Anti-Oppressive Restorative Justice: Behavior Analysis in Alternatives to Policing

Worner Leland & August Stockwell

Upswing Advocates, Chicago, IL, USA

Accepted Author Manuscript, In Press, Behavior Analysis in Practice

Abstract

The history of American policing, behavior criminalization, and carceral justice is rooted in racist practice dating back to the 1700s. In addition to racially disproportionate punishment doled out by these systems, they are not designed to support behavioral punishment of harm or reinforcement of prosocial behavior for socially significant change. One alternative to this retributive carceral justice system is Restorative Justice. This paper offers a conceptually systematic examination of Restorative Justice for behavior change, an examination of the functional utility of various restorative approaches, alignment of Restorative Justice with behavior analytic ethics, and suggestions for incorporating anti-oppressive practices.

DESCRIPTORS: transformative justice, restorative justice, functional assessment, police brutality

DISCLOSURES: We have no conflicts of interest to disclose.

ANTI-OPPRESSIVE RESTORATIVE JUSTICE

This manuscript is being published on an expedited basis, as part of a series of emergency publications designed to help practitioners of applied behavior analysis take immediate action to address police brutality and systemic racism. The journal would like to especially thank Robin Williams for their review of this manuscript. The views and strategies suggested by the articles in this series do not represent the positions of the Association for Behavior Analysis, International or Springer Nature.

Guest Editor, Denisha Gingles

Accepted Author Manuscript, In Press, Behavior Analysis in Practice

Anti-Oppressive Restorative Justice: Behavior Analysis in Alternatives to Policing

Introduction

Since the 1700s, American policing has historical roots in maintenance of order as it pertains to property and capital interests. Additionally its roots lie in formal slave patrol which existed to capture, return, and punish enslaved people who were viewed as property, and to deter revolts of enslaved people via organized terror (Reichel, 1992; Walker, 1998). Racism can be seen in modern American policing, which disproportionately targets Black, Indigenous, and Latine people whether it be through use of stop-and-frisk (Pierson et al., 2020), marijuana related arrests (ACLU, 2020), many misdemeanor arrests (Stevenson, Stevenson, & Gabriel, 2018), non-lethal force used by police (Fryer, 2016), or lethal force used by police (Edwards, Lee, & Esposito, 2020).¹ In addition to the harms of lethal and non-lethal force and of systemic racism in policing, racism and colorism can also be seen in the judicial system and the use of the carceral system as a means of managing criminalized behavior (Enns, Youngmin, Comfort, Goldman, Lee, Muller, Wakefield, Wang, & Wildeman, 2019; Horowitz & Utada, 2018; Hochschild & Weaver, 2007; Monk, 2018; United States Sentencing Commission, 2017). In addition to disparate harms of systemic racism in the carceral system, probability for physical, mental, and social harms of prison exist for all, irrespective of race.

¹ It is of note that Latine/Latinx people of all races may be misrepresented in the data, with Afro-Latinx people often coded as Black and non-Black Latinx people coded as white. As noted by the ACLU “*This miscoding likely leads to an underestimation of the true rate of racial disparities experienced by people of color at the hands of police. Arrests of Latinx individuals coded as white in the data likely artificially inflate the number of white arrests, leading to an underestimation of the disparity between Black and white arrest rates*” (2020). Additionally, while not directly captured in these data, the ACLU notes that “*in addition to Black and Latinx groups, racial bias in policing and drug enforcement may negatively affect other racial or ethnic groups, such as Native and Indigenous populations, Arab and Middle Eastern populations, Asian populations, Pacific Islander populations, and those with multiple racial/ethnic identities (e.g., biracial), among others. The UCR (2020) data classifies individuals’ race as “Black,” “white,” “Asian,” “American Indian or Alaska Native,” “Native Hawaiian,” or “unknown.”*”

ANTI-OPPRESSIVE RESTORATIVE JUSTICE

The carceral system is a system based on retributive justice and is not a system with the capacity to enact socially significant behavior change for those it deems as criminal. In a retributive carceral justice approach, “crime” is defined as engagement in a behavior or behaviors which are in violation of pre-established rules of the state, which leave little consideration for harms, or lack thereof, caused by behavior. Through this system the focus of justice lies in deciding whether a rule has been broken and determining who has broken the rule. In this system, aversive control and social isolation are utilized to attempt to deter criminal behavior and prevent future instances of behavior (Zehr, 1985).

Additionally, criminalization of behavior is malleable, and whether or not a behavior is criminalized can shift over time (Duff, Farmer, & Marshall, 2010). Thus, some less harmful behaviors have the potential to be criminalized while more harmful behaviors may not be. This is not to indicate that currently criminalized behaviors are free from harm, but to note that harm is not directly tied to criminalization of a behavior (Albonetti & Hepburn, 1996; Millie, 2011). Additionally, factors such as racism in the criminal carceral justice system may impact the punitive measure (typically sentence time or monetary fine amount) prescribed when one is convicted, such that a Black juvenile female may spend nearly three months in detention for failure to turn in homework and get up for school while on probation for prior assault and theft charges (Cohen, 2020), whereas a white adult male may spend three months in jail after being convicted of three charges of felony sexual assault (Grinberg & Shoichet, 2016).

The Functions of Using Restorative Justice Practices

One alternative to policing and carceral justice is Restorative Justice. There are many definitions of Restorative Justice, and different practitioners across a variety of processes and professions utilize the term “restorative” as a part of emerging methodologies. One definition of

ANTI-OPPRESSIVE RESTORATIVE JUSTICE

Restorative Justice is that of a justice mechanism with a specified process in which all impacted parties of an offence participate collectively in resolution and is centered on values of repair of harm and repair of community after a harm has been enacted (Daly, 2015). It has been noted that direct restoration of a relationship may not be feasible or desired after an offence, and as such alternative terms such as Transformative Justice and Innovative Justice are emerging as well to better describe these practices (Daly, 2015; Johnstone & Van Ness, 2007).

When comparing a retributive justice approach like our current carceral system to a restorative approach, there are clear delineations in approach that can be examined through a conceptually systematic behavioral lens. Unlike in a retributive justice approach, in a restorative justice approach, “crime” is defined as a behavior resulting in interpersonal harm or violation, and the focus of justice is on communal problem solving and identification of needs and obligations for repairing that harm. In this system, an offence is addressed through a lens of functional contextualism considering the moral, social, economic, and political factors contributing to the behavior causing harm. In a restorative justice system, social supports and skill building are utilized to attempt to deter criminal behavior, and acknowledgement of harm, amends and reparations, community support, and focus on the behavior’s harmful consequences are utilized to attempt to decrease future engagement in that harmful behavior (Zehr, 1985).

Principles of modern Restorative Justice include centering the victim of offences, offenders accepting responsibility for the offence, opportunities for dialogue for perspective taking, repairing harms through amends or reparations, decrease of future harm through skill building and access to resources, and community reintegration of both victims and offenders (Liebmann, 2007). Additionally, while the terms “victims” and “offenders” are frequently utilized in the Restorative Justice literature, these are mentalistic labels which assign a role

ANTI-OPPRESSIVE RESTORATIVE JUSTICE

instead of focusing on a behavior, and which also serve to ignore both interlocking contingencies of harm as well as structural and systemic harms of oppression. As such, Restorative Justice language is shifting in some spaces from the terms “victim” and “offender” to “those who have been harmed” and “those who have enacted harm” in a given context. It acknowledges that these roles are context-dependent and have the potential to change across situations and time, such that an individual in a given context may be harmed, and in another context be the one causing harm (Gavrielides, 2017).

Restorative Justice Approaches

There are many different approaches to restorative justice that may be taken, and each serves a slightly different function. These approaches include, but are not limited to, victim offender mediation, sentencing circles and healing circles, conferencing, and community panels or peer juries (Strong & Van Ness, 2015). Victim offender mediation is typically utilized when there is a clear person who has been harmed, and a clear person who has caused that harm. In this mediation, an impartial third party helps to facilitate the restorative process, and this mediation may happen directly with all parties meeting in person, or indirectly with the mediator acting as a go between, based on the preference of the person who was harmed (Reno, Marcus, Leary, & Turman, 2002). Circles may be used when there is a clear person who has been harmed, and a clear person who has caused that harm, and when these parties may need ongoing communal support. Healing circles may be created for those who have been harmed, while separate healing circles may be created for those who have enacted harm, recognizing that trauma or learning histories of harm may impact one’s enactment of harm on others. Separate sentencing circles are utilized for other decision making and follow through components of the

ANTI-OPPRESSIVE RESTORATIVE JUSTICE

restorative process, such as the person who caused harm accepting responsibility and making amends (Strong & Van Ness, 2015).

Conferencing (a type of circle which involves both the person who was harmed and the person who enacted harm, as well as the community) may be utilized if that harm may be directly or indirectly felt by a larger community. In conferencing the entire community comes together to work through the restorative process with the aid of a facilitator, and often components of community integration may take place immediately following the conferencing event (Stuart & Pranis, 2006; Strong & Van Ness, 2015). Community panels or peer juries may be utilized especially in instances where there is not a clear victim of the harm that was caused, or if the harm indirectly impacted the community at large instead of an individual. Community panels and peer juries provide a restorative process which gives agency to the community to identify the harms caused and the needs present for reparation of harm and provides the person who enacted harm with a space to take responsibility and make amends. González, Sattler, & Buth, 2018; Strong & Van Ness, 2015).

Restorative Justice and Behavior Analytic Ethics

Just as behavior analysts recommend least restrictive procedures for client behavior change and also avoid reinforcement which requires excessive motivating operations for successful change (Behavior Analyst Certification Board [BACB], 2014, 4.09, 4.10), so are behavior analysts capable of examining the restrictiveness of a carceral setting, and imagining alternatives rooted in both humanity and efficacy. Many principles of restorative justice are in alignment with ethical behavior practice, and behavior analysis may be a valuable support for some components of a restorative process. Much like in ethical behavior analytic practice (BACB, 2014, 2.02), restorative justice establishes a hierarchy of parties to which it is

ANTI-OPPRESSIVE RESTORATIVE JUSTICE

responsible. Those who have been harmed may feel entirely left out of, or even abused by, the processes of the carceral justice system (Zehr, 2015). However, in restorative justice, the primary beneficiary of any component of the process is the person who was harmed, or in some instances the community that was harmed.

Much like in ethical behavior analytic practice which is individualized and centers the client by involving them directly in program planning and consent (BACB, 2014, 4.02, 4.03), in restorative justice the needs of the person harmed (including information and truth-telling, empowerment, and restitution) are centered and drive the justice process (Zehr, 2015).

Behavioral technologies, such as goal setting and task analysis creation, may be meaningful to those who have been harmed in selecting specific, measurable, and achievable asks of restoration and future harm prevention of those who caused harm. Contingency management and behavioral support for those who enacted harm in completing the asks made of them by a person harmed may also assist in meeting the needs of those who have been harmed.

After the person or people harmed, the next most impacted beneficiary of a restorative justice process is the person who enacted harm. Much like behavior analysts utilize reinforcement instead of punishment whenever it is possible to do so, and include reinforcement for alternative behaviors when punishment of a harmful behavior is necessitated (BACB, 2014, 4.08a, b), restorative processes focus on the use of or development of perspective taking and empathy building to meet the needs of those who enact harm. These needs include accountability which addresses harm and responsibility through transforming shame into committed action, support for personal healing of past harms and self-destructive behavior, support to build one's own competencies and prevent future harm, support for community integration, and the potential

ANTI-OPPRESSIVE RESTORATIVE JUSTICE

of a space which acts as a temporary support of restraint from continuing to enact harm (Zehr, 2015).

All operant behavior, including harmful behavior, serves some type of function and may be multiply maintained by more than one function in a given context. Much like behavior analysts support clients by first conducting assessments (including a functional assessment if there is a goal of behavior reduction) and collecting and displaying data to inform decision making (BACB, 2014, 3.01), behavior analysis has the potential to make a meaningful contribution to components of support for a person who enacts harm by using needs assessments and functional behavior assessments to inform material supports and behavior change plans for those working to reduce their own harmful behavior. As behavior analysts note the environmental supports which are needed to support behavior change and advocate for the removal of environmental constraints for a client (BACB, 2014, 4.06, 4.07b), so too would this environmental assessment and advocacy benefit an person who enacted harm attempting to reduce their own harmful behavior. Behavior analysts would also likely be equipped to assist in the design of research on the impact of the provision of core environmental supports (including, but not limited to, clean water, food, housing, clothing, healthcare, mental health care, community, meaningful work or ways to contribute, and other social supports and forms of environmental enrichment) on the future rates of harmful behavior at both the ontogenetic and cultural levels. And just as behavior analysts may support clients in building conceptually consistent functional replacement behavior (BACB, 2014, 4.01) via targeted support with clearly defined measurable goals which, when met, signal the discontinuation of services (BACB, 2014, 4.11), so may behavior analysts assist in creating skill building support for functionally related

ANTI-OPPRESSIVE RESTORATIVE JUSTICE

and ancillary behaviors which meet goals identified by the person who was harmed as well as assessment-identified needs for the person who enacted harm.

It is important to note, however, that all the suggestions detailed above do not account for the totality of a restorative process. They are merely one facet of support which may be meaningful in a restorative justice path. In addition to these supports, community support and healing for those who have been harmed is a crucial component of the restorative process which, while likely not in the scope of most behavior analysts, is still the foremost critical component of a restorative justice path.

Building Anti-Oppressive Restorative Justice Practices

While Restorative Justice as a justice movement often focuses on operant interpersonal harm, it is important to acknowledge the impact of systemic cultural harm. Considering alternatives to policing requires the acknowledgement of American policing as a direct result of colonization and oppression of Indigenous peoples. When considering restorative practices, it must be recognized and addressed that many current modalities and processes utilize (and often systematize or commodify) sacred Indigenous practices, while simultaneously erasing historical origins and disinvolving Indigenous peoples' implementation, consultation, or supervision of these modalities (Malik, 2018). Considerations for anti-oppression in Restorative Justice include the identification of which Indigenous peoples' land the practice is taking place on, and the intentional centering and inclusion of those peoples in restorative practice building. This also includes accountability and restoration at all levels, and should address reparations for past disinvolvement, appropriation, and colonization at the systemic level (Malik, 2018) for both Indigenous peoples and enslaved peoples and their descendants.

ANTI-OPPRESSIVE RESTORATIVE JUSTICE

Another consideration for anti-oppression in Restorative Justice involves a careful assessment of both the topography and function of the restorative process as it is being enacted, with careful consideration for whom it is being enacted by. Many processes are labeled as restorative, and the carceral justice system has begun to engage in the use of what it calls Restorative Justice practices. While on the surface these practices may appear topographically similar to other Restorative Justice practices, functionally they are often different. Frequently these practices may solely be a precursor to, or a component of, imprisonment, serving to make the carceral justice more palatable to the general populace while failing to address the harms of the carceral system which remain (Agnihotri & Veatch, 2017). To build an anti-oppressive system of Restorative Justice requires disinvestment from the current carceral system.

Finally, anti-oppression in Restorative Justice requires a conceptually systematic understanding of cultural contingencies, and the potential for recreation of or reenactment of harm in new endeavors. As many calls for police abolition and prison abolition involve suggestions for the reallocation of crisis response to the helping profession fields, it is critical that we consider the ways in which racism is also present in these spaces and how racist power hierarches can perpetuate harm from helping professionals toward the people they serve (Bussey, 2019; Ford, 2019; Miller & Garran, 2017; Sylvestre, Castleden, Denis, Martin, & Bombay, 2019). To endeavor to build Restorative Justice systems and social support systems which do not further perpetuate oppression requires vigilant anti-racism. They additionally require practitioners to operate from a place of humility, to graciously accept feedback when cultural, colonial, or oppression-based harms occur, and to swiftly shift behavior. To commit to Restorative Justice practices and the reduction of harm is to commit to accountability and restoration at all levels (Malik, 2018).

References

- Agnihotri, S. & Veach, C. (2017). *Reclaiming Restorative Justice: An Alternate Paradigm for Justice*, 20 CUNY L. Rev. 323. <https://academicworks.cuny.edu/clr/vol20/iss2/3>
- Albonetti, C.A., Hepburn, J.R. (1996). Prosecutorial discretion to defer criminalization: The effects of defendant's ascribed and achieved status characteristics. *Journal of Quant Criminology*, 12, 63–81. <https://doi.org/10.1007/BF02354471>
- American Civil Liberties Union. (2020). A Tale of Two Countries Racially Targeted Arrests in the Era of Marijuana Reform.
- Behavior Analyst Certification Board (BACB). (2014). *Professional and ethical compliance code for behavior analysts* (ver. March 18, 2019). https://www.bacb.com/wp-content/uploads/BACB-Compliance-Code-english_190318.pdf
- Bussey, S. R. (2019). Imperialism through virtuous helping: Baldwin's Innocence and implications for clinical social work practice. *Journal of Progressive Human Services*, DOI: [10.1080/10428232.2019.1617016](https://doi.org/10.1080/10428232.2019.1617016)
- Cohen, J. S. (2020). Grace, black teen jailed for not doing her online coursework, is released. ProPublica, IL <https://www.propublica.org/article/grace-black-teen-jailed-for-not-doing-her-online-coursework-is-released>
- Daly, K. (2015). What is Restorative Justice? Fresh answers to a vexed question. *Victims & Offenders* 11(1):1-21. DOI: 10.1080/15564886.2015.1107797
- Duff, R. A., Farmer, L., & Marshall, S. E. (2010). *The Boundaries of the Criminal Law*. Oxford: Oxford University Press

ANTI-OPPRESSIVE RESTORATIVE JUSTICE

Edwards, F., Lee, H., & Esposito, M. (2020). Risk of being killed by police use-of-force in the U.S. by age, race/ethnicity, and sex. *Proceedings of the National Academy of Sciences*.

<https://www.pnas.org/cgi/doi/10.1073/pnas.1821204116>

Enns, P. K., Youngmin, Y., Comfort, M., Goldman, A. W., Lee, H., Muller, C., Wakefield, S., Wang, E. A., & Wildeman, C. (2019). What percentage of Americans have ever had a family member incarcerated?: Evidence from the Family History of Incarceration Survey. *Socius: Sociological Research for a Dynamic World* Volume 5, 1–45. DOI: 10.1177/2378023119829332

Ford, J. S. (2019). Systemic medical racism: The reconstruction of whiteness through the destruction of Black bodies." *University Honors Program Theses*. 403.

<https://digitalcommons.georgiasouthern.edu/honors-theses/403>

Fryer, R. G. (2016). An empirical analysis of racial differences in police use of force. *Harvard University and National Bureau of Economic Research*. <https://doi.org/10.1086/>

Gavrielides, T. (2017). Collapsing the labels ‘victim’ and ‘offender’ in the Victims’ Directive and the paradox of restorative justice. *Restorative Justice*, 5(3), 368-381.

González, T., Sattler, H., & Buth, A. (2018). New directions in whole-school restorative justice implementation. *Conflict Resolution Quarterly*, 36(3), 207-220. doi: 10.1002/crq.21236

Grinberg, E. & Shoichet, C. E. (2016). Brock Turner released from jail after serving 3 months for sexual assault. Cable News Network (CNN). <https://www.cnn.com/2016/09/02/us/brock-turner-release-jail/index.html>

Hochschild, J. L., & Weaver, V. (2007). The skin color paradox and the American racial order. *Social Forces*. 86(2), 643-670.

ANTI-OPPRESSIVE RESTORATIVE JUSTICE

- Horowitz, J. & Utada, C. (2018). Community supervision marked by racial and gender disparities African-Americans, men overrepresented in probation and parole population. Pew Charitable Trusts.
- Johnstone, G. & Van Ness, D. (2007). *Handbook of Restorative Justice*. Cullompton, Devon: Willan Publishing.
- Liebmann, M. (2007). *Restorative Justice: How It Works*. London: Jessica Kingsley Publishers.
- Malik, A. (2018). *Restoration and relationship in the public school system*. Rubenstein School of Environment and Natural Resources. University of Vermont.
- Miller, J. L. & Garran, A. M. (2017). *Racism in the United States: Implications for the Helping Professions*. 2nd Ed. New York, NY: Springer
- Millie, A. (2011) Value Judgments and Criminalization, *The British Journal of Criminology*, Volume 51, 278–295. <https://doi.org/10.1093/bjc/azr009>
- Monk, E. P. (2019). The color of punishment: African Americans, skin tone, and the criminal justice system. *Ethnic and Racial Studies*, 42(10), 1593-1612.
- Pierson, E., Simoiu, C., Overgoor, J., Corbett-Davies, S., Jenson, D., Shoemaker, A., ... & Goel, S. (2020). A large-scale analysis of racial disparities in police stops across the United States. *Nature human Behaviour*, 1-10.
- Reichel, P. L. (1992). The misplaced emphasis on urbanization in police development. *Policing and Society*, 3, 1-12, DOI: [10.1080/10439463.1992.9964653](https://doi.org/10.1080/10439463.1992.9964653)
- Reno, J., Marcus, D., Leary, M. L., & Turman, K. M. (2002). Guidelines for victim-sensitive victim-offender mediation: Restorative Justice through dialogue.
- Stevenson, M., & Mayson, S. (2018). The scale of misdemeanor justice. *BUL Rev.*, 98, 731.

ANTI-OPPRESSIVE RESTORATIVE JUSTICE

- Strong, K. H., & Van Ness, D.W. (2015). *Restoring Justice: An Introduction to Restorative Justice (5th ed.)*. New York, NY: Routledge.
- Stuart, B. & Pranis, K. (2006). Peacemaking circles. In D. Sullivan & L. Tifft (eds.), *Handbook of restorative justice: A global perspective* (pp.121-133). London and New York: Routledge.
- Sylvestre, P., Castleden, H., Denis, J., Martin, D., & Bombay, A. (2019). The tools at their fingertips: How settler colonial geographies shape medical educators' strategies for grappling with Anti-Indigenous racism. *Social Science & Medicine*, 237, 112363.
- United States Sentencing Commission (2017). *Demographic Differences in Sentencing: An Update to the 2012 Booker Report*. Washington, DC
- Walker, S. (1998). *Popular justice : a history of American criminal justice* (2nd ed.). Oxford University Press. <http://catalog.hathitrust.org/api/volumes/oclc/36407878.html>.
- Zehr, H. (1985). *Changing lenses: a new focus for crime and justice*. Scottsdale, Pa: Herald Press.
- Zehr, H. (2015). *The little book of restorative justice*. New York, NY: Good Books.