

Restorative Justice and Human Nature

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Faculty Introduction

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Jackson Bittick's article addresses a topic of urgent import: how to fix our broken criminal justice system. Increasing public recognition that we must do something about the problem of mass incarceration in this country naturally leads to the search for reasonable solutions. One popular alternative to the status quo is the restorative justice model, which seeks to replace punitive stigmatization and exile of offenders with a set of practices aimed at restoring victims, offenders, and the broader community. In his article, Bittick sympathetically lays out the main virtues of the restorative justice model, with special attention to its recognition and leveraging of positive aspects of human nature. He then casts a critical eye on the ways in which some offenders may game this system designed to help reintegrate them into society. This careful, balanced examination leads to thoughtful conclusions about how to shape criminal justice policy going forward.

Abstract

The criminal justice system in America is failing—America has the highest incarceration rate and the largest prison population in the world, and our system is in need of reform if we wish to end these worrying trends. The following research paper examines the conference model of Restorative Justice, a popular criminal justice reform option. Restorative Justice is a theory of justice that emphasizes the restoration of victims, offenders, and the community when a crime is committed, and the conference model is one of its forms. This paper argues that the conference model relies too heavily on shared human experience for success, that human nature will make the conference model ineffective, and this paper will also suggest possible solutions to this problem.

*I know hundreds of reformed criminals and I don't know one who was reformed by a policeman's night-stick, a severe sentence, or prison cruelty. A brutal flogging in a Canadian prison, and, years after, three days in the murderous straight jacket on a dungeon floor in California, certainly did nothing to turn my thoughts toward reformation.*¹

These words from Jack Black speak to a brutal truth about our country—that the American criminal justice system is failing. According to the Bureau of Justice Statistics² and the Prison Policy Initiative,³ the United States currently incarcerates 698 per 100,000 residents, the highest rate in the world, and we currently house 2.3 million prisoners, the largest number in the world. This rate is higher than some of the most oppressive places in the world such as China and North Korea.⁴ Even worse is the Black incarceration rate in America, where one out of every fourteen Black men will at one point end up in jail, compared to the rate of one out of every one hundred and six for White men.⁵ There are several reasons for these numbers being so high, such as policy changes in the last forty years, cultural and attitudinal changes towards crime, and the punitive and retributive nature of the current justice system – all of which need reform.

One reform option that has been gaining popularity is the idea of a restorative justice system.⁶ While appealing, there is one potential flaw to the system that could prevent it from being an effective replacement for our current justice system. In this essay, I will give an account of what restorative justice is and demonstrate that restorative justice relies too heavily on a supposed shared human experience amongst its participants to triumph over human nature; I will support this claim by providing an example from Michelle Alexander's *The New Jim Crow*; lastly I will consider possible responses to this problem, using an early 20th century essay by a career criminal, Jack Black,⁷ as an example, as well as demonstrating possible procedural safeguards against these problems of human nature.

² Bureau of Justice Statistics, "Prisoners in 2017." Washington D.C., April 2019, 3.

³ "United States Profile," Prison Policy Initiative.

⁴ "United States Profile," Prison Policy Initiative.

⁵ Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New York Press, 2012), 100.

⁶ John Braithwaite, "Restorative Justice and a Better Future." *Dalhousie Review* 76, no. 1 (1996): 9-31.

⁷ Black, *You Can't Win*, 295-305.

Restorative Justice

Our current criminal justice system is built on vengeance and punitiveness. Punishments for crimes are meant to deter people from committing crimes, while prisons and the horror stories from them are meant to scare people away from actions that would land them in jail. In practice, however, this does not work because instead of deterring crime, our criminal justice system stigmatizes those who commit crimes as irredeemable. As John Braithwaite writes, “Stigmatization is the kind of shaming that creates outcasts; it is disrespectful, humiliating.”⁸ This stigmatization is the reason why more police and more prisons often exacerbate crime problems; if the police and the prisons treat people as inherently bad, the criminals’ negative behavior is reinforced by the world around them.

A popular solution to these problems is the restorative justice model. Restorative justice is a criminal justice model centered around “restoring victims, restoring offenders, and restoring community.”⁹ Restoring

victims means restoring their property or fixing their injuries, as well as restoring their dignity and sense of security. Restoring community means restoring harmony between the offender, the victim, and the community at large,

Restoring offenders means restoring their dignity, restoring a sense of security and empowerment, and restoring a sense of procedural justice.

as well as restoring “the deliberative control of justice by citizens.”¹⁰

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These are done primarily in two ways: reintegrative shaming and the restorative conference model. Reintegrative shaming means shaming the person’s negative actions while treating the person as if they were essentially good. The restorative conference model (which may also be called a commission or a council) brings the victim, the offender, and members of the community into a conference, where the offender is shamed by the members of the conference for performing a wrong action, and the conference decides the consequence with the restorative justice officer.

⁸ Braithwaite, “Restorative Justice,” 12.

⁹ Braithwaite, 15.

¹⁰ Braithwaite, 16.

¹¹ Braithwaite, 18.

The beginning of Braithwaite's essay, "Restorative Justice and a Better Future," depicts a typical conference model. Braithwaite gives an example of a teenage boy named Sam who stole a woman's purse. Sam has had a difficult upbringing—he was abused by his parents and mistreated at school, and is homeless, struggling to make ends meet—and the restorative justice officer struggles to find people that Sam can have in the conference. Eventually, the conference is made up of Sam's sister, his uncle George, his hockey coach, the victim, and the victim's daughter. This conference involves not only the victim and the offender, but people who are attached to them as well. In the conference, the members of the council share how Sam has let them all down, how the victim is now afraid to go outside for fear of being robbed, and how much trouble Sam caused the victim post-robbery. At one point, the conference gets very emotional and heated, and a break is called for (an important detail that I will discuss later). The turning point of the conference is when Sam's sister empathizes with him over their experience in the broken home, and from then on, the conference is centered around how Sam can repay his debt to the woman he robbed.

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When Sam's sister empathized with him, she was able to understand Sam in light of all of his experiences, and through this empathy, the victim was able to feel a shared sense of humanity with Sam and

began to cry when she understood who Sam was at his core. This shared sense of humanity is important for two reasons. The first is that it is a part of human nature to empathize with others. People empathize to varying degrees, but at a fundamental level, people have empathy because of their shared human experience. The second reason this shared sense of humanity is important is because it illustrates why Braithwaite believes restorative justice is so appealing. On the value of restorative justice traditions found in every culture, he writes,

All cultures value repair of damage to our persons and property, security, dignity, empowerment, deliberative democracy, harmony based on a sense of justice and social support. They are universals because *they are vital to our emotional survival as human beings* and vital to the possibility of surviving without constant fear of violence.¹²

¹² Braithwaite, 20, emphasis added.

For Braithwaite, the values that underlie restorative justice traditions in every culture are rooted in our shared humanity, as is the cross-cultural appeal of restorative justice, the application of which should be culturally flexible:

Hence, Restorative Justice must be a culturally diverse social movement that accommodates a rich plurality of strategies in pursuit of the truths it holds up to be universal. It is about different cultures joining hands as they discover the profound commonalities of their experience of the human condition...¹³

This characterization of restorative justice's appeal and success relying on shared human experience can be summarized as saying that restorative justice relies on human nature in both its appeal and in its functionality. The conference model gathered people around Sam who all previously experienced desperation at some level, who all understand isolation and alienation at some level, and who could empathize with Sam on a personal level based on these commonalities in their histories and experiences. Ideally, this is the goal of every restorative justice conference—to reintegrate the offender back into society based on shared human experience.

Human Nature

The emphasis on a common human nature is one source of restorative justice's appeal, but it is also a potential flaw. Human beings have the capacity to do great things, as is evident by the victim who could empathize with the person who robbed her. However, human beings are also capable of great misdeeds as well. The moment in Sam's restorative justice conference where the restorative justice officer adjourned the meeting for a short break due to tensions rising and emotions burning could have been the breaking point instead of the turning point. Instead of the sister showing empathy with Sam, the members of the council could have come back to the room with hardened hearts and continued to accost Sam, turning reintegrative shaming into stigmatization. Before the conference convened, the victim could have made her mind up that she would show no mercy to Sam and plotted with her daughter to seek as punitive a punishment as possible. While Braithwaite strategically

¹³ Braithwaite, 21.

gave an account of a conference that did not go smoothly to show how the good side of human nature can prevail, he does not adequately account for the bad side of human nature – the vengeful, punitive side that looks to stigmatize others, even with the opportunity to show grace.

This problem of the punitive and vengeful aspect of human nature is well demonstrated by Michelle Alexander in her book *The New Jim Crow*, where Alexander meticulously shows how our criminal justice system is a racial caste system designed to round up Black and Brown people en masse and alienate them from the population. On the topic of how our criminal justice system has gotten away with this discrimination, Alexander shows how it took two steps for human nature to go awry. “The first step is to grant law enforcement extraordinary discretion regarding whom to stop, search, arrest, and charge for drug offenses; thus ensuring that conscious and unconscious racial beliefs and stereotypes will be given free reign.”¹⁴ By discretion, Alexander is referring to the practice of police officers using their judgement to decide what to do in each scenario. Discrimination issues are prevalent because our criminal justice system has allowed the worst aspects of human nature to permeate throughout the criminal justice system. In this particular instance, Alexander is referring to racial bias—both conscious and unconscious—but one does not have to succumb to racial bias to display their negative aspects of human nature. Overly aggressive enforcement policies,¹⁵ vengefulness from prosecutors,¹⁶ excessively punitive punishments,¹⁷ and more can also be seen permeating throughout our criminal justice system. Who is to say that the victim of a crime will not seek vengeance when given the opportunity in a restorative justice conference? While we can be reasonably sure that there will be successful conferences, we can also be reasonably sure that tensions will rise in a room where a woman has to face her abuser, where a man has to face his assaulter, and so on. What we know of human nature in general, and how it has played out in our criminal justice system in particular, suggests that not every conference is going to end well.

¹⁴ Alexander, *The New Jim Crow*, 103, emphasis added.

¹⁵ Alexander, 31.

¹⁶ Alexander, 115.

¹⁷ Alexander, 91.

A possible response to the concern that human nature could show its negative side in the restorative justice conference and render it ineffective is that it is a better, more humane system than the one the United States currently has. As stated above, our current system is riddled with the consequences of men and women of poor character abusing their power. This is one reason why we house more prisoners than the rest of the world, both per capita and in absolute number. While there are risks in giving people who do not normally practice law the authority in a restorative justice conference to punish the offender, the system is designed to let the good parts of human nature triumph over our more negative tendencies. And since no system is perfect, a system that is risky but shows an improvement over a system that is bogged down by failure after failure is an improvement.

Black also shows why a system designed to show empathy towards offenders is an effective one. In his essay “What’s Wrong with the Right People?,” Black explains how a simple act of kindness by a judge did more to change him than anything done to him before:

For the past fifteen years I have been feeding and clothing myself instead of letting the taxpayers do it, because, at the time of my life when I least deserved it, I met trust and judicial leniency, which gave me hope. The judge who sentenced me to a year when he might have locked me up for life and thrown the key away, took a greater chance on me than I ever took on anything. He stopped my stealing as effectively as a hangman’s rope. He gave me my life and I couldn’t double-cross the friend who once cut the bars in a jail window and gave me my liberty. Loyalty is the only virtue of the underworld, and the judge appealed to that. He put me in a hole where I had to stop stealing and fall into the lock-step of society.¹⁸

It was the empathy of the judge who saw that Black had not been given a fair shot to integrate into society that finally reached the heart of Black. In earlier run-ins with legal authority, he had been repeatedly beaten, abused, and stigmatized as a lowly criminal. Once he was given a lesser

¹⁸ Black, *You Can’t Win*, 298.

sentence with the chance to get out early, however, Black felt the weight of societal pressure come off of his shoulders, and a newer, lighter weight

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took its place—a pressure to live up to the lesser sentence the judge gave him. The common human experience between Black and the judge is what fostered the restoration of Black and his reintegration back into society, and this was done under a system of retributive justice. An entire system based on the compassion of this judge could lead to a drastic drop in prison recidivism, as well as lead to a drastic drop in the overall crime rate in America. It is worth considering whether we can fix up the current system, or whether we need to replace it with something else entirely, such as restorative justice.

Possible Solutions

Restorative justice does not come without its risks. The restorative justice conference places people from the community in the same room as the victim and the offender, and they are asked to do their best to keep level heads while still being able to shame the offender in a way that does not ostracize them from society. While the positive, empathetic side of human nature may lead to a deeper understanding of the wrongdoer, the negative, self-righteous and vindictive side of human nature may view the offender as deserving of punishment in full. The members of the conference are asked to show their feelings without losing control of them. While the shared human connection between the conference members and the wrongdoer may lead to a therapeutic examination of the wrongdoer, leading to a just punishment for their crime, the fragility of human emotions may lead to a high stress environment that is unhelpful to those who participate. These are no small asks of those attending the conference and these negative aspects of human nature (vindictiveness and emotional fragility, chiefly) may prove to be too much for the conference to succeed.

One way to minimize the risks of human nature leading the conference astray is to create procedural safeguards that ensure each conference operates as intended. The conference model is meant to be similar to a group therapy session; the wrongdoer feels reintegrated into society through the conference members' shaming and eventual acceptance,

similar to group therapy sessions consisting of members admitting their flaws and being accepted by the group despite those flaws. Thus, restorative justice officers must be able to run a conference as effectively as a psychotherapist runs a group therapy session. The training these officers would receive would guard against possible emotional volatility in the conference, as well as provide an authority figure to look to from the conference members.

However, there is a significant portion of the prison population that creates a puzzle for restorative justice advocates in how to best apply procedural safeguards, namely, psychopaths. According to Kent A. Kiehl and Morris B. Hoffman of the National Institutes of Health, “Though psychopaths make up roughly 1% of the general male adult population, they make up between 15% and 25% of the males incarcerated in North American Prisons.”¹⁹ While psychopaths are generally thought of as a small part of society, up to one-fourth of the male prison population are diagnosed with psychopathy, which roughly amounts to over five hundred thousand men. Psychopaths in prison are significant because, according to Kiehl and Hoffman, psychopaths not only show no signs of improvement in group therapy sessions, but they actually are at risk of their behavior becoming worse once they leave prisons should they be exposed to group therapy sessions.²⁰ Psychopaths are better able to understand how to manipulate people due to the access to information they receive from people in group therapy sessions. They better see the signs of a vulnerable individual and use what they have learned to get what they want.

Allowing psychopaths to participate in a restorative justice conference is dangerous. Because of their ability to manipulate the emotions of the people around them, they will be able to prey on any vulnerability they see in order to derail a conference session. If a psychopath sees a conference member who is behaving more vengefully than others, they may try to turn the conference against that member to disrupt the meeting. The psychopath may notice that the victim is still emotionally vulnerable as an effect of the wrong done to them, and they may take advantage of this perceived weakness to derail the session. Psychopaths

¹⁹ Kent A. Kiehl and Morris B. Hoffman, “The Criminal Psychopath: History, Neuroscience, Treatment, and Economics,” *Jurimetrics*. National Institutes of Health (2011): 14.

²⁰ Kiehl et al, p. 14 and 21.

could undermine the procedural safeguards of a restorative justice conference by preying on the negative aspects of human nature those procedures are meant to guard against. How might the conference model guard against this?

The most practical answer would be to bar any prisoner evaluated by a psychologist and deemed a psychopath from participating in a restorative justice conference. While this would make the goal of ending mass incarceration a difficult one to attain, Kiehl and Hoffman discuss ways in which juvenile psychopaths can be treated in specific ways to decrease recidivism rates, such as intense and long-lasting therapy sessions known as “decompression treatment.”²¹ Attempting to project the success of decompression treatment onto adult psychopaths is still difficult, but the results of this research provide hope that they may still be curable by other means. It is not a certainty that restorative justice conferences would be manipulated by psychopaths.

Conclusion

Mass incarceration runs counter to the concept of restorative justice. Decreasing crime rates and restoring citizens has been pushed aside in favor of harsh, retributive punishments issued in the name of deterring crime. Convicted criminals are stigmatized and treated terribly, only pushing them further into a life of crime. The answer to the problem of mass incarceration is to restore those affected by the criminal justice system and reintegrate them back into society. Restorative justice, and the conference model in particular, is designed to let empathetic aspects of human nature shine through the negative, vindictive aspects of human nature to foster a community of empathetic and empowered members. Restorative justice looks to empower its citizens with the ability to simultaneously value justice for the victim of a crime and value restoration of the criminal. Procedural safeguards such as restorative justice officers trained in group-therapy and the barring of psychopaths from participation in the conference model will allow for the negative aspects of human nature to be minimized, allowing for conferences to operate as intended and allowing for justice to be done for both the victim and the wrongdoer. While we should be wary of the negative

²¹ Kiehl et al, 21-25.

aspects of human nature when reforming our criminal justice system, we should move forward understanding that despite the potential pitfalls that may come with the restorative justice system, the good is likely to prevail. ■

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Bibliography

Alexander, Michelle. *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York: The New Press, 2012.

Black, Jack. *You Can't Win*. Port Townsend, WA: Feral House, 2013.

Braithwaite, John. "Restorative Justice and a Better Future." *Dalhousie Review* 76, no. 1 (1996): 9–31.

Kiehl, Kent A. and Morris B. Hoffman, "The Criminal Psychopath: History, Neuroscience, Treatment, and Economics," *Jurimetrics*. National Institutes of Health, 2011, Page 14.

"United States Profile." Prison Policy Initiative. Northampton, MA. Accessed December 8, 2019.

U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics. "Prisoners in 2017." Written by Jennifer Bronson and Ann Carson, Washington D.C., April 2019.

Student Biography

Jackson Bittick is a senior majoring in Philosophy and minoring in Management at Sam Houston State University. He is the President of the Philosophy Club and a member of the Ethics Bowl Team, led by Dr. Zachary Bachman. After reading John Braithwaite's "Restorative Justice and a Better Future," assigned by Dr. Benjamin Mitchell-Yellin in his Philosophy of Crime and Justice class, he was inspired to learn more about restorative justice, and his interest in ethics and morality made it a natural topic of research. With the guidance of Dr. Bachman, Dr. Mitchell-Yellin, and the Philosophy Department, Jackson hopes to continue his research in graduate school.