

**RESTORATIVE JUSTICE:
RESTORING CALIFORNIA’S JUVENILE JUSTICE
SYSTEM AND ABOLISHING JUVENILE LIFE
WITHOUT PAROLE**

*Jasmine Duel, Carl Marrone and Ricardo Rozen**

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* Jasmine Duel, Carl Marrone, and Ricardo Rozen are volunteers with the Center for Restorative Justice at Loyola Law School (CRJ). Founded by Professor Scott E. Wood in the Summer of 2009 and the second center of its kind at any law school in the nation, after the Marquette University Law School Restorative Justice Initiative, the CRJ works to introduce the concepts and practices of restorative justice into the legal field by means of classroom-based and experiential education for law students.

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*“Justice at its best is power correcting everything that stands
against love.”*

- Dr. Martin Luther King, Jr.¹

I. INTRODUCTION

The American criminal justice system is not a static entity; rather, it is a continuously evolving institution influenced by politics, economics, current events, and social norms.² The overarching goal of restorative justice is to transform societies’ response towards criminal behavior. Although several views exist as to the exact nature of transformation restorative justice should facilitate, there is widespread agreement amongst academics, legal professionals and crime victims that restorative justice aims to substitute the current professionalized systems of punitive justice and to control with community-based reparative justice and moralizing social control.³

¹Dr. Martin Luther King Jr., *Where Do We Go From Here? Address Before the 11th Annual Southern Christian Leadership Conference (Aug. 16, 1967)*, in *A Call to Conscience: The Landmark Speeches of Dr. Martin Luther King, Jr.* 165, 186 (Clayborne Carlson and Kris Shepard, eds., 2001) (“Power without love is reckless and abusive, and love without power is sentimental and anemic. Power at its best is love implementing the demands of justice, and justice at its best is power correcting everything that stands against love.”).

² Brian Sapir, Note, *Healing a Fractured Community: The Use of Community Sentencing Circles in Response to Hate Crimes*, 9 *CARDOZO J. CONFLICT RESOL.* 207, 207 (2007).

³ Gerry Johnstone & Daniel W. Van Ness, *The Meaning of Restorative Justice*, in *HANDBOOK OF RESTORATIVE JUSTICE* 5, 5 (Gerry Johnstone & DANIEL W. VAN NESS, eds., 2007).

More than simply controlling crime effectively, restorative justice applications can accomplish other favorable goals such as:

[A] meaningful experience of justice for victims of crime and healing of trauma which they tend to suffer; genuine accountability for offenders and their reintegrating into law-abiding society; recovery of social capital that tends to be lost when we hand our problems over to professionals to solve; and significant fiscal savings, which can be diverted towards more constructive projects, including projects of crime prevention and community regeneration.⁴

Restorative justice quantifies crime as public harms, not just harm against the immediate victim. It suggests that reparations should be designed through the negotiations of all parties involved with the goal of compensating the community as a whole rather than just the immediate victim.

Restorative justice is essentially synonymous with rehabilitation as it is understood in the criminal justice system, but expands the scope to seek rehabilitation for not only the offender, but the victim and the community as well. The rehabilitation model in criminal justice has been a prominent and influential school of thought for the past 200 years.⁵ Although this policy fell by the wayside,⁶ surveys suggest there is still a profound consensus by the general public that rehabilitation of offenders, and even crime victims, should still be the driving force shaping the criminal justice system today.⁷ Drawing from this collective consensus, restorative justice proponents advocate an alternative system to the criminal system, wherein healing and transformative personal change are integral to the criminal justice system. In this alternative model, offenders are equipped with the necessary life tools to be constructive individuals upon reentry into their communities.

⁴ *Id.*

⁵ Gerry Johnstone & Daniel W. Van Ness, *Introduction to Chapter 3: Restorative Processes, Outcomes, Stakeholders*, in *HANDBOOK OF RESTORATIVE JUSTICE*, *supra* note 3, at 208, 208.

⁶ *Id.*

⁷ GERRY JOHNSTONE & KAREN HEETDERKS STRONG, *RESTORING JUSTICE: AN INTRODUCTION TO RESTORATIVE JUSTICE* 3 (4th ed. 2010).

Restorative justice interventions can be implemented throughout the entire criminal process. Restorative justice may serve as 1) an alternative to prosecution, 2) a substitute for the conventional sentencing process, 3) an adjunct to the sentencing process, and 4) a post-sentence intervention.⁸ This article advocates all of these interventions generally, and specifically to reform California's broken juvenile justice system.

Section I will lay out the foundation of this article by providing a brief explanation as to what restorative justice means in a modern context. The birth and history of restorative justice will be examined in section II. Section III describes various manifestations of restorative justice, namely victim offender mediation, family group conferencing, and "circles." Section IV will lay out the current state of juveniles in the criminal justice system in California and the dire future juveniles face in institutions unfit to respond to the juveniles' development. This section highlights the uniqueness and success of the Missouri Model, which effectively utilizes key principles of restorative justice at all levels of the criminal justice process. It concludes that California should adopt the Missouri Model of juvenile justice.

II. DEFINING RESTORATIVE JUSTICE: AN ALTERNATIVE TO THE CRIMINAL JUSTICE SYSTEM

A. *An Organic Definition for an Organic Process*

As no authoritative body exists with either the responsibility or credibility to make conclusive decisions about restorative justice, the field has developed in a piecemeal fashion over time. Thus, restorative justice does not have a singular meaning, but instead is used in a variety of different ways. The manner in which it is used depends on the context and culture it is being used to serve and the ideals that people wish to highlight. In attempting to define restorative justice, some authors have concluded that restorative justice means "all things to all people."⁹ Recognizing the merits of

⁸ James Dignan, *Juvenile Justice, Criminal Courts and Restorative Justice*, in HANDBOOK OF RESTORATIVE JUSTICE, *supra* note 3 at 269, 270 (2007).

⁹ Johnston & Van Ness, *supra* note 3, at 6.

this claim, this article examines the normative goals and mechanisms of restorative justice most widely accepted by its proponents.

Most of its proponents agree that restorative justice is rooted in indigenous cultures and offers a progressive, community-based alternative to the more traditional retributive approach of crime and punishment.¹⁰ Howard Zehr, a pioneer in the field, defines restorative justice as "a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible."¹¹ Restorative justice does not outline a specific set of programs to implement, but rather it is an alternative way of thinking about and responding to the criminal justice system.

B. *What Is a Crime and Against Whom Is It Committed?*

One of the biggest differences between criminal justice systems and restorative justice is that whereas most criminal justice systems view the commission of a crime as a criminal act committed *against the state*, restorative justice views the commission of a criminal act as a violation *against an individual victim and the affected community*.¹² Similarly, when criminal justice systems treat crime as an act against the state, "crime" is defined exclusively as the actual act of breaking the law. This state/law-centered approach can reduce the importance of the social and moral issues surrounding the event.¹³ In a restorative justice system, however, crime is considered an act against the victim and the community, so justice is necessarily couched in terms of reparation and restoration.¹⁴ Most importantly, restorative justice focuses on the impact of crime on human relationships.¹⁵ Restorative justice emphasizes the needs of victims of crime but also recognizes that offenders and the community have

¹⁰ *Id.*

¹¹ HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 37 (2002).

¹² *Id.* at 64-69.

¹³ Jean Ferguson, *Professional Discretion and the Use of Restorative Justice Programs in Appropriate Domestic Violence Cases: An Effective Innovation*, 4 CRIM. L. BRIEF 3, 12 (2009).

¹⁴ *Id.*

¹⁵ ADMINISTRATIVE OFFICE OF THE COURTS, CENTER FOR FAMILIES, CHILDREN & THE COURTS, *BALANCED AND RESTORATIVE JUSTICE: AN INFORMATION MANUAL FOR CALIFORNIA 1* (2006), available at www.courtinfo.ca.gov/programs/cfcc/pdf/FILES/BAJManual3.pdf [hereinafter BALANCED AND RESTORATIVE JUSTICE].

an important stake in the resolution of every crime and the prevention of future crimes.

C. *Beyond Crime Control and Retribution*

The function of the criminal justice system is to control crime.¹⁶ Many countries, including the United States, use a retributive legal framework to craft their criminal justice policies. Retributive justice focuses on ensuring that the punishment of the offender is proportional to the crime committed.¹⁷ The “just desserts” model is associated with the Biblical concept of “eye for an eye, a tooth for a tooth,” where justice is both achieved and defined by punishment.¹⁸ Deterrence against future crime is only a secondary purpose of punishment. In a retributive legal framework, then, punishment controls crime.

Proportionality is not lost in restorative justice. Although restorative justice and retributive justice are markedly different, both systems intend to vindicate the rights of the victim in proportion to the criminal act committed by the offender. However, their response to vindication and “settling the score” is clearly different.¹⁹ Instead of punishment as both a means and an end, restorative justice seeks meaningful resolution. Restorative justice replaces “an eye for an eye” with the wager “that every human being wants to be connected in a good way, and in a safe space we are able to take action through dialogue to build community so that all life might flourish.”²⁰ This assumes that every human heart beats with a restorative impulse to seek social healing.²¹ This goal marks a stark contrast to the goals of retribution and crime control.

D. *Elements of Restorative Justice: Victims and Offenders*

For restorative justice to be successful, direct participation of the victim and offender is necessary. Restorative justice is a two-step

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Sapir, *supra* note 2, at 214-15.

¹⁹ *Id.*

²⁰ Howard Vogel, *Healing the Trauma of America's Past: Restorative Justice, Honest Patriotism, and the Legacy of Ethnic Cleansing*, 55 *BUFF. L. REV.* 981, 983 (2007).

²¹ *Id.*

process: 1) the victim must have an opportunity to share with the offender his/her emotions and experience surrounding the criminal activity, and 2) the offender must take responsibility for his/her actions and atone for them.²² Community members as indirect victims are included in restorative justice models, while the current criminal process completely ignores their needs.²³ Direct participation of victim, offender and community achieves meaningful resolution through apology rather than excuses, defenses, or legal measures.²⁴ In the words of one restorative justice proponent, this model “can act as a narrative catharsis, whereby a fractured community can come face-to-face with its broken past and begin to repair those fractures.”²⁵

Victims of crime often feel ignored or neglected by the criminal justice process and their needs are seldom adequately addressed by criminal justice outcomes.²⁶ Surrounded by courts, judges, lawyers, and legalese, victims have to wait a long time to receive answers to basic questions, such as why the crime occurred and what has transgressed since the commission of the crime.²⁷ Even when answers become available, the formal nature of legal proceedings can easily confuse and intimidate victims who seek answers. Similarly, the complexities of legal proceedings drown victims’ need for truth-telling and they may never hear the complete truth from the offenders.²⁸ Finally, knowing that an offender has been sentenced to incarceration does not wholly serve victims’ desires to be made whole again. Restorative justice holds that metal bars, barbed wire and orange jump suits cannot speak to the emotional closure victims often seek. After the commission of a crime, a victim’s sense of safety and confidence in his/her community is challenged. Only by directly confronting the offender can victims speak their peace, accept the situation, and move forward. Restorative justice

²² Abigail Perkiss, *Public Accountability and the Tuskegee Syphilis Experiments: A Restorative Justice Approach*, 10 BERKELEY J. AFR.-AM. L. & POL’Y 70, 86 (2008).

²³ *Id.* at 87-88.

²⁴ *Id.* at 87-89.

²⁵ *Id.* at 87.

²⁶ See ZEHR, *supra* note 11, at 14.

²⁷ *Id.*

²⁸ *Id.* at 14-15.

recognizes these needs and attempts to address them by encouraging active participation from victims in the process of serving justice.

As for the offender, the nature of the criminal justice system prevents most criminals from taking responsibility for their actions. Criminal justice realities like plea bargains, fear of harsh sentences, and overburdened defenders and prosecutors can collectively deter offenders from accountability and apology. Restorative justice seeks to hold offenders accountable for their actions while encouraging empathy and responsibility. Additionally, the process encourages personal transformation and healing of the problems that caused offenders to commit crime in the first place.²⁹

E. Elements of Restorative Justice: Sentencing Outcomes

Traditionally, and most commonly, offenders are held accountable for their crimes through restitution. Typically, restitution takes the form of returning or replacing property, by making financial payments or by performing services for the victim.³⁰ Restitution is an optimal way to respond restoratively to harm committed against victims, as it requires offenders to compensate victims for the sustained harm.³¹

Restorative justice proponents advocate for more expansive forms of restitution than that already required by courts. Restorative justice quantifies crime as public harms, not just harm against the immediate victim; therefore, reparations should be designed through the negotiations of all parties involved. Direct victims, secondary victims, local communities, and employers should be included in designing the appropriate restitution received by the offender. Outcomes of collective decisions emphasize a restorative process in executing restitution, rather than focusing solely on the direct harm caused to the victim. For example, if a burglar destroys property on a public school, rather than the repayment of the exact dollar amount of the property to the school, the offender, after going through a facilitated mediation, could be sentenced to community service

²⁹ *Id.* at 16-17.

³⁰ See Johnstone & Van Ness, *supra* note 3, at 14; see also Declan Roche, *Retribution and Restorative Justice*, in *HANDBOOK OF RESTORATIVE JUSTICE*, *supra* note 3, at 75, 87.

³¹ Roche, *supra* note 30.

instead. Therefore, in order for restorative restitution to be effective, restitution must become more expansive.

While criminal justice focuses on these three questions: (1) what laws have been broken? (2) who did it? and (3) what do they deserve? restorative justice asks (1) who has been hurt? (2) what are their needs? and (3) whose obligations are these?³² Restorative justice invites and encourages victims, offenders, and community members to join in an effort to right the wrongs committed in a manner that answers these questions with solutions that attempt to benefit all those involved. In sum, as two leading scholars in the field argue that by means of restorative justice practices:

We can not only control crime more effectively, we can also accomplish a host of other desirable goals: a meaningful experience of justice for victims of crime and healing of trauma which they tend to suffer; genuine accountability for offenders and their reintegration into law-abiding society; recovery of the social capital that tends to be lost when we hand our problems over to professionals to solve; and significant fiscal savings, which can be diverted towards more constructive projects, including projects of crime prevention and community regeneration.³³

III. THE EVOLUTION OF RESTORATIVE JUSTICE

The roots of the contemporary restorative justice movement are attributed to an incident in Elmira, Ontario in 1974.³⁴ Commonly known as the *Elmira Case*, a probation officer, wanting to make offenders accountable for their actions, walked two young men door-to-door to the owners of the twenty-two properties they vandalized.³⁵ This proved to be so successful and all parties involved had such positive reactions towards this event that it served as a springboard for the widespread use of victim offender mediation programs.

³² See generally HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE 185-6 tbl.5.1 (1990) (chart comparing attributes of retributive and restorative justice models).

³³ Johnstone & Van Ness, *supra* note 3, at 5.

³⁴ Ferguson, *supra* note 13, at 11.

³⁵ *Id.*

The *Elmira Case*, as well as other victim-offender encounter programs effectuated by Mennonite populations seeking to incorporate their faith and peaceful perspective into the harsh reality of the criminal justice system, are often pointed to as the origins of modern restorative justice.³⁶ However, restorative justice is far from a novel concept. Throughout the vast majority of human history, restorative justice has been the primary model in the criminal justice system. Ancient Greek, Arab, and Roman civilizations provide the foundations of the restorative justice principles used in modern day application.³⁷ The end of the Dark Ages, ushered in by the Norman Conquest of Europe, fundamentally transformed the concept of crime. Instead of a crime committed against an individual, the new definition understood crime as an offense committed against the king.³⁸ The same is still true of today's criminal judicial system, which defines criminal proceedings as "a contest between the offender and the state."³⁹

The restorative justice model started as a global movement in the 1890's based on indigenous practice from the oral justice traditions of the New Zealand Maori and North American native peoples.⁴⁰ However, the restorative justice principles of these groups approached extinction in the nineteenth century as western powers imposed their own models and definitions of justice and punishment onto these indigenous groups.⁴¹ Surprisingly, in the 1960's, an unexpected rebirth of restorative justice practices began to resurface in discrete, often indigenous communities. Due to frustration with western forms of crime and punishment, and the suppression of their inherent communal identities, restorative justice principles

³⁶ Dennis Sullivan & Larry Tift, *Introduction to Section II: The Foundations of Restorative Justice*, in HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE 147, 148 (Dennis Sullivan & Larry Tift eds., 2006) [hereinafter A GLOBAL PERSPECTIVE]; for a discussion of other spiritual practices giving rise to restorative justice, see generally Michael L. Hadley, *Spiritual Foundations of Restorative Justice*, in A GLOBAL PERSPECTIVE, *supra*, at 174-187.

³⁷ Ferguson, *supra* note 13, at 10.

³⁸ *Id.*

³⁹ Catherine Pugh, Comment, *What Do You Get When You Add Megan Williams to Matthew Shepard and Victim-Offender Mediation? A Hate Crime that Prosecutors Will Actually Want to Use*, 45 CAL. W.L. REV. 179, 197 (2008).

⁴⁰ Ferguson, *supra* note 13, at 10.

⁴¹ GERRY JOHNSTONE, RESTORATIVE JUSTICE: IDEAS, VALUES, DEBATES 36 (2002).

reappeared in order to adequately respond to crime and justice.⁴² For example, the Navajo of North America explain that their version of restorative justice was not designed to punish individuals, rather to “teach them how to live a better life . . . It is a healing process that either restores good relationships among people or, if they do not have good relations to begin with, fosters and nourishes a healthy environment.”⁴³

IV. VARIOUS MANIFESTATIONS OF RESTORATIVE JUSTICE PRINCIPLES: VICTIM OFFENDER MEDIATION, FAMILY GROUP CONFERENCING, AND CIRCLES

In the criminal justice system, various modalities are utilized to facilitate restorative justice. The three most notable forms of the restorative justice processes are: 1) victim offender mediation, 2) family group conferencing, and 3) circles.

A. *Victim Offender Mediation*

The *Elmira Case*, is generally credited with the birth of victim-offender mediation (VOM). Of all of the different manifestations of restorative justice programs, VOM is the most developed and widespread. “VOM breaks away from the more traditional ‘trail ‘em, nail ‘em and jail ‘em approach.”⁴⁴

Typically, four phases exist in VOM: 1) intake, 2) preparation, 3) mediation, and 4) follow-up.⁴⁵ During the first stage, the mediator screens potential cases to assure that the case is appropriate for mediation. During preparation, the mediator meets with all parties involved to inquire if the parties are willing, in good faith, to mediate. If any party is unwilling to take part in this process, then a VOM cannot occur. However, if all parties agree to participate, then each party is expected to honestly and candidly express his/her account of the event and his/her emotions surrounding it.

Throughout this open dialogue, victims and offenders work together to create a restitution plan for the victim to appropriately address the crime. Victims have an opportunity to be heard and

⁴² *Id.* at 37.

⁴³ Hadley, *supra* note 36, at 179.

⁴⁴ Pugh, *supra* note 39, at 215.

⁴⁵ *Id.*

explain how the crime has affected their lives. Offenders take direct responsibility for their actions and make amends with their victim. Originally, VOM included only the victim and offender. Nowadays, other participants are invited to take part in this process including parents, family members or supporters.⁴⁶ Lastly, in the follow up stage, the case is reviewed to assess the impact. If VOM was unsuccessful then the case is returned to court.⁴⁷

The benefits of VOM are threefold. The victim benefits because he/she can directly confront the offender and explain the wounds and impact he/she carries from the event. Society benefits when the offender can approach the harmed community to atone for his wrongdoings, which invariably results in decreasing recidivism.⁴⁸ Additionally, by taking personal responsibility for his/her actions, the offender benefits, as he/she must deal with the ramifications of his/her actions.⁴⁹ One study showed that 80% of victims who participated in mediation reported they experienced “fairness” compared with 40% of victims who decided not to be involved in mediation.⁵⁰

Thus, VOM can work to bridge a gap between the prosecutor’s overburdened calendar and society’s need to heal its communities. Offsets of this model involving indirect conversation between offender and victim by audio-recordings, telephone calls, letters, video-recordings, and email, have also been used when parties are unable or unwilling to meet face to face.⁵¹

B. Family Group Conferencing

Family group conferencing (FGC) began in New Zealand in 1989 under provisions of the Children, Young Persons and Families Act, to address youth justice and child welfare matters.⁵² Subsequently, FGC was adopted in Australia and is currently used in

⁴⁶ Barbara E. Raye & Ann Warner Roberts, *Restorative Processes*, in HANDBOOK OF RESTORATIVE JUSTICE, *supra* note 36, at 211 (2007).

⁴⁷ Pugh, *supra* note 39, at 216.

⁴⁸ *Id.* at 186.

⁴⁹ *Id.*

⁵⁰ VAN NESS & STRONG, *supra* note 7, at 78.

⁵¹ Raye & Roberts, *supra* note 46, at 213.

⁵² VAN NESS & STRONG, *supra* note 7, at 28.

one of its various forms across the world.⁵³ The purpose of this reform in New Zealand was to empower extended family members of the Maori whose children were disproportionately involved in the criminal system.⁵⁴

Australia and New Zealand manifest FGC differently in their respective societies. In Australia, FGC use an authoritative figure, typically a police officer, to mediate a scripted dialogue during the conference.⁵⁵ By contrast, the New Zealand model utilizes social service personnel to organize conferences and help families decide who would be an appropriate participant in this process.⁵⁶ Additionally, no script is used to dictate the direction of the dialogue, and a proposal is offered by the offender and his/her family to the victim and his/her family to remedy the harm caused.⁵⁷ These divergent modalities of FGC resulted as a response to the cultural needs of the people implementing them.

Where FGC has been adopted, practices in the United States usually follow the Australian version of FGC.⁵⁸ Typically, judges and probation officers refer cases to FGC, but police and schools can make referrals as well.⁵⁹ Neutral facilitators, which can consist of law enforcement, human services, county staff, clergy, or community-based volunteers, assist victims, offenders and their families in an open dialogue.⁶⁰ FGC was designed to facilitate cooperation between families of victims and families of offenders and to resolve their conflicts. FGC has been primarily used in cases involving juveniles, but FGC involving adult offenders is steadily increasing.⁶¹ The main difference between FGC and VOM is that

⁵³ *Id.* at 68.

⁵⁴ *Id.*

⁵⁵ Raye & Roberts, *supra* note 46, at 214.

⁵⁶ *See* ZEHR, *supra* note 11, at 49.

⁵⁷ *See id.*

⁵⁸ *Id.*

⁵⁹ Mark Umbreit & Claudia Fercello, *Practicing Restorative Justice: Family Group Conferencing and Juvenile Crime in the Suburban Metro Area*, 30 CENTER FOR URB. & REGIONAL AFF. 15, 15 (2000), available at <http://www.cura.umn.edu/sites/cura.advantagelabs.com/files/publications/30-2-Umbreit-Fercello.pdf>.

⁶⁰ *Id.*

⁶¹ Kay Pranis, *Restorative Values*, in HANDBOOK OF RESTORATIVE JUSTICE, *supra* note 3, at 59, 68.

family members take a primary and fundamental role in FGC; whereas, in VOM family members are considered secondary and non-mandatory participants.⁶²

C. Circles

“Circles” are a term of art in restorative justice that refers to a community-based decision-making approach derived from traditions of North American aboriginal peoples.⁶³ For generations these societies have been using circles, devoid of structured criminal systems, to resolve disputes. They have used circles with the objective of striking a balance between individuals and the community by restoring harmony.⁶⁴ Circle sentencing, also known as community circles, peacemaking circles, or healing circles, has evolved since the early 1990’s, as an effective vehicle to uncover the root of the problem contributing to the offender’s actions and to heal the injury of the crime by the offender.⁶⁵ Circles differ from VOM because, unlike VOM programs, which focus mainly on the victim and offender, circles expand the healing environment to include the entire community in the curative process.⁶⁶

To manage effective communication among the community members involved in the circle, a “talking piece” is passed clockwise around the circle. When a participant takes possession of the talking piece, he/she receives uninterrupted time to express what he/she wishes related to the criminal event.⁶⁷ Additionally, “a keeper” directs the movement of the talking piece and maintains order and focus by occasionally interjecting to summarize for the group.⁶⁸ Circles do more than sentence the offender. As the community at large is invited to participate in these circles, discussions typically address how communities can prevent future harm to the communities, provide care and support for victims, and appropriately receive community offenders who have been to jail.⁶⁹

⁶² Raye & Roberts, *supra* note 46, at 211.

⁶³ *Id.* at 215.

⁶⁴ Sapir, *supra* note 2, at 217.

⁶⁵ *Id.* at 208.

⁶⁶ *Id.* at 220.

⁶⁷ Raye & Roberts, *supra* note 46, at 215

⁶⁸ Pranis, *supra* note 61, at 69.

⁶⁹ See ZEHR, *supra* note 11, at 51.

Since circles are a recent addition to the restorative justice process there has been considerably fewer studies quantifying the effectiveness of circles. Limited data has generally shown positive results.⁷⁰ In a Minnesota study, participants felt a stronger sense of connection in the communities where circles took place.⁷¹ Of all three modalities of restorative justice, circles are the most inclusive because any member in the community can opt to participate in the circles, even if they are strangers to the parties involved. Widespread participation may reap the most benefits for the most people, while making quantification of those effects harder.

V. ADOPTING THE MISSOURI MODEL IN THE CALIFORNIA JUVENILE JUSTICE SYSTEM

Restorative justice interventions can be implemented throughout the entire criminal process. Restorative justice may serve as 1) an alternative to prosecution, 2) a substitute for the conventional sentencing process, 3) an adjunct to the sentencing process, and 4) a post-sentence intervention.⁷² Restorative justice policies in the California juvenile justice system are beginning to take shape throughout this entire process. Although there has been some progress, California needs to find the appropriate allies and foster a collective shift in how it views youth entangled in the system.

Restorative justice in no way suggests that juvenile offenders should not serve time for their unlawful activities.⁷³ However, in addition to being punished, they should also be fully rehabilitated. While offenders count their days behind bars, rehabilitation should address the needs of vulnerable juvenile offenders to make them productive members of our society upon reentry. Cooperation between the community, juvenile offenders, and policymakers is necessary for the effective deployment of restorative justice. Although rehabilitation programs in the California juvenile justice system exist, these programs solely address the underlying problems that led to the decision to commit the crime. They stop short of

⁷⁰ Lynette Parker, Prison Fellowship International, *Circles* (2001), <http://www.restorativejustice.org/university-classroom/01introduction/tutorial-introduction-to-restorative-justice/processes/circles>.

⁷¹ *Id.*

⁷² James Dignan, *supra* note 8, at 275-281.

⁷³ *Id.*

addressing all the injuries surrounding the crime.⁷⁴ This section will compare the current state of the juvenile system in effect in California and Missouri. The Missouri Model represents the gold standard of restorative justice in the United States. California should follow suit so the youth can take responsibility for their own actions and learn constructive tools to be contributing members of our society.

A. Reforming California's Juvenile Justice System

The California Division of Juvenile Justice (“DJJ”), formerly the California Youth Authority (“CYA”)⁷⁵, was initially regarded as forward-thinking and progressive.⁷⁶ Today, however, the juvenile system in California is perceived as a system “plagued by violence, abuse and decaying facilities.”⁷⁷

Established in 1941, the CYA was created to oversee and implement a rehabilitation program for offenders from ages twelve to twenty-five who were committed to the juvenile court system.⁷⁸ The CYA’s mission, codified in California Welfare and Institutions Code section 1700 (“Section 1700”), required the juvenile system to replace retributive punishment with education and training.⁷⁹

⁷⁴ VAN NESS & STRONG, *supra* note 7, at 4.

⁷⁵ CAL. WELF. & INST. CODE § 1710(a) (Deering 2006) (“Commencing July 1, 2005, any reference to the Department of the Youth Authority in this or any other code refers to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities.”). For clarity, “CYA” will be used to refer to the California Division of Juvenile Justice.

⁷⁶ CHRISTOPHER HARTNEY ET AL., NAT’L COUNCIL ON CRIME & DELIQUENCY, BERKELEY CTR. FOR CRIMINAL JUSTICE, A NEW ERA IN CALIFORNIA JUVENILE JUSTICE 1 (2010), available at http://www.nccd-crc.org/nccd/dnld/Home/A_New_Era.pdf.

⁷⁷ Trey Bundy, *Can Counties Handle Young Offenders on Their Own?*, THE BAY CITIZEN, Jan. 22, 2011, available at <http://www.baycitizen.org/crime/story/can-counties-handle-young-offenders-own/>.

⁷⁸ CAL. WELF. & INST. CODE § 1700-1703 (Deering 2006); see also ELISABETH HILL, LEGISLATIVE ANALYST’S OFFICE, A REVIEW OF THE CALIFORNIA YOUTH AUTHORITY’S INFRASTRUCTURE, 1, 3 (2004), available at http://www.lao.ca.gov/2004/cya/052504_cya.pdf.

⁷⁹ CAL. WELF. & INST. CODE § 1700 (Deering 2006) (“The purpose of this chapter is to protect society from the consequences of criminal activity and to that purpose community restoration, victim restoration, and offender training and treatment shall be substituted for retributive punishment and shall be directed toward the

According to Section 1700, the juvenile system was designed to: 1) protect public safety, and 2) rehabilitate youthful offenders through community and victim restoration and offender training and treatment in lieu of punishment.⁸⁰ The statutory mandate *required* juvenile offenders committed to the CYA to be rehabilitated. Despite a statutory mandate and undeniable case law advocating rehabilitative programs, rehabilitation has fallen to the wayside.⁸¹ As a result, California commands one of the highest recidivism rates in the country.⁸²

The CYA population never exceeded 7,000 in the first three decades because many programs were instituted to keep youth in local placements.⁸³ However, leadership and policy changes in the late 1970s and early 1980s initiated a stark increase in the CYA population. By 1996, over 10,000 youth were being held in CYA facilities due to the elimination of community-based programs.⁸⁴ This marked increase was also fueled by fears of the general population that juvenile violence was on the rise.⁸⁵

Youth custody peaked in 1996, when the annual cost to house a ward of the CYA rose to \$36,118.⁸⁶ Although the number of juveniles in youth custody steadily declined after 1996, the cost of custody rapidly increased to \$83,223 per youth by 2003.⁸⁷ In 2008 the annual cost per youth reached an astounding \$252,000.⁸⁸

correction and rehabilitation of young persons who have committed public offenses.”).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Cheri Panzer, *Reducing Juvenile Recidivism Through Pre-Trial Diversion Programs: A Community's Involvement*, 18 J. JUV. L. 186, 191 (1997); Brandon Bailey & Griff Palmer, *High Rearrest Rate*, SAN JOSE MERCURY NEWS, Oct. 17, 2004, at A1.

⁸³ BARRY KRISBERG ET AL., BERKELEY CTR. FOR CRIMINAL JUSTICE, NAT'L COUNCIL ON CRIME AND DELIQUENCY, A NEW ERA IN CALIFORNIA JUVENILE JUSTICE: DOWNSIZING THE STATE YOUTH CORRECTIONS SYSTEM 1 (2010), available at http://www.law.berkeley.edu/files/A_New_Era_10-22-2010.pdf.

⁸⁴ *Id.*

⁸⁵ *Id.* at 2

⁸⁶ *Id.* at 14.

⁸⁷ *Id.*

⁸⁸ Michael Rothfeld, *State to Close Largest Youth Lockup, Convert it to Adult Prison*, L.A. TIMES, August 27, 2009,

Reports of deplorable conditions and abusive practices in CYA facilities surfaced in the mid-1990s.⁸⁹ To respond to the substandard conditions of the CYA facilities, the absurd fees, and outlandish recidivism rates of youth once part of CYA, legislators enacted the historic “realignment” legislation: SB 81.⁹⁰ SB 81 redefined placement options, it allowed only the most serious offenders to be sent to the state, and required all non-violent youth to be kept out of state facilities.⁹¹ As youth were forced to stay in county facilities, counties were forced to become creative with their resources and develop local programs in their communities that worked for their youth.⁹² However, because priors for juveniles are not taken into account, youth with several violent priors, currently being held for a minor offense, would be placed with the county, and stay out of CYA.⁹³ Some argue this has resulted in increased gang activity, fighting between inmates and inability to cope with and rehabilitate these youth.⁹⁴ Senate Bill 81, thus is helpful but inadequate. It offered juvenile offenders relief from deplorable conditions in state facilities, but may have produced another set of harms entirely.

Compounding matters, California has experienced an increase in direct files to adult court for juveniles in the past few years, which bypasses the juvenile justice system entirely.⁹⁵ This has occurred in part due to Proposition 21, which requires juveniles charged with certain violent crimes to be tried in an adult court.⁹⁶

In the past 15 years, California has experienced an 80% decline in the number of youth incarcerated by the CYA.⁹⁷ Even with this dramatic decrease, public safety has not been compromised. In fact, California crime rates are steadily declining and fewer youth are being arrested.⁹⁸ Currently, the CYA holds about 1,500 youth.⁹⁹

<http://latimesblogs.latimes.com/.m/lanow/2009/08/state-to-close-youth-lockup.html>.

⁸⁹ KRISBERG ET AL., *supra* note 83, at 13

⁹⁰ *Id.* at 15.

⁹¹ *Id.*

⁹² *Id.* at 2.

⁹³ *Id.* at 15.

⁹⁴ *Id.*

⁹⁵ *Id.* at 12.

⁹⁶ *Id.*

⁹⁷ *Id.* at 19.

⁹⁸ *Id.* at 9.

Furthermore, it is clear California is taking steps in the right direction by adopting SB 81 to prevent non-violent youth from entering CYA facilities.

Three conditions still demand reform. First, allegations of violence and abuse still occur in youth facilities.¹⁰⁰ Second, although rates appear to be declining, California still commands one of the highest recidivism rates in the country despite spending the highest per capita dollar amount on each youth as compared to any other state in the US.¹⁰¹ Third, finding adequate alternatives to address the needs of serious youth offenders is crucial. This is necessary to prevent threats to less violent offenders in local facilities and to reverse the long-term trajectory of serious youth offenders. Without a rehabilitation plan for violent youth offenders, it is probable that more youth will end up in adult prison where it is more likely juveniles will become hardened criminals. “Get tough” measures to control crime like Proposition 21, especially targeting youth, do nothing more than increase prison populations, reduce the likelihood of rehabilitation, and contribute to the ineffectiveness of the criminal justice system. To sustain a successful and healing criminal justice system, California must look to Missouri to implement restorative justice principles.

B. *Missouri Model: A Miracle*

California could undeniably save millions of dollars and heal countless lives by adopting the current model used in Missouri to deal with its criminal youth. The state of Missouri has created a juvenile justice system, known as the ‘Missouri Miracle’, which has proved to be so successful over the last 30 years.¹⁰² The hallmarks of Missouri’s approach include the following: 1) Instead of institutional

⁹⁹ *Id.*

¹⁰⁰ KAREN M. HESS, *JUVENILE JUSTICE* 356 (5th ed. 2010).

¹⁰¹ Anthony Portantino, *Portantino Proposes Alternative to Early Release Prison Reform Efforts*, L.A. PROGRESSIVE, February 5, 2011, available at <http://www.laprogressive.com/law-and-the-justice-system/portantino-prison-reform/>.

¹⁰² Marian Wright Edelman, *Juvenile Justice Reform: Making the “Missouri Model” an American Model*, HUFFINGTON POST, March 15, 2010, http://www.huffingtonpost.com/marian-wright-edelman/juvenile-justice-reform-m_b_498976.html.

correctional facilities, Missouri uses three-dozen residential programs, each housing less than 35 offenders.¹⁰³ Nearly all youth live within 50 miles of their homes so that their parents can participate in the therapeutic and healing process.¹⁰⁴ 2) Programs aim to keep violent offenders separate from less serious criminal offenders.¹⁰⁵ 3) Numerous treatment centers help inmates transition to the outside.¹⁰⁶

In addition to these core features, Missouri has incorporated numerous progressive programs into its juvenile justice system. These programs target early intervention and prevention and include day treatment, community group counseling, educational tutorial and intensive probation.¹⁰⁷ Additionally, juveniles are paired with a single counselor from their first day up until their release in order to develop a lasting plan suited to their individual needs.¹⁰⁸ Peer culture is central to the Missouri system. Usually ten peers will make up teams that eat, sleep, study and exercise together.¹⁰⁹ Peer groups must “check in” with each other several times a day; this allows the group members to share their concerns before their concerns erupt in violence.¹¹⁰ Juveniles revisit traumatic life experiences with each other and try to understand and explain why they went off course. When juveniles engage in violence against one another, a very rare occurrence, Missouri allows them, with the assistance of a staff member, to use “restraint,” a controversial tactic that allows the aggressor to be pinned to the ground until he/she calms down.¹¹¹

¹⁰³ Matthew Frank, *Juvenile Justice in Missouri Serves as Model for Nation*, CYC NET, October 6, 2003, <http://www.cyc-net.org/features/ft-Juvjusticemodel.html>.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ MISSOURI DEPARTMENT OF SOCIAL SERVICES, PROGRAM AND SERVICES, DIVISION OF YOUTH SERVICES, *available at* www.dss.mo.gov/dys/articles/progservice.pdf.

¹⁰⁸ THE MISSOURI MODEL: REINVENTING THE PRACTICE OF REHABILITATING YOUTHFUL OFFENDERS 6, Summary Report, The Annie E. Casey Foundation, *available at* <http://www.aecf.org/upload/publicationfiles/MOSummarywebfinal.pdf>. [hereinafter *The Missouri Model*].

¹⁰⁹ *Id.* at 7.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 8.

Primarily made of small facilities located near the juveniles' homes, the facilities in no way operate or resemble traditional prison facilities. Devoid of barbed wire and orange jump suits, often times these dormitory facilities are located in natural environments. Only eight isolation rooms exist in the entire state of Missouri, and they are strictly used for emergency situations.¹¹² These occur rarely.¹¹³

The Missouri system emphasizes rehabilitation over punishment. Youth reenact real life situations to help each other develop positive solutions and attitudes.¹¹⁴ They learn how to manage their emotions and adopt healthier social skills.¹¹⁵ Guards are non-existent in these facilities. Instead, the staff consists of counselors that implement treatment.¹¹⁶

Post-sentencing treatment is holistic and aims to prevent recidivism. After the youth are released into their communities, they receive intensive monitoring by "trackers" who reside in the same community as them.¹¹⁷ Aftercare planning begins at admission into the facility and trackers maintain regular contact with the youth by acting as mentors and assisting juveniles with a variety of activities, such as homework and recreational services. Post-release services typically last for six months.¹¹⁸ Even though youth are treated with respect and dignity, these programs are designed as a system of consequences. The youth are held accountable for their actions and they must earn the freedoms they desire in these ongoing post-sentencing programs and they must learn to make lasting positive changes in their future.

With this non-traditional system of justice, Missouri has one of the lowest recidivism rates in the country. Fewer than eight percent of the youth in the Missouri system return after release and fewer than eight percent enter adult prison.¹¹⁹ In-fact, one third of the youth in the system return to their communities with a high school

¹¹² Edelman, *supra* note 103.

¹¹³ *Id.*

¹¹⁴ The Missouri Model, *supra* note 109, at 7.

¹¹⁵ *Missouri Practice Model*, ADVOCATES FOR CHILDREN AND YOUTH, <http://www.acy.org/printer.php?id=93> (last visited Apr. 4, 2011).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Edelman, *supra* note 103

diploma or GED and another 50% return to school.¹²⁰ Not one inmate has committed suicide in the two past two decades in Missouri, whereas in California at least 15 juveniles have taken their own lives since 1996.¹²¹

On a fiscal, communal, logical, and therapeutic level the Missouri model makes sense and should be mimicked in California. Facing a dire budget crisis, California policymakers cannot keep repeating the same thing and hoping for better results. The “super predators” teens our society feared never materialized.¹²² To heal and shape vibrant and youthful members of our community to become productive contributors to our society and social consciousness, restorative justice must become the norm. Rather than an overloaded system lacking the emotional and financial ability to support the development of the youth, restorative justice prepares young people to succeed in their communities and become productive adults, which is certainly a more logical approach. The insurmountable evidence of success of restorative justice cannot be denied. At this time, California must overcome resistance to change and act in the best interest of our communities.

C. Application of Restorative Justice: Tough Crimes Included

Although many argue restorative justice should be restricted to the confines of non-violent crimes, the Center for Restorative Justice and Peacemaking (CRJP) published a four-part study dismantling this notion.¹²³ Half of the offenses for which mediation took place were murder/manslaughter, followed by sexual assault, vehicular homicide, and attempted murder.¹²⁴ The study demonstrated that restorative justice is capable of dealing with crimes of extreme violence and in some instances, even death.¹²⁵ In fact, some have

¹²⁰ *Id.*

¹²¹ Jenifer Warren, *Spare the Rod, Save the Child*, L.A. TIMES, Jul. 1, 2004, <http://articles.latimes.com/2004/jul/01/local/me-juvie1/2>.

¹²² *See id.*

¹²³ Mark S. Umbreit, Robert B. Coates, Betty Vos & Kathy Brown, *Victim Offender Dialogue in Crimes of Severe Violence, A Multi-Site Study of Programs in Texas and Ohio 1, 1* (U. Minn. 2002), available at http://www.cehd.umn.edu/ssw/rjp/Resources/Research/Exec_Sum_TX_OH_VOD_CSV.pdf.

¹²⁴ *See id.*

¹²⁵ *See id.*

even suggested when applied in more extreme crimes, restorative justice does the most good.¹²⁶ In eight out of ten crimes involving severe violence, victims and their families reported major life changes after victim offender mediation. Changes included feeling more at peace, more capable of letting go of hate, a greater ability to have human interaction with the offender and to experience the offender's remorse.¹²⁷

Thus, restorative justice should not be viewed as a remedy limited to trivial offenses. Victims will heal while regaining confidence in our system and our communities by taking an active role in the rehabilitation process of the juvenile offenders. Juveniles must be given a chance to rehabilitate in a safe environment that can support their development. California should invest in programs that promote service and conservation work while developing employment skills as an integral part of a juvenile's sanction for criminal activity. Drastic measures must be taken to provide juveniles with support after they are released from traditional detention facilities. Such measures must be taken to ensure that juveniles stay on track and have access to the resources shaping their healing process. Restorative justice requires offenders to take personal responsibility for their actions and to work to repair the harms they caused not just to the direct victims, but to the community as a victim also. Programs that require juveniles to give back to the community through various actions such as things like graffiti removal, conversation programs, and community wide clean ups should be put into effect.¹²⁸

VI. BURIED ALIVE: JUVENILE LIFE WITHOUT PAROLE – THE ANTITHESIS OF RESTORATIVE JUSTICE

California must do away with the sentence of life in prison without the possibility of parole for juvenile offenders, as is the antithesis of the core of restorative justice. Sentencing a juvenile to life without parole qualifies as the most brutal and ludicrous form of retributive justice. Such a sentence runs contrary to restorative

¹²⁶ *See id.* at 13.

¹²⁷ *See id.*

¹²⁸ County of Los Angeles Young Offender Reentry Blueprint 79, Commissioned by Los Angeles Community and Senior Services, December 2010.

justice's most fundamental principles—such as repairing a community as a whole.

Life imprisonment without the possibility of parole is a *de facto* death sentence. By placing a juvenile behind bars for the rest of his/her life, the criminal justice system provides almost no incentive for a juvenile to hold himself accountable for his actions, to face his victim, or to give the community a challenge to restore broken pieces of its society that contributed to such violent criminal activity. The capacity to mature and experience personal self-growth is central to adolescence. With this nonsensical sentence, the state effectively buries a juvenile alive by extinguishing any potential the juvenile may possess to understand his own humanity and experience compassion in the world in which he lives. Furthermore, life without parole is the second most severe punishment a state may impose upon a guilty person because it permanently separates a convict from his loved ones and society. It ends any hope of rehabilitation or of making a positive contribution to one's community. While it is true a person may live a long life behind bars, he will do so with minimal freedom and autonomy—if any. Accordingly, the criminal justice system should reserve a life sentence without the possibility of parole for the most callous offenders who have not demonstrated the capacity to understand the heinousness of the crimes they committed.

California law provides that a juvenile as young as sixteen may fall under this category and, accordingly, may be sentenced to die in prison.¹²⁹ It is easy to accept this as a perfectly valid policy if one only focuses on the graphic nature and consequences of a particularly horrible crime. However, a sound sentencing policy should steer clear of using tunnel vision to zero in on any single factor. Like any other well-founded law, it must take much more into account and consider what is best for the community as a whole. A well-rounded examination of juvenile life-sentences without the possibility of parole clearly calls for this form of injustice to be abolished.

This section presents three reasons to eliminate life sentences without parole for juvenile offenders. First, there is an international consensus that such a sentence should not be available for juvenile offenders.¹³⁰ Second, psychological and criminological research

¹²⁹ CAL. PENAL CODE §190.5 (West 2008).

¹³⁰ See *infra* Part V.A.

provides a sound basis for the abolishment of this sentencing practice for juveniles as it does not advance society's goals of deterrence and retribution.¹³¹ Finally, contrary to public opinion, this policy is not consistent with the theory behind incapacitation, and abolishing it will actually advance public safety through efficient allocation of resources to crime prevention.

A. *International Consensus*

There is a strong and ascertainable international consensus that juveniles should not be sentenced to life without the possibility of parole.¹³² In fact, only eleven countries in the world continue to allow such sentences.¹³³ Of these eleven nations, only two actually impose them: Israel and the United States.¹³⁴ Israel currently has a mere seven juveniles serving these sentences.¹³⁵ The United States, on the other hand, has 2,589.¹³⁶ Thus, almost universally, sentencing a juvenile to life without parole is a dejected principle.

It is also noteworthy that six states in the United States have already abolished this harsh sentencing policy: Alaska, Colorado, Montana, Kansas, Kentucky, and Texas.¹³⁷

B. *Psychology, Deterrence, and Retribution*

Psychological research indicates that adolescent and adult brains are hardly comparable.¹³⁸ A typical seventeen year old simply does not possess the same intellectual capacity as the average forty year

¹³¹ See *infra* Part V.B.

¹³² See *Graham v. Florida*, 130 S.Ct. 2011, 2033 (2010).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *State Distribution of Youth Offenders Serving Juvenile Life Without Parole (JLWOP)*, HUMAN RIGHTS WATCH, <http://www.hrw.org/en/news/2009/10/02/state-distribution-juvenile-offenders-serving-juvenile-life-without-parole> (last visited Jan. 28, 2011).

¹³⁷ See *Graham*, 130 S.Ct. at 2035.

¹³⁸ See *Adolescence, Brain Development and Legal Culpability*, Juvenile Justice Center of the Am. Bar Ass'n, Jan. 2004, at 1-2, available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_juvjus_Adolescence.authcheckdam.pdf.

old.¹³⁹ This difference renders a juvenile less culpable than an adult who commits the same offense. Laurence Steinberg and Elizabeth S. Scott's article, *Less Guilty by Reason of Adolescence*, provides an excellent overview of the scientific literature suggesting that juveniles are less blameworthy than adults for their crimes.¹⁴⁰ Steinberg and Scott conclude that "juveniles may have diminished decision-making capacity compared with adults because of differences in psychosocial capacities that are likely biological in origin."¹⁴¹

They justify their contention by emphasizing psychosocial immaturity found in the adolescent brain that marginalizes a juvenile's judgment.¹⁴² They report four major factors that affect an adolescent's impaired decision-making process: (1) susceptibility to peer pressure, (2) attitudes toward and perception of risk, (3) future orientation, and (4) the capacity for self-management.¹⁴³ These deficiencies seriously undermine the arguments for an identical sentencing approach for juveniles and adults.

A criminal justice system that punishes an offender for the purpose of deterring future criminal behavior from both the offender and society in general¹⁴⁴ relies on the assumption that a person weighs the pros and cons of his decision prior to executing it. If a harsh sentence is intended to prevent future delinquency, a would-be offender must conduct a rational cost/benefit analysis to determine whether the fruits of his crime outweigh the possibility of a severe punishment.

The deterrence rationale also assumes that offenders are actually capable of performing a rational cost/benefit analysis. This assumption is tenuous, at best, when applied to juveniles. Adolescents "use a risk-reward calculus that places relatively less

¹³⁹ See *id.* at 2 ("Just because they're physically mature, they may not appreciate the consequences or weigh information the same way as adults do.").

¹⁴⁰ Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009 (2003).

¹⁴¹ *Id.* at 1013.

¹⁴² *Id.* at 1012.

¹⁴³ *Id.*

¹⁴⁴ LYNN S. BRANHAM, *THE LAW AND POLICY OF SENTENCING AND CORRECTIONS* 2-3 (7th ed. 2005).

weight on risk, in relation to reward, than that used by adults.”¹⁴⁵ In other words, juveniles focus on the benefits of delinquent behavior and do not give adequate consideration to the possibility of negative consequences. It is difficult to justify a *de facto* death sentence for a person who may literally be incapable of making a rational, informed decision on whether a crime’s benefits are worth its risks.

If Steinberg and Scott’s contention is correct and a juvenile’s psychosocial immaturity is biological, then it follows that his inability to perform an adequate cost/benefit analysis is beyond his control. Without a proper balancing of risks and rewards, the potential of spending a lifetime in prison will not produce any meaningful deterrent effect.

The Supreme Court has utilized parallel reasoning to delineate the boundaries of cruel and unusual punishment prohibited by the Eight Amendment of the U. S. Constitution.¹⁴⁶ Since 2002, the Supreme Court has decided three major cases that not only clarify what “cruel and unusual” is for juvenile offenders, but they also demonstrate a reluctance to sentence juveniles and adults identically. This rapid evolution in jurisprudence strongly suggests that abolishing life sentences without parole for juveniles would be neither revolutionary nor unfounded. Rather, it would actually be aligned with the principles rooted in the Constitution.

In *Atkins v. Virginia*, the Court held that executing a mentally retarded offender violates the Eighth Amendment.¹⁴⁷ The court partially relied on the notion that mentally retarded offenders are less likely to consider the consequences of a death sentence during a cost/benefit analysis due to their “diminished ability . . . to engage in logical reasoning.”¹⁴⁸ Thus, executing a mentally retarded criminal would not deter any similar would-be offenders because of their diminished ability to make rational decisions.

Moreover, the *Atkins* court explained that executing such offenders does not advance the retributive purpose of a harsh sentence.¹⁴⁹ Retribution demands that offenders deserve to be harshly punished for their crimes. Hence, imprisonment is an offender’s “just

¹⁴⁵ Steinberg & Scott, *supra* note 140, at 1012.

¹⁴⁶ U.S. CONST. amend. VIII.

¹⁴⁷ *Atkins v. Virginia*, 536 U.S. 304 (2002).

¹⁴⁸ *Id.* at 320.

¹⁴⁹ *Id.* at 319.

deserts.”¹⁵⁰ However, according to the *Atkins* Court, the same mental disabilities that impair these offenders’ logical reasoning also render them less morally blameworthy.¹⁵¹ The most pertinent conclusion to draw from *Atkins* is that deterrence and retribution are not convincing reasons to execute offenders who lack the ability to engage in a proper decision-making process.

The Court extended this philosophy to juvenile offenders in *Roper v. Simmons*.¹⁵² The Supreme Court essentially mirrored the language used in *Atkins* to undermine both the deterrence and retribution rationales for executing a minor.¹⁵³ Steinberg and Scott also subscribe to this philosophy.¹⁵⁴ *Roper* provides strong evidence that the Supreme Court views minors as different—as *per se* less culpable.

Just last year, in *Graham v. Florida*, the Supreme Court held that a life sentence without parole for a juvenile convicted of a non-homicide offense violates the Eight Amendment.¹⁵⁵ This case is particularly significant because it extends the *Atkins* and *Roper* jurisprudence to cases not involving homicide and mandates that states give these defendants “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”¹⁵⁶ More importantly, *Graham* evidences a trend of expanding the scope of what constitutes “cruel and unusual punishment” for juveniles—who are not only less likely to be deterred by severe sentences but who are also not as morally culpable for their actions.

It appears as though the Supreme Court has embraced using psychological research on juveniles to help shape the parameters of the Constitution. The California State Legislature must take a similar approach and enact legislation prohibiting life sentences without parole for juvenile offenders. Such a law would not be revolutionary nor run counter to the sentencing jurisprudence for juveniles; rather, it would advance it. Legislation prohibiting these sentences for

¹⁵⁰ BRANHAM, *supra* note 144, at 6-7.

¹⁵¹ *See* Virginia, 536 U.S. at 319.

¹⁵² *Roper v. Simmons*, 543 U.S. 551 (2005).

¹⁵³ *Id.* at 576.

¹⁵⁴ *See* Steinberg & Scott, *supra* note 140, at 1015-17.

¹⁵⁵ *Graham v. Florida*, 130 S.Ct. 2011 (2010).

¹⁵⁶ *Id.* at 2030.

juveniles would be consistent with the previously described principles of restorative justice as well.

C. *Criminology and the Economics of Incapacitation*

While psychology has cemented its place in the juvenile sentencing debate, the same cannot be said for criminology—the study of causes and effects of crime. The criminological field is a virtually untapped resource that legislators cannot ignore any longer. Some of the most effective innovations in policing are derived from criminological research, including: community policing,¹⁵⁷ hot-spots policing,¹⁵⁸ problem-oriented policing,¹⁵⁹ and COMPSTAT.¹⁶⁰ Criminology includes the research of the efficacy (or lack thereof) of numerous rehabilitative programs, including: correctional boot camps,¹⁶¹ drug courts,¹⁶² and cognitive behavioral therapy.¹⁶³ Criminology should also be considered and applied to developing a sentencing policy for juveniles. Criminology provides the most concrete evidence for abolishing life sentences without parole for juveniles because it offers a pragmatic promise that may ironically increase public safety in the long-run for California and every other state in dire need of economic responsibility.

¹⁵⁷ See generally Wesley G. Skogan, *The Promise of Community Policing*, in POLICE INNOVATION 27-43 (David Weisburd & Anthony A. Braga, eds., 2006) (explaining the tenets, benefits, and prospects of community policing).

¹⁵⁸ See generally David Weisburd & Anthony A. Braga, *Hot Spots Policing as a Model for Police Innovation*, in POLICE INNOVATION 225-44 (David Weisburd & Anthony A. Braga, eds., 2006) (explaining the efficiency and benefits of focusing resources on areas of high crime).

¹⁵⁹ See generally John E. Eck, *Science, Values, and Problem-Oriented Policing: Why Problem-Oriented Policing?*, in POLICE INNOVATION 117-32 (David Weisburd & Anthony A. Braga, eds., 2006) (defining and explaining the benefits of problem-oriented policing).

¹⁶⁰ See generally Eli Silverman, *Compstat's Innovation*, in POLICE INNOVATION 267-83 (David Weisburd & Anthony A. Braga, eds., 2006) (explaining Compstat is a management philosophy for police departments that offers a multi-dimensional approach to crime reduction and personnel and resource management. It uses geographic information to map crime and identify problems).

¹⁶¹ See generally DORIS LAYTON MACKENZIE, *WHAT WORKS IN CORRECTIONS*, 277-303 (2006).

¹⁶² See generally *id.* at 221-40.

¹⁶³ See generally *id.* at 112-34.

1. Age and Incapacitation

Arguably, the most well established finding among criminologists is probably the age-crime curve. The likelihood of criminal behavior rapidly increases throughout one's teenage years, peaks between age eighteen and twenty-four, and then consistently and somewhat more slowly decreases with time.¹⁶⁴ This relationship between age and crime is invariant despite an offender's gender, race, and location.¹⁶⁵ Two prominent criminologists, Travis Hirschi and Michael Gottfredson, even suggest that "there is reason to believe that age could replace social class as the master variable of sociological theories of crime."¹⁶⁶

Another common argument used to justify harsh sentencing is incapacitation. That is, dangerous people need to be isolated from society to prevent them from committing additional crimes. This argument relies on the assumption that a convicted person remains as dangerous from the time he commits a crime until the day he dies behind bars. The research on the relationship between age and crime strongly suggests that this assumption is without merit. As a person ages, he becomes increasingly less likely to reoffend.¹⁶⁷ By the time he is an elderly inmate, the likelihood of recidivism is low enough to render incapacitation a futile argument for a life-sentence without parole.

Finally, incapacitating a juvenile offender for the rest of his life is inconsistent with the tenets and goals of restorative justice. A life sentence completely eliminates the possibility of him re-entering society as a productive citizen. A community's restoration should, in theory, involve the party most responsible for its damages—the offender. Arguably, the offender is in the most opportune position to correct his wrongs. Although far too few juvenile offenders will be motivated to restore their communities, and if they never leave prison, they will not have the opportunities to do so.

¹⁶⁴ Travis Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89 AM. J. SOC. 552, 554-61 (1983).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 553.

¹⁶⁷ *Id.* at 554-61.

2. Social Controls and Desistance From Crime

John Laub and Robert Sampson's unique research on criminality, throughout the course of an individual's life, offers perhaps the most compelling criminological argument that a juvenile must not be sentenced to life in prison without the possibility of parole. Laub and Sampson's research centers around data gathered by Sheldon and Eleanor Glueck, which Sampson and Laub discovered in the Harvard Law School basement after decades of gathering dust.¹⁶⁸ After following up with the Glueck's participants, Laub and Sampson developed "the only criminological study in the world that contains data from birth and early childhood to age seventy" for juvenile offenders.¹⁶⁹ As a result, they were able to examine what made some juvenile delinquents desist from their criminal trajectories.

Their research uncovered three factors that appeared to play a significant role in desistance from delinquency: marriage, gainful employment, and the military.¹⁷⁰ Each of these institutions has a tendency to remove a delinquent from antisocial peers and establish a relationship of interdependency with others.¹⁷¹ In other words, these institutions function as informal "social controls" that give an offender something to lose.

This research not only undermines the positive effects that incapacitation is supposed to have on society, but it also provides support for restorative justice proponents. Although incarcerating a violent convict will prevent him from committing future violent crimes in the public, it also precludes him from utilizing the social controls Sampson and Laub have found to be effective in ceasing criminal behavior. These informal social controls can facilitate a former offender's successful re-entry into society and restoration of the community. A young person cannot join the military if he is incarcerated. It is much more difficult to get married while in prison.

¹⁶⁸ Posting of John H. Laub, *Turning Lives Around: Boys in Trouble and How They Age*, to Changing Lives, Changing Minds (Mar. 25, 2009), <http://cltlblog.wordpress.com/2009/03/25/turning-lives-around-boys-in-trouble-and-how-they-age/>.

¹⁶⁹ *Id.*

¹⁷⁰ See JOHN H. LAUB & ROBERT SAMPSON, *SHARED BEGINNINGS, DIVERGENT LIVES: DELINQUENT BOYS TO AGE 70, 36-60* (Harvard Univ. Press 2003).

¹⁷¹ *Id.*

Additionally, not only is it impossible to be gainfully employed while in prison, the stain of a criminal record follows the individual upon re-entry and makes it extremely difficult to find reputable work.

D. Economics

A brief discussion of California's financial woes is appropriate here. The state's deficit is expected to reach \$25.4 billion by mid-2012.¹⁷² Governor Jerry Brown plans to make significant budget cuts for welfare, health care, and education to "take our medicine now."¹⁷³ Therefore, California should seek innovative ways to save money while still accomplishing its goals. In other words, California should embrace restorative justice's emphasis on cost-effective approaches. Eliminating juvenile life sentences without the possibility of parole presents California, and every other state in the country, with such an opportunity.

The costs of incarceration are astronomical. California taxpayers paid \$49,213 per inmate in 2008,¹⁷⁴ and it is more than likely above \$50,000 today. An elderly inmate costs an estimated two to three times as much,¹⁷⁵ and the population of inmates over fifty-five has doubled in the last decade.¹⁷⁶ These figures will continue to increase as the prison population ages.

Resources should be spent in areas that need them the most. Given the applicability of the age-crime curve, the research on the

¹⁷² Judy Lin & Shannon McCaffrey, *State Budgets: Year Ahead Looms as Toughest Yet*, HUFFINGTON POST, Jan. 15, 2011, http://www.huffingtonpost.com/2011/01/15/state-budgets-year-ahead_n_809521.html.

¹⁷³ Shane Goldmacher, *Jerry Brown Rolls the Dice with Pain-Filled Budget Plan for California*, LOS ANGELES TIMES, Jan. 11, 2011, <http://articles.latimes.com/2011/jan/11/local/la-me-state-budget-20110111>.

¹⁷⁴ *Statistics for the State of California*, NAT'L INST. OF CORR., <http://nicic.gov/features/statestats/?state=ca> (last visited Jan. 16, 2011).

¹⁷⁵ Presentation from Legislative Analyst's Office to California Assembly Committee on Public Safety, Hon. Tom Ammiano, Chair (May 11, 2010), *available at* http://www.lao.ca.gov/handouts/crimjust/2010/Elderly_Inmates_05_11_10.pdf.

¹⁷⁶ *Id.* at 1. ("The percentage of inmates over the age of 55 has more than doubled over the past decade, from 3 percent (or about 4,900 inmates) in 2000, to 8 percent (or about 13,600 inmates) in 2010.").

life-course of offenders, the rising costs of incarceration as inmates age, and California's economic state of emergency, a sentencing policy that advocates life without parole sentences for juveniles is simply ill-advised and antithetical to restorative justice. Why spend precious funds on an elderly inmate who requires the state to spend more by the day? Why do so when he is unlikely to recidivate? Why do so when it does nothing to restore the community? And, most importantly, why do so when these funds may be applied to enhance public safety and bolster crime prevention?

The millions of dollars California would save could be used to train more police officers and pay their yearly salary. Training an average peace officer cost \$16,000 in 2005,¹⁷⁷ and the starting salary for one in 2007 was \$40,500.¹⁷⁸ These figures are probably higher today, so let's assume that it costs \$60,000 to train a new officer and pay her for one year in 2011. Thus, assuming it costs \$100,000 to incarcerate an elderly inmate each year (the lower estimate), California may put five new officers on the street for every three elderly inmates released on parole. If the higher estimate is used (\$150,000 per year), then California may employ five new officers for every two elderly inmates released on parole. Although these figures are mere estimates, it is clear that releasing low-risk and expensive inmates will enable California to hire more law enforcement officers to keep its neighborhoods safe.

The funds could also be used to fight the drug use that plagues far too many citizens and communities. Empirical research indicates that drug courts are effective in reducing recidivism among drug criminals.¹⁷⁹ Evidence also demonstrates that drug courts are an extremely inexpensive alternative to incarceration. Each drug court participant requires just under \$6,000 from the state budget.¹⁸⁰ Thus, using the estimates for the cost of keeping an elderly person in prison, for every juvenile inmate with a life sentence that is released

¹⁷⁷ *State and Local Law Enforcement Training Academies, 2006*, BUREAU OF JUSTICE STATISTICS, 5 (Feb. 2009), <http://bjs.ojp.usdoj.gov/content/pub/pdf/slleta06.pdf>.

¹⁷⁸ *Local Police Departments, 2007*, BUREAU OF JUSTICE STATISTICS, 6 (Dec. 2010), <http://bjs.ojp.usdoj.gov/content/pub/pdf/lpd07.pdf>.

¹⁷⁹ See MACKENZIE, *supra* note 161, at 221-40.

¹⁸⁰ *Drug Courts: The Second Decade*, NATIONAL INSTITUTE OF JUSTICE, 28 (June 2006), <http://www.ncjrs.gov/pdffiles1/nij/211081.pdf>.

on parole, California may send between sixteen and twenty-five drug offenders to drug court. Again, although this is merely an estimate, the California taxpayers' money should not be squandered on elderly inmates when it may be utilized to alleviate the disturbing drug problem.

The foregoing criminological and economic arguments for abolishing life sentences without parole for juveniles are consistent with restorative justice's goals and they also focus on diverting valuable resources to more constructive alternatives. The existing criminological research strongly suggests that a *de facto* life sentence for a juvenile is not an effective method of incapacitating the most dangerous offenders. Rather, it indicates that releasing elderly inmates who were sentenced to life without parole as juveniles will not inundate California neighborhoods with high-risk criminals. It further suggests that parole will lead to an opportunity for informal social controls to provide a vehicle to desistance. Simple arithmetic shows that the saved money can be used to make California communities safer places to live. Thus, even if an offender is unwilling to participate in a community's restoration upon his release, the funds that would otherwise be spent on his incarceration could be used to improve the community. At the very least, there will be additional resources to prevent crime through more police officers and less drug recidivism.

Finally, it must be emphasized that a sentencing policy for juveniles that prohibits a life sentence without the possibility of parole will *not* preclude an especially callous, heinous criminal from permanent incarceration. If authorities believe that a person is simply too dangerous to be released, then they will retain the ability to keep him behind bars. Abolishing these sentences merely provides the opportunity for an offender to be heard; it will never require a prison to release especially violent people.

VII. CONCLUSION

Restorative justice, unlike retributive justice, allows a user-friendlier forum for the victim, offender and community to make informal decisions without government intervention, which allows creative solutions and meaningful dialogue to take shape. Whereas the current criminal justice system focuses on establishing guilt and enforcing prison punishments, the restorative justice model creates a

space for empathy and allows all stakeholders' concerns to be adequately addressed through the use of victim offender mediation, family group conference, and circles. A sincere apology by the offender is both a symbolic and literal amends to the victim and the community at large. Juveniles can obviously gain the most value in a restorative justice framework as their capacity to mature and change is still in its incubation phase.

Sentencing a juvenile to life without parole is absolutely absurd. It is effectively ending a life before it has even been given a fair chance to develop. Although California has made sweeping reforms in its juvenile justice system, it still spends exorbitant dollar amounts per youth offender each year, but it still has one of the highest recidivism rates in the country. It is obvious the system needs to be reworked. Rehabilitation, the Missouri Model, compassion, and apologies are all simple and yet cost effective measures with a disproportionate high rate of return in which California must invest. It is necessary to remember that crime has moral roots and the passionate side of justice can no longer be neglected. We can no longer commit murder in our hearts by condemning juveniles to a senseless injustice by ignoring their humility and capacity to transform. Without the ability to turn the lens on ourselves and face the realities of our communities, we risk a hollow victory in transforming juveniles entangled in our criminal justice system.

AFTERWORD: THE CENTER FOR RESTORATIVE JUSTICE'S PRACTICUM

In the Spring of 2011 the CRJ launched the first Restorative Justice Practicum, training law students to facilitate victim-offender dialogues as part of a diversionary program from the Los Angeles County Juvenile Delinquency Courts. Through a partnership with Centinela Youth Services, first and second time offenders are referred by probation officers to participate in what has been termed Victim Offender Restitution Services (VORS). The victim in a case referred by a probation officer is invited by a VORS representative to participate. If the victim agrees, the offender is notified of the time and place of the meeting. All information discussed at the meeting is confidential and no attorneys are allowed to attend in the capacity of legal representatives. VORS facilitators help both victims and offenders to speak and be heard by one another, and help to create an agreement between victims and offenders about what further steps should be taken as a result of the crime. Most often, this agreement involves a letter of apology from the offender, some amount of community service hours and the payment of some monetary restitution. When these agreements are successful and respected, offenders can move forward with their lives without a criminal record. A record of the offender's arrest remains until he or she reaches the age of majority and has that record sealed.

The CRJ has hosted a number of symposia at Loyola Law School on the subject of restorative justice, including multiple presentations on the issue of Juvenile life without possibility of parole sentencing, a victims' rights conference, poetry and art exhibitions from employees at Homeboy Industries, and panels of community organizers speaking on the subject of restorative justice during Juvenile Justice Week of Faith and Healing March 7th through March 11th, 2011. The first annual CRJ conference on restorative justice, entitled "Another Way: Restorative Justice for Youth" was held at Loyola Law School on Friday, June 3rd and Saturday June, 4th 2011.