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Justifying Restorative Justice:

A Practical and Theoretical Justification for Restorative Practices¹

Introduction:

As proponents of restorative justice, we tend to believe that these processes should be integrated into the criminal justice system because they work, they make sense and they address the real needs of people. To us, the justification for using restorative practices is almost self evident, However, the truth is that most criminal justice practitioners are extremely skeptical about these processes, and are concerned with their feasibility, effectiveness and theoretical justification.

If we want the justice system to employ restorative practices we must address these concerns. In this paper I will first present evidence that shows the potential of restorative practices to better address victim’s interests, the way in which the criminal justice system is perceived and the effectiveness of this system. Then I will demonstrate the theoretical compatibility of restorative practices with the two main theories of punishment: retribution and deterrence, hence providing a theoretical justification for the use of restorative processes.

Does Restorative Justice Work?

Research into restorative justice programs in the United States has demonstrated the necessity for prosecutors, judges and defense attorneys to cooperate in implementing

¹ This presentation is based on an article titled: “Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices,” 2005(2) *Journal of Dispute Resolution* (Forthcoming, Feb.06)

these programs. Prosecutors are required to surrender part of their discretion and power in dealing with offenders, judges are required to allow participants in restorative processes to reach their own agreements on the resolution of the criminal event and to respect those wishes during sentencing and defense attorneys are required to allow their clients to participate in such practices, if they voluntarily wish to do so. From the perspective of prosecutors, judges and defense attorneys, this is asking quite a lot, and they will need good reasons to proceed with such restorative justice programs.

Unfortunately, while restorative justice practitioners can come up with many reasons, such as the healing power of these processes, their cathartic effect and the needs-oriented approach they offer, such reasons are quite unconvincing and insufficient for many in the criminal justice system. On the other hand, there are three issues of overwhelming interest to the justice system where, I believe, restorative justice can make a significant contribution. Make no mistake about it, I do not argue here that these issues are what restorative justice practices are about and I do not wish for them to become the focus or objectives of these processes. Nonetheless, since empirical studies show that they tend to be probable by-products of successful restorative justice programs, I believe they are worth mentioning to criminal justice professionals in order to promote the meaningful integration of restorative justice within the current criminal justice system.

The three issues that I would like to address are the effectiveness of restorative justice (does it reduce crime rates); the efficiency of restorative justice (does it save time and money) and finally, the perception of fairness among restorative justice participants (does it promote justice).

1. Does restorative justice reduce crime?

The effects of restorative justice practices have been studied and measured for over twenty years, providing a substantial body of empirical evidence on many key aspects of these processes. Within these studies, researchers and evaluators have been (and still are) interested in the ability of restorative justice to reduce recidivism. It is important to note that the current criminal justice system in many countries around the

world suffers from relatively high recidivism rates. The question asked by many within the justice system is whether restorative justice practices are able to reduce these rates. The short answer to this question is: “probably yes.”

The long answer addresses the reason for this uncertainty, which is reflected in “probably yes” rather than “definitely yes.” First of all, not all recidivism studies have demonstrated reduction of re-offense rates, and some (however few they may be) have found that offenders referred to restorative justice programs actually re-offended more than offenders in the court system. Second of all, it is important to be aware of the intrinsic problems associated with recidivism studies in general that impact on their credibility. For example, there may be differences in the way recidivism is defined (does it include any new arrest, only new charges, new convictions, new incarceration, only felonies or also misdemeanors², and more). Furthermore, in order for a recidivism study to be credible it must follow offenders for a substantial period of time after their legal proceedings are over. In many cases, the local criminal justice system may require relatively “young” restorative justice programs to conduct recidivism studies and report their outcomes at the end of every fiscal year. Clearly, the results of studies that follow offenders for several months cannot be considered sufficiently credible. Yet another concern has to do with the control groups used for these studies. In order for a control group to be credible it must include the same type of offenders as those referred to restorative justice programs. It may very well be that offenders who feel remorseful about their conduct, are willing to confess to their wrongdoing and meet their victims are less inclined to re-offend in the first place, leaving the actual effect of the restorative intervention questionable.

That said, and after providing all the necessary caveats, it is extremely noteworthy that the majority of recidivism studies conducted during the last two decades in different countries and cultures around the world show that in worst case scenarios restorative justice has not increased recidivism rates, but in many other cases it has been able to

² A misdemeanor is an offense that carries a punishment of less than a year of imprisonment; a felony includes all other offenses.

reduce recidivism rates, at times substantially. For example, Heather Strang's RISE study examined 275 cases of juvenile property crimes and adult middle-range violent crimes in Canberra, Australia over a five-year period, from 1995 to 2000.³ The RISE experiment demonstrated a reduction of 38 crimes per 100 offenders per year among violent offenders who were randomly chosen and referred to restorative justice practices in comparison to those tried by the court. Another convincing example can be found in a meta-analysis conducted by Mark Umbreit, aimed at searching for "evidence that VOM [victim offender mediation] participation is related to a decrease in the prevalence or severity of subsequent delinquent behavior."⁴ The meta-analysis found "a clear relationship between VOM participation and subsequent delinquent behavior,"⁵ demonstrating a reduction of between 9% to nearly 27% in recidivism rates for VOM participants. Other studies show a reduction of approximately 20% in recidivism rates for offenders who participated in different types of restorative processes, although some studies demonstrate smaller differences and others reductions of up to 38% in recidivism.⁶ In addition, many of these studies have found that in cases where participants in restorative processes did re-offend, this involved less serious offenses than those committed by non-participants.⁷

On the other hand, as mentioned before, not all recidivism studies demonstrate reduction in re-offense rates, and some have shown an increase in re-offending among restorative justice participants. One example of such a study is the RISE experiment cited previously. In addition to the cases described above, the RISE study monitored recidivism rates of drink drivers who were referred to a restorative conference in comparison to similarly situated offenders tried by the court. The study found an increase

³ The Canberra Reintegrative Shaming Experiments (RISE). The final report is available online at <http://www.aic.gov.au/rjustice/riase/recidivism/report.pdf>

⁴ W. R. Nugent, M. Williams and M. S. Umbreit, "Participation in Victim Offender Mediation and the Prevalence and Severity of Subsequent Delinquent Behavior: A Meta-Analysis" *2003 Utah L. Rev.* 137, at 139.

⁵ *i.d.* at 163.

⁶ M. Umbreit, R. B. Coates and B. Vos, (May 2002) "The Impact of Restorative Justice Conferencing: a Review of 63 Empirical Studies in 5 Countries", 12-15, Center for Restorative Justice & Peacemaking, <http://2ssw.che.umn.edu/rjp/Resources/RJP%20CONFERENCING-mono%205-5-02.pdf>; For a comprehensive review of the studies conducted in this area see John Braithwaite, *Restorative Justice & Responsive Regulation* 55-62 (Oxford University Press, 2002).

⁷ See Umbreit, Coates and Vos, *i.d.* at 16-17.

of 6 crimes per 100 offenders per year for drivers who were referred to a restorative intervention. There are, however, a few possible explanations for this outcome. As Strang herself suggests, the revocation of a driver's license was one of the usual sanctions in the court proceedings, which was unavailable in the restorative conferences. It is clear that allowing drink drivers to keep their driver's license increases the chances that they will recidivate. John Braithwaite has suggested that the reason for the increase in recidivism rates of these offenders is the fact that the conferences dealt with the specific crime of drinking and driving but did not confront the underlying drinking problem, which is the real cause of the offense. A third possible explanation may be that these offenders did not meet with victims in their conferences. Studies show a certain relation between a face-to-face meeting of victims and offenders and a drop in recidivism rates.⁸

2. Does restorative justice save time and money?

Here too, the short answer is that restorative processes are probably more efficient than the formal court system in that they are less costly and require less time. However, as with recidivism studies, it cannot be definitely concluded that restorative practices are more efficient than conventional criminal adjudicatory systems. For one, there are no meta-studies that examine the overall costs of restorative practices in relation to their formal alternative, which leaves us only with local programs and their efficiency analysis. While some of these studies demonstrate substantial savings to local criminal justice systems due to the implementation of a restorative justice program, the amount saved and the time invested in these programs varies greatly depending on the type of restorative practice model employed, the types of cases referred to the program and more.

Additionally, restorative justice practitioners are well aware of the amount of time needed for their programs to operate appropriately. Administrative and logistical resources are invested in coordinating conferences, meetings and preparation sessions. Most programs train their facilitators and mediators and some even provide their community members with basic introductory training on restorative justice. Most of the

⁸ See for example C. Hoyle, "Securing Restorative Justice for the 'Non-Participating' Victim" *New Visions of Crime Victims* 97, 112 (C. Hoyle and R. Young Eds., Hart Publishing 2002)

restorative justice programs invest additional time and resources in following up on compliance with the agreement and collect feedback from participants in order to evaluate the quality of their work. All of these may be extremely time-consuming, often requiring more time than would have been required for a similar case in the court system.⁹

As mentioned above, a growing number of studies that examine local restorative justice initiatives have indicated substantial savings. An example of the way a restorative justice program saves both time and money may be found in Chilliwack, British Columbia, Canada. Here, the local criminal justice system saves approximately \$260,000 per year as a result of its restorative justice diversion program. In addition, the time required to dispose a case in the restorative program is substantially less than that required for the same case in court. While an average case in the restorative program requires approximately 13 hours from the moment it commences until its final disposal, the same exact case requires 34.5 hours in court.¹⁰ In Henderson County, North Carolina, researchers found a two-thirds reduction in the number of trials due to the operation of a restorative process, making a substantial impact at the county level.¹¹

Restorative justice also impacts on expenses by avoiding the punishment of first resort – imprisonment. For example, in 1981, Genesee County, New York, initiated a restorative justice program intended to divert the appropriate offenders to “community service sentencing.” Genesee County reports savings of nearly \$4 million since it first began the program, simply by avoiding the expense of \$70 per day per inmate for the aggregated sum of 57,000 jail days.¹²

⁹ For example, in the RISE study it was shown that while the average court case for drink drivers takes 6 minutes, the average conference takes 88 minutes. Similarly, while the average court case for young offenders in property and violence offenses takes 13 minutes, the restorative justice conference requires an average of 71 minutes (L.W. Sherman and H. Strang, *Restorative Justice and Deterring Crime*, Australian National University, Canberra, RISE Working Papers, no. 4 (April 1997), at: <http://www.aic.gov.au/rjustice/rise/working/risepap4.html>)

¹⁰ see <http://www.gov.chilliwack.bc.ca/main/attachments/files/178/Cost-Benefit-Analysis.pdf>

¹¹ Umbreit, *supra note 6*, at 16, citing a study by Clarke, Valente Jr. and Mace (1992).

¹² see Genesee Justice Progress Report, at: <http://www.co.genesee.ny.us/frameset.html?/dpt/communityservices/csprogress052604.html&1>

3. Does restorative justice promote justice?

It is extremely difficult, if not impossible, to assess whether or not justice “was served.” On the other hand, it is relatively easy to find out whether or not justice was perceived to have been served. It is this latter notion – the perception of justice and fairness – that the criminal justice system in the United States and many other countries explicitly strives to achieve. It is in this category that restorative justice practices clearly and unconditionally outdo the formal court system in every possible way.

In the United States, a national survey found that 32% of the public describes the way the criminal justice system treats people accused of committing a crime as “unfair.” According to the survey, the majority of the public was not willing to rate the system as more than “somewhat fair,” and overall, there was a higher percentage of people who perceived the system as “unfair” to some extent than people who perceived it as “very fair.”¹³ Undoubtedly, these are troubling ratings, to say the least, for a justice system that considers the perception of justice to be as important as American judges claim it is.

From the perspective of crime victims, things do not look a lot better. The criminal justice system is structured in a way that systematically leaves victims in the margin. This is not the result of any ill intent on the part of criminal justice professionals; it is simply the product of the way modern criminal law is designed. It is offender oriented, both in theory and in practice. The only interest the system has in victims is as witnesses to the crime. However, it is not difficult to imagine that testimony in court and exposure to cross-examination by a defense attorney are by no means healing experiences; in fact, such experiences carry the risk of re-victimization. The criminal justice system is well aware of this problem, and in many countries, statutes have been enacted, providing victims with certain rights. Unfortunately, without changing the basic paradigm upon which criminal law is based, these laws are of little comfort to victims.

According to a meta-study that collected data from numerous studies of restorative justice programs in the United States, Canada, England and Australia over a

¹³ Sourcebook of criminal justice statistics Online, <http://www.albany.edu/sourcebook/pdf/t20004.pdf>

period of twenty years, it was found that restorative justice was far more likely to be perceived as fair and just than the traditional court system. For example, victims in restorative justice programs were 3.4 times more likely to believe the criminal justice system was fair than victims in court systems. Offenders in restorative justice programs were twice as likely to believe so. In addition, victims who participated in restorative interventions were 2.3 times more likely to believe that the mediator was fair than victims in court. Offenders in restorative interventions were **six times** more likely to believe so. This outcome, in particular, demonstrates the prominence of restorative justice in this category. And finally, both victims and offenders in restorative justice programs were 2.6 times more likely to believe the outcome was fair than victims and offenders in court.¹⁴ These differences are substantial and extremely meaningful.

Moreover, research has found that not only is the perception of justice improved in restorative justice, but also the numbers of cases in which victims' actual needs are answered. For example, one of the most natural and basic forms of acknowledgment of a victim's emotional harm is through an apology. The RISE study found that while 86% of victims in restorative justice received an apology from their offenders, this was the case for only 16% of the victims in court proceedings. Restorative justice is not only superior to the court in answering victims' emotional needs, but in repairing their financial harm as well. Firstly, it is still relatively rare for courts to order compensation or restitution decrees as part of offenders' sentences. But even when they do order the offender to compensate the victim, these orders are only fully implemented in 60% of the cases, whereas in restorative justice, completion rates of restitution agreements stand at approximately 80%.¹⁵

Is Restorative Justice Justified?

After demonstrating that restorative justice processes perform better than the conventional criminal justice system in a number of key categories, it is equally important to examine the theoretical justifications for the use of restorative justice

¹⁴ Barton Poulson, "A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice," *2003 Utah L. Rev.* 167

¹⁵ H. Strang, L.W. Sherman, "Repairing the Harm: Victims and Restorative Justice," *2003 Utah L. Rev.* 15

practices within the criminal justice system. Since restorative processes are not intended to replace the fact finding stage of a trial, but rather to offer an alternative to the outcome of the criminal proceedings – the punishment, it is interesting to examine their compatibility with the two dominant theories of punishment: retribution and utilitarianism.

Restorative Justice and Retribution:

At first sight, restorative justice and retribution seem to contradict each other. While retribution focuses on the harm caused to society by the offense, restorative justice focuses on the harm caused to the individuals involved in the criminal event; while retribution views punishment as the goal, restorative justice seems to view it as an educating and healing opportunity; while retribution is retrospective, restorative justice is prospective. Nonetheless, when examining the premises of both theories, it is apparent that they share more than meets the eye.

According to Georg Hegel, one of the forefathers of modern retribution, the offensive act obligates the offender to face the consequences of his or her actions. According to Michael Moor, a prominent contemporary retributivist, the offense obliges the state to punish the offender. In restorative justice things are not very different. In his seminal book “Changing Lenses,” Howard Zehr wrote: “When someone wrongs another, he or she has an obligation to make things right. This is what justice should be about. It means encouraging offenders to understand and acknowledge the harm they have done and then taking steps, even if incomplete or symbolic, to make that wrong right.”¹⁶ In other words, the offense obligates the offender to restore the harm he or she caused, but it also obligates society to hold the offender accountable for his or her action. In both the retributive theory and the restorative justice theory the offense is in fact a “call for action;” an event that creates positive obligations on both offenders and society. In fact, if anything, it seems as though restorative justice is stricter with offenders than the

¹⁶ Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* 197 (Herald Press, Pennsylvania, 1990)

retributive ideal since it requires them to take concrete action instead of passively awaiting their punishment.

Another commonality between the two seemingly contradictory theories is their ultimate goal. According to Hegel, an offense is a breakdown of the social ties that connect individuals in a society. Punishment is intended to “annul” the crime, and by so doing to “restore” the justice. In restorative justice, the obligations imposed on offenders are intended at “restoring” or “repairing” the harm. I believe that there is a deep connection between the retributive “restoration” of justice and the restorative “reparation” of the harm. According to George Fletcher, a prominent American retributivist, a criminal offense gives the offender “a form of dominance” over the victim. That, according to Fletcher, is the breakdown in society - the public harm caused by the offense. In order to fix that breakdown, Fletcher contends that punishment should strive to “restore the position and dignity of victims.”¹⁷ This, for restorative justice practitioners, should sound extremely familiar. As shown above, there is no better way for “restoring the position and dignity of victims” than through a restorative process. It is restoration in a far deeper sense than the false vindication victims are told to expect from the punishment of their offenders

Finally, an important premise in the theory of retribution is the notion of “just deserts.” Offenders must be punished in proportion to their wrongdoing. In restorative justice, the mere notion of punishment is treated in an entirely different way. Punishment is not at the center. Repairing the harm caused to the victim is most essential. However, this harm is to be repaired by offenders as part of their obligations in the wake of the crime. A broad understanding of punishment, which includes the denunciation of a wrongful act along with the imposition of some kind of inconvenience on the actor, can easily cover the restorative obligation of making things right. In fact, the mere participation in a restorative process can be seen as far more demanding and inconvenient for offenders than sitting passively in a courtroom and hoping for the best.

¹⁷ G.P. Fletcher, “The place of Victims in the Theory of Retribution,” 3 *Buff. Crim. L.R.* 51

With this new understanding of punishment, a third and central commonality between restorative justice and retribution can be set. Going back to the notion of “just deserts,” it must be asked who should determine what kind of punishment offenders “deserve” for their wrongdoing? A traditional retributivist would surely contend that the public, through its representatives and judges, should determine the punishment. A restorativist could agree that the public should determine the “deserved” response to crime, but would expect the public’s representatives to be the victims and the other participants in restorative processes. In other words, both theories agree about the principle, but differ regarding the technical means by which the principle should be realized. In conclusion, we have seen that both the retributive ideal and restorative justice strive to achieve similar goals, though at times they do so in different ways. However, they are not contradictory; restorative justice simply does a better job of achieving these common goals.

Restorative Justice and Utilitarianism:

When comparing both restorative justice and utilitarianism, it seems as though these two theories have much in common. Both strive to achieve a nobler goal through the public response to crime, and therefore, both are forward looking. A utilitarian theory of punishment justifies punishing offenders if by so doing crime can be reduced. Jeremy Bentham, one of the forefathers of modern utilitarianism, identified two objectives for punishment: specific deterrence and general deterrence. The idea behind both is that by increasing the “price” for a criminal act, rational potential offenders would be deterred from choosing to commit one.

As demonstrated in numerous recidivism studies, restorative justice processes probably reduce the chances of re-offense. Therefore, under a utilitarian theory of punishment it would be more than justified to employ restorative processes as the public response to crime. In fact, it would be the preferred means of responding to crime, since it would best achieve Bentham’s specific deterrence: causing the punished offender to refrain from committing other crimes in the future.

On the other hand, restorative processes seem, at first, to be insufficient in terms of their ability to provide general deterrence. How can restorative justice processes, which are generally unknown and perceived to be “soft on crime,” deter potential offenders other than the specific offender participating in the restorative process? I believe that in order to answer this question it is necessary to offer a new understanding of the term “general deterrence.” Moreover, I believe that this new understanding is crucial to the criminal justice system because “old school” conventional deterrence simply does not work. Numerous empirical studies have shown that potential offenders are generally uninterested in the harshness of the punishment they may face but are extremely concerned with the probability of actually having to face that punishment (which in most cases is not very high).¹⁸

Before pursuing this new understanding of “general deterrence,” in which we will try to find innovative ways for discouraging potential offenders beyond mere intimidation, it is important to examine what makes people follow the law in the first place. A few social theories have attempted to explain compliance with the law. For instance, some theories proclaim that people obey the law when they feel their social group will disapprove of the law’s violation or when they believe that others, whom they respect, view the law as worthy of obedience.¹⁹ Other theories contend that people

¹⁸ See Paul H. Robinson and John M. Darley “the Utility of Desert” *91 Nw. U.L. Rev.* 453, at 458 – 464, footnotes 12-22 (the authors cite studies that demonstrate the low risk of getting caught, convicted and imprisoned after committing serious offenses; they also cite studies that demonstrate the low deterrent effect of imprisonment and the uselessness of lengthy prison terms. The authors conclude this part arguing that taking into account the studies above, it would require ridiculous periods of imprisonment, which the community could never accept, to truly deter potential offenders.); see also Braithwaite, *supra* note 6, at 102 and 108 (demonstrating the failure of deterrence as a policy and outlining the “deterrence trap,” leading to the conclusion articulated by Robinson and Darley above.); see D. Bush, “Law and Economics of Restorative Justice: Why Restorative Justice Cannot and Should Not Be Solely About Restoration” *2003 Utah Law Review* 439, at 454-457 (the author discusses whether, from a law and economics perspective, the criminal justice system deters crime. He finds in conclusion a “marginal deterrence value to prison,” but determines that the benefits of “long-term incarceration will be outweighed by the costs under any analysis, given that it serves no deterrence purpose, increases societal costs, and leaves offenders who might otherwise be productive members of society without that ability;” see Dan Kahan, “Social Influence, Social Meaning, and Deterrence”, *83 Virginia L. Rev.* 349, 361 (where the author describes how despite the heavy reliance on imprisonment during the 1980s, crime rates steadily continued to increase).

¹⁹ See for example Robinson and Darley, *i.d.*, at 468-470 (citing scholars and researchers that emphasize the dominant role of “informal forces of social control” and “interpersonal influence” in inducing compliance with the law, over legal sanctioning;); See also Kahan, *i.d.*, at 357 (citing studies that show that

generally perceive themselves as moral human beings who try to conduct themselves accordingly, and if they equate violating the law with immorality they will refrain from doing so.²⁰ The connection between these different theories is clear. As Robinson and Darley explicitly state: “[eventually] people come to hold the moral standards of the cultures in which they are raised; internal moral standards and external norms generally label the same actions right or wrong.”²¹

Gunther Jakobs, a German scholar, coined the phrase “positive general deterrence”²² which in essence is based on the social theories mentioned above. According to Jakobs, general deterrence can best be achieved by strengthening and supporting the basic norms prohibiting criminal conduct rather than by using intimidation and the threat of inflicting pain in cases of non-compliance.

I find this new understanding of general deterrence extremely appropriate to this analysis since it provides restorative practices with a strictly utilitarian justification of punishment. Restorative processes (especially the broader ones such as group conferencing and circles) enable communities to express their disapproval of criminal conduct and to reiterate the value of abiding by the law. Offenders in these processes face their families, neighbors and community members as they express their disapproval of the criminal conduct and expect them to live up to their obligations. In so doing, not only will the defendants experience the condemnation of their acts, but each and every participant will experience it as well. It is in this way that restorative processes achieve, quite literally, positive general deterrence.

Conclusion:

As shown above, restorative justice practices can help the conventional criminal justice system address some of its most burning concerns: reducing crime rates, saving

“most people refrain from engaging in crime not because they fear formal penalties but because they fear damage to their reputation and loss of status.”)

²⁰ Robinson and Darley, *supra note* 18, at 469.

²¹ *i.d.* at 469-470. See also Kahan, *supra note* 18, at 358-359 (“individuals tend to adapt their moral convictions to those of their peers.”)

²² See Manuel C. Meliá, “Victim Behavior and Offender Liability: A European Perspective” 7 *Buff. Crim. L. Rev.* 513, 514 footnote 5.

valuable resources and strengthening the image of the justice system in the eyes of the public. But restorative practices are not merely practical tools. They are philosophically compatible with the current theories of punishment which influence today's sentencing policies. In fact, I believe they can help give these theories new meaning and rehabilitate their basic values and purposes. Today, sentencing policies in the United States are mainly based on the notion of incapacitation. Convicted offenders are generally imprisoned, regardless of their true "just deserts" or the correct "amount" of punishment necessary to deter the specific offenders and the general public. This means that society has, in fact, given up on retribution, since people are punished far beyond what they really deserve, and that it has given up on deterrence, since by preventing offenders from returning to their communities the deterrent effect of the punishment cannot be measured. Restorative justice can help restore the criminal justice system by restoring the basic principles which should govern its sentencing policies.