RESTORING A FOCUS ON VICTIMS IN CRIMINAL JUSTICE
Washington University School of Law Restorative Justice Seminar
Peter Merideth, May 1, 2009

OBJECTIVES OF A CRIMINAL JUSTICE SYSTEM

Any effort to reform the criminal justice system must begin with an evaluation of what objectives we hope to achieve through the system. How do we want to respond to crime, and what do we hope to achieve through that response? The traditional jurisprudential approach has been almost exclusively limited to punishment. Our courts have focused exclusively on the guilt of an offender, and tried to assign an appropriate punishment in response to the severity of the crime committed. While we often modify and tweak the severity of punishments, or the procedures through which the punishments are determined, rarely do we look toward responses other than punishment. Punishment forces us to focus exclusively on the treatment of the offender, and ignores any reparative response to the crime itself. In order to look beyond punishment, we must first expand our understanding of what the criminal justice system can offer us.

In theory, punishment can be directed toward two different objectives in response to crime. First, our society seems to generally accept the idea of punishment as a deterrent. This deterrent function comes in the form of specific deterrence, or its ability to deter the specific offender from repeating his crimes, and general deterrence, or its ability to deter other potential offenders from committing similar crimes. The effectiveness of general deterrence is largely left to theory, as it is difficult, if not impossible, to measure the societal deterrent effect of a criminal policy.\(^1\) Specific deterrence, on the other hand, can be measured more clearly, and the high numbers of

recidivism in our present system demonstrate a rather poor effect. Moreover, critics of deterrence as a justification for punishment often argue that criminals rarely, if ever, consider the potential criminal consequences of their actions, and are instead motivated by desperation, addictions, or passion, without much rational consideration.

The second objective of punishment is to serve a retributive purpose. While this retributive purpose may be, in theory, to address the needs of victims of crime, it doesn’t actually address the harm caused to the victim, or in any way begin to fix that harm. In fact, while retribution is the only element of the traditional criminal approach in America that considers the needs of victims, substantial evidence suggests that this is one of the least useful ways of helping a victim move on from crime. Perhaps significantly, most students of criminal law learn early on that the goal of this retributive function by the State is to prevent additional crime in the form of revenge. However, the effectiveness of this strategy is again largely theoretical and difficult to measure.

A more recent trend in criminal theory has focused on an additional objective of rehabilitation and reintegration of the offender. In response to high levels of recidivism, perhaps due in part to the failure of punishment as an effective specific deterrent, it has become rather clear that an additional focus on the way we treat our criminals may be necessary in order to prevent repeat offense. Currently, offenders are placed into a court system where they often feel victimized themselves by the State, then they are punished by being thrown into a prison system that often only perpetuates the roots of their crime –

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2 The Bureau of Justice Statistics reports that of the 272,111 persons released from prisons in 15 States in 1994, an estimated 67.5% were rearrested for a felony or serious misdemeanor within 3 years, 46.9% were reconvicted, and 25.4% resentenced to prison for a new crime.
4 Id.
drug addiction, or a community of criminals, for example. Then after serving their sentence, offenders are left to again fend for themselves in society with the additional burden of having been removed from their communities, separated from the job and educational markets, and given the additional label of ex-con. Accordingly, many scholars and activists have focused on efforts to improve the rehabilitative goal of criminal justice, as well as the reintegration process. Their goal, of course, is to teach the offender not to want to commit further crime, and to help them find a role in society where they do not feel the need to resort to further crime. Again, however, the ever-increasing levels of recidivism in our system suggest that these efforts have had little success as of yet.

A third approach, however, may be to incorporate into criminal justice the objective of restoration – repairing the harm done by the crime itself. The objective of repairing harm has traditionally been left to the realm of civil law, and ignored by criminal law. To incorporate this objective removes the focus from the offender exclusively, and requires an examination of the specific harm caused by crime, and, perhaps more importantly, the victims of crime. Repairing harm may be a more appropriate response to crimes, and may be the only way to truly address the needs of victims of crime. Afterall, it is the harm caused to victims that is generally the justification for declaring certain acts illegal. Rather than simply offering an attempt at retribution from the hands of the state, such an approach attempts to address the real needs of those damaged by crime.

Many scholars believe that not only can this approach address its specific aim of repairing the harm caused by a crime already committed, but that it can greatly improve
the process of rehabilitation and reintegration, as well. By holding offenders accountable directly to those harmed by their crime, it is thought that a more sincere change of heart can occur. Incorporating into the process the victims and communities that have been harmed may even help to heal some of the divisions caused by the crime, thus facilitating the offender’s reintegration process into that community, as well. Indeed, this very same reasoning suggests that a restorative approach may even further the objective of deterrence better than the current system, by achieving lower recidivism rates and creating a community more in tune with the core causes of criminal behavior.

DEFINING THE VICTIM

In order to incorporate a restorative approach into our criminal justice system, we must first understand clearly who the victims of any given crime are. Certainly, many crimes have an easily identifiable direct victim – what we’ll call the primary victim. The primary victim is the one who was directly attacked or harmed, or the owner of property damaged or robbed. In attempting to repair the damage caused by a crime, it is easiest to look to the needs of this primary victim, who may need counseling, the ability to confront the offender, compensation for loss, and so on. However, for a more complete picture we must recognize that this is not where the victimization ends with most crimes. The family and friends in the immediate community of the victim, which we’ll call secondary victims, have also been harmed. They may be afraid, or have lost a sense of security, and they more likely have had to make specific sacrifices in order to comfort the primary victim. Their lives have been changed by the crime.

With many crimes, the same is likely true of the broader society in which the crime occurs as well - a third order of victims beyond the immediate community of the
victim. This broader society loses a sense of security as fear of future crime increases. Property values may be affected, and lifestyles changed. With crimes such as drug crimes, an offender’s actions may have contributed to a broader market of drug trafficking and production, contributing to crime and poverty reaching across the country. Accordingly, communities from the most immediate secondary victims to larger and larger spheres of society may need to be considered when dealing with each individual crime.

But it is also true that the offender himself must be acknowledged as a victim of the crime, as well. Often, the crime was motivated by factors far outside the control of the offender – poverty, desperation and addiction being the most obvious examples. Further, after the initial commission of the crime, it is arguably the offender that suffers the most, as a subject of criminal prosecution. Along with punishment may come ostracization from the community, even from their families. The offender’s future may be lost entirely, with limited hope for reintegration into society, or even for finding a decent job down the road. The crime has placed them in a difficult cycle of the same things that motivated the crime in the first place. Certainly, this does not excuse the crime itself, but merely means that it may be helpful to acknowledge the needs of the offender as we focus on the victims of crime.

In some ways, the offender is a sort of primary victim in a separate sphere from the true primary victims. In this separate, though certainly overlapping, sphere, there also must be considered secondary victims, as an offender’s family and community may be substantially harmed by the crime. The loss of the offender as a member of the family can leave children and spouses unsupported, and community roles and jobs unfilled. As
people are pulled out of their community for prosecution and punishment, and perhaps
more importantly when they are returned to that community afterward, the community
can be torn apart. This harm to the offender’s community may even amplify the roots of
the crime to begin with, as an unsupported family may turn to crime just as the initial
offender had, with poverty and addiction problems only made worse. Accordingly, the
families and communities of the offender must be considered in addition to those of the
primary victim. Yet again, a third order of victims may be affected by the harm to the
offender, as well, as the even the broadest view of society suffers when a large segment
of it is imprisoned or otherwise removed as contributors to society.

Indeed, for many crimes such as drug crimes, which take up the largest share of
our criminal prosecution system of any category of crime\(^5\), there is no clear primary
victim at all. Nevertheless, these crimes demonstrate the powerful harm that can be
caused to second and third order victims, and more directly to the offender’s sphere of
victimization. It may be equally beneficial, or even more beneficial, to focus on repairing
that harm in these cases. One approach to restoring this kind of harm involves a very
personal investigation of the harm caused by the crime, such as that seen in Alcoholics
Anonymous. The offender himself can look into the drug or alcohol addiction to
determine who in his family and community have suffered most from it, and then make
an attempt to right the wrongs done. Additionally, various forms of community service
may provide the offender an opportunity to contribute directly to the repair of the harms
caused by the specific type of crime committed to the community and society as a whole.
This not only provides the direct reparation done by their service, but also helps the

\(^5\) According to the Bureau of Justice Statistics, drug crimes accounted for 13\% of all arrests in 2007, with
1.9 million arrests. Driving under the influence, which leads to a similar analysis, came in second with 1.4
million arrests.
offender to understand more deeply the negative affects of the crime, and thus to avoid repeat offense. These types of crime may best demonstrate the need to identify the whole picture of victims in order to make any effort to fix the harm caused by the crime.

It is worth acknowledging that least in this picture of victims is the State as a whole affected by crime. Traditionally, the State may bear the cost of prosecution and punishment, but this is generally the extent of the harm done by a specific crime to the State. And yet, in the traditional American criminal justice system, the only party with a true voice other than the offender is the State. The prosecution represents the State exclusively, and generally the punishment handed down is punishment for the crime against the State. If that punishment takes the form of a sanction or fine, even that fine traditionally goes to the State, rather than the victims.

This was not always the case. The idea of the State taking over the role of prosecution developed in the Middle Ages, when monarchs found significant profit in deciding that all crimes were crimes against the State, rather than against victims.\(^6\) Prior to that, history shows a tendency toward restitution to victims for crimes, and heavy community involvement in criminal prosecution.\(^7\) Since the State took over this role, it has been widely accepted that this was the natural way of things – with a focus on punishment by the State.

In our traditional system of criminal justice, nonetheless, the primary victim has little to no role to play other than as witness for the prosecution. This is the greatest complaint of most victims and victim advocacy groups. After victims report a crime,


rarely are they even informed of any of the proceedings unless they are needed to act as a witness. Even then, the victim has no real say in the plea bargaining process, or even in the prosecution or sentencing. Instead, the victim is simply used by the prosecution to help reach its goal of punishment. Moreover, due to our adversarial system victims often feel abused, even re-victimized, when they do participate as witnesses. That adversarial process of two battling extremes is anything but conducive to a healing process for any of the parties involved.

Even when the primary victim does get to speak in a criminal proceeding, this still leaves out the voices of the secondary victims in the community. Ideally a “jury of peers” could help fill this gap. However, juries are carefully selected to specifically avoid actual members of the victim’s or offender’s communities, in order to avoid jury bias. Accordingly, the jury ends up being comprised of citizens of the same city as the offender and victim, but with the least connection to the crime. The community most affected by the offense is intentionally left out of the process entirely, with those least affected left to make the decisions of how to treat the crime.

It should be noted that our system does afford an alternative for primary victims that want to be compensated for the harm they have suffered at the hands of an offender – the civil justice system. Realistically, however, the usefulness of that system for victims is extremely limited. They must take on litigation at their own cost entirely, which is generally quite expensive. More importantly, however, the system is generally limited to monetary damages and avoids creative resolutions. Monetary damages are often useless in the cases of crime where the victim wants something other than money in order to repair the harm, or where the offender has no substantial money from which to demand
restitution. Moreover, this process is also still an entirely adversarial process, with a winner and a loser. Again, this is not an environment at all conducive to a healing process from which the parties can find a real resolution.

In the end, the only relevant party with a real voice in the criminal proceedings is the offender himself. Admittedly, this is a result of a long history of oppression of the accused by the criminal proceeding. Arguably the greatest room for abuse of the system comes at the offender’s expense. For this reason, our system has evolved with a focus on protecting the rights of the offender – from the right to confront his accuser and the right to representation to the presumption of innocence and due process rights. However, little attention has been traditionally paid to comparable rights for victims in the process. Instead, the State has actively removed the victims from the process, and tried to represent their interests purely in the form of assigning a retributive punishment. This simply does not satisfy the needs of victims.

**IDENTIFYING THE VICTIMS’ NEEDS**

In order to design a criminal system with a restorative approach, then, having identified the possible victims of a crime, we must next evaluate what types of restoration a victim can hope to get out of that system. What exactly do victims need to be made whole again after a crime? First and foremost, studies suggest that victims want to be able to participate in the process of responding to the crime. They want to be able to influence the decisions made as to how to handle the offender, and they don’t want this power taken completely by the State. Admittedly, there are legitimate reasons for removing this power from the hands of victims, such as an interest in preserving the rights of an offender, and maintaining a professional criminal justice system. However,
some of these interests may be preserved by at least offering the victim a less formal environment in which they can freely voice their stories to both the offender and to those ultimately making the decisions. If the community can be brought into this process, it can lead to a situation in which all affected parties can voice their feelings and find some level of resolution. Ultimately, if victims feel their voices are heard, they find much greater satisfaction with the system.8

As for more direct restoration, victims often crave emotional restoration and apology from their offenders as much or more than they do physical or monetary restoration. Certainly, where compensation, or repair of physical damage, is possible, this can be central to helping a victim recover from a crime. However, often a victim has been damaged more severely emotionally than any other way. They find themselves handicapped by fear, anger, or unanswered questions. These needs simply cannot be addressed by a formal state-run proceeding in which the victim never gets to interact with the offender. The only way these needs can even begin to be addressed is by a safe environment through which victims and communities can confront their offender directly. Often in this environment, offenders may begin to understand the harm they've caused and in many cases even offer an apology to victims. Even where an offender fails to apologize, however, a victim can feel empowered by this process, and have the opportunity to vent their feelings. Moreover, victims in this setting often can reach a place of forgiveness that has been shown to facilitate greater emotional healing than

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anything retribution at the hands of the state can begin to offer. This can be the most valuable element of restoration for victims of crime.

Finally, victims have a significant interest in simply being informed of the proceedings as they happen. Too often in the current system, after reporting a crime, victims are not informed of anything that follows – arrest, prosecution, sentencing, even release from jail. At the very least, victims have generally expressed that if they were informed of what was happening with their case, they would feel greater resolution of the problem.

**Victims’ Rights Movement**

In the past two or three decades, there has been a strong movement to acknowledge victims’ rights in traditional criminal proceedings. This movement has focused on establishing law to codify the rights of victims the way that defendant rights are so clearly defined. Such rights include a right to be informed of all proceedings, a right to participate in various parts of the proceedings, such as sentencing and plea bargaining, a right to be informed of the risks and benefits of such participation, a right to restitution where possible, a right to confront the offender and ask questions, and a right to representation in the proceedings, among others. An organization known as the National Victims’ Constitutional Amendment Project (NVCAP) has been leading the way for these rights to be codified, mostly in the form of Amendments to state constitutions. So far, all but 16 states have adopted amendments to their Constitutions outlining rights such as these. However, enforcement mechanisms remain minimal, where any exist at all.

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9 *Id.* at 18-21.
10 nvcap.org
California recently followed this trend by adopting one of the most comprehensive victims’ bill of rights, known as Marsy’s Law, of any state to date. The rights acknowledged include: a right to notice of all proceedings; right to be present whenever the defendant has the right to be present; right to be heard at critical stages… before the defendant is released after arrest, before a plea bargain is accepted by the court, before any sentence is imposed, before there is a parole, and any time their rights are at issue; right to have their safety considered before any release decisions are made and to know when the offender is being released or has escaped; right to protect their confidential records; right to refuse to submit to interrogations by the defendant or his lawyer before trial; right to confer with the prosecutor; right to be free from intimidation, harassment, or abuse, and to be treated with fairness and respect; and a right to a speedy trial and to reasonable finality. The law also provides that victims would have an independent right to enforce these rights in any court, and requires that victims be informed of their rights just like the defendants are given their Miranda rights. Additionally, it secures for victims a meaningful opportunity to participate in parole proceedings and sets their safety and the safety of the public as the critical standard before release decisions are made.

NVCAP continues to lobby for such rights to be acknowledged by other states, as well as for an amendment to the United States Constitution officially recognizing the rights nationally. While the national amendment has not yet been achieved, some alternative statutory action has been taken on the national level, including the Crime Victim Rights Act, which was passed in 2004. This Act provided for many of the same

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11 Victim’s Bill of Rights Act of 2008: Marsy’s Law
12 Id.
13 Id.
rights for victims as Marsy’s Law, with some enforcement mechanisms for them to demand their rights in court, and it also authorized some financial support for victims’ law clinics to educate victims of their rights and help them to assert them. While few of these changes have yet been implemented nationally, in 2006 the Court of Appeals for the Ninth Circuit did at least uphold a victim’s right to speak at sentencing under the Act. Some advocates have argued for an integration of the rights into the FRCP, as well, in order to make the rights more effective in court.

This move for acknowledgement of victim rights, however, only begins to address the challenge of reintegrating the victims of crime into the criminal justice process. It focuses only on the rights of primary victims, and continues to ignore the interests of the community of victims as a whole. It is still the State that is represented by the prosecution, and the State simply determining a punishment. While some restitution may be allowed, the forms of repayment are greatly limited by the process. From the perspective of the offenders, they still are held accountable to the State rather than to real people they have harmed, or their communities. Ultimately, while the primary victim may have gained some valuable rights, this is not a full picture of the victim, nor does it embrace the full potential value of victim participation.

**Restorative Justice and Victims**

Restorative justice programs offer an approach which places the power in the hands of the parties most affected, with the State merely as a facilitator with alternative means of punishment where necessary. This approach could potentially satisfy the needs of victims and communities fully in the criminal process, and lead to a much more

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14 Kenna v. United States Dist. Court, 435 F3d 1011 (9th Cir 2006).
effective system of justice. Victims have the freedom to participate as much or as little as they are comfortable, and the communities involved can take a leadership role instead of the State. But perhaps more importantly, these processes may be able to bring the focus on victims, and on the real harm caused by a crime, into the eyes of the offender. Arguably this will improve the reintegration process dramatically and lower recidivism. Standing in front of the community and victim, and accepting wrongdoing directly to them creates a more genuine awareness and understanding of that wrongdoing. Where a particular victim may not be available, similar victim advocacy groups may be able to step in for a similar impact. Moreover, a direct response to the community and victims, via apologies, compensation, community service work, and other creative solutions tailored to the harms caused by a specific crime can also lead to a smoother reintegration into the community, which observes a real debt being paid, as well as some resolution to the harm.

Ultimately, however, even as we develop a restorative justice approach in order to more effectively deal with crime and offenders, many of the same concerns must be addressed for victims as in the traditional criminal justice context. It is therefore essential that, as new programs develop, victims and victim advocacy groups play an active role in their design and planning. Involving victims must be motivated by helping the victim first and foremost, rather than as a means of healing the offender. In other words, we must be careful not to re-victimize the victims in the process, but instead to use the process to empower the victim. Victim participation must be entirely optional, as it shouldn’t be seen as the victim’s duty to rehabilitate the offender. Similarly, the victim’s role must be flexible to fit his or her specific needs and concerns. Support and
counseling must be available in order to help the victim determine what is best for them. Finally, victim safety must be a top priority for any involvement in the process.

It is also worth considering that this process does not necessarily have to replace the current system of punishment by the State. A restorative approach should be the first choice, where possible, but in some cases it may not be an option. Certainly if an offender is unwilling to accept responsibility it cannot be forced on them. Similarly, however, if a victim does not want to participate at all, or simply wants retribution, the traditional approach by the State may be the best option. Such flexibility can empower victims significantly by giving them the choice as to be a part of the process or to leave the offender in the hands of the State. Moreover, if we as a society determine that general deterrence still depends on some clearly defined punishments, the restorative approach may be used as merely a supplement to the current system in order to better address the goals of specific deterrence, repairing of harm, and reintegration, as well as to meet the basic needs of victims.
SOURCES


Twist, Steve. Bulletin: To Supporters of Senate Joint Resolution 1, the Crime Victims Rights Amendment; National Victims Constitutional Amendment Project; April 28, 2004


US Code Title 18, 3771 (Crime Victims’ Rights Act)


Kenna v. United States Dist. Court, 435 F3d 1011 (9th Cir 2006).

Victim’s Bill of Rights Act of 2008: Marsy’s Law

The Bureau of Justice Statistics, www.ojp.usdoj.gov/bjs/

National Victims’ Constitutional Amendment Project, www.nvcap.org