

1-1-2009

Restoration But Also More Justice

Stephanos Bibas

University of Pennsylvania, stephanos.bibas@gmail.com

Follow this and additional works at: http://scholarship.law.upenn.edu/faculty_scholarship

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), [Ethics and Political Philosophy Commons](#), [Law Enforcement and Corrections Commons](#), [Public Policy Commons](#), and the [Social Control, Law, Crime, and Deviance Commons](#)

Recommended Citation

Bibas, Stephanos, "Restoration But Also More Justice" (2009). *Faculty Scholarship*. Paper 253.
http://scholarship.law.upenn.edu/faculty_scholarship/253

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.

RESTORATION, BUT ALSO MORE JUSTICE

Stephanos Bibas*

Erik Luna writes a strong and concise defense of restorative justice, a sprawling international movement against some of the impersonal, state-centered, punitive trends of our times. Although there is much to admire in it, restorative justice sacrifices traditional notions of criminal justice. It has become a cover for left-wing hostility to punishment, just as victims' rights has become a cover for right-wing toughness on crime. Restoration nevertheless deserves to supplement but not supplant retribution, and its processes should indeed give ordinary victims and criminals much greater roles.

Luna ably catalogues the strengths of a movement that spans substantive and procedural goals. Substantively, criminal law is not just an impersonal effort to deter, incapacitate, or extract bloodless Kantian retribution. Victims and criminals are wounded, ill, scared, angry, defiant . . . the list goes on. They need to heal these wounds and vent these emotions, but abstract academic discourse ignores them. In the messy real world, as Luna recognizes, punishment must serve multiple goals, including these.

Procedurally, criminal justice too often is divorced from the substantive goals it supposedly serves. All it seems to do is to work as a speedy assembly line, efficiently dispensing incapacitation but doing so coldly and with little concern about human feeling or healing. Procedure does need to better serve the other substantive values it is supposed to implement.

Luna is also right that when they agree to take part in restorative justice, victims, criminals, and their families usually come away happier and better off. Face-to-face discussions, mediation, and circles let people tell their stories, vent, apologize, forgive, and heal. And these human interactions, by relatives and friends who often must go back to living with one another, matter immensely to them.

Modern justice has become too state-centered and impersonal. Crime is centrally about harm to victims. It makes them feel helpless, and criminal justice does too little to re-empower them. Victims deserve to be heard, to influence processes, and to have the power to forgive some portion of punishment.

The problem, though, is restorative justice's megalomaniacal ambition to sweep away the traditional goals and processes of criminal justice instead of merely supplementing them. To restorative justice advocates, retribution for retribution's sake seems pointless. Their overoptimism about human nature leads them to slight deterrence and incapacitation as at best secondary, at worst needless. Prison seems like a pure waste of human life.

But punishment is supposed to hurt. The bite of punishment sends an unequivocal message condemning the wrongdoer and vindicating the victim. It pays the criminal's debt to society. It teaches criminals and others not to hurt others, humbling proud wrongdoers. Restitution and fines can supplement prison and perhaps reduce the need for it. But because they lack the bite of condemnation and pain, they send too soft a message, overlooking the wrong and

* Professor, University of Pennsylvania Law School.

trying to hurry by it too fast. Criminals need to atone, to be humbled, to suffer. If they do not, the criminal does not learn a lesson and victims and the public never see justice done, leaving them dissatisfied.

True, there are more minor offenses for which prison may not be necessary. Thus, it is no surprise that restorative justice is most prevalent for juvenile crime and minor adult crimes, not violent felonies. Shaming punishments are among the most promising alternatives to prison; they can do what fines and restitution cannot, precisely because they unequivocally blame and inflict pain. And until the public sees serious criminals suffer, it is reluctant to reintegrate and welcome them back.

Restorative justice deserves more of a role in American criminal justice. Already, several states have instituted restorative processes for victims and inmates to meet after conviction and sentence. Shorn of its political baggage and reflexive hostility to punishment, restorative justice has much to teach us. But to restore victims and criminals who commit serious crimes, the state must first punish before it and we can forgive. Cheap grace and promiscuous forgiveness demean the crime and the victim.