



Restorative Justice: Friend or Foe?

By Thomas J. Quinn

The concept of "balance" is key to our system of justice. Judges daily are faced with the challenge of weighing protection of society versus due process for individuals; the rights of offenders versus the interests of victims; and the reality of more cases than can humanly be decided under the full color of law. The degree of difficulty is increasing as higher expectations from the victim movement and escalating demands from a fearful public confront a fiscally strapped justice system.

Dissatisfaction with justice is not new, although the disconnect felt by many citizens is in ascendancy as a result of recent high profile cases. What is different is the growing influence of victims in setting justice policy. Victims are demanding to be present, to be informed, to be heard. Further, they seem to hold the moral high ground over rigid bureaucracies arguing procedural nuance that seems unconnected to disorder in the street or pain felt by victims of crime. Victims are organized, and legislators are listening. Some 20 states have adopted constitutional amendments for victims and the President has endorsed a federal amendment. In some ways, that has been fueled by the anomie among citizens disjoined from justice.

The tendency of some officials - especially lawyers knowledgeable about case law and valuing precedence - is to go on the defensive, arguing against change. The judiciary, by design, helps to insure structure, order and stability over time - a bulwark against

whim and transient shifts of public opinion. Against that legitimate role must be balanced the recognition of one of our founding fathers, Thomas Jefferson, that our institutions must change as society matures. He thought it as unlikely that an adult don the clothing worn as a child as our institutions rely on practices of former generations. The judiciary as an institution and the individuals who comprise it can play a deliberate part designing the changes that are certain to arrive.

Judges are more than arbiters of fact of individual cases; they are respected professionals who share the responsibility to help mature the process of justice. The consumers of justice have legitimate concerns, and the judiciary can play a leadership role in transforming that dissatisfaction into positive system change. Short of a constitutional amendment, or perhaps in addition to it, programs and policy adjustments can address much of the dissatisfaction. Restorative justice principles offer a common sense framework for this to occur.

Restorative justice addresses both the process and the goal of justice. Under these principles, the victim plays a central role and the sanction process is more personal. Crime is considered first an offense against the individual and the community, rather than the state. The offender is held accountable to right the wrong, to repay the damage, with more direct involvement of the principals and greater emphasis on consensus processes rather than adversarial ones. Choices are given to victims.

This is actually a return to the justice of old, before the Norman conquest at the Battle of Hastings in 1066. For centuries in England the local villages delivered justice by making the offender repay the victim, based on the Laws of Ethelbert which continued

traditions established by earlier cultures back to the Code of Hammurabi 2000 years before Christ.

Furthermore, the Bible supports a restorative justice philosophy. While "an eye for an eye..." is often thought of as justification for revenge, some scholars cite its limiting and restorative aspects. A reading of Leviticus 24 supports this interpretation:

"...he that killeth a beast, shall provide a beast...eye for an eye, tooth for tooth, shall be restored..." William the Conqueror and his son Henry changed the emphasis from individual victims to crimes against the state; the fines and centralization gave him money and power.

The supporters of restorative justice would return some of the control and power to the victim and the community.

Importantly, the victim advocacy community is cautiously opening its arms to this approach. They are acknowledging that since most offenders are returning to the community, we should ensure that the intervention is a positive one. One note of caution: many victims are suspicious that restorative justice is a veiled attempt at rehabilitation with no serious attempt to involve or address the victim's concerns. Any agent of change should honestly attempt to involve victim interests if their support is to be expected.

This would not replace the adversarial process for all cases, but many issues are forced into the adversarial system due to an absence of options, not unlike the situation on the civil side where ADR has been accepted as a necessary partner in delivering justice. Even in the most contested and serious cases, however, there steps that can be taken to help victims along the adversarial path. Examples of restorative justice

approaches:

Victim offender mediation: the victim is offered the opportunity to confront the offender with a trained mediator - either directly or through video. Screening and preparation help diffuse extreme actions and set an atmosphere where anger can be expressed, questions answered, and restitution agreements reached, before or after incarceration. Victims should never be coerced. Research demonstrates that such processes reduce fear, increase satisfaction, and improve payment of restitution. In the relatively few very serious cases where such dialogue takes place in prisons with lifers, victims still report a sense of healing otherwise absent.

Family group conferences and Sentencing Circles: Victims and their family meet in a mediated setting with the offenders and their families, (sometimes with community representatives too) to discuss the case, how to repay the damage, and what penalty should apply. This more personal approach is credited as part of the reason juvenile crime went down 27% in one Australian jurisdiction; it also reduced prosecutions, court cases, and incarcerations in New Zealand. Several U.S. jurisdictions, including the Mille Lacs tribe in Minnesota, are adapting this model to their locale.

Community service: This well known sanction is particularly appropriate for crimes with no specific victim, as a substitute to repay society for the disruption caused. The specific service should in some way be related to the harm. The Midtown Community Court in Manhattan requires prostitutes to work in the immediate area cleaning up trash and graffiti and contributing to a sense of order. Like other examples cited here, community service should be rooted in restorative principles in its actual



application, not just a punitive sanction.

Restitution: This most basic of sanctions usually suffers from a lack of professional process for assessing, ordering, collecting and disbursing the funds. It is low priority in most systems, with few having state of the art operations or involving the victim in the discussions with the offender.

Sentencing: The private program "Restorative Resolutions" in Winnepeg, Canada prepares client specific plans tied to restorative justice principles. The community is involved in designing the sanction.

The U.S. District Court field probation and pre-sentence staff in Arizona collaborate with the U.S. Attorney's office and other agencies to focus on victim needs throughout the sanction process.

Balanced and Restorative Justice: BARJ is supported by the federal Office of Juvenile Justice and Delinquency Prevention in several sites. BARJ principles call for every sanction to include consideration of public safety; accountability to victim and community; and competency of the offender.

Victim Impact Panels: Victims are given the opportunity to speak to classes or groups of offenders, whether or not the perpetrator in their case was apprehended. The limited research available indicates it helps victims heal and lowers recidivism.



Citizen reparative boards: Vermont's judiciary will refer some probation cases to volunteer citizen boards to contact the victim and meet with offenders to design an appropriate sanction.

There is no question that adding the victim and the community to the equation will complicate the mechanics of the process, but should advance the search for justice.

The police community has come to recognize that their job is more than enforcing the law. As part of the community their responsibilities include helping to solve problems and create an environment that encourages public safety. Other components of the justice process, including the judiciary, are beginning to acknowledge their role as part of the broader justice mechanism charged with insuring domestic tranquility. Though interpretation of case law and administration of court rules are important, it will take more to achieve justice in the eyes of America. How the court can best interact in new ways with the other segments of the justice process and the citizenry to better serve victims is best left to local factors and consensus, but a judiciary that is open to new methods and partnerships would be a step in the right direction. Judges should be informed about victim issues, present during efforts at system improvement, and heard in the community. The process and the perception of justice will be better for it.

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