

Restorative Justice

What is It and Who is It For?

By

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I want to introduce you to Restorative Justice by first saying quite a lot about the punitive mindset that our current model of criminal justice is based on, the immature idea that if one does something the authorities declare is wrong, then the individual must be punished. This authoritarian, punitive mindset, according to developmental psychology, is one that most of us should begin to outgrow before we reach middle school age and, certainly, by the time we are adults. The fact that our society's criminal justice system is based on this immature, under-developed mindset, should trouble us all. Mature people require mature solutions for our challenges. But our punitive system is based on the old eye-for-an-eye morality demonstrated on playgrounds and schoolyards, "fair is fair," one must be wronged to the same degree they are determined to have wronged others in order to make things right.

In our criminal justice system, what's fair is determined by equating the impacts of all wrongs with a number that can then be used to decide the fine to be paid or the amount of time behind bars perpetrators must spend for justice to be served. Our punitive authoritarian response to crime is like withholding a child's allowance or putting them into a timeout. It is a further extension of being sent to our rooms as kids or receiving detention after school for misbehavior. This analogy quickly breaks down, however, when we consider that it is the authorities, those driven to punish wrongdoers, whose development has been stifled. It is the punitive authoritarian mindset itself that is immature.

Developmental psychologist, Jean Piaget called this rudimentary idea, which he attributed to the earliest stage of human development, "retributive justice," explaining that, "In the domain of retributive justice, every punishment is accepted as perfectly legitimate, as necessary, and even as constituting the essence of morality."¹ During our earliest years, up to about age seven, seeking retribution, which is synonymous with revenge, is the essence of our morality—fair is fair, and eye for an eye. Those who wrong us or break the rules must pay.

James Fowler, another developmental psychologist, says, "stage one looks to the consequences of an act and the probable degree of punishment it would entail,"² to determine if it is right or wrong. In other words, early in our lives we don't think about the value of our actions or about how they might impact the welfare of others to determine if ethical or not. We only consider if they have been declared wrong by some external authority, and the personal risks of our own disobedience. As Lawrence Kohlberg, best known for his stages of moral development, puts it, "The young child is not oriented to the bad as 'being selfish,' 'Being deceitful,' etc.; [but] is, rather, oriented to the bad as being punished."³

When we are young children, obeying the authorities in our lives is necessary as we learn to navigate the world, like holding Mommy's hand while crossing the street or, later, observing the rule of thumb to look both ways before crossing by ourselves. Taking Mommy's hand, no questions asked, "because I said so," is an example of Kohlberg's preconventional morality, the punitive authoritarian morality I've been talking about that is typical of children younger than seven. Looking both ways crossing the street reflects the next stage of moral development, the conventional stage, based on obeying social rules, mores, and customs. But at Kohlberg's final stage of moral development, the postconventional stage, the individual differentiates oneself from the beliefs and expectations of others and society to determine which universal principles—like freedom, and equality, truth, and justice—ought to be applied in all circumstances for the benefit of all and every individual, regardless of one's own self-interests.

A loving parent will initially take a child's hand crossing the street and will soon teach the child to look both ways when navigating life on its own, but a loving parent must also respect a child's autonomy and work to help them fully mature and unfold as individuals who can and must eventually make their own choices in life. By extension, the same can be said of a mature society, that it must respect the freedoms and rights of its citizens. At best, however, most societies only reach the conventional—law-and-order—stage of development. This is so because community, as the word implies, is based upon what people share in common, including their beliefs and behaviors. We're usually happy to let people cross the street on their own, so long as they obey the rules while doing so, but just as soon as they violate those rules, we revert to the preconventional retributive model that translates the impacts of every crime into a number for determining fines and time.

Many years ago, when in Louisville, we had a church pianist from Ecuador. When I asked what she thought of life in the U.S., she told me she was surprised by all the rules we have. "I thought you were supposed to be a free country," she said, "but you have rules for everything, where you can park your car, signs that say keep off the grass. It's overwhelming." When she put it that way, I imagined how difficult it must be to suddenly find oneself in a country with so many unknown rules and laws, and what it must be like to live in a place where you just park anywhere you wish for as long as you want with no fear of getting a ticket, or walking on a lawn without getting in trouble for trespassing. There are so many rules, so many dos and don'ts in our society, that have been ingrained in us almost since birth, that we don't really think about their value or necessity. I told our pianist, "There are a lot of rules to know. I guess you practically have to be an attorney to live here."

In the so-called freest country in the world, we have both a greater percentage and a greater number of our citizens in prison than anywhere else, even though we have only five percent of the world's population. In light of this, it is hard to justify calling ourselves a free country. If we are to truly live up to our idea of freedom, which is a postconventional principle, then we have to have mature solutions to our problems, solutions that continue

to guarantee freedom, respect for the individual, and that promote individual unfolding—not a system, like our current punitive criminal justice system, that is almost certain to stunt one’s ability to achieve one’s full potential.

Restorative Justice is such a system. For Restorative Justice isn’t about punishing wrongdoers, but about holding them accountable in ways allowing them to repair some of the damage they caused while maintaining their dignity, freedom, and a chance to remain productive members of the community, which they may lose for the rest of their lives once locked behind bars for even brief sentences. Once stigmatized as a felon, it’s nearly impossible for ex-convicts to find gainful employment ever again, and they remain ineligible for public assistance, including public housing. According to a 2015 Bureau of Justice Statistics report, nearly 80 percent of those released are arrested again within five years, 44 percent of them during their first year of freedom.⁴

Although many efforts are made and programs exist to help “reform” inmates, the system of locking people up in cages to compensate for their crimes with timeouts is not working. In fact, according to a 2011 Pew Research report on recidivism rates, based on a decade of statistical research, the opposite seems true. “During the past 10 years,” the report says, “all 19 states that cut their imprisonment rates also experienced a decline in their crime rates.”⁵ It would appear that our current criminal justice system is only increasing our crime rates with an unforgiving penal system that turns most offenders into lifelong hardened criminals whom taxpayers must not only house, clothe, feed, and otherwise care for, but also continue to repeatedly have arrested, tried, defended, prosecuted, sentenced, and imprisoned.

Nor, as we all know, is this immature “fair-is-fair” mentality even fair. Sentencing is all over the place for the same crimes and seems to target nonwhites and poor people more than others. If this is justice, then we must conclude justice is not blind, nor even blindfolded.

In addition to its failure to stop crime, it’s tendency to perpetuate crime, and its unjust biases, not to mention it’s tremendous expense to our communities—as much as 75 cents per tax dollar here in Spokane, County—locking people behind bars, or making them pay heavy fines to the municipalities, does little to nothing to repair the damage done to the victims of crimes. Some may feel better knowing that their perpetrators were taken off the streets for a short while, but the damage is still done.

Restorative Justice, by contrast, establishes a legal agreement between the perpetrator and their victim to help repair whatever damage has been done. If someone burglarizes your home and damages your property in the process, sending them to jail doesn’t return your stolen items, fix the damage, or help you feel safe in your own home again. But what if you, the police, the prosecutor, public defender, and the courts work on a contract that would require the individual to get a job and replace your stolen goods, pay for any repairs, for

counseling if you'd like, and install a security system. The agreement would not only include real consequences should the perpetrator fail to deliver but would also include detailed strategies and support systems to help them succeed.

This form of Restorative Justice, developed by my late friend, Allan MacRae, New Zealand's former Youth Coordinator's National Operations Manager, is called Family Group Conferencing, or Community Conferencing where it is used here in the U.S. In the early 1980s, Allan was responsible for fixing a youth justice system that was too expensive, ineffective, and that unfairly impacted native Maori families. Family Group Conferencing brought survivors and youth offenders together with law enforcement, community members, family, and one's support system, to work out an agreement through which the offender can make reparations in a way that is acceptable to the survivor. It worked so well that in 1989 New Zealand passed the Children, Youth and Their Families Act, requiring all juvenile offenders to undergo a family group conference before ever appearing in court, hopefully to keep them from ever going to court. New Zealand now holds about 7000 FMCs each year, has completely closed all of its juvenile detention centers, has cut juvenile crime by more than 60 percent, has reduced juvenile court in its largest city from all day, every day to just two hours on Friday to see about six cases.

You might think that property crimes are a lot different than violent crimes, including sexual assault, which is certainly true. But Restorative Justice has worked just as well in these cases, especially by empowering victims to confront their abusers, to regain their dignity, and to hold them accountable in meaningful ways. For example, Allan once told me about an elderly woman who had her purse snatched and was knocked to the ground in the process. Afterward, she was afraid to leave her retirement community. During her conference with the young offender who took it, she startled everyone when she suddenly got up, walked up to him and handed him her purse. "The last time you took this," she said, "an officer had to hand it back to me. Now I want you to."

Afterward, Allan was disturbed to realize she had come to the conference alone in a cab. He deeply apologized for not making sure she had a support system present, which is supposed to be vital to the process. "No, no," she protested, "I wanted to come alone. You see, I'm at an age where I have to depend on others for almost everything and almost everything is done for me. I needed to do this for myself." And in the process, her confidence and courage had been restored. That's the restoration in restorative justice.

Yet this approach to crime is not new. In fact, it is more ancient, more natural, and more human than is imprisoning people. I once heard Dr. Fania Davis, a Civil Rights Attorney, Professor of Law, and Director of RJOY, Restorative Justice for Oakland Youth, explain that "For most of human history reconciliation and restitution to victims and their kin took precedence over vengeance. This is because restoring social peace and avoiding blood feuds were paramount concerns." This is why, as she also says, "in most indigenous languages,

there is no word for *prison*.”⁶ The punitive system we have become accustomed to emerged only in the 13th century, with the dawning of the Nation-state and the industrial age.

In 2010, I had the good fortune of meeting with a delegation from Afghanistan who came to the U.S. to learn about our criminal justice system. During our day together, they told me they had two systems of justice in their country, a formal system that is expensive, slow, and corrupt, and a traditional system in which tribal leaders come together with the parties involved, sometimes over a period of several days, to work out an agreement in which the offender agrees to make reparations for the harm caused. This keeps the community peaceful by preventing vengeful feuds and keeps it whole by allowing the offender to make amends and remain a respected and productive member of the community. So long as the agreements keep the peace, they are recognized as legitimate by the Afghan government.

Perhaps, because the U.S. came into existence long after the rise of the Nation-states, and nearly eradicated its indigenous populations and their ancient wisdom, that it is completely unfamiliar with anything but industrial systems of punishment that lock people out of the way while we march toward progress, culminating today in the advent of for-profit corporate prisons.

The good news is that today many are realizing just how costly our punitive system is and are working to institute restorative practices. According to a 2016 article in the *Justice Policy Journal*, “Restorative practices are increasingly being incorporated within state statutes and codes. Twenty states specifically address restorative practices, including victim offender mediation. Other related practices included in state statute or code include victim offender conferencing, victim offender dialogue, and victim offender reconciliation.”⁷ I was personally involved in starting Restorative Justice Louisville in 2010, which has been working ever since to prevent a few youthful mistakes from becoming the mistake of a lifetime, using group conferencing to keep kids out of the school-to-prison-pipeline.

We’re making progress in our nation, thanks to lots of people working both in and out of our criminal justice system. But, for the most part, our supposed free country remains highly punitive. This is so whether it’s rightwing conservatives chanting “lock her up, lock her up,” when referring to a political opponent or threatening to hang their own Vice President for not giving them exactly what they want, to left wing radicals using social media to destroy the reputations and livelihoods of anyone they disagree with. But wanting to punish people we disagree with, while a natural emotion, reflects an immature mind, not a liberal mind. Any society that predominantly handles crime with punishment is an immature society, not a free society. Liberty means freedom. And being liberal means being for freedom.

This isn’t to say there won’t always be a few individuals who must be forcibly kept away from society for its protection, but, even then, they don’t have to be locked away in small

cages, which should be considered cruel, and, I hope someday, unusual punishment. And if we didn't spend so much unnecessarily locking away millions of Americans, rather than keeping them as productive contributing members of our society, we could afford to give better care to the few people who must be detained. But the point now is that as country that claims to value freedom above most everything else, and as a liberal religion rooted in the idea of liberty and justice for all, we need to move swiftly toward a mature approach to criminal justice that better preserves this principle and our free society.

Nelson Mandela, who spent 27 years of his life in prison for resisting Apartheid in South Africa, once said, "to be free is not merely to cast off one's chains, but to live in a way that respects and enhances the freedoms of others." May we establish ways of dealing with criminal justice in our nation and in our world that respect and enhance the freedoms of others.

¹ Gruber, Howard E. and, Voneche, J. Jacques, Jason Aronson, Inc., Northvale, NJ, 1995, p. 187f.

² Fowler, James, *Stages of Faith*, HarperCollins, New York, NY, 1981, 1995, p. 58.

³ Munsey, Brenda, ed., *Moral Development, Moral Education, and Kohlberg*, (Religious Press Education, Birmingham, AL, 1980, p. 80.

⁴ <https://bjs.ojp.gov/library/publications/recidivism-prisoners-released-30-states-2005-patterns-2005-2010-update>

⁵ https://www.michigan.gov/documents/corrections/Pew_Report_State_of_Recidivism_350337_7.pdf

⁶ Davis, Fania E., PhD, "Gandhi's Justice, Restorative Justice," Remarks delivered at the 10th Annual *Howard Thurman Convocation* at Church of the Fellowship of All Peoples, 2041 Larking Street, San Francisco, CA 94109, Oct. 16, 2005.

⁷ Pavelka, Sandra, "Restorative Justice in the States: An Analysis of Statutory Legislation and Policy," *Justice Policy Journal*, Volume 2, Number 13 (Fall), Center on Juvenile and Criminal Justice 2016.