SIXTH EDITION

RESTORING JUSTICE

AN INTRODUCTION TO RESTORATIVE JUSTICE

DANIEL W. VAN NESS
KAREN HEETDERKS STRONG
JONATHAN DERBY
L. LYNETTE PARKER

ROUTLEDGE

RESTORING JUSTICE

Restoring Justice: An Introduction to Restorative Justice, Sixth Edition, offers a clear and convincing explanation of restorative justice, a movement within criminal justice with ongoing worldwide influence. The book explores the broad appeal of this vision and offers a brief history of its roots and development as an alternative to an impersonal justice system focused narrowly on the conviction and punishment of those who break the law. Instead, restorative justice emphasizes repairing the harm caused or revealed by criminal behavior, using cooperative processes that include all the stakeholders. The book presents the theory and principles of restorative justice, and discusses its four cornerpost ideas: Inclusion, Encounter, Repair, and Cohesion. Multiple models for how restorative justice may be incorporated into criminal justice are explored, and the book proposes an approach to assessing the extent to which programs or systems are actually restorative in practice. The authors also suggest six strategic objectives to significantly expand the use and reach of restorative justice and recommended tactics to make progress towards the acceptance and adoption of restorative programs and systems.

Daniel W. Van Ness has explored and promoted restorative justice as public policy advocate, program designer, writer, and teacher for 35 years. He received the John W. Byrd Pioneer Award for Community and Restorative Justice from The National Association of Community and Restorative Justice in 2013.

Karen Heetderks Strong has worked on restorative justice theory and principles since the late 1980s. She spent 22 years in an American non-profit organization serving prisoners, ex-prisoners, crime victims, and their families and supporting advocacy for reforms in the state and federal criminal justice systems.

Jonathan Derby has worked more than 16 years with non-profit organizations in India that help the most vulnerable access justice. Currently, he serves as Special Advisor on Restorative Justice with Prison Fellowship International and teaches restorative justice as adjunct professor at Straus Institute for Dispute Resolution, Pepperdine Caruso School of Law.

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Endorsements of Previous Editions of *Restoring Justice*

"As a crime victim, victim advocate, and long-time supporter of restorative justice values and principals, I found *Restoring Justice* to be an excellent resource for anyone interested in the complex world of restorative justice history, processes, and ideas. Bravo to Dan Van Ness and Karen Strong for offering a balanced approach to restorative justice that understands "real" justice is about repairing the harm and healing those who have been harmed by crime: victims, offenders, and communities. *Restoring Justice* is a well-written and quite often inspirational book!"

—Ellen Halbert, *Director, Victim/Witness Division, Travis County District Attorney's Office, Austin, Texas*

"At each edition of *Restoring Justice,* Daniel Van Ness and Karen Heetderks Strong set the standard and make their volume one of the basic books—or perhaps the basic book—on restorative justice.

Their book reflects the richness of the restorative justice approach, through process analyses with clinical relevance, theoretical thinking with social ethical and social significance, principled exploration on juridical options, and a broad sociological context analysis. Van Ness and Heetderks Strong colour this broad interdisciplinary picture with their own visions and options. In doing so, they deliver a crucial contribution to understanding restorative justice principles and their proper implementation.

Restoring Justice is the result of intensive commitment to the values of restorative justice, balanced with a constructive critical mind for possible problematic implementations, and openness for unanswered questions and unresolved difficulties. It is a landmark in the restorative justice literature."

—Lode Walgrave, *Emeritus Professor of Criminology, Faculty of Law, Catholic University of Leuven*

"*Restoring Justice* is the best, most thorough text on the most important development in the justice system in the last decade: restorative justice.… a seminal work.… this book does a wonderful job of describing the rationale, presenting the arguments, confronting the criticisms.… provides a measured, reliable statement on our need to restore justice."

—Todd Clear, *University Professor of Criminal Justice, Rutgers University School of Criminal Justice*

"… a great introductory overview of restorative justice … easily understood while also providing significant depth.… draws together the significant insights in the field while making several new contributions… invites and encourages change without alienating people who are currently working in the field. I recommend *Restoring Justice* for both the novice and the seasoned restorative justice reader."

—Ron Claassen, *Co-owner, Restorative Justice Discipline, Fresno and former Director of the Center for Peacemaking and Conflict Studies, Fresno Pacific University*

"… an exceptionally good job of clearly articulating the underlying principles and values of restorative justice, including many practical examples. This book will serve as a primary resource for scholars and practitioners involved in the restorative justice movement as it continues to expand."

—Mark Umbreit, *Professor and founding Director of the Center for Restorative Justice & Peacemaking, School of Social Work, University of Minnesota*

"[In Restoring Justice, Dan Van Ness and Karen Strong] challenge researchers and scholars to move beyond measuring only recidivism as the ultimate outcome of evaluation, and victim and offender satisfaction as the primary intermediate measures. Based on this work, we may now instead build upon core principles to develop dimensions and measures of process integrity, as well as theoretical dimensions to assess intermediate outcomes for victim, offender, and community."

—The late Gordon Bazemore,
former Professor of Criminology and Criminal Justice Florida Atlantic University

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An Introduction to Restorative Justice

Sixth Edition

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PREFACE

Restoring Justice is an introduction to the theory, principles, and practices of restorative justice. When it was first published in 1997, restorative justice was still relatively unknown although it had begun to gain some traction, especially in juvenile justice cases. The book's purpose then, as now, was to introduce restorative justice to those who are unfamiliar with it.

Today, restorative justice is a generally familiar term, although there are divergent views about what it is and how it should be applied. As with previous editions, this book is primarily about the application of restorative justice to criminal justice, although it mentions some of the wider applications of restorative and "transformative" thinking and practices.

Dan and Karen's work on restorative justice began in the mid-1980s when the criminal justice advocacy organizations for which we worked undertook development of a model built on what was then a largely unknown and incomplete theory called restorative justice. The organization was Justice Fellowship, a criminal justice reform affiliate of Prison Fellowship Ministries® and Prison Fellowship International®. A remarkable set of colleagues were engaged in exploring the theory, principles, and practices of restorative justice. The prefaces to previous editions acknowledged these colleagues and partners who were instrumental in developing our understanding of it. We remain grateful for their invaluable contributions and are also encouraged by the next generation of scholars and practitioners, whose insights and critiques continue to shape restorative justice. Two such contributors, Lynette Parker and Jonathan Derby, have joined us as co-authors for this edition.

In this sixth edition of our textbook, we have made some significant changes beyond simply updating program information and incorporating more recent sources. One of these is the *terminology* we use. Previous editions of this book used the terms *victim* and *offender*. But these labels put the focus on negative deeds and experiences, rather than on the humanity and potential of the people involved. Furthermore, such terms can oversimplify the complex personal, social, and economic realities that complicate fault, blame, cause, and effect. So, in this edition, we use terms such as *person who was harmed*, and *person responsible for the harm*. Occasionally, this terminology is a little cumbersome, but we have accepted this downside because it is outweighed by our commitment to the dignity and value of each person who is involved, which is inherent to the values of restorative justice. We have learned from others in the field who also share this commitment.

In the following chapters, we consider why so many people throughout the world believe that criminal justice needs a new vision, and we offer a brief history of the development of restorative justice. We present our understanding of the meaning of restorative justice and discuss its conceptual and practical cornerposts of inclusion, encounter, repair, and cohesion. We then explore how restorative justice ideas and values are being (and might be) integrated into policy and practice. Finally, we discuss the challenges in shifting the criminal justice paradigm toward restorative justice, and the reasons we are full of hope for personal and institutional transformation. Appendices provide a case study showing how restorative justice is applied and a list of restorative justice programs and applications across the globe.

For those who have previously used *Restoring Justice* in teaching, we want to clarify what has changed in this edition compared to the previous one. One is that throughout the book, we have

sought to include insights and examples from non-European cultures to a greater extent than in the past. And, of course, we have updated our sources and information. There are also other changes to the structure and content of the book.

Part 1 (The Concept of Restorative Justice) has three chapters, as before.

Chapter 1, "How Patterns of Thinking Can Obstruct Justice," still discusses patterns of thinking, looks back at ancient roots of a more relational approach to justice, and gives a brief history of how the pattern has shifted to a more impersonal, government-centered concept of criminal justice. We have added information about the consequences of the current pattern in mass incarceration and the war on drugs. And the chapter closes with an invitation to consider an alternative pattern. Content about reform efforts has been moved to Chapter 2.

Chapter 2, "The Development of a New Pattern of Thinking," discusses the origins of the term "restorative justice" and goes on to explore reform movements and indigenous practices that have contributed to the development of restorative justice. Some of this content was previously found in Chapter 1. The chapter concludes with a discussion about early explorers of restorative justice theory. The "Time Line of Significant Advances Concerning Restorative Processes" has been taken out of the book, given the rapid pace of change and development throughout the world. But we have added, in Appendix 2, a table showing ways restorative justice is being used throughout the world.

Chapter 3, "Justice That Promotes Healing," still presents the concept, definition, principles, and values of restorative justice, though the order of the content has changed a bit. Our definition and three principles are essentially the same, but in the brief presentation of "cornerpost values," we have replaced "amends" with "repair" to widen the consideration from the obligation of the person causing harm to the needs of all the parties, including the need for repair of structural issues that affect justice. We've also replaced "reintegration" with "cohesion" to underscore the importance of building community strength, so that communities are able to provide the means and opportunity to assist both persons harmed and those responsible for harm. This is more fully developed in Chapter 7.

The four chapters of Part 2 (The Cornerposts of Restorative Justice) still present the four "cornerpost values" of restorative justice. But we have made noticeable alterations especially to Chapters 5–7.

Chapter 4, "Inclusion," is not significantly changed.

Chapter 5, "Encounter," begins with a different story than previously. It describes an actual encounter, based on the experience of one of the co-authors. It goes on to define what is meant by "encounter" and continues to discuss various kinds of processes that function to bring the parties together in a restorative way. New to this chapter is the issue of trauma for participants in an encounter. The chapter also introduces the benefits of restorative justice for creating opportunities for connection between the parties involved, in contrast to contemporary criminal justice, where disconnection is inherent in the justice processes and their consequences.

Chapter 6, "Repair" (formerly "Amends"), discusses the needs of people who have been harmed by crime, adding a section on trauma-informed support and assistance. It goes on, as before, to explore the aspects of meaningful amends, including restitution, but has a new section on justice-informed considerations affecting repair and restitution.

Chapter 7, "Cohesion" (formerly "Reintegration"), begins with a different story than formerly. It presents a prison in Brazil that operates on a radically different model than most, one that is rooted in relationships, respect, and resilience—the three elements of cohesion. These three elements are woven throughout the chapter. There is a significant emphasis on trauma and trauma-informed community-building, in view of the stresses and challenges in some communities and how that affects their capacity to be reintegrative for persons harmed by crime, and especially people returning from incarceration.

Part 3, "The Challenges Facing Restorative Justice," still has three chapters but Chapters 8 and 9 are significantly revised. The contents of Chapters 8 and 9 are flipped in this edition. Chapter 8, "Toward a Restorative System" (formerly "Making Restorative Justice Happen") presents the five systems models for incorporating restorative justice. The chapter also discusses how restorative justice fits into the various stages of criminal justice proceedings. Formerly, these were presented as uses by

the police, prosecutors, courts, and so on. And finally, there is a revised section suggesting a method to assess the "restorativeness" of a system or program.

Chapter 9, "Shifting to a Restorative Paradigm," presents six strategic objectives to expand the use of restorative justice. All six of these objectives are different from the goals in Chapter 8 of the previous edition. This chapter also contains significantly revised content about what is needed to "make restorative justice happen" than was previously found in Chapter 8.

As in previous editions, we have concluded the book with Chapter 10, "Transformation," discussing transformation and reasons for hope. This chapter has been revised, but its direction is similar to previous editions.

In preparing this book, we have sought to incorporate what we have learned from an increasingly diverse group of scholars and practitioners, policymakers, and influencers who lead the movement for restorative justice. The involvement of growing numbers of people of color and indigenous people is a wonderful sign of a maturing movement. Many of the helpful changes in this edition are the result of Jonathan and Lynette's fresh insights and current awareness of developments and critiques of restorative justice. For Dan and Karen, this is a natural way to bring in the next generation of scholars with a heart for this movement.

We desire this volume to be a useful text for both teachers and students, and hope it stirs discussions and debates that will stimulate further thinking about justice. We recognize that in looking at restorative justice, we bring our own lenses as White, privileged men and women. This is why we are especially grateful to learn from the perspectives of others, an ongoing process as we strive to understand more fully and advocate more effectively.

As people of faith, our hearts are stirred both with a desire for a more just world and hope that more restorative responses to crime can bring about increased healing and peace in communities and individual lives.

We dedicate this sixth edition to the restorative justice thinkers, practitioners, policymakers, critics, and champions who have been wonderful teachers and colleagues to us and who have kept restorative justice growing and adapting to meet the challenges and opportunities of a changing world. We particularly honor Dr. Gordon Bazemore (1952–2021), a friend and scholar whose life work made a lasting impact for good. Gordon helped shape the restorative justice movement from its early development and was directly instrumental in the Balanced and Restorative Justice (BARJ) Project in the United States, beginning in 1992 when he first made his case for a "balanced approach." Through BARJ, restorative justice principles were put into action across the United States in juvenile justice systems, courts, policing, policymaking, victim services, and community efforts. It continues to be instrumental. Gordon's writing, training, collaboration (and yes, his humor) are a significant reason why restorative justice is known and respected today.

Acknowledgments

We certainly do not claim to be the first or principal proponents of restorative justice. At every stage of our journey, we have benefited from the insights, questions, research, writings, experience, and practical contributions of scholars and practitioners around the globe. Our best ideas are the result of interaction with the remarkably generous, creative, and courageous people in this field. Although these individuals may not agree with all our conclusions, their contributions have enriched and strengthened our work and that of restorative justice advocates and practitioners throughout the world.

Excerpts from other previously published works by Daniel W. Van Ness have also been used by permission in this volume. These works and publishers are as follows: "Preserving a Community Voice: The Case for Half-and Half Juries in Racially-Charged Criminal Cases," *John Marshall Law Review* 28, 1 (1994), is used courtesy of The John Marshall Law School. "New Wine and Old Wineskins," *Criminal Law Forum* 4, 2 (1993), and "Anchoring Just Deserts," *Criminal Law Forum* 6, 3 (1995), are used courtesy of Criminal Law Forum, Rutgers Law School. Adapted excerpts from "Restorative Justice" in *Criminal Justice, Restitution, and Reconciliation*, edited by Burt Galaway and Joe Hudson (1990); from "Restorative Justice and International Human Rights" *in Restorative Justice: International Perspectives*, edited by Burt Galaway and Joe Hudson (1996); and from "Legal Issues of Restorative Justice" *in Restorative Juvenile Justice: Repairing the Harm of Youth Crime*, edited by Gordon Bazemore and Lode Walgrave, are used with permission from Criminal Justice Press, P.O. Box 249, Monsey, New York 10952. The review of uses of restorative justice processes in the criminal justice system in Chapter 8 was drawn from a paper Van Ness prepared for the Workshop on Enhancing Criminal Justice Reform, Including Restorative Justice, conducted on April 11, 2005, at the United Nations 11th Congress on Crime Prevention and Criminal Justice held in Bangkok, Thailand. The RJ City® Case Study in Appendix 1 and material drawn from RJ City®: Phase 1 Final Report (December 2006, revised August 2010) are used with permission from Prison Fellowship International.

"Making Peace" by Denise Levertov, is from BREATHING THE WATER, copyright© 1987 by Denise Levertov. It is reprinted in Chapter 10 by permission of New Directions Publishing Corporation.

Our front cover shows an example of Kitsugi pottery, a Japanese artform that mends broken pieces with gold. It transforms the object into something more beautiful than before it was broken. We think this is an apt metaphor for restorative justice. Copyright© Getty Images, Marco Montalti.

We especially thank our many former colleagues at Justice Fellowship, Prison Fellowship, and Prison Fellowship International. As we have prepared each edition of *Restoring Justice*, we have been continually reminded of the formative and highly meaningful interaction among these individuals as we worked together to challenge, articulate, and refine ideas about restorative justice and ways those ideas can bear fruit.

We are also indebted to our colleague, Sir Kim Workman, for permitting us to use a story from his personal papers in Chapter 2, and to the Counsel to Secure Justice in New Delhi, India and the project's lead editor Arti Mohan, for their generosity in sharing a portion of their extensive work, presented here as Appendix 2, "Restorative Justice Across the World." We are grateful to Straus Institute for Dispute Resolution at Pepperdine Caruso School of Law for access to their library and online tools.

We are learners and sojourners in the work of restorative justice. Most of what we have come to understand, we received from others. We thank the generous people who have gone before us, including the aboriginal peoples of the world who have preserved restorative approaches for centuries

and also the wonderful people who travel the road with us today. We are very grateful for the ongoing encouragement of our publisher, who has kept the book in print since 1997. We especially thank Ellen Boyne for her wise and skillful editing from the first edition until now, as well as Kate Taylor and others whose diligence has helped bring this edition to print. We are also shaped by our faith in God, who steadily leads us into a deeper understanding of true peace—shalom—and inspires us toward that goal.

Daniel W. Van Ness
Karen Heetderks Strong
Jonathan Derby
L. Lynette Parker
Autumn 2021

Part 1

THE CONCEPT OF RESTORATIVE JUSTICE

1

HOW PATTERNS OF THINKING CAN OBSTRUCT JUSTICE

Key Concepts

- Patterns of thinking—their strengths and limitations
- An ancient pattern of thinking about justice: Justice is relational
- Historical shifts in thinking about crime
- Current pattern of thinking: Justice is impersonal
- Restorative Justice: An alternative pattern

PATTERNS OF THINKING

The young woman watched intently as the man who raped her was sentenced to prison. But as the person convicted of rape was escorted from the courtroom, it was clear to Justice John Kelly that she was no less distraught than she had been throughout the court proceedings. So, before the next case was called, Justice Kelly asked the woman to approach the bench. He spoke with her briefly and quietly about what had just happened, and he concluded with these words: "You understand that what I have just done here demonstrates conclusively that what happened was not your fault." At that, the young woman began to weep and fled from the courtroom. When Justice Kelly called her family several days later, he learned that his words had been words of vindication for the woman; they marked the beginning of her psychological recovery. Her tears had been tears of healing.

A short time later, this Australian judge spoke at an international conference on criminal law reform held in London. Speaking to 200 judges, legal scholars, and law reformers from common law countries, he laid aside his prepared comments and spoke with great feeling about the need for criminal law practitioners to view themselves as healers. A purpose of criminal law, he said, should be to heal the wounds caused by crime—wounds such as those of the woman who had been raped. For her, even the conviction and sentencing of the man who had done this to her had not been enough.

The rehabilitation model of criminal justice has been the most influential school of thought in criminology in the past 200 years. Although the model fell into disrepute among criminal justice policymakers in the latter decades of the twentieth century, opinion surveys suggest that the desire to rehabilitate people who have harmed others through crime remains strong among members of the general public and even many people who have been harmed.[1] At a fundamental level, we recognize that criminal justice should consider not only whether those accused of committing crimes have violated the law but also why they have done so. However, even when rehabilitation programs

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are helpful in addressing the underlying problems that led to the decision to commit a crime, those programs fail to address all the harm surrounding the crime. Crime is not simply lawbreaking; it also harms others. In fact, that is often why those activities have been criminalized—to prevent those injuries from happening.

Crime is not simply lawbreaking; it also harms others. That is: the reason for criminal laws to prevent those injuries from happening.

As we will see, these injuries exist on several levels and are experienced by those who were directly harmed, by their communities, and even by the persons who caused the harm. However, the current policies and practice of criminal justice focus almost entirely on the lawbreaker, filtering out virtually all aspects of crime except questions of legal guilt and punishment. This is because a set of assumptions, or a pattern of thinking, structures our perception of crime and, consequently, our sense of what a proper response should be. Howard Zehr's description of paradigms is pertinent here: "They provide the lens through which we understand phenomena. They shape what we 'know' to be possible and impossible. [They] form our common sense, and things which fall outside … seem absurd."[2]

Patterns of thinking are necessary because they give meaning to the myriad bits of data we must deal with in life. Edward de Bono uses the example of a person crossing a busy road:

> If, as you stood waiting to cross the road, your brain had to try out all the incoming information in different combinations in order to recognize the traffic conditions, it would take you at least a month to cross the road. In fact, the changing conditions would make it impossible for you ever to cross.[3]

To avoid this problem, the brain uses "active information systems" to organize data into patterns of thinking that allow us to quickly make sense out of the chaos of information that would otherwise overwhelm us. A pattern of thinking is like the collection of streams, rivulets, and rivers formed over time in a particular place by the rainfall; once the pattern of water runoff is established, rainwater will always flow there, and nowhere else.

A fundamental weakness of patterns of thinking is that they limit what we perceive; we see only what makes sense in the pattern.

However, the reason for their usefulness is also a fundamental weakness of patterns. They limit the data we perceive. We see only what makes sense in the pattern; we simply do not recognize "absurd" information. Therefore, one sign that a pattern of thinking has become deficient is that we increasingly encounter troublesome data that do not fit. We are then forced to make a choice either to disregard that evidence or to seek a new pattern. For example, at one time, scientists believed that the Earth was flat, and that the universe revolved around it. However, as astronomers recorded the actual movement of heavenly bodies, this model became increasingly less satisfactory. When Copernicus proposed that the Earth revolves around the sun—not the other way around—his model offered a much more satisfactory explanation of observable data.

It is normal to think that the way we understand or do something is not only the *right* way but also the *only* way, until we encounter other approaches and recognize that they present alternatives. We may not adopt those alternatives, but the benefit to having encountered them is that we realize we have choices. The idea of neuroplasticity has emerged from a recent change in scientific understanding of

how the brain works. It is not, as was thought for 400 years, a machine whose parts have pre-assigned, specific functions. Rather, the brain not only shapes mental activity, but it is shaped by mental activity. Patterns of thought need not be static, but can change.[4] When people travel abroad, read, watch television programs, go to museums, listen to podcasts or music, they discover that other people in other times and places have made different choices, and that those choices have had consequences. And even as they experience differences, they also notice things they have in common and may come to a changed understanding of what it means to be human.

Exposure to other ways of doing things helps us recognize patterns of thinking, allows us to reflect on alternative approaches, and offers us the opportunity to make choices.

In other words, exposure to other ways of doing things helps us recognize patterns of thinking, allows us to reflect on alternative approaches, and offers us the opportunity to make choices.

Consider criminal justice. When we hear about a crime, we "know" that someone has been charged with breaking a law. That law may be justified on the grounds that it protects individuals (like laws about burglary), the community (like laws about drug dealing), or the government (like laws about paying taxes). We also "know" that there are laws to protect those who have been harmed, and that the person responsible for the crime should be caught and held accountable for breaking those laws. We "know" that criminal cases involve government prosecution of people accused of causing criminal harm to determine whether they did in fact break the law. We also "know" that those who are guilty are sent to prison as punishment or may be "given a break" and placed on probation. We may have opinions about whether the person was actually guilty, or about whether the sentence was just, but we seldom, if ever, question the underlying assumptions of the process. Crime is lawbreaking; the focus after crime should be on the person we believe did it, and once found guilty they should be punished, such as by having their liberty taken away or curtailed in some way.

Yet, nagging questions surface from time to time, prompted by events or intuitions that do not fit neatly within the pattern. Perhaps the most profound and obvious ones have to do with the people who were harmed. Why are some so dissatisfied with how the criminal justice system treats them? Is it wrong when they want to have a say in how the police conduct the investigation, or how the prosecutor presents the case, or what sentence the judge gives the person convicted of harming them?

If the criminal justice system is fair, why are people of color and other marginalized groups so disproportionately impacted when compared to their representation in the population? Imprisonment has a long-lasting negative relationship to the ability of those who have been locked up to reestablish themselves when they return to society. Instead of reducing crime, imprisonment results in high rates of repeat offending among those who did time before. Yet, US incarceration rates increased fivefold between the early 1970s, when it was less than 100 people per 100,000, until it peaked in 2007 at 762 people per 100,000. Only then did policymakers take notice of the financial impact of this practice, and incarceration rates began a slight decline. As we will see, the institutions of criminal justice were developed in large part to achieve rehabilitation. For two centuries, Americans and Europeans have experimented with a succession of programs to accomplish this purpose. Every attempt has ended in disappointment. Is there anything we could do differently that might get better results?

We suggest in this book that the way we think about crime is inadequate. By defining crime as lawbreaking and then concentrating on the adversarial relationship between the government and the defendant, we fail to address—or even recognize—certain fundamental reasons for, and results of, criminal behavior. Moreover, we fail to recognize the fruits, or outcomes, our justice systems produce. Adding new programs to an inadequate pattern of thinking is not enough if what is needed is a different pattern. That is what this book proposes.

Adding new programs to an inadequate pattern of thinking is not enough if what is needed is a different pattern.

It is not as though our current approach to criminal justice is the only one. There have been times and places when crime was viewed far more comprehensively—as an offense against the people harmed, their families, the community, and society. The goal of justice was to satisfy the parties, and the way to do that included making things right by repairing the damage to those parties, whether the damage was physical, financial, or relational. This is different from an approach that defines crime solely as an offense against the government, and whose goal is crime prevention through rehabilitation, incapacitation, and deterrence.

Let us explore these patterns more closely.

AN ANCIENT PATTERN: JUSTICE IS RELATIONAL

The legal systems that form the foundation of Western law did not view crime solely as a wrong to society. Although crime breached the common welfare so that the community had an interest in—and responsibility for—addressing the wrong and punishing the person who caused these harms, the offense was not considered a crime against the state, as it is today. Instead, it was also an offense against the persons harmed and their families. Consequently, those who caused harm and their families were required to settle accounts with the persons harmed and their families in order to avoid cycles of revenge and violence. This was true in small non-state societies, with their kin-based ties, but attention to the interests of people harmed by crime continued after the advent of states with formalized legal codes. The Code of Hammurabi (*ca.* 1700 BCE) prescribed restitution for property offenses, as did the Code of Lipit-Ishtar (1875 BCE). Other Middle Eastern codes, such as the Sumerian Code of Ur-Nammu (*ca*. 2050 BCE) and the Code of Eshnunna (*ca*. 1700 BCE), provided for restitution even in the case of violent offenses. The Roman Law of the Twelve Tables (449 BCE) required people convicted of theft to pay double restitution unless the property was found in their houses, in which case they paid triple damages; for resisting the search of their houses, they paid quadruple restitution. The Lex Salica (*ca*. 496 CE), the earliest existing collection of Germanic tribal laws, included restitution for crimes ranging from theft to homicide. The Laws of Ethelbert (*ca*. 600 CE), promulgated by the ruler of Kent, contained detailed restitution schedules that went so far as to distinguish the value, for example, of each finger and that of its nail. Each of these diverse cultures retained an expectation that those who cause harm, and their families, should make amends to the people who were harmed and their families—not simply to ensure that injured persons received restitution, but also to restore community peace. Peace was important in small kin-based societies because every family living in it was important to the defense of the community from outside threats.

While an individualistic, retributive voice of justice dominates Western criminal justice approaches, a more communal, reparative voice calling for justice that heals (to which Justice Kelly alluded) exists in many other cultures and religious traditions.

While an individualistic, retributive voice of justice dominates Western criminal justice approaches, a more communal, reparative voice exists in many other cultures and religious traditions.

In the Judeo-Christian tradition, the word *shalom* describes the ideal state in which the community should function. It means much more than the absence of conflict; it signifies completeness, fulfillment, and wholeness—the existence of right relationships among individuals, the community, creation, and God. It was a condition in which, as Ron Claassen says, no one is afraid.[5]

Fundamental to the concept of *shalom* is that individuals are interconnected in a web of relationships. When crime occurs, it ruptures right relationships and creates harmful ones. It tears apart *shalom*. Justice, then, restores *shalom*. It heals individuals and reconciles broken relationships and communities that have been harmed by crime.

Although restitution formed an essential part of these ancient justice processes, it was not understood to be an end in itself. The Hebrew word for restitution, *shillum*, derives from the same root as *shalom*, implying that it was related to the reestablishment of community peace. Along with restitution came the notion of vindication of the person who was harmed and the law itself. This concept was embodied in another word, also derived from the same root as *shalom* and *shillum—shillem*. *Shillem* can be translated as "retribution" or "recompense," not in the sense of revenge (that word derives from an entirely different root), but in the sense of satisfaction or vindication. In short, a purpose (but by no means the only purpose) of the justice process was, through vindication and reparation, to restore a community that had been eroded by crime.

Similarly, in Islam the word *salaam* signifies peace, health, and well-being. It forms part of the common greeting "*Assalamu Alaikum*" and conveys a desire for peace and wholeness to the one being greeted.[6] Islamic law shares some values with restorative justice, including respect for the other's dignity based on the interconnectedness of the entire community.[7] Although the Qur'an does not consider it appropriate to handle all crimes this way, it permits restorative approaches in *qisas* crimes (involving intentional and unintentional murder and intentional and unintentional physical harm) and *ta'zir* crimes (embezzlement, perjury, sodomy, usury, breach of trust, abuse, and bribery).[8]

The Qur'an also places a high value on forgiveness in those two categories of crime. This forgiveness is defined as "an abdication of someone's right to punishment without resentment and with contentment."[9] The *sulh* process of conciliation provided a way of repairing the ruptures that would come between members of the community from time to time.[10]

The African concept of *ubuntu* recognizes that humanity is intertwined so that what impacts one impacts all. *Ubuntu* is the essence of being human. When the brutal apartheid era in South Africa ended in April 1994, Nelson Mandela and Archbishop Desmond Tutu pushed for a Truth and Reconciliation Commission to unify and heal the country, in part because it was consistent with *ubuntu*. They recognized that persons who had harmed others and those who had been harmed alike would continue living together in post-apartheid South Africa, and that ongoing criminal trials would further divide the nation. In *No Future Without Forgiveness*, Desmond Tutu explains:

> The humanity of the perpetrator of apartheid's atrocities was caught up and bound up in that of the victim whether he liked it or not. In the process of dehumanizing another, in afflicting untold harm and suffering, inexorably the perpetrator was being dehumanized as well.[11]

The traditions of indigenous populations in North America, New Zealand, Australia, and elsewhere also view crime as impacting others in the community. The Lakota Sioux tradition views others within the community as relatives. They exist to care for and to live in right relationship with one another and with the earth so that the community may flourish.[12] Likewise, the Navajo Nation considers all within the clan to be their relatives. The term *k'e* signifies a strong sense of belonging to a clan. When one person hurts, others within the clan hurt too because they are relatives. In his important law review article, *Life Comes From It: Navajo Justice Concepts*, Robert Yazzie, Chief Justice Emeritus of the Navajo Nation, explains this sense of connectedness within the community.

> If I see a hungry person, it does not matter whether I am responsible for the hunger. If someone is injured, it is irrelevant that I did not hurt that person. I have a responsibility, as a Navajo, to treat everyone as if he or she were my relative and therefore to help that hungry person. I am responsible for all my relatives.[13]

In traditional Navajo tort law, restitution is required so "there will be no hard feelings" within the community and persons who have been harmed can be made whole again. However, the compensation amount

is based on the feelings and intuitions of the person harmed and the abilities of the person who caused the harm to pay rather than a transactional calculation based on summing up actual losses.

A BRIEF HISTORY LESSON

For all its traditions, this approach to criminal justice is unfamiliar to most of us today. When we think about criminal justice, we tend to focus on prosecutors, police, and prisons. Cases are called *The People of a State v. Defendant*. Juries are supposedly the made up of defendant's "peers," but most often know jurors nothing about the people who were harmed, the people who caused the harm, or the communities from which they come. How did this transformation take place?

The People Who Are Harmed

As tribal societies in Europe were consolidated into kingdoms under feudal lords, rulers took an increased interest in reducing sources of conflict. The interests of people harmed during those conflicts began to be replaced by the interests of the rulers in their resolutions. For common law jurisdictions, the Norman invasion of Britain marked the turning point in this changing understanding of crime. William the Conqueror and his successors found the legal process an effective tool for establishing the preeminence of the king over the Church in secular matters and in replacing local systems of dispute resolution. The *Leges Henrici Primi*, written early in the twelfth century, asserted royal jurisdiction over offenses such as theft punishable by death, counterfeiting, arson, premeditated assault, robbery, rape, abduction, and "breach of the king's peace given by his hand or writ."[14] Breach of the king's peace gave the royal house an extensive claim to jurisdiction:

> [N]owadays we do not easily conceive how the peace which lawful men ought to keep can be any other than the Queen's or the Commonwealth's. But the King's justice … was at first not ordinary but exceptional, and his power was called to aid only when other means had failed.… Gradually the privileges of the King's house were extended to the precincts of his court, to the army, to the regular meetings of the shire and hundred, and to the great roads. Also, the King might grant special personal protection to his officers and followers; and these two kinds of privilege spread until they coalesced and covered the whole ground.[15]

Thus, the king became the paramount person harmed when offenses occurred, sustaining legally acknowledged (although symbolic) injuries. The actual person harmed was gradually removed from any meaningful place in the justice process. One important way we see this is that reparation for the person harmed (restitution) was replaced with reparation for the king (fines).

Reparation for the person harmed (restitution) was replaced with reparation for the king (fines).

Private and Public Prosecution

Even after Henry I succeeded in redefining crime as an offense against the king instead of the person who was harmed, that person (and to a certain extent, the community) retained a voice in the criminal process through the mechanism of private prosecution. Private prosecution had its roots in medieval England, preceding the Norman Conquest. A private prosecutor managed the entire case (from apprehension through trial) as though it were a civil matter. Although the private citizen (usually the person harmed) was required to bear the financial costs of the prosecution, there were also financial incentives for the successful private prosecutor such as threefold restitution. England, and

some other common law countries, still allow private prosecutions by any persons (including any business or non-governmental organization), regardless of whether they were directly affected by the crime. This is viewed as "a valuable constitutional safeguard against inertia or partiality on the part of authority."[16]

However, during the nineteenth century, British reform advocates such as Jeremy Bentham and Sir Robert Peel began campaigning for the establishment of a public prosecutor. They did not argue for the abolition of private prosecution; in fact, Bentham argued for a system with both public and private prosecution. But private prosecution alone, he believed, was inadequate for crimes that were essentially public in nature. At the same time, he opposed giving the state a monopoly on prosecution because this put too much power in the hands of the government.

There were other complaints about private prosecution as well. At times of high crime, when so much depended on the deterrent ability of the legal system, it was unwise to rely on the willingness of people who had been harmed to prosecute. Private prosecution might be ineptly conducted and result in unnecessary acquittals. It might be motivated by revenge or greed.

This debate in England culminated in the passage of the Prosecution of Offenses Act in 1879, which established the office of the public prosecutor, charged with supervising prosecutions of a limited range of offenses in which the ordinary form of prosecution was seen as insufficient. The remainder of the cases was left to private prosecutors, and the overwhelming number of those prosecutions (some report 80%) was initiated by police officers.[17]

For a long time, historians equated adoption of public prosecution with the elimination of private prosecution. Therefore, they concluded that private actions fell into disuse in the United States shortly after the Revolution. It was historian Allen Steinberg's research into the magistrate's courts in Philadelphia that shed new light on the operation of a hybrid public–private prosecution process lasting until late in the nineteenth century. In his book *The Transformation of Criminal Justice: Philadelphia, 1800–1880*,[18] Steinberg makes a convincing case for the dominance of private prosecution until the 1880s (at least in dealing with the largest numbers of prosecutions—those for relatively minor offenses). The reason for this dominance was the popularity of the magistrate courts, operated in Philadelphia by elected officials known as aldermen who conducted administrative as well as judicial functions.

Although these courts were highly informal in operation, the aldermen/justices had the power to hold defendants in jail pending trial by a court of record, to dispose of certain minor cases, and to require the posting of a peace bond. The aldermen were for the most part unschooled in the law, and they would create new offenses on the spot if it seemed necessary. Poor people, in particular, frequently resorted to aldermen for justice.

It is the popularity of the magistrate's courts that Steinberg finds intriguing, particularly in light of what appear to twenty-first-century lawyers to be significant flaws in how these courts operated. They were crowded, unruly, and undignified. The aldermen created new offenses and made them effective retroactively. Because the aldermen's fees came from the litigants, there was little incentive for them to refuse a prosecution and ample opportunity for corruption. Steinberg concludes that these courts were a form of popular, local, and informal justice. They offered a forum in which disputes could be readily resolved because the disputants controlled what happened. Although there were regular outcries against the courts' abuses, these were raised by reformers, not by those who used the courts.

Eventually, the development of the public police force (combined with the longstanding complaints about abuses of informality) led to a reorganization of the magistrate courts, which effectively ended private prosecution. Philadelphia did not have a police department until 1854. Prior to that time, it relied on a night watch system with only limited police coverage during the day, and the patrol was much more passive than it was proactive. With the advent of the police force, a new possibility emerged for initiating criminal cases, one that could bring greater efficiency to crime fighting, namely, requiring all cases to be initiated by the police or by a public prosecutor based on investigative work

performed by the police. This was viewed as an antidote to the unruliness of the magistrates' courts, as Steinberg described them.

> The central point is that, at bottom, the criminal court was dominated by the very people the criminal law was supposed to control…. The ordinary people of Philadelphia extensively used a system that could also be so oppressive to them because its oppressive features were balanced by the peoples' ability to control much of the course of the criminal justice process. Popular initiation and discretion were the distinctive features of private prosecution, rooted in the offices of the minor judiciary where it began, and remained the most important aspect of the process even in the courts of record. Whether it be to intimidate a friend or neighbor, resolve a private dispute, extort money or other favors, prevent a prosecution against oneself, express feelings of outrage and revenge, protect oneself from another, or simply to pursue and attain a measure of legal justice, an enormous number of nineteenth-century Philadelphians used the criminal courts.[19]

Prisons

In the late 1800s, progressive thinkers in England, such as Henry Fielding, John Howard, and Jeremy Bentham, began calling for segregation of people in prison from their criminogenic environments, much as doctors would quarantine persons with a contagious disease. They proposed a treatment plan for those people that would focus on "correction of the mind."[20] In the United States, like-minded reformers convinced policymakers to implement this rehabilitative model of sentencing. With that model emerged an institution that, although novel at that time, has since become a symbol of the criminal justice system itself—the prison.

> Prior to 1790, prisons were used almost exclusively to hold persons who had been accused of crimes until they were tried or sentenced, or to enforce labor orders.

Prior to 1790, prisons were used almost exclusively to hold persons who had been accused of crimes until they were tried or sentenced or to enforce labor orders while the person worked off debts.[21] Reformers in Philadelphia, aghast at the cruelty of the available punishments and miserable jail conditions, and believing that criminals were the products of bad moral environments, persuaded local officials to turn the Walnut Street Jail into what they optimistically called a "penitentiary," or place of penitence.

How did they arrive at the idea of imprisonment as the vehicle for reform? It appears they drew from the use of confinement in monasteries, which began as early as the fourth century. Initially, confinement was to the monk's room, but over time, special rooms were built to hold those who it was believed needed time for reflection and change.[22]

The 1787 preamble to the constitution of the Philadelphia Society for Alleviating the Miseries of Public Prisons clearly stated that their intention was not only to save people who were in prison from dehumanizing punishment but also to rehabilitate them:

> When we consider that the obligations of benevolence, which are founded on the precepts of the example of the author of Christianity, are not canceled by the follies or crimes of our fellow creatures … it becomes us to extend our compassion to that part of mankind, who are the subjects of these miseries. By the aids of humanity, their undue and illegal sufferings may be prevented … and such degrees and modes of punishment may be discovered and suggested, as may, instead of continuing habits of vice, become the means of restoring our fellow creatures to virtue and happiness.[23]

People sent to this penitentiary were isolated in individual cells, away from the influence of immoral parts of society. They were given a Bible and time to contemplate it and regular visits from the warden