victim’s reasons for communicating the hurt, and respect reciprocated by the victim, constructive conflict has occurred between victim and offender.”\textsuperscript{28} When an offender is not put in a situation to confront or acknowledge their shame, the shame can become anger. The offender then lashes out, feels more shame for lashing out, withdraws from that shame, and the cycle continues.\textsuperscript{29} This cycle is more likely to occur in a courtroom than in a conference because in a courtroom, shame is not acknowledged because it is “hidden behind impersonal rhetoric about technical culpability.”\textsuperscript{30} In a conference, technical culpability is irrelevant – to get to the conference, the offender must first accept that he has done something wrong. That admission is the first step to healthily dealing with shame. Approaching an offender’s shame in a positive manner, by providing an opportunity to apologize and acknowledge that their actions were wrong, should allow the offender to

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\textsuperscript{26} Id.
\textsuperscript{27} Id. at 45.
\textsuperscript{28} Id.
\textsuperscript{29} Id. at 43.
\textsuperscript{30} David B. Moore, \textit{Public Anger and Personal Justice: From Retributive to Restorative and Beyond}, 6 (1996)
confront and emotionally deal with the shame that comes from their crime. This should bypass the shame/anger loop that can lead to violence and more crime in the future.

IV. Data on Recidivism

Research into the effect of restorative justice on recidivism is hampered by the fact that few third party studies have been done to provide actual numbers relating to recidivism. Research that has been performed has been carried out primarily by a variety of restorative justice programs, examining whether or not their participants re-offend. Data from the Midwest Community Court, a national survey of drug courts, and the Resolve to Stop the Violence Project illustrate the effect that restorative programs can have on reducing recidivism rates for local quality of life problems, drug offenses, and violent crimes, respectively.

A. Midwest Community Court

The Midwest Community Court program began in New York in 1993 as a three year project to increase community involvement in reducing misdemeanor quality-of-life crimes.31 A separate program for quality-of-life crimes, such as prostitution, shoplifting, or minor drug possession, became a necessity for several reasons:

1. Centralized courts were occupied with more serious crimes and did not devote adequate resources to misdemeanor crimes.

2. Community members felt shut off from the centralized court system, engendering feelings of frustration over both lacking input and the courts’ general ineffectiveness.

3. Low-level offenses such as prostitution, street-level drug possession, and vandalism create an oppressive atmosphere that is conducive to more serious crimes.

4. Communities affected by quality-of-life crimes have a direct stake in the subsequent proceedings and their outcome.\textsuperscript{32}

The goals of the community court were to process cases swifter, make justice more visible to the community, encourage the enforcement of misdemeanor offenses, and utilize local resources to ultimately restore crime-ridden communities.\textsuperscript{33} The community utilized several features that enhanced the traditional court process. Out in the community, efforts included a coordinating team working with court administrators to encourage collaboration between the court, the community, and other criminal justice agencies. There was also a Community Advisory Board designed to aid the community in informing the court of local quality-of-life problems, identifying community service projects to address the problems, and providing overall feedback regarding the court.\textsuperscript{34} Once a suspect was actually arrested, an assessment team would determine various facts about the defendant, such as whether he had a substance abuse problem, a place to sleep, or other such things. In the courtroom, there was a resource coordinator, whose job was to connect defendants with appropriate treatment and community service programs. Finally, punishments are mostly community service projects designed to repair the harm done to the community, rather than punitive jail sentences.\textsuperscript{35}

Within 18 months, the project achieved its goals. The arrest to arraignment time in the Midtown was 12 hours shorter than at the downtown court. The coordinating staff

\textsuperscript{32} Id. at 1-2.
\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{35} Id. at 2-3.
ensured that 40 percent of defendants started their community service the same or next day, thus preventing sentenced offenders from walking out without scheduling community service.\textsuperscript{36} Swifter Justice had been achieved. Visible justice was inherent in the program. The court created a Community Advisory board, and contributed $280,000 in community service work repairing damage to the neighborhood.\textsuperscript{37} That, combined with newsletters and meetings with community leaders, provided public awareness for the efforts being carried out. The court encouraged enforcement of quality-of-life crimes by having regular meetings with precinct commanders and other local police. As the police became aware of the court’s purpose and developed a relationship with it, enforcement of quality-of-life crimes increased, largely because the court was able to actually handle the cases – something the regular courts were ill equipped to do.\textsuperscript{38} The community service work, combined with nearly two dozen community-based projects designed to assist in offender re-entry, allowed much of the damage done to the community to be repaired.\textsuperscript{39}

The most important impact of the court, for the purposes of this paper, is the positive effect it had on the community as a whole. Within the first 18 months, arrests for prostitution dropped by 56 percent, while unlicensed vending arrests dropped 24%.\textsuperscript{40} There was a visible reduction in street activity and graffiti. Defendants also took advantage of drug-treatment facilities, education programs, and employment assistance, contributing to the decrease in future arrests.\textsuperscript{41} The Midtown Community Court used

\textsuperscript{36} Id. at 4.
\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{40} Id. at 7.
\textsuperscript{41} Id.
restorative principles to better the quality of life of an entire community. The community involvement, rehabilitation programs, and community service enforcement both repaired the damage caused by offenders’ crimes, but also helped to change the offenders themselves, preventing repeat offenses.

B. Drug Courts

In July 2003, the National Institute of Justice commissioned a nationwide study of drug court recidivism rates. The study was able to avoid many of the pitfalls of other studies by having one consistent measure of recidivism for all of the various drug courts, rather than relying on suspect numbers provided by the courts themselves. The study used the internal FBI criminal history database. To provide the average recidivism rate for drug court graduates, the study examined a sample of 2,020 graduates in 1999 and 2000 from 95 drug courts. Every graduate studied who was arrested for a serious charge (carrying at least one year of jail time) was classified as recidivating. Overall, the study estimates that within one year of graduating, 16.4% of drug court graduates had been arrested and charged with a serious offense. Within two years, the percentage rises to 27.5%. The numbers are somewhat lower than the rates would be if expanded to all drug court participants, rather than all graduates. Drug court dropouts have been found to have higher rates of recidivism than graduates. While there was no average recidivism rate provided for offenders who did not participate in drug courts, the study provided comparison data for 5 drug courts: Baltimore, Maryland; Maricopa County, Arizona;
Chester County, Pennsylvania; Dade County, Florida; and Washington DC. The Baltimore court had a 48% recidivism rate, compared to a 64% rate for treatment as usual.47 Maricopa County had 31% recidivism rate, compared to a 33% rate for treatment as usual.48 Chester County had a 5.4% recidivism rate, compared to a 21.5% rate for treatment as usual.49 Dade County had a 33% recidivism rate, compared to a 48% rate for treatment as usual.50 The DC program had a 26% recidivism rate, compared to a 27% rate for treatment as usual.51 While the difference between treatment as usual and drug court recidivism varies substantially from program to program, in every program, recidivism rates decreased when offenders completed drug court.52

There are a few limitations to the study results. The largest is that the various drug courts were not all treating similar offenders. Many of the courts that reduced recidivism less were located in areas with more severe drug and crime problems. The more effective courts tended to deal primarily with offenders facing alcohol or marijuana charges, while the less effective courts, on the whole, tended to deal primarily with cocaine and heroin.53 The study also underestimates the recidivism in two ways. First, the FBI database, while the single best source of criminal history data available, does not include every arrest that occurs nationally. Second, it is possible that an offender could be arrested and manage not to be matched to their FBI record. When drug court graduates could not be matched, it was assumed that no arrest occurred.54

Counterbalancing the underestimation, recidivism rates were overestimated due to

47 Id. at 8.
48 Id.
49 Id.
50 Id.
51 Id.
52 Id.
53 Id. at 5-6.
54 Id. at 8-9.
definitional issues. The study counted anyone arrested for serious charges as recidivating. There is likely a portion of these arrests that did not result in a conviction, causing the recidivism rate to be higher than it would be if only arrests leading to conviction were included.\(^{55}\)

C. Resolve to Stop the Violence Project

The San Francisco County Sheriff’s Department established the Resolve to Stop the Violence Project in September 1997.\(^{56}\) The program was designed to apply restorative principles\(^{57}\) to violent offenders. The goals of the program were to reduce recidivism and promote offender accountability in five ways:

1. Taking responsibility for one’s own actions and accepting the possibility for change.

2. Identifying and analyzing the social, cultural and personal belief systems that promote one’s violent behavior.

3. Recognizing that one has a choice at the critical time of violent response.

4. Increasing awareness of the effects of one’s behavior and empathy for victims.

5. Preparing to take on a restorative role when back in the community.\(^{58}\)

The program worked towards achieving those goals by housing the offenders involved in the program in a single dormitory and having them participate in a 12-hours-a-day, 6-days-a-week program of workshops, classes, enactments, counseling sessions, and communications with victims of violence.\(^{59}\) The program had 101 subjects, and the

\(^{55}\) Id. at 9.
\(^{57}\) “offender accountability, victim restoration, and community involvement”
\(^{58}\) Id.
\(^{59}\) Id.
study of the program chose a control group of 101 subjects who would have been eligible
for the program had there been more space. The study monitored the criminal records
of the 202 subjects for a year after their release. Resolve to Stop the Violence Project
participants experienced a reduction in violent recidivism by 66.7% and a reduction
general recidivism of 48.3%. The control group had a reduction in violent recidivism of
41%, with a reduction of general recidivism of 34%.  

While the study of the Resolve to Stop the Violence Project suffered from having
a relatively small sample size, its results give a positive indication that a program focused
on instilling restorative principles in even the most hardened violent offenders can have
some level of success at reducing recidivism and preventing harm to others in the future.

V. Criticism

The primary criticism of restorative justice, as it relates to recidivism, is that the
majority of studies use numbers provided by the programs being studied. Rather than
having an independent third party perform studies and gather data regarding recidivism,
programs turn over their own data, which is then taken as truth. There is a concern that
the data provided by restorative justice programs is not entirely objective and may be
skewed towards presenting a favorable picture of restorative justice as a sort of panacea
for all of society’s woes. While this is a valid concern, especially given organizations
claiming significantly higher than expected results, the problem is less a result of
programs trying to force faulty research onto the academic world as a result of a lack of
independent third party studies on recidivism in general. Were there a plethora of

60 Id. at 146.
61 Id.
62 See Latimer, Jeff; Craig Dowden; and Danielle Muise. “The Effectiveness of Restorative Justice
agencies examining restorative justice as a viable alternative to the current criminal justice system, it would be much easier to provide clearly unbiased numbers. However, until such research exists, the only way to get an idea of the effect of restorative justice is to use the information available. It is also helpful to note that the National Institute of Justice study, which was performed by a third party unrelated to the drug courts being examined and which used a relatively simple methodology to determine recidivism, provided results similar to those being generated by the programs themselves. In an ideal world, the source of the data used to evaluate restorative justice would be more objective, but until more independent studies are performed, analysts must use the data available.

VI. Conclusion

As Colson put it, the purpose of a criminal justice system is to “preserve order with the minimal infraction of individual liberty.”\textsuperscript{63} Restorative justice’s traditional focus on victim restoration and offender rehabilitation does not fully fit within that goal. If the goal is preserving order, the making the victim of a crime happy is a tangential benefit. The real goal is to prevent crime. As a result, many view restorative justice as a frivolous expense, designed to address crime after it has occurred rather than protecting society from it. Examining how restorative programs affect recidivism rates tells a different story, however. Not only does restorative justice provide an incredibly effective way to repair the harm done to the victim of a crime, it is also an effective means to rehabilitate offenders so that they are less likely to re-offend. In some instances the reduction in recidivism may be small, but there is consistently a reduction of some level. The United States criminal justice system would benefit greatly from government funded programs utilizing restorative justice principles. Moving the criminal justice system

\textsuperscript{63} Colson 20
away from a focus on punishment and incarceration to restoration and rehabilitation will ultimately benefit not just the victims and criminals, but everyone throughout America.