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Juveniles and the Law: More Than A Diversion, Restorative Justice Allows For Restitution By And Rehabilitation For A Youthful Offender

Margo Chaly

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Margo Chaly
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Juveniles and the Law:

More than a diversion, restorative justice allows for restitution by and rehabilitation for a youthful offender

Despite the increase in transfers, and regardless of the age at which a bright line rule is – or should be – drawn, there remain young (under the age of majority) individuals who face the justice system. Juveniles will face either retributive or restorative methods of punishment. Restorative justice is more cost effective than confinement and focuses on restoring the offender's status in the victimized community. The various approaches to restorative justice share an emphasis on offender accountability through offender-victim-community interactions. There remain criticisms (lack of offender remorse and high recidivism rates) and limitations (immeasurable success and unmonitored participation). Still, this paper will show that a shift towards restorative justice is a favorable alternative or diversion to the traditional retributive juvenile justice processing system.

For the past 100 years in the United States a separate justice system has existed to adjudicate, sanction and rehabilitate juveniles on the premise that there are significant psychological differences between adolescents and adults.¹ Traditionally, only in extreme cases juveniles are processed in the criminal system, for example if they pose a threat to other juveniles, if the offense is exceptionally severe or gruesome, or if there is a history of repeated offenses.² While this paper is not meant to provide an in-depth discussion of adolescent psychological

¹ Steinberg, L. *Should Juveniles Offenders Be Tried As Adults? A Developmental Perspective on Changing Legal Policies*. January 19, 2000. Page 1.

² Steinberg, L. *Should Juveniles Offenders Be Tried As Adults? A Developmental Perspective on Changing Legal Policies*. January 19, 2000. Page 1.

development, there exists evidence of legally relevant competencies, capacities, and capabilities that are helpful in determining whether or not there should be a bright line ‘jurisdictional boundary between juveniles and adults, and if so, at that age it should be drawn.’³

Whether or not a juvenile is processed through the criminal justice system can affect the posture of the case. First, the legal process is distinct between criminal and juvenile court; the former functions on an adversarial model while the latter is based on a cooperative model.⁴ Second, the legal standards applied in each court differ, specifically as relates to competency. Adults are presumed competent unless they suffer from a serious mental illness or retardation.⁵ Juvenile courts may consider psychological development and age as opposed to a strict presumption of competency. Lastly, the final adjudication of an adult in the criminal system can differ dramatically from that of juvenile court. In the criminal system a finding of guilt almost always results in punishment whereas in juvenile court the outcome of being found delinquent may result in punishment but there is usually also an option for rehabilitation.⁶

There is a recent shift policy shift which shows a growing number of juveniles prosecuted as adults nationwide.⁷ As many as 247,000 offenders younger than age 18 would have been referred to criminal courts in 2007.⁸ At the close of the twentieth century there was a noticeable shift in policy from offender-based to an offense-based focus, regardless of the offenders’ age.⁹ Most states have multiple mechanisms to impose adult sanctions on offenders of juvenile age

³ Steinberg, L. *Should Juveniles Offenders Be Tried As Adults? A Developmental Perspective on Changing Legal Policies*. January 19, 2000. Page 2

⁴ Steinberg, L. *Should Juveniles Offenders Be Tried As Adults? A Developmental Perspective on Changing Legal Policies*. January 19, 2000. Page 3.

⁵ Steinberg, L. *Should Juveniles Offenders Be Tried As Adults? A Developmental Perspective on Changing Legal Policies*. January 19, 2000. Page 3.

⁶ Steinberg, L. *Should Juveniles Offenders Be Tried As Adults? A Developmental Perspective on Changing Legal Policies*. January 19, 2000. Page 3.

⁷ Steinberg, L. Page 2. However, as of 2011, most states do not report the transfer rate. USDOJ, OJJDP. Juvenile Offenders and Victims: National Report Series. September 2011. Page 1.

⁸ USDOJ, OJJDP. Juvenile Offenders and Victims: National Report Series. September 2011. Page 21.

⁹ Steinberg, L. *Should Juveniles Offenders Be Tried As Adults? A Developmental Perspective on Changing Legal Policies*. January 19, 2000. Page 2.

including, but not limited to, judicial waiver¹⁰, prosecutorial discretion¹¹, automatic transfer¹², and ‘once an adult always an adult’¹³ laws.

Whatever the mechanism to transfer juveniles to criminal court, presumably in an effort to deter youth crime or reduce further criminal behavior on the part of youth subjected to transfer, research has failed to establish the effectiveness of transfer. Studies find a greater recidivism rate among juveniles who were prosecuted as adults than those processed through the juvenile system.¹⁴ Of those youth who committed new crimes, those sent to adult court re-offended at approximately twice the rate of those sent to juvenile court. While not all studies agree that transfer has counter-deterrent effects, generally speaking, trying youth as adults does not reduce crime or increase public safety. I would therefore recommend that youth remain in the juvenile justice system while under the age of 18, regardless of offense. What follows is a discussion of the two models of justice within the juvenile court system.

Within the juvenile justice system there exists contrasting approaches to processing youthful offenders. The traditional system, generally a retributive approach, defines crime as an offense against the state, with a limited or passive role by the victims.¹⁵ The traditional system typically results in a punishment involving confinement. Alternatively there is a restorative approach, which defines crime in terms of harm to victims or a violation of relationships, and therefore

¹⁰ A juvenile court judge may transfer the case to criminal court based on various factors including the seriousness of the offense, maturity of the offender and likelihood of the offender’s rehabilitation. In some states there is a presumption of waiver and the burden of proof is on the juvenile to prove that s/he is suitable for rehabilitation. Steinberg, page 1

¹¹ A prosecutor has the discretion to file charges in either juvenile or criminal court. No hearing is held to determine which court is appropriate and there may be no formal stands for deciding between them.

¹² Certain categories –usually a combination of age and offense- of juveniles are automatically excluded from juvenile court and must be filed in criminal court.

¹³ A special form of exclusion requiring criminal prosecution of any juvenile who has been criminally prosecuted in the past, usually without regard to the seriousness of the current offense.

¹⁴ USDOJ, OJJDP. Juvenile Offenders and Victims: National Report Series. September 2011. Page 21.

¹⁴ Steinberg, L. *Should Juveniles Offenders Be Tried As Adults? A Developmental Perspective on Changing Legal Policies*. January 19, 2000. Page 26.

¹⁵ Bergseth, K.J., *Journal of Criminal Justice* 35 (2007). Page 434.

victims are encouraged to actively participate in an offender's adjudication.¹⁶ The goal of restorative justice is to repair the harms associated with the crime by bringing together those most affected by the crime to discuss offender accountability and the needs of victims¹⁷ through alternatives to confinement, discussed in greater detail below.

The policy rationale for restorative justice approaches to juvenile delinquency is a direct response to the overcrowding and high costs of correctional institutions as a result of criminal processing sentences that result in confinement. A number of states recognized the problem in the 1960s and 1970s, which led to an increased use of the strategies generally referred to as restorative justice, in an effort to reduce the demand for expensive state confinement and to supervise as many young offenders within the community.¹⁸ State legislators are tasked with balancing operational resources that allow the justice system to function within their jurisdictions. Some, for which incarceration is a key component of the youth justice system, choose to focus on youth confinement facilities.¹⁹ Many others believe that costly confinement should be reserved for chronic and seriously violent offenders, and therefore chose to invest in community-based restorative justice programs.²⁰

The trend to employ restorative approaches as alternatives to traditional juvenile processing continues to expand throughout the country. We now turn to an in-depth assessment of the models of restorative justice, including the goals, procedural guidelines, components, case studies and criticisms.

¹⁶ Bergseth, K.J., *Journal of Criminal Justice* 35 (2007). Page 434.

¹⁷ Bergseth, K.J., *Journal of Criminal Justice* 35 (2007). Page 434

¹⁸ Butts, Jeffrey A. (2011). *Resolution, Reinvestment and Realignment: three strategies for changing juvenile justice*. CUNY. Page ii.

¹⁹ Butts, Jeffrey A. (2011). *Resolution, Reinvestment and Realignment: three strategies for changing juvenile justice*. CUNY. Page ii.

²⁰ Butts, Jeffrey A. (2011). *Resolution, Reinvestment and Realignment: three strategies for changing juvenile justice*. Page ii. CUNY. Page ii. California, Pennsylvania, Wisconsin, North Carolina, Ohio and Oregon.

The overarching purpose of restorative justice programming is restoration of victims, offenders and the wider community. Application of these methods to juveniles must be approached in a developmental context that considers the mental and emotional distinctions between adolescents and adults.²¹ Accountability, the repeating theme of the following restorative justice models, requires a combination of adolescent development, public safety and the effects of victimization into a process that helps young offenders avoid putting themselves and others at risk in the future.²² As a general principle, restorative justice is the “idea of discussion, dialogue and negotiation between the parties involved in and affected by a given crime.”²³

Juvenile justice programs are codified in most states as a result of the evolving policy agendas nationwide. Most states incorporate one or more, or a combination, of the following models in legislation.

1. Balanced and Restorative Justice

In this model, the meaning of accountability –a juvenile’s obligation to a victim when the juvenile commits a delinquent act- shifts the focus from incurring a debt to society to that of incurring a responsibility for making amends to the victimized person and community.²⁴ Approximately sixteen states promote balance and restorative programs, which include a focus on the protection of the community; imposition of accountability for violations of the law; and implementation of skills needed to live responsibly and productively as a law abiding adolescent.²⁵

²¹ USDOJ, OJJDP. Juvenile Offenders and Victims: National Report Series. September 2011. Page 2.

²² USDOJ, OJJDP. Juvenile Offenders and Victims: National Report Series. September 2011. Page 2.

²³ Karp, D. Reluctant Participants in Restorative Justice? Youthful Offenders and their Parents. 2004. Page 199.

²⁴ USDOJ, OJJDP. Juvenile Offenders and Victims: National Report Series. September 2011. Page 3.

²⁵ Pavelka, Sandra. Restorative Juvenile Justice Legislation and Policy: a National Assessment. 2008. Page 101, citing Alaska Statute Sec. 47.12.010.

2. Restorative Justice Principles

Under this model, legislation often includes a nod to improving public safety, but the focus is overtly shifted to the rehabilitation of the juvenile offender. In Colorado, the goal is to reduce the rate of recidivism by providing treatment in the best interest of the juvenile.²⁶ California's Welfare and Institutions Code, Section 1700 requires that offender training and treatment shall be substituted for retributive punishment and shall be directed toward the correction and rehabilitation of young persons who have committed public offenses.²⁷

3. The Balanced Approach

Approximately seven states promote a system based on the principles of "personal responsibility, accountability and reformation within the context of public safety and restitution to the victims and community."²⁸

While the codes vary state by state, a common language is pervasive throughout all programs and jurisdictions. The programs that these models use to meet the policy goals expressed above involve a strength-based rather than deficits-based approach to help.²⁹ Examples of the juvenile accountability programs that recognize victims as clients of the justice system and emphasize the offender's objective to make reparation to their victims³⁰ include: victim-offender mediation; family group conferencing; circle sentencing; and reparative boards³¹. These four basic models

²⁶ Pavelka, Sandra. Restorative Juvenile Justice Legislation and Policy: a National Assessment. 2008. Page 101, citing Colorado Statute CRS Section 19-2-102.

²⁷ Pavelka, Sandra. Restorative Juvenile Justice Legislation and Policy: a National Assessment. 2008. Page 101.

²⁸ Pavelka, Sandra. Restorative Juvenile Justice Legislation and Policy: a National Assessment. 2008. Page 101, citing Oregon Statute Sec . 419C.001.

²⁹ ²⁹ USDOJ, OJJDP. Juvenile Offenders and Victims: National Report Series. September 2011. Page 3.

³⁰ ³⁰ USDOJ, OJJDP. Juvenile Offenders and Victims: National Report Series. September 2011. Page 6. Discussing the Pennsylvania's State Juvenile Court Judges' Commission.

³¹ U.S. DOJ OJJDP. Model Programs Guide.

(1) Victim-Offender Mediation: While empowering the victim, this process is designed to develop empathy in the offender, which can help prevent future criminal behavior.

(2) Family group conferences developed from the indigenous Maori (New Zealand) values that emphasize the roles of family and community in addressing wrongdoing. Based on the theory of reintegrative shaming, this process

share common features including a community-based sanctioning focus, non-adversarial and informal processes, and decision making by consensus.³²

These programs stress the components of accountability, which include acknowledgment of personal responsibility and reparation. When provided in a safe, face-to-face setting, input from victims and communities affected by crime will almost always facilitate the best process to determine restorative obligations.³³ Three factors used to measure the success of the restorative justice process are the level of participation from all parties, their willingness to engage in dialogue, and the effect the discussions have on each party.

The extent to which youthful offenders participate in and provide effective dialogue in the restorative process is helpful to understand the foundation of restorative justice programs. While empowerment of victims and offenders is greatly enhanced by the voluntary nature of these programs, the reality is that in many cases offenders are sanctioned to participate with the only alternative option a return to court where more severe sanctions may be imposed.³⁴ Still, while avoiding a criminal record and the subsequent obstacles to employment and travel, offenders find relief of conscience in the ability to repay the moral debt they owe to victims and society.³⁵

intends to deter individuals from committing crime by two informal types of social control: conscience and fear of social disapproval.

(3) Circle Sentencing resemble traditional sanctioning and healing practices of the native American Indians. Participants include victims, offenders, and justice and social service representatives (police, lawyers, judges). The process is labor intensive and is not recommended as a response to first offenders or minor crimes.

(4) Community Reparative Boards include a small group of specially trained citizens who conduct public meetings with offender who have been court-ordered to participate. The members of the board develop a sanction agreement with the offender who is required to document his or her progress in fulfilling the terms of the agreement, a report of which is submitted to the court.

³² Bergseth, K.J., *Journal of Criminal Justice* 35 (2007). Page 434.

³³ Karp, D. *Reluctant Participants in Restorative Justice? Youthful Offenders and their Parents*. 2004. Page 200.

³⁴ Karp, D. *Reluctant Participants in Restorative Justice? Youthful Offenders and their Parents*. 2004. Page 200.

³⁵ Strang, H. *Repairing the Harm: Victims and Restorative Justice*. (2003) Page 37

While the role of parents³⁶ in the juvenile justice system is essential for the effective execution of restorative justice programs and reduction of recidivism, getting to that stage proves to be an uphill battle for most parents.

At the turn of the nineteenth century the first juvenile court opened in Cook County, Illinois with the ultimate goal of rehabilitation in a flexible, informal manner. In this system, due process protections did not attached to juvenile offenders. Following the British legal doctrine *parens patriae*, in which the state's duty was interpreted so as to serve as the guardian of the interests of the juvenile, Judges wielded wide latitude of discretion. By the 1960s civil activists challenged the discretion of judges and argued that if juveniles were going to treated as adults in the sentencing face by being sent to institutions similar to prisons they should be given due process protections. In an effort to stem the harsh results of juvenile justice proceedings, *In re Gault* afforded juveniles the right to notice of charges, to counsel, to confrontation and cross-examination of witness, and to privilege against self-incrimination.

Significant within the execution and effectiveness of restorative justice programs is the possibility for different treatment of offenders.³⁷ Research indicates that community members have often recommended more severe sanctions for particular offenders based on race, age, and gender.³⁸ The variations of sanctions often increase the harm and future delinquency of some offenders.³⁹ It appears that community members may allow there judgment to be swayed by individual biases.

³⁶ "Parent(s)" as used here includes guardians.

³⁷ Rodriguez Nancy, Restorative Justice at Work: Examining the Impact of Restorative Justice Resolutions on Juvenile Recidivism. *Crime & Delinquency* V53. N. 3 355-379. 360 (2007).

³⁸ Rodriguez Nancy, Restorative Justice at Work: Examining the Impact of Restorative Justice Resolutions on Juvenile Recidivism. *Crime & Delinquency* V53. N. 3 355-379. 360 (2007).

³⁹ Rodriguez Nancy, Restorative Justice at Work: Examining the Impact of Restorative Justice Resolutions on Juvenile Recidivism. *Crime & Delinquency* V53. N. 3 355-379. 360 (2007).

In 1974 Congress passed the Juvenile Justice and Delinquency Prevention Act, which continues to govern the juvenile justice system today, and the Office of Juvenile Justice and Delinquency Prevention (OJJDP) was created.

It is still unclear which offenders or cases are most likely to succeed after taking part in a program of restorative justice.⁴⁰ The impact of restorative justice on recidivism has not shown a significant reduction in crime.⁴¹ Proponents of the various restorative programs (mediation, conferencing, etc) argue that current statistics are not indicators of program effectiveness, but rather result from flawed methodological practices.⁴²

However, some results can be extrapolated from various studies regarding recidivism. For example, poverty and parental neglect affect recidivism.⁴³ Mostly, indicators do not provide any significant relationship between program type, age of participants, or program point of entry and recidivism outcomes.⁴⁴ As specific study of the Maricopa County, Arizona, Community Justice Committees found that after 24 months of successfully completing diversions, juveniles in the restorative justice program had slightly lower rates of recidivism.⁴⁵ Further, this program found that restorative justice programs can reduce recidivism, especially among girls, first-time offenders, and offenders with only one prior offense.⁴⁶

Future

⁴⁰ Rodriguez Nancy, Restorative Justice at Work: Examining the Impact of Restorative Justice Resolutions on Juvenile Recidivism. *Crime & Delinquency* V53. N. 3 355-379. 356 (2007).

⁴¹ Rodriguez Nancy, Restorative Justice at Work: Examining the Impact of Restorative Justice Resolutions on Juvenile Recidivism. *Crime & Delinquency* V53. N. 3 355-379. 359 (2007).

⁴² Rodriguez Nancy, Restorative Justice at Work: Examining the Impact of Restorative Justice Resolutions on Juvenile Recidivism. *Crime & Delinquency* V53. N. 3 355-379. 359 (2007).

⁴³ Rodriguez Nancy, Restorative Justice at Work: Examining the Impact of Restorative Justice Resolutions on Juvenile Recidivism. *Crime & Delinquency* V53. N. 3 355-379. 360 (2007).

⁴⁴ Rodriguez Nancy, Restorative Justice at Work: Examining the Impact of Restorative Justice Resolutions on Juvenile Recidivism. *Crime & Delinquency* V53. N. 3 355-379. 360 (2007).

⁴⁵ Rodriguez Nancy, Restorative Justice at Work: Examining the Impact of Restorative Justice Resolutions on Juvenile Recidivism. *Crime & Delinquency* V53. N. 3 355-379. 371 (2007).

⁴⁶ Rodriguez Nancy, Restorative Justice at Work: Examining the Impact of Restorative Justice Resolutions on Juvenile Recidivism. *Crime & Delinquency* V53. N. 3 355-379. 371 (2007).

In order for restorative justice programs to be successful, participants, including legislators, must have a working understanding of adolescent psychology. Further, participants must consider the crime rates, racial and ethnic makeup, and the poverty level of the community in which an offender will carry out his or her sanction as well as reintegrate upon completion of the sanction. The point of the restorative justice programs is to reduce the stigma of the juvenile adjudication on a young person who may have merely misjudged a situation, as teens and young adults often do, resulting in a harm against another person or property. Of course, it is imperative that perpetrators of heinous crimes i.e. murder and rape, not be ever considered for the restorative justice program because those crimes cannot result from a peer pressure instigated 'misjudgment' by an adolescent. Even a child knows that murder and rape (although they may not know what rape is in a technical, Merriam-Webster sense) are wrong and should not happen. Therefore, it is imperative that offenders of murder and rape, regardless of age, are tried as adults and punished to the fullest extent of the law.

Restorative justice should be left to the first time offenders, unless the offense is murder or rape as stated above. A restorative justice program will allow a young offender to understand the value of crime, and, specifically, the subsequent consequences. Like teaching a young person the value of money by performing tasks or chores, a young person who is pulled into a destructive situation may simply need the attention and oversight of a well maintained restorative justice program to understand that, unlike the chore or task that results in 'income,' the crime results in sanctions. Therefore, the restorative justice program will deter future criminal activity.

A utopic restorative justice program will be flexible to incorporate the various factors of a juvenile offender: age, race, class, geographical location, familial relationships, community

make-up. The group who determine a sanction for the juvenile offender should include age-appropriate peers as well.