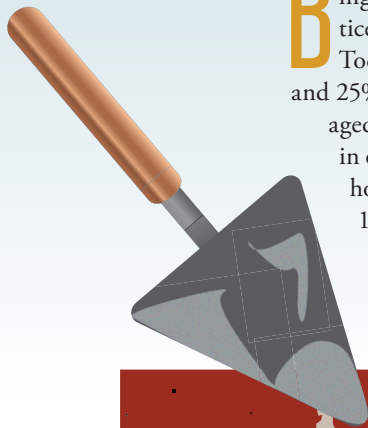


RESTORATIVE JUSTICE: LET'S GO WITH WHAT WORKS!

by the HONORABLE JAMES P. GRAY (RET.)

Back in the early 1970s, our country made a significant mistake by turning the political slogan of “Get Tough on Crime” into a criminal justice policy with an emphasis upon increased incarceration. The result? Today, the United States of America has 5% of the world’s population, and 25% of its prisoners. In fact, between 1990 and 2005, our country averaged building 1 new prison every 10 days, such that now 1 in 28 children in our country has at least 1 parent in prison. Similarly, where California housed 23,264 adult inmates in 12 state prisons in 1980, we now house 115,000 adult inmates in 35 prisons, plus another 15,000 in camps. When faced with these statistics, former U.S. Senator Jim Webb of Virginia was quoted as saying, “Either we are the most criminally oriented people in the world, or we’re doing something wrong.”



Fundamentally, it is not the purpose of the criminal justice system to punish people. Instead, the purpose is to reduce crime, along with the pain and misery that often accompanies it. But, fortunately, a new approach is gaining traction, and it is increasingly becoming more successful. This new approach uses programs that reduce the use of incarceration but also address the root causes of crime. And with this approach, 35 states in our country have reduced their prison populations at the same time they have also reduced crime.

What does that mean? Here in Orange County, programs are effectively using both voluntary social programs to address the root causes of criminal behavior and the criminal justice system, with its inherent threats of punishment, as a means to “encourage” offenders back into doing what is socially beneficial both for them and for the rest of us.

Importantly, these are not approaches to “coddle criminals.” Obviously, there are some offenders who simply must be removed from society, either because they continue to be a safety threat to us and our property, or because their crimes were so deeply harmful to our society. For example, there are some people in our society who see the rest of us as their natural prey and, regardless of how they evolved into this mindset, it is not now safe to release them. In addition, some offenders, like Charles Manson, should never be released from confinement because the crimes they committed were fundamental attacks upon our civilized society. Of course, while in custody, each offender must be provided with a threshold level of safety, sanitation, nutrition, and medical care, but otherwise, they deserve to be where they are.

But, for the vast majority of other offenders, a comment from former California State Assemblyman Pat Nolan from Glendale is instructive. While he was in office, Nolan consistently spoke and voted in favor of longer and longer prison sentences for larger numbers of offenses. Then, after serving a two-year prison sentence for political corruption, he announced publicly that he had changed his mind. As he stated it, Nolan had seen large numbers of people in prison who simply should not have been there. He summarized his conclusions by observing that we should “reserve costly prison beds for people we are afraid of, not for people we’re mad at.” That is also consistent with the maxim that most people should not be judged by the worst thing that they have ever done in their lives.

So, since there are large numbers of offenders who are often serving unnecessarily long sentences who will (and should) eventually be

released back into society, what kind of people will they be when they are released, what are the chances that they will re-offend, and how can we reduce crime in the first place? Fortunately, with some programs that are in place and are gaining traction, there are strong grounds for optimism in answering those questions. Some of these programs are described below.

Community Policing

First, I’d like to offer a personal note about policing. I hope and believe that police officers should be—and be seen to be first and foremost—*peace officers* who are there to protect our communities and keep us safe. And, just as surgery is seen as the last option for medical doctors, an arrest should be the last option for the police. Today, it is so easy for people to be placed into the criminal justice system and so truly difficult to get out. So, the police should use their best efforts to know the people of their communities, and work with them to encourage and oversee responsible behavior. But if offenders must be brought into the system, we should keep them from being arrested pre-trial if at all reasonably possible. Arrests frequently cause the loss of jobs, lost credibility in schools and the community, and often also are the cause of offenders wrongly being coerced into pleading guilty to offenses just so they can get credit for time served and be released. If feasible, people should only be punished *after* they are convicted of an offense, not before.

Community Courts

Orange County’s Collaborate Courts network includes Drug Court, Homeless Court, Veterans Court, and Mental Health Court, all of which focus on taking personal responsibility for people’s actions, but also address the issues that increased the likelihood of the offenses being committed in the first place. Obviously these courts are not meant for truly serious offenses, but most offenses do qualify. Most of these courts are now held in the former Buffum’s Department Store building on Main Street in Santa Ana, but some are even held at places like the Orange County Rescue Mission. Of course the participants are subjected to punishments if they don’t take the mandates of the courts seriously, but they are also rewarded for honest and beneficial progress. In that regard, positive reinforcement by those in charge of the programs simply cannot be over-emphasized. As a personal note, when I was presiding over a formal probation violation calendar, I had a procedure that if a probation report stated that particular probationers were not only taking the program

seriously for themselves, but were also assisting their colleagues to do so as well, I would call them forward first, publicly congratulate them, and then get down from the bench and shake their hands. And you should know that, on two separate occasions when I did this, two young men who were probably in their mid-twenties actually broke down in tears, saying that this was the first time in their lives that any man had ever commended them for anything! Studies have shown that these programs are much more successful at reducing crime and recidivism than the traditional criminal justice approaches.

Programs That Replace Drug Prohibition with “Harm Reduction”

The so-called War on Drugs, which has been fought vigorously in our country since the early 1970s, has in so many ways become a war on our own people—especially ethnic or racial minority populations. Most studies show that people of all racial and economic groups use and abuse presently illicit drugs at about the same rate. (In fact, if any group uses or abuses drugs more than any other it is probably mine, which is upper-middle-class white males.) But a much larger percentage of minorities are charged with and convicted of drug offenses, with the result that many times unnecessary and life-changing harms are inflicted upon them, such as having a criminal record, being incarcerated, losing their jobs, and being taken away from their families—which often puts their families on welfare. And this does not even take into account how expensive this is for the taxpayers. Even worse, for example, many years ago a good friend of mine came into my chambers in total despair and said: “Jim, the Probation Department just killed my son.” By explanation, he said that his son had been using opiates and was on probation for offenses related to that usage. So, when he was told that he had just failed a drug test and was going to be taken back into custody, he committed suicide instead of going back to jail. Fortunately, more and more people are beginning to understand that the criminal justice system was designed for, and really is quite good at, protecting us from each other. But it was simply not designed for, and is terribly ineffective at, protecting us from ourselves.

On the other hand, some of the measures that are and will be providing real and positive results for us all are:

The Cannabis Administration and Opportunity Act: This is a pending piece of legislation that would no longer make cannabis actions illegal under federal law if that conduct was not

illegal in the state in which it occurred. Thus, many people would no longer have to fear federal arrest or conviction, or being barred from public housing or federal financial aid for higher education simply for cannabis offenses where their acts were not illegal in their state. Plus, state-compliant cannabis businesses would finally be able to access essential financial services, like bank accounts, loans and the use of credit and debit cards. Depriving cannabis companies of these services, thus requiring them to deal only in cash, has made them prime candidates for robberies. Furthermore, medical research into the benefits and harms of cannabis would no longer be stifled. Finally, this bill would allow certain non-violent cannabis crimes to be expunged from the records of some people, and even allow an individual still serving time in federal prisons to petition the court for a re-sentencing.

Needle Exchange Programs: There is no evidence to indicate that people will start using injectable illicit substances simply because they could have legal access to sterile syringes. But there is ample evidence that allowing people to trade used hypodermic needles for new sterile ones will prevent illnesses, saving both lives and health care costs. In many places, it is easier for people to obtain illicit drugs than to obtain sterile syringes. So, they naturally either borrow a used syringe from someone else or continue to re-use their own. Needle exchange programs strongly decrease the odds of injecting users being inflicted with blood-borne diseases such as hepatitis B and C, as well as HIV/AIDS, and they also strongly reduce the risk to the rest of us and our children from coming into contact with dirty needles on public sidewalks or in public parks. This is a classic Harm Reduction program, and it is effective.

Narcan Availability: Narcan, better known as Naloxone, is a medication that is used for the emergency treatment of known or suspected opioid overdose. And it literally saves lives! So, fortunately, there are increasingly more programs that make Naloxone readily available not only to First Responders to counteract drug overdoses, but also in places where drug overdoses are likely to occur. There is a trite slogan in the Harm Reduction community that dead addicts can't get sober and, of course, it is true. All human lives are important—even if they abuse drugs—and any program that can reasonably save them from dying should be employed.

Programs That Remediate Harm to Victims

Presently there is a restorative justice program that emphasizes the need to repair the

harm done to crime victims through a process of negotiation, mediation, victim empowerment, and reparation. This program brings both the offenders and victims together, along with a third-party counselor, so they both can see each other as the human beings that they are. The purpose is to show the offenders firsthand the trauma and losses experienced by the victims as a result of their criminal acts. But it also serves to show the victims the backgrounds and environments that led the offenders to have committed these crimes. This is intended to lead the offenders to make both financial and psychological reparations to the victims. But, depending upon the circumstances, it also can keep the offenders out of the court system if they both make full reparations and also suc-

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cessfully attend and engage in special programs to address the reasons that the offenses were committed in the first place, using things like anger management classes, drug addiction programs, mental health counseling, and more. Or, if they are sent through the court system, they either can have their convictions expunged or their sentences reduced—always with the express consent of the victims. These programs have been found to be quite therapeutic for both the offenders and the victims. And they also materially reduce recidivism rates.

Mentoring Programs for Adults and Teenagers

As a personal aside, the first drug case I ever tried when I was a federal prosecutor in Los

Angeles involved an undercover DEA agent who had worked out a buy/bust operation for heroin. But, at the last moment when he was to have purchased the drugs, he noticed that the potential seller was a former friend of his from high school. Knowing that the seller would recognize him, the agent had someone else step in and complete the buy/bust. But when I asked the agent what type of person his friend had been in high school, he told me that while he had been mentored by his basketball coach, his friend had been mentored by a drug dealer. So, if circumstances had been different, the roles could have been switched. I never forgot that message. Facilitating positive mentoring for our youth is one of the most important things that a society can do! Because if we don't do it, drug and gang leaders, if not people like Charles Manson, will do it in our place. Orange County boasts some mentoring programs that are doing wondrous things.

Orange County Bar Foundation's "Project Youth," "Short Stop," and "Stop Short" programs. Project Youth is a program that provides academic, social, and resource support for high school students and their parents. Each year this program serves more than 1,500 at-risk 12-to-18-year-old youths, as well as more than 1,000 of their parents. Furthermore, virtually all of the program's high school students enroll in college! Furthermore, the OCBF's Short Stop and Stop Short programs, which bring juveniles physically to jails where they interact with actual inmates (both in English and in Spanish) have a 91% non-recidivism rate! Talk about keeping people out of the criminal justice system and reducing lives of crime. For further information, please visit www.ProjectYouthOCBF.org.

The Nicholas Academic Centers. Founded by Judge Jack Mandel and Dr. Henry T. Nicholas, III, who was a founder of Broadcom, this program tutors and mentors high school students in three centers located in Santa Ana. All of the staff are alumni of the program, including the present director, Ms. Rosa Diaz, who says: "There was nothing special about me, until I realized that I too could go to a university, get an advanced degree and, with hard work and motivation, truly make something of myself." Not only is their graduation rate from high school virtually 100%, most of the graduates go on to college with full-ride scholarships! For more information, please visit www.nacenters.org, and to hear an exciting 12-6-2019 interview of Ms. Diaz, please visit <https://www.voiceamerica.com/show/3883>.

OMID. This is an Orange County program that provides mental health care, psychologi-

cal testing, neuropsychological services and psychoeducational life skills, coping skills, and parenting skills training for mostly under-served people in the English, Spanish, Farsi, Vietnamese, and Mandarin languages. For more information, please visit www.OMIDinstitute.org.

Open Gate International. This Orange County program teaches women who formerly were sexually trafficked, people who have overcome their drug addictions, and people convicted of felonies after they are released from prison to become cooks and have other skilled positions in the culinary arts field. In doing this, Open Gate provides a twelve-week program without charge to the students and then, with their connections, is successful in landing about 75% of their students in good-paying jobs upon their graduation. Taking this enormous success into account, we were able to interest the warden at Norco State Prison in Riverside County in allowing Open Gate to teach these skills to inmates while they are still in prison. Why wait for the inmates to be released? Studies show that, if parolees have jobs, their recidivism rates are reduced by about 80%. So, this is a program that is truly effective. (Unfortunately, with the onset of the COVID-19 virus, the training program at Norco has been put on hold, but we are optimistic for the future.) For further information, please visit www.OpenGateIntl.org.

Orange County's Peer Court. This is a diversion program for high school students that is administered by the Constitutional Rights Foundation of Orange County. Through it, juvenile offenders are screened out by our probation department and then taken to one of fourteen high schools during the school year for a trial before their peers.

Once in session, after six to ten high school jurors are selected, a probation officer reads a summary of the offenses to which the subjects have already acknowledged their culpability, and then the jurors are encouraged to ask questions both to the subjects as well as their parents, who are required to attend. And you would be gratified to hear some of the questions asked by the jurors to the subjects. For example: "You were smoking marijuana, right?" Answer: Yes. "Well, you have a younger sister; do you want her to smoke marijuana too?" Answer: No, actually I don't. "Well, don't you understand that regardless of what you tell her, she will probably follow your lead? Had you thought of this?" And they also often make it clear to the parents that there is a stark difference between being

their child's "friend," as opposed to being their parent!

Once the jurors feel they have a sufficient amount of information, they retire and decide upon a reasonable recommended sentence, which will be imposed by a real judge. (Often, however, the sentences are adjusted downward by the judge because these jurors are often pretty tough.) Then, if the subjects complete the ordered sentence within four months, the underlying charges are dismissed and they will have no criminal record for those offenses. But, if they don't comply, the only sanction is that their case is referred back to the District Attorney for prosecution. Accordingly, Peer Court is known as a diversion program, and its recidivism rates are remarkably low. For more information see www.CRFOC.org/Programs/PeerCourt.

Families Against Mandatory Minimums. As the name suggests, this national program, also known as "FAMM," is organized to educate and lobby against mandatory minimum sentences that often result in obscenely long prison sentences. After I was interviewed on the nationally syndicated *Coast to Coast* radio show with George Noory, I received letters from eleven inmates from prisons across the country. One of them told me that a fellow inmate was serving a mandatory minimum federal sentence of twenty years for having downloaded a child pornography website that had been established by federal authorities. While child pornography must be prosecuted and curtailed, this inmate, for whatever reason, was only looking at the site. Had he created it using children, or even found to be selling it, that would be one thing. But twenty years for merely downloading it? I believe this serves no one's interests except politicians and prison guards' unions.


Instead, sentencing judges should be given more discretion. Of course, some judges sentence more lightly or heavily than others. I would suggest that we employ a panel of three judges who would hear and sentence the defendants convicted at trial for all of those three judges' cases. That would make all the sentences more consistent and also more reasonable.

Mandatory minimums are not realistic, because no one in Congress can possibly know in advance what a reasonable sentence would be until learning the facts about the defendants, their victims (if any), and the underlying circumstances of their offenses. For further information about FAMM, please visit www.FAMM.org.

Law Enforcement Action Partnership. Otherwise known as LEAP, this is a program of

speakers who have a considerable background in law enforcement. It began with the name of Law Enforcement Against Prohibition but, since so many of these issues are interrelated, it later evolved into its present title. It is made up of former police officers, federal agents, judges, parole officers, and other law enforcement officials. Since they all have a great deal of practical and sophisticated experience in dealing with the War on Drugs and other criminal justice issues, their speakers traditionally are quite knowledgeable and persuasive. For further information, please visit www.LawEnforcementActionPartnership.org.

Conclusion

Obviously life is complicated. (You heard it here first!) But we as Americans must ensure that our system of justice accounts for and responds to those complications in a way that is just. And, as stated as emphatically as I can, in many ways our system has become too bureaucratic, too political, and unjust. As such, since it is our democratic government, if it isn't working, we have no one to blame but ourselves. So, I request that everyone please take notice of the issues set forth above, think about and analyze them, then act and vote accordingly, and help spread the word. Obviously, I don't have all of the answers, but I have been involved in and seen a lot about these critical issues throughout the years. And I strongly believe that, for justice's sake and everyone else in our country's sake, we must do a better job. Let's focus on the programs that work and employ them. Thank you for your consideration. 

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