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Restorative Justice in Federal Sentencing: An Unexpected Benefit of Booker?

Erik Luna* and Barton Poulson**

I. INTRODUCTION

The Supreme Court's decision in United States v. Booker1 ended a standard practice in federal sentencing and may yet inspire a more fundamental change to the way punishment is approached in United States district courts. As originally formulated and interpreted, the federal scheme—the United States Sentencing Guidelines—set narrow, mandatory ranges of punishment based on the crime of conviction, the offender's prior criminal history, and a limited number of additional considerations, including facts that could substantially enhance an offender's sentence. The prosecutor need only prove such facts by a preponderance of the evidence to the sentencing judge, and the court would be bound to increase the punishment accordingly. In a bifurcated, dual-majority decision, Booker ruled that this practice was unconstitutional.

The first majority opinion applied to the federal system a line of cases that had held that the Sixth Amendment right to trial by jury requires that all facts necessary for a given punishment (other than a prior conviction) be admitted by the defendant or proven to a jury beyond a reasonable doubt.2 It was thus impermissible for the Guidelines to demand greater punishment based on facts that had not been conceded by the defendant or found true by a jury. The second opinion resolved the constitutional infirmity by excising a pair of statutory provisions, thereby rendering the Guidelines advisory rather than mandatory for sentencing judges and establishing a standard of reasonableness for appellate review of punishment.3 Federal judges were now permitted to sentence defendants outside of the tight ranges prescribed by the Guidelines and to consider factors that were verboten prior to Booker.

In the immediate aftermath, some commentators were "ecstatic" and "elated" with "a wise and careful decision," ending two decades of "unjust, irrational sentences" and replacing them with a "marvelous" and "ideal sentencing system" where "federal judges can be federal judges again."4 Others described Booker as

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3. See Booker, 536 U.S. at 259 (remedial majority).
a "disaster," an "egregious overreach," and "a retreat from justice that may put
the public's safety in jeopardy," portending "grave effects" on the prosecution of
"drug trafficking, gangs, corporate fraud and terrorism offenses," and virtually
guaranteeing that "chaos will reign in federal courthouses."5

With the passage of time, however, the Supreme Court's decision has proven
to be neither miraculous nor catastrophic,6 although the jury is still out, so to
speak, as the lower courts sort through lingering questions and various legislative
"fixes" continue to be banded about.7 If nothing else, Booker has inspired a
stream of scholarship in legal journals focusing on, among other things, the
history of American sentencing law, the legitimacy of the Guidelines regime, the
role of various criminal justice actors in setting punishment, the impact on
charging and plea bargaining decisions, and, most importantly, the return of
judicial discretion in sentencing.8

These and other topics are all exceptionally important for the future of the
federal system, and the scholarship to date has been rich and exciting. But
Booker also provides an opportunity to take a fresh look at the very reasons for
punishment and the methods used to determine and impose criminal penalties. As
United States District Court Judge Nancy Gertner wrote a few years ago, "[a]ll
experimentation with alternatives to incarceration and innovative approaches to
sentencing, like restorative justice, was necessarily squelched" by the Guidelines
regime.9 Recently, however, she noted that "United States v. Booker could well
herald a new era in American sentencing practices"10—and among these
possibilities, we believe, is one Judge Gertner had expressly mentioned before:
the idea of restorative justice in the federal system. Our symposium contribution
hopes to begin this discussion, explaining what restorative justice is, how it might
be implemented in United States district courts, and why criminal justice actors
and others should support the concept of federal restorative justice.

5. See Hamblett, supra note 4; Dan Eggen, Ashcroft Defends Tough Politics, WASH. POST, Feb. 2, 2005,
at A2; Implications of the Booker/Fanfan Decision for the Federal Sentencing Guidelines: Hearing Before the
Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 109th Cong. 21
criminal/press_room/testimony/2005_3785_fedSentencAfterBooker02lO05.pdf (on file with the McGeorge
Law Review).


7. See, e.g., Is a Booker Fix Needed?, 17 FED. SENT'G REP. 291 (2005); Erik Luna, Gridland: An

8. See, e.g., Symposium, A More Perfect System: Twenty-Five Years of Guidelines Sentencing Reform,


II. WHAT IS RESTORATIVE JUSTICE?

The phrase “restorative justice” appears in a grand total of three reported federal opinions. One case uses the term in the context of an employment discrimination claim and another applies it to equitable remedies in a wrongful death suit, both more than a quarter-century old and neither having any relevance to criminal justice. The third opinion, written by United States District Court Judge Jack Weinstein, cited restorative justice scholarship in discussing the history of restitution. He then noted that modern federal law “has increased the obligation of courts to consider the victims’ need for emotional healing and financial compensation within the context of criminal law,” with the “special interests [of victims] evaluated separately from those of the government.”

Beyond these references, the federal courts have had nothing to say about restorative justice, which is not altogether surprising given the stultifying effect of the pre-Booker mandatory Guidelines regime. The following sections will define the theory, principles, and practices of restorative justice, as well as provide a brief, preliminary sketch of how restorativism might be adopted in the federal system.

A. The Theory and Principles of Restorative Justice

Restorative justice can be defined as an approach to sentencing that incorporates all stakeholders in a specific crime—the offender, the victim, family members, community representatives, and other interested parties—in a process of group decision-making on how to respond to the crime and its implications for the future. As a unique sanctioning philosophy, restorativism is often compared to two leading theories of punishment: utilitarianism and retributivism.

Utilitarianism imposes criminal penalties only to the extent that the social benefits of punishment outweigh the costs. It is a “consequentialist,” forward-looking approach, concerned with the consequences of punishment and, in particular, reducing future crime and the accompanying damage to society.

13. Id. at 221. It might also be noted that one reported case cited to an article on restorative justice but only in regard to opposition to mandatory minimum sentences. See United States v. Harris, 165 F.3d 1277, 1281 n.2 (9th Cir. 1999). In addition, two unreported cases referred to restorative justice. In a military appeal, the reviewing court upheld the trial judge’s refusal to admit a pamphlet on restorative justice during sentencing. See United States v. Wilson, 1997 WL 1420945 (A.F. Ct. Crim. App. 1997). And in a civil rights suit against New York State’s Sing Sing Prison, the district court rejected the plaintiff’s attempt to reinstitute a restorative justice-based workshop canceled by corrections authorities. See West v. Keane, 1997 WL 266977 (S.D.N.Y. 1997).
Among others, utilitarian goals include deterring the offender from further criminality and rehabilitating him toward a pro-social lifestyle. In contrast, retributivism is a "non-consequentialist" theory, focused on past acts and mental states irrespective of what may ensue from criminal penalties. As such, the retributive approach is backward-looking, imposing punishment on the offender solely because he deserves it, not because it produces desirable social consequences. The traditional aim of retributivism is providing the offender his "just deserts," a sanction that is morally commensurate to the offense, no more, no less. Despite disparate objectives, utilitarianism and retributivism have one key aspect in common: a narrow focus on the offender to the exclusion of all others.

Unlike these traditional theories, restorative justice recognizes that a successful criminal sanction must be both backward-looking—condemning the offense and uncovering its causes—and forward-looking—making amends to the victim and the general community while actively facilitating moral development and pro-social behavior in the offender. Restorative justice thereby expands punishment theory along two dimensions: the timeline of offending and the stakeholders concerned with crime. It seeks the involvement of all affected parties, not merely the state and the offender, to address what has happened and what should happen. Metaphorically, it views crime as a point in the middle of a motion picture, with action both before and after the criminal event, rather than a snapshot without the context of the past or a vision for the future.

Over the years, restorative justice has been subject to numerous definitions by scholars and practitioners. Moreover, it can be separated into (at least) two distinct conceptions—one that views restorativism as a substantive theory challenging retributivism, utilitarianism, and other philosophies of punishment; and another that sees restorative justice as a procedural approach to the criminal sanction that allows all legitimate sentencing theories, as represented by affected stakeholders, to have a say in the decision-making process and ultimate outcome. For present purposes, however, it is not necessary to dwell on different definitions of restorative justice or conceptions of restorativism. Although such points can be important, it is enough for now to emphasize the differences between restorative justice in general and the prevailing methodology in the United States.

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15. To avoid confusion, we use male pronouns in this article. Cf. Erik Luna, Punishment Theory, Holism, and the Procedural Conception of Restorative Justice, 2003 UTAH L. REV. 205, 209 n.11 (2003). Also, any reference to a singular offender and/or victim is for rhetorical convenience.


17. See, e.g., id. at 288-90.

18. See infra note 117 and accompanying text (discussing difference between values conception and procedural conception of restorative justice).

790
In particular, restorative justice incorporates three basic principles that distinguish it from America's standard approach to punishment. First, crime is not just an action against the state but against specific victims and the relevant community. Offending is reframed as a violation of social relationships that also violates the law, with the source of pro-social norms and crime control located in families, support networks, and communities, rather than penal codes and courts. With this in mind, restorative justice promotes the active involvement of victims, families, community representatives, and other interested parties to deal with the causes and effects of crime.

Second, a central ambition of restorativism is making amends for the offense—especially for the physical, emotional, and economic harm to the victim—instead of imposing pain upon the offender. This approach delineates accountability as an offender acknowledging the wrongfulness of his behavior, communicating remorse for the damage he has caused, and taking actions to mend the breach in social relationships. Restorativism contends that crime creates affirmative duties that the offender must meet with an active response instead of passive submission to some penalty.

Finally, restorative justice envisions a collaborative sanctioning process that involves all stakeholders concerned with the offender and the offense. The primary feature is largely uninhibited dialogue among the parties, allowing all present to express their emotions and ideas in an open forum. Through discussion and deliberation, restorative justice contemplates mutual agreement on the steps that must be taken to heal the victim and the community, resulting in the formation of a plan to confront the factors contributing to the offender's conduct and to facilitate his development as a law-abiding citizen.

Restorative justice thus questions the very underpinnings of contemporary approaches to criminal punishment. An offense is not merely a “breach of the King's peace,” to use the historical term, but a direct violation of the victim's rights and interests, a grave concern to loved ones (both of the victim and of the offender), and a threat to the community. Although state intervention stems the brutality of a private settling of scores, the modern criminal justice system is premised not on public intercession but government domination, often drastically limiting the input of affected parties or wholly excluding them from the process. Restorative justice recognizes that the victim, families, and community members have, in Nils Christie's words, a type of “property” interest in the case as a matter of process and outcome.

Moreover, the crime itself cannot be isolated or reduced to a problem with the criminal. There is context to offending, a history surrounding the event, and thoughtful solutions to crime will not focus on the offender alone. Although the wrongdoing must be firmly denounced and the nature of the harm made clear to
the perpetrator, restorative justice argues that the needs of the victim must be addressed as well, including repairing any harm caused by the offense. In addition, the community should undergo some reflection: Did the social environment contribute to the offending and, if so, how are the relevant criminogenic influences remedied? What must be done to regain a sense of security and reaffirm pro-social values? How can the community and its members facilitate the moral education and social integration of the offender? These questions are not asked as a means to exonerate a defendant for his harmful wrongdoing, but instead to restore the community's sense of well-being and to take affirmative, prophylactic steps against future offending.

B. The Practice of Restorative Justice

In its practical applications, restorative justice has slowly emerged in many Western nations, with programs such as victim-offender mediation, sentencing circles, and family group conferences implemented or tested in Australia, Britain, Canada, New Zealand, and even the United States. For example, victim-offender mediation programs have existed for more than two decades, typically employed for property crimes but also increasingly used for certain serious and violent offenses. In most jurisdictions, the cases are referred for mediation as a form of diversion from prosecution or as a condition of probation after an accepted guilty plea. Both the offender and the victim must agree to participate in the program, with the mediator establishing contact with each party, explaining the process and setting an acceptable time and safe location for the meeting.

Although procedures vary, the victim usually speaks first during a victim-offender mediation, describing the crime's impact on his life, such as the physical and emotional harm and financial loss caused by the event. The process also provides an opportunity to ask any questions about the offense and offender that may have remained with or even haunted the victim. In turn, the offender is provided a chance to tell his story, to explain the circumstances of the crime as


22. The term “diversion” can be defined quite broadly. See, e.g., Daniel W. Van Ness & Pat Nolan, Legislating for Restorative Justice, 10 REGENT U. L. REV. 53, 69 (1998). We will use this term to refer to a procedure by which an offender is removed from the formal court system at an early stage in the criminal process—for instance, pretrial diversion whereby individuals who do not contest their guilt avoid the filing of a formal case by agreeing to participate in and successfully completing particular programs. See, e.g., WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 1.3(h) (2005).
well as his past and potential future, and most importantly, to apologize and accept responsibility for the offense. Through facilitated dialogue, the victim and offender can discuss and possibly reach an appropriate outcome, such as an agreement that the offender will provide restitution for property damage and volunteer for community service. Depending on the jurisdiction and legal posture of the underlying case, a mediator, probation officer, or program personnel may follow up to ensure that the offender is making progress and meeting his obligations under the agreement.23

Family group conferencing also employs facilitated dialogue, but it expands the prospective participants and collective decision-making beyond the limited number of parties included in dyad-based mediation programs. Cases referred for conferences may come as a type of diversion—although New Zealand uses family group conferencing throughout its juvenile justice system, whether in lieu of formal charges or in response to admissions or verdicts of guilt in all but the most serious offenses (e.g., homicide). In general, the coordinator will consult with the victim, the offender, their families and supporters, social service providers, law enforcement officials, and other stakeholders to determine who should be invited to participate and when and where the conference should be held. The coordinator is also responsible for informing the invited parties about the relevant background of the offense, how the conference will likely proceed, and any other information necessary for voluntary, knowledgeable participation.

A conference typically begins with an introduction of the participants and a coordinator’s description of the ensuing steps in the process. A law enforcement representative may summarize the offense, and the parties will have a chance to comment on the factual synopsis. The victim then has the opportunity to discuss his feelings about the crime, its consequences, and possible outcomes of the conference, and to ask questions about the offense and other issues of importance—followed by similar opportunities for the offender and other participants to express their views. After open dialogue about the crime and general discussion of available options, the process seeks negotiation on and formulation of a mutually agreed upon plan for the offender (e.g., providing restitution, engaging in community service, undergoing counseling, etc.). In the New Zealand model, the coordinator is responsible for following up on the offender’s advancement and checking that the conditions of the conference plan are being met.24


24. See, e.g., Gabrielle M. Maxwell & Allison Morris, Family, Victims and Culture: Youth Justice in New Zealand (1993); Joy Wundersitz & Sue Hetzel, Family Group Conferencing for Young Offenders, in Family Group Conferences: Perspectives on Policy and Practice 126 (Joy Wundersitz ed., 1996); Bazemore & Umbreit, supra note 21, at 5-6, 7-12; Belgrave, supra note 21; Luna, supra note 15, at 295-301.
Circle sentencing expands the participants even further, adding numerous community members and possibly judges, prosecutors, defense attorneys, and relevant court personnel. The basic methodology uses a variation on the decision- and peace-making practices of indigenous cultures around the globe, including the First Nations people of Canada and Native American tribes such as the Navajo. A circle may be employed as an alternative to the traditional sentencing hearing after an offender has pled to or been found guilty of the underlying offense. Pursuant to one version of this model, the offender applies to participate in a circle, with the decision made by a community justice committee and affected parties. If the case is accepted, committee members will meet separately with the offender and victim and help establish support groups for both individuals.

The participants will gather together at a convenient time and place and will literally sit in a circle facing one another. The facilitator is known as a “keeper,” who begins the session with an introduction and description of the process to be followed. In particular, sentencing circles pass a “talking piece” (i.e., a small item of symbolic value) from one participant to another, signifying the item’s holder as the person whose turn it is to speak and requiring that all others respectfully listen. Each speaker is thus provided an uninterrupted opportunity to express his feelings about the crime, the parties, and potential resolutions. As the talking piece moves around the circle, often multiple times, the process allows all participants to meaningfully contribute to the discussion, to better understand their fellow contributors and the incident in question, and to reach a consensus on an appropriate sentencing plan. It also invests the participants in a successful outcome, with members of the justice committee and support groups following up on the sentencing circle and assuring that the offender is abiding by the plan (possibly by convening additional circles).

Although diverse in format and usage, as well as having distinct advantages and limitations, all of these programs are premised on an admission or finding of guilt on the part of the offender and the freely chosen, fully informed participation of all parties. Each model utilizes non-adversarial, informal procedures and provides the participants with a degree of process control over place, time, and format. Moreover, the programs tend to empower those people directly touched by the crime, allowing them to openly discuss their feelings and ideas—the victim explaining how the crime has changed his life, for instance.

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and what is needed to make things better—thereby contributing to a collaborative, consensus-based decision-making process. In drawing upon all involved to reach an appropriate resolution, the goal is not merely to impose a painful sanction but instead to engage the offender in a moral dialogue about the wrongfulness of his conduct, to provide him the opportunity to take responsibility and express remorse, and to repair the damage and meet the needs of those injured by the offense.

The models (especially family group conferencing and circle sentencing) also emphasize support networks for the victim and offender, surrounding the most vulnerable parties with people who are concerned about their well-being. This social support may be particularly important in addressing the offender and his offense. In restorative programs, the focus is always on the wrongfulness of the crime and the harm to the victim and community—but it is the offense, not the offender, that is placed at the center of discussion. The attendance of supporters gives the process credence while ensuring that positive identities—as a family member, neighbor, employee, artist, student-athlete, and so forth—are reinforced by the presence and words of those who care most about the offender. And consistent with substantive restorativism, these programs strive to reintegrate the offender back into the law-abiding community. Rather than simply labeling him an outcast and forcing him to bear a badge of inferiority, restorative justice aspires to bring the offender back into the community and to help him become a contributing member of society.27

C. Restorative Justice in the Federal System

How might restorativism be employed in federal criminal justice? To be clear from the outset, the aforementioned programs are not substitutes for many of the core functions of the federal system. Restorative justice is not an investigative tool for determining whether a crime has been committed and who is responsible, and it certainly lacks the fact-finding apparatus of the traditional court process. In other words, restorative-based programs can answer neither the "whodunit" questions nor the myriad issues of culpability—whether an individual committed the crime at issue, whether there is any merit to an affirmative defense like mental illness or self-defense, whether the defendant is guilty of the highest charged crime or a lesser included offense, and so on. Likewise, restorative justice has no capacity to interpret the federal criminal code or the United States Constitution, such as a claim that the statute of limitations bars prosecution, for example, or that a government search violated the defendant's Fourth Amendment rights. But what the above programs do offer is an inclusive, context-sensitive, holistic method for affected parties to tell their stories and

27. See infra notes 75-76 and accompanying text (discussing reintegrative shaming versus stigmatizing shaming).
voice their concerns, to condemn the offense and provide the offender an opportunity to express remorse, to discuss potential options that address the needs of the victim and community, and to formulate a mutually agreed-upon resolution.

Theoretically, these programs could have been implemented in the past as a form of diversion prior to the filing of federal charges, but such an approach would have been inconsistent with the charge-first mentality within the prosecutorial ranks. In the words of one trial judge, the United States Department of Justice is "addicted to plea bargaining to leverage... law enforcement resources to an overwhelming conviction rate," where the bargaining process begins only after charges are pending. Any organization with an ethos of constant victory, and the weaponry to ensure it, seems highly unlikely to consider non-adversarial alternative resolutions, even if they might serve the larger interests at stake. In the case of federal prosecutors, the stiff penalties prescribed by the Guidelines virtually guaranteed a conviction after charging, given that most criminal defendants would accept a plea bargain and a lesser sentence rather than take their chances in court at the risk of a long prison term. Due to the mandatory nature of federal punishment, those defendants convicted at trial usually had no recourse in the district court judge, who often was required to impose the sentence under the Guidelines, no matter how unreasonable it might be and irrespective of all other considerations. So whether by plea or conviction, the resulting sentence was largely predetermined, unresponsive to the views of affected lay parties, and unamenable to alternative resolutions.

As suggested at the beginning, however, the Supreme Court's decision in Booker opens the door for new and progressive options beyond the confines of the United States Sentencing Guidelines, including the incorporation of restorative justice programs. Because the Guidelines are no longer obligatory on the district court, judges are not bound to the will of prosecutors through their charging decisions and need not impose "a stiff penalty upon defendants who exercise their constitutional right to trial by jury." As a result, there are no guaranteed sentences, possibly creating a different incentive structure for federal prosecutors, one that encourages them to think about considerations other than sheer conviction rates and cumulative prison terms.

Moreover, the very words of governing federal law and the Booker decision itself seem to emphasize sentencing factors conducive to restorativism. By excising the statutory provision that makes the Guidelines mandatory, sentencing judges now must

\[
\text{take account of the Guidelines together with other sentencing goals. . . .} \\
\text{[They should] consider the Guidelines sentencing range established for . . . the applicable category of offense committed by the applicable}
\]

29. Id. at 264.
category of defendant, the pertinent Sentencing Commission policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims. And [judges should] impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care.  

Along these lines, restorative justice programs place great importance on meeting the needs of crime victims and typically result in restitution agreements. They also provide a forum for victims to express their emotions and opinions and to ask lingering questions about the offense and offender. This may be all the more relevant to the federal system with Congress’ passage of the Crime Victims’ Rights Act and recent efforts to implement its provisions through the Federal Rules of Criminal Procedure. Although the Act makes no mention of restorative justice, its emphasis on providing victims access to proceedings, opportunities to be heard, and the right to be treated with fairness and respect, among other things, is consistent with and can be supported by well-run restorative programs.

In addition, restorativism can be effective at promoting respect for the law, deterring future crime, and protecting the community. As detailed at length elsewhere, the Guidelines utilize a cryptic jargon of “levels,” “categories,” “points,” and “scores,” while drawing seemingly hair-splitting differences between, for instance, “minor” and “minimal” participation by an offender—with the resulting numbers plugged into a sentencing equation and the offender’s future charted on a lifeless 258-box punishment grid. The entire sentencing process is incomprehensible to the affected individuals (and even criminal justice actors), lacking any type of clear moral reasoning for punishment. As a consequence, the proceeding has virtually no intellectual or emotional value other than to daze and confuse those individuals most intimately concerned about the sentence.

In contrast, restorative justice programs seek to directly engage and positively impact these individuals through the use of open dialogue and the flow of personal narratives about the crime, the unambiguous condemnation of the offense and the harm it has caused, the power of emotional bonds of family and friends who want the offender to be a lawful, contributing member of society, and the investment of the offender and others in his success. Moreover, those most affected by the crime—the victim, family members, and community

32. See Luna, supra note 7.
representatives—may be in the best position to gauge the seriousness of the offense and determine a just punishment. And, of course, the offender and his loved ones, in conjunction with social service providers, can best articulate his educational, vocational, and medical needs.

Although a variety of options are possible, restorative justice programs might be incorporated at two stages of the federal criminal process: (1) prior to charging as a form of diversion; and (2) after a guilty plea or conviction as an input for the sentencing judge. Federal restorative justice as diversion might come into play after law enforcement has investigated the offense and determined that a particular individual is responsible. Based on consultation with the relevant agent, the victim, and other interested parties, the United States Attorney would forego filing charges (or presenting the case to a grand jury) if the offender enters into a restorative justice program and successfully completes the resulting plan. In fairness to both sides and out of an abundance of caution, this option might require (at a minimum):

(1) advice of counsel for the offender;
(2) a written agreement between the government and the offender;
(3) a stipulation that charges can be filed if no plan is reached during the mediation, conference, circle, et cetera, or if the offender fails to follow through with his obligations under the plan; and
(4) a stipulation (or possibly a new rule) that statements made by the offender during the restorative process cannot be used against him in a later prosecution.\textsuperscript{33}

The post-plea/conviction option could be relatively straightforward. With the consent of the court and the prosecutor, and with the voluntary participation of the defendant, victim, and other interested parties, a facilitator would initiate a restorative interaction prior to sentencing. Any plan that was reached through the mediation, conference, circle, et cetera, would be provided to the district court for its consideration in setting punishment. The participants could then attend the sentencing hearing and convey their opinions about the program and resulting plan (or failure to reach a plan), followed by the more standard factual and legal claims by the prosecutor and defense attorney about an appropriate punishment. Taking into account the relevant Guidelines range, the restorative plan, the statements of participants, the arguments by counsel, and any other pertinent

\textsuperscript{33} The inadmissibility of statements made during a restorative justice meeting would be consistent with the practice of family group conferences in New Zealand, see \textsc{Belgrave}, \textit{supra} note 21, at §§ 4.2-4.3, as well as the rule for negotiations in American civil and criminal cases and the best practice (if not legal standard) in civil mediation. \textit{See}, e.g., \textsc{Fed. R. Crim. P.} 11; \textsc{Fed. R. Evid.} 408, 410; \textsc{Cal. Evid. Code} § 1119 (West Supp. 2006); \textsc{Uniform Mediation Act} (2003), available at \texttt{http://www.law.upenn.edu/bll/ulc/mediat/2003final\_draft.htm} (on file with the \textsc{McGeorge Law Review}).
matters, the judge could deliver the sentence and its rationale to an informed group that has participated in the process and feels invested in the outcome.

III. WHY RESTORATIVE JUSTICE?

Restorative justice offers a thoughtful response to crime that might be readily adopted in United States district courts. But we recognize that any change to the status quo of federal sentencing will have to do more than this—it has to provide demonstrated, empirical benefits for those involved and society at large—a point that may be especially true for restorative justice, given that its theory and practice are seen as relatively new in the United States and perceived as challenges to America's traditional approach to punishment. Restorativism can surmount this hurdle, however, as studies show that the programs have numerous, well-documented, salutary effects, from reducing fear experienced by victims to lowering recidivism rates among offenders. Yet restorative approaches may be able to do much more. Based on potential connections between restorative justice studies and mental health research, we suggest that restorative practices may attenuate the effects of psychopathologies and create situations that are more constructive for victims, offenders, and the larger community.34

A. Cognitive, Affective, and Behavioral Benefits

A recent review of the empirically verified benefits of restorative justice35 found that, relative to parties in traditional court processes, those who participated in restorative programs were more likely to:

(1) believe that the criminal justice system was fair;
(2) say that the mediator or judge had been fair;
(3) rate the outcome of their proceedings as fair;
(4) be satisfied with the way that their case was handled;
(5) be satisfied with the outcome of the proceedings;
(6) believe that they had been able to tell their stories during the proceedings;
(7) believe that their opinions were adequately considered;
(8) believe that the offender had been held accountable;
(9) have better perceptions of the other party's behavior; and
(10) apologize to the victim/to forgive the offender.36

34. The prevalence of mental illness among offenders would seem to increase the possibilities. See infra notes 119-20 and accompanying text.
2006 / Restorative Justice in Federal Sentencing

In addition, victims who participated in restorative programs tended to:

(11) be less upset about crime; and
(12) be less afraid of revictimization.  

Not only are the data favorable to restorative justice, but the results were practically identical in each of the studies. The consistency of the data is remarkable in light of the substantial variability of the studies, with restorativism displaying clear, dependable benefits for almost all participants.  

In addition, restorative justice has two other important behavioral advantages: increased reparations and decreased recidivism. Meta-analytic findings show that offenders who participate in restorative programs have substantially higher rates of completing their obligations (e.g., compensating victims for property damage) than do traditionally processed offenders. In one study, for instance, 81% of restorative justice participants completed their requirements, which was significantly more than the 57% of those not in the victim-offender mediation program. Another study compared average payments from the two groups and found that restorative justice offenders paid between 95% and 1000% more than offenders in court. In general, completion of

36. The odds ratios (i.e., the odds of agreement for restorative justice participants compared to the odds of agreement for litigation participants) for these ten items for offenders were as follows: (1) OR = 2.7; (2) OR = 6.0; (3) OR = 2.6; (4) OR = 1.9; (5) OR = 1.6; (6) OR = 4.1; (7) OR = 2.1; (8) OR = 4.8; (9) OR = 1.9; and (10) OR = 6.9. The advantages of restorative justice for offenders were statistically significant for every comparison except for Item 5, which was still in the direction favoring restorative justice. For victims, the odds ratios were as follows: (1) OR = 3.4; (2) OR = 2.3; (3) OR = 2.6; (4) OR = 2.8; (5) OR = 2.3; (6) OR = 8.8; (7) OR = 1.3; (8) OR = 4.9; (9) OR = 2.4; and (10) OR = 2.6. Every comparison for victims showed a statistically significant advantage for restorative justice except Item 7, which was again in the direction favoring restorative justice.

37. The odds ratios were as follows: (11) OR = 0.5; and (12) OR = 0.3. Both indicate statistically significant advantages for restorative procedures.


41. Audrey Evje & Robert Cushman, A Summary of the Evaluations of Six California Victim Offender Rehabilitation Programs (2000), available at www.courtinfo.ca.gov/programs/cfocl/pdffiles/vorp.pdf (on file with the McGeorge Law Review). It should be noted, however, that one study found no difference, with both groups completing almost eighty percent of contracts. See Sudipto Roy, Two Types of
agreements is significantly more common, and more bountiful, through restorative processes.

Meta-analysis on the effects of restorative justice on recidivism was also supportive. One study found that after a year, 28% of participants in traditional sanctioning procedures had committed new crimes, compared to 19% of participants in restorative programs, a statistically significant reduction of 32%. While a second meta-analysis found a smaller but still significant impact on recidivism. Interestingly, two other studies discovered that restorative practices had the strongest effects on recidivism when the crimes were more severe. Research has also shown that among offenders who do reoffend, participants in restorative justice tended to commit less serious crimes than other offenders. As an empirical matter, then, it can be said that restorative justice outperforms standard court processes in facilitating the completion of reparations for the current offense and reducing the chance of future crime.

B. Potential Mental Health Benefits

In addition to these verified contributions of restorative justice to desirable cognitive, affective, and behavioral outcomes, it is our belief that restorative practices may help reduce mental health disorders among participants. This would not be altogether surprising, as some leading scholars have suggested a connection between restorative justice and "therapeutic jurisprudence," a field that examines law’s influence on the psychological well-being of affected parties through the production of therapeutic or anti-therapeutic effects. Beyond theoretical and conceptual commonalities—for example, that therapeutic

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43. Latimer, supra note 38, at 14-16.


jurisprudence and restorative justice "are both part of a return to problem-oriented adjudication"—there may be reason to believe that restorativism can affirmatively improve the mental health of participants and possibly prevent the most anti-therapeutic outcome of all, suicide. To date, just one randomized experiment (for victims only) has been conducted on this topic, which found some evidence for a reduction in post-traumatic stress symptoms among restorative justice participants. With this exception, there are no data available that correspond to the findings above on the cognitive, affective, and behavioral benefits of restorative justice. We believe that the potential link between restorativism and mental health presents a new direction for research and could offer yet another argument in favor of restorative practices.

Prelude on Suicide. The empirical impetus for this section was a study by Doug Gray, a pediatric psychiatrist who specializes in youth suicide. Gray and his colleagues found that for adolescent males in Utah, a single encounter with the juvenile justice system doubled the odds of suicide, compared to non-referred youths. Moreover, seven or more referrals led to a five-fold increase in the odds of suicide. In fact, of the 151 Utah youths to commit suicide during the study period (1996-1999), nearly two-thirds (63%) had been referred to the juvenile justice system, which was more than were enrolled in or graduated from school. Although it is, at best, risky to generalize from juvenile delinquents in a state system to adult offenders in the federal system, the possibility is too significant to pass up. Could restorative justice reduce suicide and other mental health problems in offenders?

The fact that appearing in court is a significant predictor for suicide makes restorative justice relevant, given its reduced emphasis on formal, in-court processes. And as noted above, restorative justice decreases repeat offending and thus further court appearances. Still, the potential causal connection between restorative justice and mental health is ambiguous. One of the purposes of this symposium piece, therefore, is to suggest possible relationships between the two based on existing empirical research. Although a complete discussion of the etiology of psychopathology is beyond the scope of this article, there are some pathogenic factors that restorative practices may be able to influence. These factors include perceived control, problem-solving skills, social integration, and procedural justice. We will focus our attention on these factors and, in particular,

48. Braithwaite, supra note 46, at 246.
51. See Nugent et al., supra note 42.
their impact on depression and anxiety, which are not only the two most common forms of psychopathology but also significant predictors of suicide risk.

Potential Benefits of Greater Perceived Control. Some of the most influential theories in explaining psychopathology have centered on the individual’s sense of control or perceived efficacy in bringing about desired changes. Originally formulated to explain depression, some of the major theories have addressed helplessness, hopelessness, the perceived contingency of outcomes on one’s behavior, and dysfunctional attributional styles. A central component of all of these theories is that the individual erroneously believes that he is no longer capable of producing positive changes. Instead, the locus of control is placed in powerful and, in the eyes of the perceiver, possibly malevolent others, such as parents, employers, or the courts.

Extensive research supports the relationship between perceived control and poor mental health. For instance, a meta-analysis of over 100 studies with nearly 15,000 participants found that depression was consistently associated with internal, stable, and global attributions for negative (as compared to positive) events. Similarly, a survey of over 10,000 adults found that perceptions of low control at home or work during the initial testing period predicted increased levels of depression and anxiety six years later. Another study of 733 adolescents (twelve to fourteen years old) confirmed that the pattern generalizes across age groups. A pessimistic attributional style significantly predicted higher levels of depression both at initial testing and in a follow-up evaluation. These studies represent only a small sample of the research on perceived control and poor mental health, but the link is empirically robust.
Although no research appears to have addressed directly the effects of restorative justice on hopefulness, helplessness, or attributional style (making these areas ripe for future research), the perception of control has received some attention. In one of the largest single evaluations of restorative justice practices—the Reintegrative Shaming Experiments (“RISE”) in Australia—offenders who participated in family group conferences were more likely to feel that they had some control over the outcome of the proceedings, that they had an opportunity to express their views, that they had some control over the way things were run, and that they were less likely to feel pushed around by others in power. While limited, these results are promising and suggest that restorative practices may be able to foster a greater sense of involvement and control over critical events than provided by the traditional approach. This possibility is consistent with theories of restorative justice and alternative dispute resolution that emphasize personal involvement and commitment to the process of justice.

Potential Benefits of Greater Problem-Solving Skills. A second major area of research into the predictors and causes of psychopathology has focused on the individual’s ability to solve the many dilemmas of life. For example, a negative problem-solving orientation—that is, one that is characterized by passive, avoidant, or self-destructive approaches to problems—was found to predict higher levels of depression if the respondent suffered negative life events during the preceding year. Similarly, a study of college students found that individuals with poor problem-solving skills who earned low exam grades were more likely to experience increased levels of depression and hopelessness as compared to students who received the same grades but had good problem-solving skills.

The potential risks of problem-solving deficits are even more dramatic when suicide is considered. Weak problem-solving abilities are frequently characteristic of persons who are at risk for suicide or who have committed suicide. A study found that, relative to non-suicidal psychiatric patients, suicidal
patients performed significantly worse on the "Alternative Uses Test," a measure of divergent thinking, as well as on measures of the ability to solve interpersonal problems. Suicidal patients were also more cognitively rigid. When asked to evaluate their potential solutions to problems, such patients generated a greater number of negative consequences and had difficulty implementing some of the solutions that they chose. However, training in problem-solving skills can be effective for those individuals at risk for suicide. One study found that self-poisoning patients who were randomly assigned to a focused training program did better than a control group on problem-solving ability, perceived ability to cope with ongoing problems, and desirable forms of self-perception. These advantages persisted at a six-month follow-up, and most importantly, the group trained in problem-solving was much less likely than the control group to have attempted suicide again.

All of the above studies demonstrate the relationship between problem-solving difficulties and mental-health problems. Although there is a dearth of empirical data on the quality of solutions generated by participants in either litigation or restorative justice, the theoretical arguments in support of the problem-solving/mental-health relationship are legion. The common focus of these arguments is that restorative justice, like other forms of alternative dispute resolution, is a collaborative problem-solving exercise in which participants are assisted by a competent facilitator in: (1) defining the problem (e.g., separating positions and interests); (2) coming up with creative alternatives; and (3) evaluating those alternatives. These practices are essentially identical to those taught in problem-solving programs for persons at risk for psychological problems. This unmistakable similarity between restorative processes and mental health interventions leads us to believe that the problem-solving focus of restorative justice may have a direct salutary effect on mental health.

Potential Benefits of Greater Social Integration. The two predictors of mental health that have been discussed so far, perceived control and problem-solving skills, are essentially characteristics of isolated individuals. However, many psychological problems—and potential solutions—are more socially oriented. For instance, based on both contemporary theorizing and past clinical

69. Respectively, ten percent versus twenty-five percent. Id.
70. There is one possible, indirect exception: Participants in restorative justice are generally more satisfied with the proposed outcome to their dilemma than are participants in litigation. See, e.g., ROBERT C. DAVIS ET AL., MEDIATION AND ARBITRATION AS ALTERNATIVES TO PROSECUTION IN FELONY ARREST CASES: AN EVALUATION OF THE BROOKLYN DISPUTE RESOLUTION CENTER (FIRST YEAR) (1980).
71. See, e.g., UMBREIT, supra note 23; ZEHR, supra note 62.
72. See, for example, the transformative approach to the mediation of community disputes in BUSH & FOLGER, supra note 63.
interviews, Thomas Scheff has argued that depression is rooted not only in biological and characterological components but also an individual’s sense of shame and alienation from social communities. More recent empirical support for this claim comes from the suicide literature, with at-risk persons tending to lack positive social support. The absence of the buffering effects of social integration can render a person especially susceptible to the pressures of everyday life. A lack of support for criminal defendants can become even more challenging due to the high levels of stress that offenders commonly face in court.

Restorative justice may be particularly well suited to create the positive social support that these individuals frequently lack. Restorative practices are inherently social in nature and require the active, supportive involvement of at least three people (e.g., victim, offender, and facilitator) and possibly dozens more (in certain forms of family group conferencing or circle sentencing). The best examples of how restorative processes can encourage social integration and support may come from the RISE study, which found that offenders in conferences as compared to those in courts were much more likely to report that they had experienced “reintegrative shame.” Although at first glance shaming may appear to be a universally negative phenomenon that would only increase social alienation, shaming that is self-consciously reintegrative (rather than stigmatizing) has the ability to express disapproval for criminal behaviors without communicating contempt for the offender. In other words, it censures the crime within a framework of respect and a circle of care, inviting the offender to join the law-abiding community. As such, this evidence fits relatively well with the theoretical arguments that focus on the socially involved nature of restorative practices. In turn, the psychiatric data support the notion that increased social involvement and integration should reduce mental health problems.

Potential Benefits of Greater Procedural Justice. Finally, the notion of procedural justice may also play an important role in the link between restorativism and mental health. Procedural justice, or the perceived fairness of the process by which a decision is reached, has become a prominent topic of

74. See, e.g., Esposito & Clum, supra note 66; Elaine A. Thompson et al., Mediating Effects of an Indicated Prevention Program for Reducing Youth Depression and Suicide Risk Behaviors, 30 Suicide & Life-Threatening Behav. 252 (2000).
75. STRANG ET AL., supra note 61, at 64-65 tbls.4.37-4.40 (finding that restorative processes increased: expressions of reintegrative shame; disapproval of the type of offense; disapproval of the offender’s actions; support given to offender at treatment; expressions of respect for offender; perceptions that the offender was treated as someone loved; approval of the offender as a person; and perceptions that the offender could put the offense behind him).
76. For a complete discussion, see JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (1989).
77. This emphasis on procedures stands in contrast to the perceived fairness of the outcome of the decision, which is addressed under the rubric of distributive justice. See, e.g., MORTON DEUTSCH, DISTRIBUTIVE JUSTICE: A SOCIAL-PSYCHOLOGICAL PERSPECTIVE (1985); Morton Deutsch, Equity, Equality,
social psychological and organizational research as well as a familiar concept to many legal scholars. Although early theories described procedural justice as a way to ensure favorable outcomes over the long run, more recent accounts have focused on social worth. Specifically, decision procedures can communicate important information about standing (i.e., whether the affected person is seen as a valued member of the group), neutrality (i.e., whether the decision-maker is biased for or against the affected person), and trust (i.e., whether the decision-maker will take into consideration the particular needs of the affected person).

Evidence of a direct link comes from a large-scale study of nearly 1800 female hospital employees that examined whether mental health of this sample population was shaped by procedural justice. Two years after completing the original questionnaires, employees who had reported low levels of procedural justice—that is, decision-making procedures were inconsistent, closed, uncorrectable, and excluded input from affected parties—were nearly twice as likely to develop new psychiatric disorders. Moreover, empirical evidence already associates restorative programs with increased procedural justice. As mentioned above, data from several existing studies showed that, compared to those in court, participants in restorative justice were more likely to feel that they were treated equitably, that the mediator was evenhanded, that the criminal justice system was fair, that they were able to tell their story, and that their opinions were adequately considered. All of the above are important elements of procedural justice. In sum, the implication of the empirical findings and theoretical arguments is that restorative justice can boost perceived control, problem-solving skills, social integration, and perceptions of procedural justice, each of which has a documented connection with mental health.

IV. CONCLUDING THOUGHTS: BARRIERS

The theory and principles of restorativism can be tremendously stimulating, forcing punishment philosophers and criminal justice actors alike to reevaluate their own intellectual commitments and the virtues and vices of their chosen sentencing methodologies. The specific restorative practices themselves offer non-adversarial, context-sensitive, holistic approaches that integrate those most directly impacted by crime in a dialogic, consensus-based decision-making

80. Mika Kivimäki et al., Association Between Organizational Inequity and Incidence of Psychiatric Disorders in Female Employees, 33 PSYCHOL. MED. 319 (2003).
81. See Poulson, supra note 35.
process on how to address an offense and its future consequences. Moreover, the
data show consistent, empirically verified cognitive, affective, and behavioral
benefits from restorativism, and there are good grounds to believe that restorative
justice may also be able to improve mental health. With the Supreme Court’s
decision in Booker, the federal criminal justice system has been provided a
golden opportunity to incorporate restorative practices into its sentencing
scheme. To be sure, the realization of restorative justice in United States district
courts will face significant barriers. Many of these concerns apply to the adoption
of restorativism in any jurisdiction and have already been addressed in the
literature. Nevertheless, we will conclude by briefly examining a few of the
obstacles to restorative justice in a post-Booker federal system.

To begin with, there are obvious limits to the empirical data we have
presented. It must be remembered that the results reported are aggregates, and, of
course, it would be absurd to argue that restorative justice always works as
promised, just as it would be to suggest the same for litigation. Restorative
programs have occasionally produced shocking miscarriages of justice, serving
as strong negative examples. One of the most thoughtful proponents, John
Braithwaite, takes these exceptions to heart and discusses in detail (in his
“Pessimistic Account”) the theory and data behind important objections, such as
the claim that restorative justice can increase fears of revictimization or that it is
ineffective at reducing crime. But he also sees the many potential advantages (in
his “Optimistic Account”) as sufficient to warrant hope and continued efforts to
develop restorative practices. The conflict between these accounts, however,
presents an obstacle that can be overcome only through empiricism:

None of the problems in the Pessimistic Account is satisfactorily solved.
None of the claims in the Optimistic Account is satisfactorily
demonstrated. Decades of research and design on restorative justice
processes will be needed to explore my suspicion that the propositions of
both the Optimistic and Pessimistic Accounts are right. For the moment,
we can certainly say that the literature reviewed here does demonstrate
both the promise and the perils of restorative justice. It is, however, an
immature literature, short on... rigorous or nuanced empirical research,
far too dominated by self-serving comparisons of “our kind” of
restorative justice program with “your kind” without collecting data (or
even having observed “your kind” in action). That disappoints when the
panorama of restorative justice programs around the globe is now so

82. See, e.g., Allison Morris & Warren Young, Reforming Criminal Justice: The Potential of Restorative
    Justice, in RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE 11 (Heather Strang & John Braithwaite eds.,
    2000); Braithwaite, supra note 14, at 5; Luna, supra note 15, at 234-42, 246-50.
83. See, e.g., Umbreit et al., Restorative Justice in the Twenty-First Century, supra note 21, at 298-300.
84. Braithwaite, supra note 14, at 79-104.
85. Id. at 19-79, 104-07.
dazzling, when we have so much to learn from one another’s contextual mistakes and triumphs.86

Although our review of the data supports the conclusion that restorative justice has numerous benefits, Braithwaite’s warning is well taken. The argument that restorative practices can ameliorate mental health problems among offenders is still speculative. What is needed is high-quality, representative research that can directly address these significant possibilities—for example, by adding commonly used, valid measures of depression, anxiety, and other psychopathologies to evaluations of restorative justice programs. Such data could then be combined across studies that use different samples and methods, providing a more reliable and complete picture of the mental health consequences of restorative justice.

Even accepting our own admittedly “optimistic account” of the data, non-empirical questions will remain about the possibility of federal restorative justice, such as the very practical issues of program selection and implementation. For instance, which of the various models should be employed in the federal system? Victim-offender mediation has the longest track record in the United States and may be the most manageable of the models detailed above. It also has some similarities to the civil mediation programs already existing in state and federal courts. Family group conferencing expands the potential participants and can be exceptionally valuable in providing a type of moral education and preventing anti-social behavior. Moreover, this model has been incorporated by the juvenile justice systems of a few states and extensively used by other common law nations, offering helpful examples in jurisdictions with similar legal structures or a shared jurisprudential heritage. Circle sentencing is the most inclusive of the models. The emphasis on community participation corresponds nicely with the concepts and practices falling under the heading of “community justice,”87 and because it is derived in part from tribal customs, circle sentencing seems like an ideal methodology for federal crimes committed on Native American reservations. Given each model’s advantages and disadvantages, the best approach for federal restorative justice might be to create a “menu”88 of alternatives rather than picking one or another, permitting criminal justice actors to select an appropriate process based on the facts and circumstances of the case at hand.

A related issue concerns the precise format or procedures to be utilized and the individual or group that will organize and facilitate restorative programs. As for the former, federal officials can be assured that there is a vast body of

86. Id. at 107.
material on the various models, complemented by restorative justice organizations, conferences, training sessions, videos, and so on—some of it sponsored by and/or available from the United States Department of Justice! It should also be noted that effective restorative justice procedures will not be rigid and formulaic like traditional sentencing; instead, they will be flexible in nature and able to adjust to the endless diversity of cases, providing the participants a level of process control that meets their needs while empowering and investing them in the interaction and outcome. As for coordinating and facilitating the programs, the federal system could hire experienced mediators or contract with some outside organization to provide this service. An interesting option with potential returns extending beyond the programs themselves, however, would be to train federal probation officers to be the organizers and facilitators of mediations, conferences, circles, et cetera.

Prior to the Guidelines-era, probation officers were often educated as social workers and came at their position from a social-work perspective. They were neither law enforcement agents representing the government nor private detectives for the defense, but instead tasked as neutral evaluators and advisors to the judicial branch with the objective of providing information to the trial judge that would help him determine an appropriate sentence. Under the Guidelines, however, probation officers have been foisted into the position of quasi-gumshoe, investigating crime and reaching factual conclusions about the offense and offender—and as a result, they have been criticized as being advocates for the prosecution or the defense, or even as a “third adversary” in the process.
Federal probation officers were also expected to become experts at the convoluted rules of the Guidelines, transforming social workers into "bean counters" who plug and chug numbers in a punishment equation; worse yet, they were sometimes called upon to cook the books, so to speak, fudging the calculations or ignoring certain facts in order to achieve a specific sentence. It is little wonder that they often expressed dismay over their duties under the mandatory Guidelines, and Booker may free them from some of the tomfoolery. But serving as organizers and facilitators of restorative programs would provide probation officers an opportunity to further distance themselves from adversarial postures and strange calculations, and to return to the neutral, non-adversarial, and advisory roles of social work.

This last point, however, raises another obstacle: the hesitance of those within the federal criminal justice system to consider a challenge to the status quo represented by restorative justice. It can be argued that a generation of probation officers have lived under the Guidelines regime, "and, unlike their senior counterparts who entered the field with a social work perspective, they have a distinctly law-and-order approach to their work." Federal prosecutors and defense attorneys are adversarial by profession, schooled in the art of legal combat, and they too may be reluctant to consider an alternative that strays from the standard battle model of criminal justice. Judges may be more open to restorativism, although they were trained as attorneys as well, and anyone who took the bench after 1987 has spent his entire judicial career under the dictates of the Guidelines.

Criminal justice actors may also express doubts about the applicability of restorative justice to the regular business of the federal system. Many restorative programs have focused on juvenile offenders, a rarity in United States district courts, while the federal criminal docket is filled with victimless crimes, namely, non-violent drug offenses. In turn, some have argued that "restorative justice would not work in federal court because most of the offenders are too young for juvenile court and too old for youth court."

Between Defense Counsel and the Probation Officer Under the Guidelines, 11 FED. SENT'G REP. 312 (1999); Stephen R. Sady, Eliminating the Adversarial Role of the Probation Office, 8 FED. SENT'G REP. 28 (1995).


95. See, e.g., Probation Officers Advisory Group Survey, 8 FED. SENT'G REP. 303 (1996); Nancy J. King, Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment, 58 STAN. L. REV. 293 (2005); Natali, supra note 94.


97. See, e.g., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, 2003 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 419 tbl.5.18 (2004) [hereinafter 2003 SOURCEBOOK] (citing 0.9% of federal convictions involving defendants eighteen years old or younger); id. at 388 tbl.4.33 (citing 28.5% of federal arrests involving drug violations).
Moreover, restorative justice may be seen as incompatible with the Guidelines' target of uniformity in sentencing, instead producing the type of unwarranted disparities among offenders that the federal regime was intended to prevent. And given that more than ninety percent of those convicted in federal court are incarcerated, an outcome typically perceived as inconsistent with restorativism, some might question whether restorative programs will have any relevance for the vast majority of federal cases.

To us, at least, an unwillingness to consider restorative justice because criminal justice actors have become habituated to the standard sentencing hearing under the Guidelines—or, even worse, due to a lust for adversarial combat—cannot be deemed legitimate. Such arguments are not valid justifications but poor excuses that, in fact, may never be aired (because the relevant actors recognize them to be self-serving) and instead may be hidden behind some other claims that have the veneer of respectability. To counter these obstacles, whether acknowledged or concealed, legal reformers and restorative justice activists will need to engage judges, prosecutors, defense attorneys, and probation officers, attempting to educate them about the feasibility and benefits of restorativism in the federal system. As just mentioned, a wealth of resources exists to aid this endeavor, backed by motivated supporters to participate in a campaign for federal restorative justice. Another possible solution is to influence the cradle of legal professionals and the main source of legal scholarship, the American law school—a process that may have begun, with the advent of new courses, recent law review symposia, and clinical initiatives on restorative justice.

Concern about the applicability of restorativism to the majority of federal cases deserves a full response, which, unfortunately, is far more than can be provided here. But we would note that although restorative justice has been utilized to a large extent with juvenile offenders, there have been successful adult programs around the world and even in the United States. Contrary to the old adage, you can teach old dogs new tricks; many adult offenders can become law-abiding and desire to make amends, and restorative practices may prove to be

100. 2003 SOURCEBOOK, supra note 97. at 435 tbl.5.29 (citing 9.1% of federal sentencing involving probation only).
important contributors to their success.\textsuperscript{102} We also doubt that offenders in the federal criminal process are by nature more calculating or devious than those in the state systems, and thus less likely to be genuinely moved by restorative justice. Individuals find themselves in United States district courts for any number of reasons—by committing crimes on federal lands or due to unique jurisdiction provided by congressional statute, for instance, or just for infuriating some federal official (a very real but unspoken impetus)—and not necessarily because their offenses are especially conniving or represent incorrigible criminality.\textsuperscript{103}

Moreover, programs like victim-offender mediation have been employed with major offenses and crimes of violence.\textsuperscript{104} Some leading proponents have contended "that restorative justice should be used in serious cases," and they "would not exclude the use of restorative processes for any offences where the parties wished to use them."\textsuperscript{105} Still, there is a powerful argument that cases involving domestic abuse, sex offenses, or severe violence (e.g., homicide) may not be suitable candidates for restorative programs, although a refusal to apply restorative justice to such cases would not undermine its value in responding to other offenses such as property crimes. Indeed, restorative justice may be a powerful means to deal with a special class of federal offender, the white-collar criminal: In a restorative program, he must confront and listen to the victims of

\begin{itemize}
\item \textsuperscript{102} As an anecdote, consider Charles Colson, the White House official who was convicted and sentenced for his involvement in the Watergate scandal. After his release, Colson went on to found the Prison Fellowship Ministries, the world's largest outreach program to present and former prisoners, crime victims, and their families. Among other things, he has been an outspoken supporter of restorative justice. See Charles W. Colson, \textit{Truth, Justice, Peace: The Foundations of Restorative Justice}, 10 \textit{Regent U. L. Rev.} 1 (1998); Chuck Colson & Pat Nolan, \textit{Prescription for Safer Communities}, 18 \textit{Notre Dame J.L. Ethics & Pub. Pol'y} 387 (2004).
\item \textsuperscript{103} \textit{Cf.} Erik Luna, \textit{The Overcriminalization Phenomenon}, 54 \textit{Am. U. L. Rev.} 703 (1998) (discussing, \textit{inter alia}, the expansion and far-reaching consequences of federal criminal justice).
\item \textsuperscript{105} Morris & Young, \textit{supra} note 82, at 24.
\end{itemize}
his offense and hear the harm that it has caused, rather than simply enter into another business-like transaction via a formulaic guilty plea and abstract sentencing hearing.  

As for drug cases in United States district courts, restorative programs may still have application to offenses without discernible victims. For example, foreign nations have utilized conferencing for the "victimless" crime of drunk driving, with the offender confronted by the potential consequences of his actions—most importantly, injuring or killing another motorist or a pedestrian. A similar methodology might be employed for drug offenders, with a restorative program emphasizing the impact of drug crime on family members, friends, neighbors, and the larger communities, possibly with the participation of those who have been negatively affected by drugs (e.g., a parent whose child died of an overdose).

The prime focus of criticism, however, may be the issue of uniformity. Specifically, some might argue that restorative justice generates disparities in punishment between similarly situated offenders, thereby violating a central goal of the Guidelines. Yet such concerns will tend to be reflexive and unfounded, premised on the "myth" of uniform federal sentencing. As mentioned earlier and discussed at length elsewhere, the Guidelines incorporate a limited number of factors—often privileging certain objective criteria, like the quantity of drugs sold or amount of money embezzled—but then marginalize or ignore other seemingly relevant factors, such as an offender's youth or the fear instilled in a victim. Conversely, peculiar distinctions and slight factual changes can drastically alter an individual's sentence; whether a defendant occupied a "leadership" versus "managerial" role in a criminal scheme or possessed 5.01 grams of crack cocaine rather than 4.99 grams, for instance, can produce significant variations in punishment. Moreover, the complex and rigid strictures of the Guidelines fostered an environment of systematic evasion by criminal justice actors, with attorneys, judges, and probation officers playing fast-and-loose with the "facts" to obtain desired outcomes. Although these and other problems cannot be fully detailed here, it suffices to say that the Guidelines have hardly produced uniform punishment in any meaningful sense.

106. See, e.g., Braithwaite, supra note 14 (discussing benefits of restorative justice and reintegrative shaming for white-collar and regulatory offenders).


108. Even if federal officials deem some or all drug crimes unsuitable for restorative programs, they need not accept the status quo. For instance, another alternative methodology—the so-called "drug court"—has shown great success at reducing recidivism and was recently highlighted by one appellate court judge as worthy of consideration in the federal system. United States v. Ellefson, 419 F.3d 859, 868 (8th Cir. 2005) (Lay, J., concurring).


110. See, e.g., Luna, supra note 7.
As such, it might be tempting to glibly assert that restorative justice (or some other alternative) cannot make disparity in the federal system much worse. The better argument, however, is that restorativism may not only be compatible with concerns animating the drive for uniformity, it may generate a deeper conception of equality than currently obtainable under the Guidelines alone. Federal sentencing sorts real events and individuals into abstract groups for mechanical calculations and, in the process, eliminates most of the distinctive aspects of the offense and affected parties. The Guidelines thus ignore the truism of life that no two crimes are exactly alike; there is a background and foreground to every event that can be disregarded only at the expense of dehumanizing that which is inextricably human. By treating as identical all criminals who fit within certain prefabricated categories (e.g., some amount of ill-gotten proceeds), the system necessarily overlooks the human element of crime: What inspired the offender to sell drugs on a street corner? What have been the consequences for the bank teller who had a gun pointed in his face? What are the lingering effects for a neighborhood poisoned by environmental waste? What is the impact of the offense and potential punishment on the families of the victim and offender? Does the offender feel genuine remorse and want to make amends for his wrongdoing? What is needed to set things right for the victim and community?

These and other highly relevant issues distinguishing one case from another often receive little if any attention under the Guidelines. In contrast, restorative justice incorporates affected parties into a dialogic process that allows key questions to be asked and important concerns to be addressed, all in pursuit of a sentence that actually fits the crime and criminal and serves the needs of the victim and community. Restorativism’s conception of equality, based on real-world consideration of concrete events and the participation of concerned individuals, appears to us to be more meaningful than the mechanical equality provided by the Guidelines. Needless to say, restorative programs must be subject to review, guaranteeing that an outcome conforms to the law and falls within the general range of sentences in similar cases. As suggested earlier, a United States district court would evaluate the restorative plan—along with the arguments of counsel, in-court statements of relevant participants, information about previous cases, and the judge’s own knowledge of the present proceedings—in reaching an appropriate punishment. The federal courts as neutral, repeat-players in the criminal justice system could thus ensure that restorative plans meet the various matters of justice that inform sentencing. So conceived, we would argue that federal restorative justice offers a richer conception of equality, one cognizant of true-life differences among cases and affected individuals, without exacerbating the disparities perpetuated by the Guidelines regime.

111. For insightful analysis of whether restorative justice is consistent with various conceptions of uniformity, see Michael O’Hear, Is Restorative Justice Compatible With Sentencing Uniformity?, 89 MARQ. L. REV. 305 (2005); see also Luna, supra note 15.
Nor do we believe that the federal system’s heavy reliance on incarceration would necessarily preclude restorative programs. Certainly, many (if not most) of those who support substantive restorativism reject the preoccupation with imprisonment in retributive- and utilitarian-based sentencing, and they may well be horrified by the exploitation of their espoused processes in setting prison terms. Nonetheless, it can be argued that incarceration is American society’s chosen medium to broadcast an unambiguous denouncement of the criminal and his crime, with all other sanctions offering a less condemnatory message. This problem of “punishment incommensurability,” as Dan Kahan has described it, may mean that anything short of imprisonment will be considered insufficient by the public. Moreover, Sara Sun Beale has identified a series of obstacles to the adoption of restorative justice in America, including a general perception that harsh sentences reduce crime, the media’s incessant and fear-provoking coverage of crime stories, and the political reward to elected officials from supporting draconian penalties. There may even be some people who so viscerally despise offenders that they actively desire the imposition of physical and psychological pain that accompanies incarceration—more or less, “those criminals deserve whatever they get in prison”—and presumably this group would be indifferent to (or even disapprove of) the potential mental health benefits from restorative justice programs. Against this background, there is every reason to believe incarceration will remain a (if not the) core component of federal sanctioning for the foreseeable future.

This is descriptive and predictive, not normative—we find it disheartening that the United States may continue to lock-up a vast number of its own citizenry, sentenced not just to a loss of freedom but also the violence and depravity of correctional institutions. Even so, if restorative justice is to be anything other than a trivial practice in United States district courts, imprisonment will have to be countenanced as part of punishment. In some cases, there may be no choice but incarceration, a point conceded by some leading restorative justice advocates from foreign nations with far smaller prison populations. And even if a

116. See, e.g., Morris & Young, *supra* note 82, at 16 ("In fact, any outcome—including a prison sentence—can be restorative if it is an outcome agreed to and considered appropriate by the key parties. For example, it might be agreed that a prison sentence is required in a particular situation to protect society, to
"values" conception of restorativism assails the apparent incapacitative commitment of retributive and utilitarian theories and practices, a procedural conception of restorative justice would invite all decent punishment philosophies to the table and would not foreclose any viable sentencing options, including imprisonment.117 Moreover, it seems possible that the implementation of restorative programs in the federal system, despite (or even because of) the inclusion of prison terms, could slowly alter the professional and lay mentality about sentencing alternatives for the better, as people are forced to reconsider their opinions about the propriety of relying upon mass incarceration as a public policy.118

Restorative justice would remain unacceptable for punishment sadists, however, given its emphasis on healing rather than hurting, and quite frankly, there is not much that can be said to individuals who enjoy the infliction of pain on others. Yet there may be some who question the improvement of an offender’s mental health via restorative justice, not out of a desire for schadenfreude, but based on doubts about any programmatic gain for the law-abiding public. To put it more bluntly, why should society care about the well-being of offenders at all? For many people, the improvement of an offender’s—or any person’s—mental health will be a worthy end in and of itself, but others will need to see benefits beyond those that accrue to the individual who committed the underlying crime. Although it is not possible to go into a full discussion here, a few general lines of argument bear on this issue.

The first is the staggering financial burden on the public due to poor mental health among offenders. For example, the mentally ill can cost up to two-and-a-half times more to incarcerate per year119—a price tag that has only grown in the past few decades, with jails and prisons picking up new residents as mental institutions have decreased their populations, leading to unusually large numbers of inmates with psychiatric disorders.120 This expense is coupled with the obvious fact that if an offender (whether mentally ill or not) is incarcerated, then he is not
earning an income outside of the penal complex and will likely receive a diminished salary upon release.\textsuperscript{121} Such information could make proper treatment for offenders economically attractive to even the most recalcitrant policy-makers. Second, although it is common to feel contempt for offenders and pity for victims, there is substantial overlap between the two supposedly distinct populations.\textsuperscript{122} The categories are not mutually exclusive, and it would be wrong to place all of our affections in inappropriately reified classes of "pure offenders" and "pure victims." Instead, mental health benefits to offenders may also be mental health benefits to many crime victims. Finally, as demonstrated by social psychologist Stanley Milgram's classic research on the "six degrees of separation,"\textsuperscript{123} we are all connected, directly or indirectly. Inasmuch as few people would show callous disregard for the welfare of their friends or family, we should be concerned for others' well-being even when the connection is not immediately clear.

Undoubtedly, many questions remain to be answered about restorative justice in America, and many obstacles exist between the concept of federal restorative justice and its realization in United States district courts. We are optimistic, not naïve, and we fully recognize that criticisms about restorative justice must be aired and discussed in depth. As Professor Braithwaite notes, a thoughtful critique "helps us to be systematic in accounting for the negatives," and the interaction between advocacy and critique "is the stuff of the most productive intellectual work."\textsuperscript{124} At the same time, we must be "careful not to kill fertile ideas in the womb,"\textsuperscript{125} particularly those like restorative justice that challenge the status quo and may face a level of system inertia or even professional intransigence. Restorativism certainly cannot solve all of the criminal justice problems America faces today, but it may be a good start. And thanks to Booker, the benefits of restorative justice could be part of a brighter future for federal sentencing.


\textsuperscript{122} In a recent analysis of data from the National Longitudinal Study of Adolescent Health, offenders were 5.3 to 6.0 times more likely to also be victims than were non-offenders. Similarly, victims were 2.4 to 4.0 times more likely to offend than were non-victims. Jennifer N. Shaffer & R. Barry Ruback, The Relationship Between Victimization and Offending Among Juveniles, JUV. JUST. BULL., Dec. 2002, available at http://www.ncjrs.gov/pdffiles1/ojjdp/195737.pdf. Earlier studies found that status as either a victim or an offender increased risks of cross-categorization up to seven fold. See Janet L. Lauritsen et al., The Link Between Offending and Victimization Among Adolescents, 29 CRIMINOLOGY 265 (1991); Simon I. Singer, Homogenous Victim-Offender Populations: A Review and Some Research Implications, 72 J. CRIM. L. & CRIMINOLOGY 779 (1981).

\textsuperscript{123} Stanley Milgram, The Small World Problem, 1 PSYCHOL. TODAY 60 (1967). This research was conceptually replicated and confirmed in an email-based study by Duncan Watts, which is discussed in his book, SIX DEGREES: THE SCIENCE OF A CONNECTED AGE (2003).


\textsuperscript{125} Id.