

Handbook of Restorative Justice

Edited by

Gerry Johnstone

and

Daniel W. Van Ness



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List of abbreviations

ACT	Australian Capital Territory
ADR	alternative dispute resolution
AVP	Alternatives to Violence Project
BARJ	Balanced and Restorative Justice
BJS	Barangay Justice System
BJSS	Barangay Justice Service System
CASEL	Collaborative for Academic Social and Emotional Learning
CRE	conflict resolution education
CSC	Correctional Services of Canada
DfES	Department for Education and Skills
FGC	family group conference (conferencing)
JRC	Justice Research Consortium
MCC	Mennonite Central Committee
NCDRO	National Coalition of Dispute Resolution Organizations
NGO	non-governmental organization
NICPRO	National Institute for Crime Prevention and the Reintegration of Offenders
NSJS	non-state justice system
OAS	Organization of American States
OJJDP	Office of Juvenile Justice and Delinquency Prevention
OVC	Office of Victims of Crime

PMC	people's mediation council
PRAWA	Prisoners Rehabilitation and Welfare Action
PRC	People's Republic of China
PRI	Penal Reform International
PSR	pre-sentence report
RCMP	Royal Canadian Mounted Police
RGC	restorative group conference
RISE	Re-integrative Shaming Experiments
RJ	restorative justice
RR	Restorative Resolutions
SACRO	Scottish Association for Safeguarding Communities and Reducing Offending
SAJJ	South African Juvenile Justice/South Australian Juvenile Justice
TRC	truth and reconciliation commission
VOM	victim-offender mediation
VORP	Victim Offender Reconciliation Program
YJB	Youth Justice Board
YOP	youth offender panel
YOT	youth offending team

Notes on contributors

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Simon Green is Lecturer in Community Justice and Criminology at the University of Hull. He is currently co-editing a text entitled *Addressing Offending Behaviour* for Willan Publishing and co-authoring a new edition of *Understanding Crime Data* for the Open University Press *Crime and Justice* series. His research interests are in the fields of social and criminological theory, victimology, probation and community studies. He is currently Hull University's Programme Director for the Diploma in Probation Studies and is in the process of developing an online MA in restorative justice with Gerry Johnstone.

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Howard Zehr is author of numerous books, including *Changing Lenses: A New Focus for Crime and Justice*, one of the foundational texts that defined the theoretical framework of restorative justice. In their recent book, *Restoring*

Justice, Daniel W. Van Ness and Karen Heederks Strong cite Howard as the 'grandfather of restorative justice'. He lectures and consults internationally on restorative justice and victim-offender conferencing, which he helped pioneer. He is also Professor of Sociology and Restorative Justice and Co-director of the Center for Justice and Peacebuilding at Eastern Mennonite University in Harrisonburg, Virginia.

Margarita Zernova is a postdoctoral research Fellow in the Institute of Applied Ethics, University of Hull. Her doctoral research involved an examination of aspirations of proponents of restorative justice and experiences of participants in family group conferences. She is currently researching the ethics of restorative justice.

Preface

The idea of restorative justice emerged over a quarter of a century ago. Since the 1990s it has become a central topic in debates about the future of criminal justice. In recent years, the concept has also become prominent in debates about how we might respond to wrongdoing and conflict in schools, workplaces and everyday life, and in discussions of how we should handle gross violations of human rights. Hundreds of restorative justice schemes are being developed around the world and they are attracting more and more attention from academics, professionals and policy-makers.

Advocates of restorative justice argue that traditional ways of responding to wrongdoing tend to leave the needs of victims, perpetrators and communities unmet and leave the harm caused by wrongdoing unrepaired. They advocate alternative approaches designed to make wrongdoers aware of the nature and magnitude of the harm they cause to other people and of their obligation to atone for that harm through constructive and reparative gestures and deeds. Such reparative action, they suggest, can pave the way to forgiveness and reconciliation, the reintegration of wrongdoers into the community and the healing of victims' trauma. But achieving these goals, they argue, requires a more participatory approach than is traditional. Wrongdoers and their victims, when willing, should ideally meet face to face in a safe and supportive environment and play an active role in discussion and in decision-making. A core idea of restorative justice is that the people most affected by a problem decide among themselves how it should be dealt with.

The rise of restorative justice has been accompanied by the development of a large, diverse and increasingly sophisticated body of research and scholarship. This has now reached the stage where a comprehensive, reliable and accessible survey of the field is possible and necessary. The *Handbook of Restorative Justice* is intended to provide such a survey. Aimed at students, practitioners, policy-makers, researchers – and, indeed, anybody curious about restorative justice and the future of criminal justice – the Handbook:

- explains how the campaign for restorative justice arose and developed into the influential global social movement it is today;
- elucidates and discusses the key concepts and principles of restorative justice;
- analyzes the relationship of restorative justice to more conventional concepts of criminal justice;
- discusses the roots of restorative justice in ancient approaches to conflict resolution, aboriginal justice, religious texts and the victims' movement;
- examines issues of gender and race as they are dealt with within the field of restorative justice;
- describes the variety of restorative justice practices, explains how they have developed in various places and contexts, and critically examines their rationales and effects;
- identifies and examines the various ways by which restorative justice is being (and might be) integrated into mainstream responses to crime and strategies of regulation and the various contexts in which restorative justice has been developed;
- summarizes the results so far of empirical evaluations of restorative justice and looks critically at the assumptions and methods of these studies;
- outlines the global development and appeal of restorative justice;
- critically examines the rhetoric, practices and policies of restorative justice and discusses its future.

It was clear to us from the outset that, in order to provide such a survey of the field of restorative justice, we would need to commission the sharpest and most illuminating writers in the field – both emerging and well established and from around the globe – and get them not only to write chapters on predefined topics, but also to provide comprehensive and even-handed coverage of these topics. We have been fortunate in persuading so many excellent writers to agree to such a task and then to stick to the topic and style asked of them (not to mention meeting our demanding deadlines).

Now that we are at the end – rather than in the middle – of the mammoth task of compiling this Handbook, we are very grateful to Brian Willan for coming up with the idea and for asking us to take it on. As anybody familiar with the field will know, Willan Publishing has led the way in encouraging and providing an outlet for research and scholarly writing about restorative justice, and we are proud to be chosen to edit this particular contribution to Willan's much-admired *Handbook* series. During the planning stages, we benefited significantly from a number of thoughtful reviews of our plans. We would like to thank these reviewers: Adam Crawford, Russ Immarigeon, George Pavlich, Brian Williams and Howard Zehr. Finally, on a more personal note, we thank our families for their encouragement, support and understanding during this project.

Gerry Johnstone and Daniel W. Van Ness, October 2006

The Idea of Restorative Justice

Gerry Johnstone and Daniel W. Van Ness

Part 1 opens with six chapters explaining and discussing the basic ideas of restorative justice. In the first chapter, we set the scene by looking at what it is that people who promote restorative justice are actually trying to bring about. There is widespread agreement among proponents that the goal is to transform the way contemporary societies view and respond to crime and related forms of troublesome behaviour. However, there are a range of views as to the precise nature of the transformation sought. These are to some extent in tension with one another, suggesting that restorative justice is best understood as a deeply contested concept. We outline three different but overlapping conceptions of restorative justice: the *encounter* conception, the *reparative* conception and the *transformative* conception. We suggest that rather than pushing one of these forward as the true or primary meaning of restorative justice, or trying to gloss over disagreements among proponents, the most fruitful way forward for the restorative justice movement is to keep debating the meaning of the concept but to conduct this debate in a manner consistent with the principles of restorative justice.

The following chapters explore particular conceptions of restorative justice in more detail. In Chapter 2, Susan Sharpe explores what it means to redress wrongdoing by repairing the harm resulting from it. Whereas the notion of repairing harm is often presented as if it required little further elaboration, Sharpe presents a reflective account of the forms reparation can take, what it can accomplish and optimal conditions for achieving those results. From there, she goes on to discuss some of the key issues facing those who propose repair of harm as an alternative to seeking redress through vengeance and retribution: must reparation be onerous for those undertaking it? How important is the principle of proportionality when it comes to reparation? Should those who point to the need for wrongdoers to repair harm also push for perpetrators of systemic injustices to undertake reparation?

Jennifer Larson Sawin and Howard Zehr consider a rather different but equally important aspect of the idea of restorative justice: the idea that

those most directly affected by crimes and other wrongful acts should be engaged and empowered in the process by which it is decided what should be done to put things right. In Chapter 3, after illustrating this idea by an account of the now classic 'Kitchener experiment', Larson Sawin and Zehr explore in depth why, for restorative justice advocates, engagement and empowerment are essential to the achievement of justice in the aftermath of crime, and what it means (and what it does not mean) to be engaged and empowered in a justice process. Importantly, they then go on to look at the challenges faced by those who seek to put these ideas into practice – i.e. how in practice does one determine precisely who needs to be engaged and empowered in any particular restorative justice process and how does one ensure that key stakeholders are in fact engaged and empowered?

Increasingly, restorative justice proponents are referring to values as a key means of distinguishing restorative justice from other approaches to crime and wrongdoing. In Chapter 4, Kay Pranis examines how the values of restorative justice are expressed in the literature. Crucially, counter to a recent tendency to draw a sharp distinction between a 'process' conception of restorative justice and a 'values' conception (a tendency described in Chapter 6), Pranis shows that the discussion of restorative values in the literature is primarily about 'process values'. That is to say, those who think of restorative justice primarily as a process – whereby parties affected by criminal wrongdoing come together to resolve collectively what should be done about it – are trying to identify and define values which should guide and constrain such processes, thereby ensuring that what happens within them and as a result of them can properly be described as 'restorative'. These attempts to guide and constrain 'restorative processes' raise an important question: are those who are promoting restorative justice now imposing upon people whom they claim to be empowering a set of values which are in fact 'foreign' to those people? Pranis, drawing upon her extensive practical work with those developing justice circles in a wide range of settings, suggests not. In her experience, while people do not always behave according to restorative values, they do tend to affirm those values as ones which they should follow.

In Chapter 5, Declan Roche looks at one of the key debates in current restorative justice literature: that concerning the relationship between retributive and restorative justice. He shows how an early and persisting assumption that retributive and restorative justice are polar opposites has been challenged by a number of writers for a variety of reasons. He reviews the work of contributors to this debate such as Kathleen Daly, who argues that the depiction of conventional justice as 'retributive' and restorative justice as lacking retributive elements is vastly mistaken and misleading, and the rather different arguments of philosopher Antony Duff, whose position is that our aim in responding to crime should indeed be restoration, but that this should be achieved through a form of retributive punishment (although not necessarily the harsh exclusionary sanctions which other proponents of restorative justice tend to associate with the idea of retribution). For

Roche, the more sophisticated understanding of restorative justice that has emerged from this debate has important implications for thinking about the possible dangers of (well intentioned) restorative interventions and the need for checks and balances – issues which are taken up in a number of later chapters in the *Handbook*.

The final chapter of Part 1, by Margarita Zernova and Martin Wright, returns to the theme of diversity and conflict within the restorative justice movement over how restorative justice could be conceptualized and practised. This chapter examines closely specific debates between proponents over how restorative justice should be understood and implemented. Zernova and Wright show that, for some, restorative justice should be conceived as a process outside the criminal justice system to which appropriate cases can be diverted if the parties agree. Others would want to include, within the restorative justice tent, alternative sentencing practices within criminal justice, in which offenders are ordered to undertake reparative deeds rather than to undergo more traditional forms of punishment. Another debate which Zernova and Wright elucidate is that between those who think restorative justice should aim primarily at reforming our response to crime (whether by creating alternatives to conventional criminal justice or changing the criminal justice system) and those who think that the project of restorative justice is incoherent and impractical unless it also and perhaps primarily aims to bring about much deeper and wider social changes designed to ensure social justice. Similar to our own position in Chapter 1, Zernova and Wright conclude, not by calling for a more unified vision of restorative justice and the elimination of diversity and conflict, but for an acceptance that differences within a social movement – if discussed in an appropriate way – can be source of strength, keeping the movement open and fluid.

The meaning of restorative justice

Gerry Johnstone and Daniel W. Van Ness

Introduction

The restorative justice movement is a global social movement with huge internal diversity. Its broad goal is to transform the way contemporary societies view and respond to crime and related forms of troublesome behaviour. More specifically, it seeks to replace our existing highly professionalized systems of punitive justice and control (and their analogues in other settings) with community-based reparative justice and moralizing social control. Through such practices, it is claimed, we can not only control crime more effectively, we can also accomplish a host of other desirable goals: a meaningful experience of justice for victims of crime and healing of trauma which they tend to suffer; genuine accountability for offenders and their reintegration into law-abiding society; recovery of the social capital that tends to be lost when we hand our problems over to professionals to solve; and significant fiscal savings, which can be diverted towards more constructive projects, including projects of crime prevention and community regeneration.

However, there is no agreement on the actual nature of the transformation sought by the restorative justice movement. For instance, some regard restorative justice as a new social technique or programme which can be used within our criminal justice systems. Others seek ultimately to abolish much of the entire edifice of state punishment and to replace it with community-based responses that teach, heal, repair and restore victims, perpetrators of crime and their communities. Still others apply the vision of healing and restoration to all kinds of conflict and harm. In fact, the ultimate goal and primary focus, they suggest, should be on changing the way we view ourselves and relate to others in everyday life (Sullivan and Tifft 2001). What all proponents of restorative justice seek is something better than that which exists, and also something better than the various other alternatives (such as penal treatment) which have been tried, with limited success, in the past.

It is in fact only recently that the restorative justice movement has achieved widespread prominence. Writing in 1998, the founders of the

Contemporary Justice Review stated: 'there still remain a considerable number of people involved in the administration of criminal justice and even many who teach about justice issues at the university level, for whom issues of restorative justice, even the term itself, remain quite foreign' (Sullivan *et al.* 1998: 8). Today, by contrast, one seldom encounters people involved in the administration or study of criminal justice who are not familiar with the term.¹ Indeed, the concept of restorative justice is already cropping up in other discourses, including those of school discipline, workplace management, corporate regulation, political conflict resolution and transitional justice.

Yet, despite its growing familiarity in professional and academic circles, the meaning of the term 'restorative justice' is still only hazily understood by many people. The main goal of this chapter, therefore, is to explore what people who advocate 'restorative justice' are actually promoting. This is by no means a straightforward task. The term 'restorative justice' appears to have no single clear and established meaning, but instead is used in a range of different ways. Some who have attempted to clarify the meaning of restorative justice have tended to conclude, often with some hint of despair, that 'restorative justice' means 'all things to all people' (Roche 2001: 342). Moreover, it is not simply that people use the term in different ways in different contexts. Rather, some proponents of restorative justice assert or imply that their use of the concept is the only proper one, and that to use the concept in a different way is to create confusion or to adulterate the concept of restorative justice by applying it to practices or agendas which are not restorative. These assertions can be made with such passion that they take on 'the tone of a weird inter-faith squabble in an obscure religious sect' (Bazemore and Schiff 2004: 51; cf. McCold 2004a).

Why so much passion? As we hope to show, it is because restorative justice is not simply a persistently vague concept; it is in fact a deeply *contested* concept.

What sort of a concept is 'restorative justice'?

In what follows, in order to explain why 'restorative justice' is so profoundly contested, we will undertake a brief examination of the *type* of concept which restorative justice is.²

An appraisive concept

Most of those who use the term restorative justice consider it to be a constructive and progressive alternative to more traditional ways of responding to crime and wrongdoing. Hence, for its proponents, the judgement about whether a particular practice or situation is properly characterized as 'restorative justice' is not simply a matter of taxonomy, it is a matter of evaluation. The question is whether a particular practice or agenda meets the *standards* of restorative justice. The appraisive nature of the quest for a definition is brought out explicitly by Declan Roche:

In the same way that counterfeit goods may tarnish the good reputation of a manufacturer's brand label, programs that are called restorative when they are not can tarnish the concept ... restorative justice should seek to prevent counterfeiters from benefiting from the good name of restorative justice. One way to do this is to continually clarify the meaning of restorative justice so that judgments can be made about how restorative a program or practice really is (2001: 343).

An internally complex concept

Not every constructive and progressive alternative to traditional interventions into crime and wrongdoing can be described as restorative justice. For such an alternative to be credibly described as restorative justice, it will usually have one or more of the following ingredients, which are presented in no particular order of importance:

- 1 There will be some relatively informal process which aims to involve victims, offenders and others closely connected to them or to the crime in discussion of matters such as what happened, what harm has resulted and what should be done to repair that harm and, perhaps, to prevent further wrongdoing or conflict.
- 2 There will be an emphasis on empowering (in a number of senses) ordinary people whose lives are affected by a crime or other wrongful act.
- 3 Some effort will be made by decision-makers or those facilitating decision-making processes to promote a response which is geared less towards stigmatizing and punishing the wrongdoer and more towards ensuring that wrongdoers recognize and meet a responsibility to make amends for the harm they have caused in a manner which directly benefits those harmed, as a first step towards their reintegration into the community of law-abiding citizens.
- 4 Decision-makers or those facilitating decision-making will be concerned to ensure that the decision-making process and its outcome will be guided by certain principles or values which, in contemporary society, are widely regarded as desirable in any interaction between people, such as: respect should be shown for others; violence and coercion are to be avoided if possible and minimized if not; and inclusion is to be preferred to exclusion.
- 5 Decision-makers or those facilitating decision-making will devote significant attention to the injury done to the victims and to the needs that result from that, and to tangible ways in which those needs can be addressed.
- 6 There will be some emphasis on strengthening or repairing relationships between people, and using the power of healthy relationships to resolve difficult situations.

Few would deny the applicability of the concept of restorative justice to an intervention which clearly has all these ingredients. Quite often, however, interventions will possess some of these ingredients, but not others.³ Whether or not a person defines such an intervention as 'restorative justice' will then depend on how important he or she regards any particular ingredient as being. For example, those who regard the first two ingredients as essential to restorative justice will be reluctant to apply the concept to an intervention which lacks them, even if it clearly possesses the other four. Moreover, they may be willing to apply the concept to an intervention which clearly has the first two ingredients even if some of the others are barely present.

An open concept

New and unforeseen developments can affect the way we use the concept of restorative justice. For instance, in the 1970s and 1980s, the concept was most commonly used in the context of North American experiments with victim-offender mediation and reconciliation (Peachey 2003). These programmes rarely included more participants than the victim, the offender and the facilitator. The facilitator was typically a trained community volunteer. Then, in the early 1990s, new 'conferencing' approaches to crime emerged from New Zealand and Australia, and were subsequently identified as a form of restorative justice (Zehr 1990: 256–62). In these, much larger groups of people, including the friends and family of the victim and offender, are brought together to discuss and decide a much wider range of issues. Furthermore, criminal justice officials, such as police, may participate in the conferences and even serve as facilitators. Several years later, peacemaking circles of the First Nations peoples in North America began to be recognized by some criminal courts as a way to resolve criminal matters. Circles include not only victims, offenders and their 'communities of care', but interested members of the surrounding community as well. The involvement of criminal justice officials also expanded, with prosecutors and judges participating. These developments, unforeseen in the late 1980s, had a profound impact upon the usage of the concept of restorative justice. It came to be understood by some as an approach that places high value on bringing together as many stakeholders affected by a crime as possible. Furthermore, the initial assumption that only community volunteers have sufficient neutrality to facilitate restorative processes has given way in some jurisdictions to an assumption that following best practice standards is sufficient to assure that criminal justice officials can provide the neutral setting necessary for authentic participation by offenders.

These are just two examples of how the generally accepted understanding of restorative justice in the 1970s and 1980s shifted because of developments that few would have anticipated in advance. In fact, those shifts were initially resisted by some as departures from restorative justice principles and values (Umbreit and Zehr 1996: 24–9; Pranis 1997; McCold 2004b).

In sum, we suggest that restorative justice is an appraisive, internally complex and open concept that continues to develop with experience, and that this helps explain why it is so deeply contested.

Conceptions of 'restorative justice'

One of the significant implications of viewing restorative justice as a deeply contested concept is that there is not likely ever to be (indeed perhaps should not be) a single accepted conception of restorative justice. Instead, we must acknowledge the differing and indeed competing ideas about its nature. To ignore or gloss over these differences misrepresents the character of the restorative justice movement, presenting it as more unified and coherent than it actually is. Just as importantly, doing this presents it as a more limited and more impoverished movement than it truly is. In an effort to avoid such shortcomings, we will review three conceptions of restorative justice.⁴

The encounter conception of restorative justice

In recent years a set of new processes has been devised, developed and employed in social responses to incidents of criminal behaviour, processes such as victim-offender mediation, conferencing and circles (Johnstone 2003: part C; Van Ness and Strong 2006: ch. 4). What is most distinctive about these processes is that, rather than remaining passive while professionals discuss their problem and decide what to do about it, victims, offenders and others affected by some crime or misconduct meet face to face in a safe and supportive environment and play an active role in discussion and in decision-making. For instance, with the assistance of a facilitator, they speak openly but respectfully to each other about what happened, express their feelings and have a say in what is to be done about the matter. Such meetings are intended to be democratic experiences in which the people most affected by a problem decide among themselves how it should be dealt with (O'Connell *et al.* 1999: 17). Rather than being the chief decision-makers, professionals and state officials remain more in the background, making it possible for the stakeholders themselves to make the decisions (Christie 2003).

Many people refer to such processes as 'restorative justice' (Robinson 2003: 375). Indeed, this is probably the most common way of using the term. That is to say, 'restorative justice' is most commonly used as if it were interchangeable with mediation, conferencing, etc.⁵ We will refer to this way of defining restorative justice as the *encounter* conception, a term which captures one of the central ideas of the movement: that victims, offenders and other 'stakeholders' in a criminal case should be allowed to encounter one another outside highly formal, professional-dominated settings such as the courtroom.

In order to understand this encounter conception what we need to ask, of course, is *why* encounters are thought to be better than 'courtroom' responses to crime. One possible answer could be that people who are most directly affected by a discussion and decision have a *right* to be meaningfully involved in the discussion and decision-making process. Adherents to this position might argue that this right must be respected even if doing so disturbs the efficient running of the justice machinery, and even if it results in 'solutions' to problems which strike professionals as unenlightened, wrong, absurd and not even in the best interests of the parties involved.⁶

There are some traces of the above rationale for encounter processes in the discourse of restorative justice. Significantly, however, this is not the main way in which proponents of restorative justice tend to argue for encounters. Rather, the more common argument is that such processes are useful for achieving a whole range of beneficial outcomes. This raises the question of how to characterize encounter processes which clearly fail to achieve such beneficial results: are these examples of restorative justice that have failed, or are they not examples of restorative justice? In order to explore this issue, it will be helpful if we provide a brief account of the beneficial effects typically attributed to encounter processes.

Proponents of encounter processes tend to argue that, when they are used in appropriate cases and properly conducted, a number of beneficial results can emerge. Some of these are familiar within the criminal justice system: rehabilitation (changing offenders' attitudes makes them less likely to commit new crimes), deterrence (it is difficult for offenders to meet with their victims, and to do so in the presence of family and friends) and reinforcement of norms (the process and the people involved underscore the importance of the norm that the offender has violated). Other benefits are new in the context of criminal justice: it offers victims avenues for receiving restitution, gives them the opportunity to be involved in decisions in the aftermath of the crime, can contribute to reduced fear and an increased sense of safety, and may help them understand offenders' circumstances that led to commission of the crimes (Robinson 2003: 375–6).

This transformative potential has led some to use encounters to allow the parties to achieve personal growth even if they do not settle claims that victims have against offenders. Umbreit (2001; see also Johnstone 2002: 140–50) contrasts settlement-driven mediation with what he calls humanistic mediation. In humanistic mediation the presenting conflict will receive some attention, but the focus is on helping the parties reach inner resolution through mediated dialogue. This begins with empowerment of the parties and a process of mutual recognition of the other's humanity:

Through recognition, 'the parties voluntarily choose to become more open, attentive, [and] responsive to the situation of another, thereby expanding their perspective to include an appreciation for another's situation.' Whether an actual settlement occurs is quite secondary to the process of transformation and healing that occurs in their relationship

...

One of the most powerful and perhaps most controversial expressions of the transformative qualities of empowerment and recognition has been consistently observed in the small but growing application of mediation and dialogue between parents of murdered children and the offender. After lengthy preparation by the mediator, involving multiple individual meetings, the parties frequently, through a genuine dialogue about what happened and its impact on all involved, get beyond the evil, trauma, and inconsistencies surrounding the event to achieve an acknowledgement of each other's humanity and a greater sense of closure (Umbreit 2001: 8–9, citations omitted).

Crucially, however, meetings of stakeholders may not turn out to be transformative or even restorative. They can be conducted in non-restorative ways and arrive at non-restorative results (see Young 2003) such as a now infamous conference which ended with the decision that the young offender should publicly wear a T-shirt emblazoned with 'I am a thief' (Braithwaite 2000). The encounter process alone is not enough to assure the desired results. The question then arises: does such an encounter that does not yield the desired results fall within the definition of restorative justice? Roche raises this issue starkly when he suggests that if we adhere to a strict encounter conception of restorative justice, it is difficult to explain why an encounter which resulted in such a decision should not count as an example of restorative justice. Indeed, he suggests: 'Viewed simply in process terms, any punishment meted out by a victim on an offender, such as lynching and stoning, may potentially satisfy the definition of restorative justice' (2001: 344).

It is important to be clear about what is going on here. Ambiguity over whether encounter processes are important in their own right (because they enable those affected by crime to meet and be involved in the process of deciding what is to be done about it) or are valued mainly because of the desirable outcomes that they can achieve (but will also fail to achieve) manifests itself in uncertainty over whether encounters which are conducted in 'non-restorative' ways and fail to deliver restorative outcomes fall within or outside the *definition* of restorative justice.

Recently, efforts have been made to resolve this issue by focusing as much upon the distinctive *values* of restorative justice as upon its distinctive *processes*. In these efforts, restorative justice becomes redefined, or perhaps we should say more sharply defined, as an encounter process which is guided and constrained by certain values. For instance, Braithwaite (2003: 9–13) suggests that there are three sorts of values to attend to: values that *constrain the process* to prevent it from becoming oppressive (he mentions the values of non-domination, empowerment, respectful listening and equal concern for all stakeholders, among others); values that *guide the process* and that can be used to measure the success of the process (values such as restoration of property, emotional restoration, restoration of dignity, compassion, social support and so forth); and values that *describe certain outcomes of the process* that may, but also may not, emerge from a successful restorative process (values such as remorse, apology, censure of the act, forgiveness and mercy).

Others have proposed alternative sets of values, and it will be necessary for adherents to the values-based encounter conception to continue refining and defining the values that must be present in a restorative process (see, for example, Braithwaite and Strang 2001: 12; Roche 2001: 347; Boyack *et al.* 2004: 1–12 Supp.). It will also be necessary for them to address the question of where these values come from and what their status is. For instance, what needs to be explained is the precise relationship, if any, between the values being proposed by leading advocates of restorative justice (who tend, after all, to be professionals) and the values adhered to by typical lay participants in encounters. And, to the extent that there are tensions between these two different sets of values, it needs to be made clear how these tensions are to

be resolved. Important initial efforts to do just that are discussed in more detail by Kay Pranis in her contribution to this handbook.⁷

The reparative conception of restorative justice

There are many, however, who use the concept of restorative justice in a markedly different way; it is a distinctive state of affairs that we should attempt to bring about in the aftermath of criminal wrongdoing, and which might be said to constitute 'justice'. Those who use the concept in this way share, with adherents to an encounter conception, the goal of revolutionizing our response to offending and wrongdoing (cf. Wachtel 1997). However, their ideas about what this project entails are considerably different. For them, it involves a radical break with certain widely accepted 'wisdoms' about what needs to be done to re-establish just relationships when somebody commits a crime against another person (or persons).

Conventionally, we assume that if a person commits a serious wrong against another, a state of injustice arises which needs to be corrected. It tends to be further assumed that, in order to correct this state of injustice, the perpetrator of the wrong must undergo pain or suffering in proportion to the seriousness of the offence. Once the offender has suffered, according to his or her just deserts, the equilibrium has been restored and justice prevails.

Proponents of what we will call a reparative conception of restorative justice reject this way of thinking almost entirely. To be precise, they do agree that if a person commits a serious wrong against another an injustice arises which needs to be put right. However, they insist that simply imposing pain upon offenders is neither necessary nor sufficient to make things right. They argue that the imposition of pain upon offenders, while it occasionally provides us with a slight and short-lived sense that justice has been done, generally fails to deliver a rich and enduring experience of justice.⁸ In order to create such an experience, other things need to happen. In particular, the harm which the crime has caused to people and relationships needs to be repaired. This is a very complex process, involving a wide range of things an offender might do to repair the material and symbolic harm he or she has caused to his or her victim(s) (see Chapters 2 and 14, this volume; also Zehr 1990). Some adherents to this reparative conception of restorative justice suggest further that reparation of harm is a *sufficient* ingredient of justice – i.e. in order to achieve justice it is not necessary that the offender undergoes pain or suffering.

What we want to explore briefly now is how this reparative conception of restorative justice relates to the encounter conception outlined earlier. At first sight, the two seem barely distinguishable, since it tends to be argued that in order to achieve the goal of repair of harm, encounter processes are almost indispensable. This argument is based upon a number of ideas. In particular, it is suggested that one of the chief ways in which victims are harmed by crime is that they lose their sense of personal power (Zehr 1990: 27). According to Zehr, one of the reasons why crime is so traumatic for its victims is that it upsets their belief in personal autonomy (1990: 24).

Hence, for the harm of crime to be repaired, this sense of personal power needs to be returned to them. However, when the case is then dealt with by conventional criminal justice processes, in which victims are largely neglected and expected to play a passive role while professionals make all the key decisions, the victim's sense of personal power is further damaged rather than repaired. For repair to take place, victims 'need a sense of control or involvement in the resolution of their own cases' (1990: 28). Other things that victims need in order to recover from the trauma of crime, according to Zehr and others, are answers to questions that only 'their' offenders can answer (and perhaps can only answer convincingly in face-to-face meetings) and the opportunity to express the way they feel about what happened to them and to have their feelings (such as anger, pain and fear) validated by others (1990: ch. 2). For these things to happen, an encounter process is virtually essential.

Turning to offenders, one of the key contributions of the restorative justice movement (broadly conceived) is to argue that, quite apart from any harm they may have suffered in the past (offenders often being the victims of past injustices), they too are harmed by their criminal wrongdoing, since this often has the affect of alienating them – or further alienating them – from their own community.⁹ If this harm is to be repaired (i.e. if offenders are to be reintegrated into the community), things need to happen to repair this breach (Burnside and Baker 1994). One thing that can contribute to repair, indeed that may be necessary if repair is to take place, is for the offender to demonstrate genuine repentance and a willingness to make amends for his or her wrongdoing (see Chapter 11, this volume). One significant way in which offenders can do this is to meet with those harmed, listen respectfully to them, answer any questions they may have, apologize and agree to reasonable reparative actions which they suggest. Again, this all points to encounter processes.

An important question, however, is: what happens if such a process is not possible? What if the parties are unwilling or unable to meet? Those who adhere to the reparative conception of restorative justice argue that even then the justice system should respond in a way that repairs, rather than adds to, the harm resulting from crime. A simple example is a sentence of restitution rather than a fine or imprisonment (unless there are overriding considerations of public safety, for example). Under this conception, restorative principles would become a profound reform dynamic affecting all levels of the criminal justice system, whether or not the parties to particular crimes eventually choose to meet. This would revolutionize the justice system, yielding a range of new, restorative responses to all kinds of crimes and circumstances:

While these responses might differ greatly in the case of, say, a minor property crime by a first-time offender and a serious violent crime (based in part on the level of restrictiveness imposed on an offender according to the threat imposed to public safety or to individual victims), restorative interventions would be carried out according to

what must become widely understood basic principles and familiar processes (Bazemore and Walgrave 1999: 45–74, 64).

The important point here is that adherents to a reparative conception of restorative justice, while they express a strong preference for encounter processes, also envisage the possibility of *partially* restorative solutions to problems of crime emerging outside such processes, including through reparative *sanctions* ordered and administered by professionals employed by the formal criminal justice system (Van Ness and Strong 2006). Those strongly committed to an encounter conception of restorative justice, on the other hand, have difficulty in seeing how interventions such as these can be properly included within the definition of restorative justice. They lack what, for adherents to an encounter conception, are the most crucial elements of restorative justice – i.e. meetings of key stakeholders to discuss what happened and to agree on what should be done about it (McCold 2004a). Even if they have repair of harm as one of their official goals, such reparative sanctions appear to strong adherents of the encounter conception as professionally imposed measures masquerading as restorative justice in order to benefit from its good name (see the quotation from Roche, earlier in this chapter).

We saw earlier that adherents to an encounter conception of restorative justice have turned to ‘restorative values’ to provide guidance in order to counter certain problems with a pure encounter conception. In a similar vein, adherents to a reparative conception have turned to ‘restorative principles’ in order to ensure that the wide range of reparative interventions that they would include within the definition of restorative justice do not veer into becoming punitive and purely offender oriented. Principles are general guidelines that point from normative theory to specific application (see Chapter 21, this volume). They offer policy guidance to those designing systems or programmes that increases the likelihood that the result will be restorative.

These principles have been expressed in different ways. One useful collection, prepared by Zehr and Mika (Zehr 2002: 40), is called ‘restorative justice signposts’ and takes the form of ten indicators that work being done is actually restorative. Two examples of these indicators are ‘show equal concern and commitment to victims and offenders, involving both in the process of justice’, and ‘encourage collaboration and reintegration rather than coercion and isolation’.

Bazemore and Walgrave (1999: 65) offer three principles to inform the government’s role in restorative justice.¹⁰ First, it would seek to ensure that all parties are treated with *equity*, meaning that they and others in similar circumstances will feel that they are treated similarly. Secondly, it would seek the *satisfaction* of the victim, offender and community. Thirdly, it would offer *legal protection* of individuals against unwarranted state action.

Van Ness and Strong (2006) identify three alternative principles on which a restorative system might be constructed:

First, justice requires that we work to heal victims, offenders and communities that have been injured by crime. Second, victims, offenders

and communities should have the opportunity for active involvement in the justice process as early and as fully as possible. Third, we must rethink the relative roles and responsibilities of government and community: in promoting justice, government is responsible for preserving a just order, and community for establishing a just peace.

Just as the values espoused in the encounter conception need continuing refinement and definition, so too do principles proposed to guide the reparative conception. Nevertheless, both serve a similar function within their respective conception: to increase the likelihood that what actually takes place in the new processes and justice structures is actually restorative.

The transformative conception of restorative justice

The restorative justice movement has tended to focus its efforts upon changing social responses to crime and wrongdoing. Its initial energies were focused upon revolutionizing societal responses to behaviour which we classify as crime and which is regarded as serious enough to warrant intervention by criminal justice agencies such as the police and correctional institutions. For the most part, this remains the main focus of the restorative justice movement, although it has also been applied to forms of misconduct which, although defined as rule-breaking, are usually not classified or handled as criminal offences, such as misconduct in schools (see Chapter 18, this volume) or in workplaces.

Others, however, go further still and suggest that both the initial and the ultimate goal of the restorative justice movement should be to transform the way in which we understand ourselves and relate to others in our everyday lives (Sullivan and Tifft 2001; cf. Ross 1996 and some of the essays in Strang and Braithwaite 2001). The argument appears to be: 1) that, in the absence of such transformations, any efforts to change specific practices, such as our social responses to crime, are unlikely to succeed and can even have effects quite different from those intended; and 2) that even if such changes do succeed, they can make only a peripheral contribution to the goal of achieving a just society – achieving that goal requires much deeper and more far-reaching transformations.

Such goals entail a conception of restorative justice significantly different from those we have described so far. Under this *transformative* conception, restorative justice is conceived as a way of life we should lead. For its proponents, among the key elements of this way of life is a rejection of the assumption that we exist in some sort of hierarchical order with other people (or even with other elements of our environment). Indeed, it rejects the very idea that we are ontologically separate from other people or even from our physical environment. Rather, to live a lifestyle of restorative justice, we must abolish the self (as it is conventionally understood in contemporary society) and instead understand ourselves as inextricably connected to and identifiable with other beings and the 'external' world.

This has implications in the way we use language (Ross 1996: ch. 5), the way we regard and treat other people and the environment, and the

way in which we allocate resources – which should be on the basis of need rather than right or desert and with the recognition that the needs of all are equally important (Sullivan and Tifft 2001). In such a context, we would probably not make sharp distinctions between crime and other forms of harmful conduct, but simply respond to all harmful conduct (from crime, to economic exploitation, to the use of power in everyday life) in much the same way – by identifying who has been hurt, what their needs are and how things can be put right (cf. Zehr 2002: 38).

It is vision that animates and guides this conception. Restorative justice seems to evoke a passion and commitment among its adherents that cannot be explained by rational cost/benefit calculations. Stories are repeated of dramatic changes in attitude in which the victim and offender recognize within the other a common humanity, empathy develops and inner resolution takes place. But what animate proponents are not simply the transformations taking place in others; they are also, and equally importantly, the transformations they begin to experience inside themselves. Sullivan and Tifft (2005: 154–60) describe this as a transformation of the ‘power-based self’ to the true self, a ‘being, a consciousness, of peace and gentleness’ (p. 155). This does not happen automatically, but instead takes place through a discipline of self-criticism that leads eventually to self-transformation.

For those who come to see restorative justice as a way of life, this recognition that the most profound changes ‘out there’ require (and may generate) inner transformation has political implications. Quinney observes:

All of this is to say, to us as criminologists, that crime is suffering and that the ending of crime is possible only with the ending of suffering. And the ending both of suffering and of crime, which is the establishing of justice, can come only out of peace, out of a peace that is spiritually grounded in our very being. To eliminate crime – to end the construction and perpetuation of an existence that makes crime possible – requires a transformation of our human being ... When our hearts are filled with love and our minds with willingness to serve, we will know what has to be done and how it is to be done (1991: 11–12).

Overlaps and tensions

Earlier attempts to explore disagreements over the meaning of restorative justice include exchanges over the ‘purist’ and the ‘maximalist’ models (cf. Bazemore and Walgrave 1999; McCold 2000; Walgrave 2000; Chapter 6, this volume) and over whether community justice can appropriately be considered part of restorative justice (cf. the entire issue of *Contemporary Justice Review*, 2004, Vol. 7, no. 1). We, of course, have the benefit of insights those controversies have generated. We have suggested in this chapter that the differences are more than a dispute over models, but not so profound as to conclude that any of the perspectives is outside the restorative justice movement. The differences are over alternative *conceptions* of restorative justice.

All three conceptions embrace encounter, repair and transformation. The difference between them is where the emphasis is placed. The restorative emphasis of the *encounter conception* is that the parties to a crime should be offered an opportunity to meet and decide the most satisfactory response to that crime. The restorative nature of that process is guided by values which constrain and guide the process and which help describe its desired results. The restorative emphasis of the *reparative conception* is that the response to crime must seek to repair the harms resulting from crime. The restorative nature of that reparation is guided by principles which constrain and guide justice processes and outcomes designed to bring healing. The restorative emphasis of the *transformative conception* is the restorative insight that fundamentally we are relational beings connected through intricate networks to others, to all humanity and to our environment. The restorative nature of those relationships is guided by a vision of transformation of people, structures and our very selves.

Clearly, there are considerable overlaps between these three conceptions. In fact, there is sufficient common ground to regard advocates of each conception as members of the same social movement, rather than as members of quite different social movements which have somehow become entangled. Yet, there are also considerable tensions between them which are not easy to dissolve.

For example, many adherents to an encounter conception do, in fact, share a commitment to the broad approach to crime espoused by those who hold to a reparative conception. However, practice is in many ways more limited and in other ways more extensive than that emerging from the reparative conception. The encounter conception is more limited in that it has no response when the parties to the crime are unable or unwilling to meet. It is more extensive in that its adherents use processes to address harm, conflict or problems that do not involve lawbreaking, or for purposes other than to repair the harm resulting from the lawbreaking.

Furthermore, adherents to both the encounter and reparative conceptions are attracted to and motivated by the vision of transformation.¹¹ They may apply what they learn from restorative justice to other dimensions of their lives. But they are more likely to explain this in terms of new skills or growing spiritual insight than as necessary elements of doing restorative justice. In other words, restorative justice is considered more limited in application than adherents of the transformative conception claim. It is either a profound and useful process or it is an improved and hopeful way of addressing wrongdoing, but it is not an all-encompassing way of looking at life and relationships.

The overlaps help explain why it has been difficult to arrive at a common definition of restorative justice; we suggest that it will be impossible to do so, for reasons that we might explain using the metaphor of a three-storey home.

Imagine a home built on a gentle hillside with three storeys. Because of the grade of the hill, it is possible to enter the house from outside into each of the three floors. Because of porches and decks on the two top floors, and additions made to the first floor, each floor is a different size. The first floor

is the largest, while the two upper floors are offset, so that areas of the third floor are directly above the second, but other areas are only above the first floor, creating a porch for those on the second floor. Similarly, some parts of the building are only two storeys high, which offers a deck area for the third floor.

The house stands for the restorative justice movement. The first floor represents the transformative conception, whose application of restorative justice is the most expansive of the three. The second and third floors represent the encounter and reparative conceptions, each of which overlaps the other in some matters but not all, as we have seen. Reflecting on this house suggests at least four reasons for internal disagreement over the meaning of restorative justice.

First, the people who disagree spend most of their time on different floors of the house. As long as we are talking about a restorative process in the context of dealing with crime, people on all floors agree that this is restorative justice. But a process used for purposes other than dealing with a rule violation (for example, helping neighbours find a solution to a problem) will be embraced more by people on the encounter and transformative floors, and either resisted or only half-heartedly accepted by those on the reparative floor. Restitution commitments that emerge from a restorative process are viewed as restorative by all; those that are ordered by a judge are accepted only by people on the reparative and transformative floors. Organizing community members in an economically deprived neighbourhood to oppose a proposed action by City Hall that would harm them is understood to be restorative only by people on the transformative floor.

A second reason for lack of agreement is that there are internal stairs connecting the three floors. This means, for example, that an encounter proponent might walk up to the reparative floor to consider matters like the needs and interests of victims, even though that person would not agree with reparative proponents that all measures to meet those needs and interests are restorative.

A third reason also stems from the fact that people are able to move easily from floor to floor: sometimes they forget what floor they are on, and as a result may wander into areas that do not fall within their conception. This can happen because they haven't thought through the areas of agreement and disagreement they have with people on other floors. Other times it is because of the topic being discussed. For example, reparative adherents might meet with encounter proponents, to discuss how restorative values are shaping encounters that lie outside the reparative conception, such as in peace-making circles convened to address neighbourhood conflicts.

A fourth reason is that there are a number of points of entry into the building. The 'normal' entry, then, could actually be any of the floors, depending on how the person approaches the building. So political perspectives, life experiences, employment and other factors contribute to a person's perspective as to which floor is the obvious or self-evident floor that should be the ground floor for restorative justice.

Conclusion

There are a number of ways in which its proponents and critics might answer the question: 'What does restorative justice mean?' For some it is principally an encounter process, a method of dealing with crime and injustice that involves the stakeholders in the decision about what needs to be done. For others it is an alternative conception of the state of affairs that constitutes justice, one that seeks to heal and repair the harm done by crime rather than to ignore that harm or try to impose some sort of equivalent harm on the wrongdoer. Still others would answer that it is a distinctive set of values that focus on co-operative and respectful resolution of conflict, a resolution that is reparative in nature. Others argue that it calls for the transformation of structures of society and of our very way of interacting with others and our environment. For many it is a vision that things can be made better, that it is possible to aspire to more than fair processes and proportionate punishment in the aftermath of crime, that out of tragedy can come hope and healing if we seek it.

These are different but related conceptions. We have argued that these differences are the consequence of the nature of the concept 'restorative justice' itself: it is a deeply contested concept. As a consequence, work to understand the meaning of restorative justice should not have as its goal the resolution of those differences, but instead a deeper appreciation of the richness of the concept and perhaps new insights about how to apply restorative measures to make things better than they are now. The intensity of discourse about those disagreements reveals areas in which proponents have moved from common ground to disputed territory.

How, then, might restorative advocates deal with the tensions that arise from working with people who hold to different conceptions? Restorative justice itself offers some guidance. Encounters are important, and when possible disputes should be explored in safe environments in which disagreeing parties are able to listen and speak. Apology is a useful way to make amends, when that becomes necessary. Conflict is not something to avoid or solve, necessarily; it can be a valued possession for those who are in conflict, and wrestling with that can become the occasion for inner growth and personal transformation.

Above all, allow restorative values to inform conversation and discourse. Zehr and Toews (2004: 403) have distilled these into two words: *humility* and *respect*. Humility includes, but is more than, the idea of not taking more credit than one should. It also means having such a profound awareness of the limitations of one's knowledge and understanding that it is possible to remain open to the truth that others' life realities are not the same as one's own, and that therefore they may have insights one does not yet possess. Respect means not only treating all parties as persons with dignity and worth, but also as people with wisdom and other valuable contributions to offer.

We make one final suggestion: it would be useful to adopt names for the different conceptions to avoid disputes that arise because of misunderstanding

and to increase collaboration. We have proposed the 'encounter conception', the 'reparative conception' and the 'transformative conception'. It may be that there are other and better names. But it does seem sensible, if we cannot settle on a single meaning of restorative justice, to become more adept at articulating its contested meanings.

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Notes

- 1 At least in Europe, North America, the Pacific and Africa. Interest in restorative justice is growing in Asia and Latin America, but these are early days. On the international development and global appeal of restorative justice, see Part 6 of this handbook.
- 2 This analysis is influenced by an important essay published in the 1950s by the philosopher W.B. Gallie on 'essentially contested concepts' and the work of the political theorist William Connolly, who has developed Gallie's ideas and applied them in the domain of political discourse (Gallie 1962; Connolly 1993). We believe that these classic works have very important lessons for the restorative justice movement, although in the space available here it is not possible to discuss these theoretical sources or to indicate how we have utilized them.
- 3 Given the nature of these characteristics, the question is usually to what extent are they present, rather than a simple are they or are they not present. See Van Ness (2003) on the need to think in terms of *degrees* of restorativeness.
- 4 We wish to emphasize that, while distinguishing these three conceptions is (in our view) useful for analysing debates about the meaning of restorative justice, we are not suggesting that any actual use of the concept of restorative justice can be neatly matched to a particular conception. Also, we are by no means suggesting that these three conceptions are *totally* distinct from one another; to the contrary we will point to numerous points of overlap.
- 5 Although there are some disputes over whether all these processes are properly called restorative justice, or over which of them is the purest form of restorative justice.
- 6 Analogously, one of the key arguments for democratic governance is that people have the right to govern themselves, even if they do so in what a minority (or outsiders) consider to be an unenlightened manner.
- 7 While our goal in this chapter is to introduce various ways of conceiving restorative justice, rather than to discuss particular issues in any detail, we do think it necessary to make one suggestion: that efforts to articulate a set of distinctive restorative justice values and to think through their status would be significantly advanced by a prior effort to describe with more sophistication than usual the range of values which underlie conventional criminal justice processes.

To describe these processes – as is often done – as being underpinned simply by a desire to get even with those who hurt us or to respond to the hurt of crime with the hurt of punishment is too crude. A more fruitful starting point might be to recognize that conventional criminal justice practices tend to embody a wide range of values, and can be better understood as shaped by passionate struggles over which values should predominate in the penal realm, rather than being shaped by one particular set of values (see Garland 1990 for an account of the competition to shape the field of penal practices, in line with particular values and commitments, and of how this results in a highly complex institution which embodies and gives expression to a wide range of values, many of them contradictory). Also, we would go so far as to suggest that, rather than engage in wholesale rejection of traditional criminal justice values in favour of restorative justice values, the restorative justice movement might commit itself to devising responses to crime which incorporate the best of both. For instance, we might conceive of restorative justice as a process which enables people affected by crime to devise responses which meet *their* local needs and which are closely in keeping with *their* ethical ideals. We could then recognize that such a response needs to be bounded by broad values more often associated with the idea of the rule of law than with restorative justice. As Braithwaite elegantly puts it, restorative justice (the ‘justice of the people’) needs to be constrained by the ‘justice of the law’ (2003: 14–16).

- 8 See Zehr (1990) for a rich and sophisticated account of this position. We have relied heavily upon Howard Zehr’s work in this section because we regard it as one of the most cogent expositions of, and arguments for, restorative justice available, and because of its influence on the restorative justice movement (Zehr is often referred to as ‘the grandfather of restorative justice – see Zehr 2002: 76). Just a few of the other works worth consulting in this context are Braithwaite (2002), Cayley (1998), Consedine (1999), Graef (2000), Johnstone (2002), Marshall (2001), Ross (1996), Sullivan and Tifft (2001), Wright (1996) and Van Ness and Strong (2006).
- 9 These ideas are explored in more depth in Johnstone (2002) and Van Ness and Strong (2006).
- 10 They call these ‘values’.
- 11 Stories of transformation abound. The most spectacular stories, told with an air of wonder, are those in which a restorative encounter leads to transformation of the victim, the offender and ultimately of their relationship. Out of evil, something good has come, something far better than could be expected from contemporary criminal justice, and in some ways something better than existed before the crime.

There is almost a mythic dimension in these stories, one that emerges in arguments for restorative justice as well. The themes of rebirth and renewal that recur in mythology and in religion have their place as well in restorative justice. Within the death and destruction of crime lies the possibility of resurrection and new life. This may not be realized in all, or even in most, cases. But the possibility is there, and is realized frequently enough to give reason for hope.

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The idea of reparation

Susan Sharpe

A former soldier asked a Buddhist nun how to atone for the destruction he had caused during the war. She said, 'If you blow up a house, then you build a house. If you blow up a bridge, then you build a bridge' (Thomas 2004: 18). This basic prescription – the simple fairness of replacing what one has taken or destroyed – is the essential idea of reparation.

The word 'reparation' stems from 'repair' meaning to fix or mend. It overlaps with a cluster of other related concepts, including restitution, compensation, atonement, damages and remedies (Weitekamp 1999: 75; Teitel 2000: 119). Reparation is a kind of recompense, which means to give back or give something of equivalent value. Often the term is used in reference to making amends or paying damages.¹ In all these senses, reparation is a mechanism for redress – i.e. a way of correcting or remedying a situation. Redress is not specific to the context of justice; one might speak of redressing a troubling economic trend, for example. But in human affairs, redress often has the connotation of correcting a wrong.

As such, redress is linked to reciprocity, which William Ian Miller identifies as a fundamental mechanism by which human beings maintain stable social relationships. He says that reciprocity is triggered whenever we receive something from others: 'Both the good and the ill received oblige the other to make a return' (1993: 5). While we need not repay every kindness or injury, we typically do not accept many of either before finding a way to reciprocate or at least to prevent the imbalance from growing.

Keeping our social accounts in relative balance appears to be a basic human drive. Honour, Miller says, is 'rooted in a desire to pay back what we owe, both the good and the evil. The failure to reciprocate, unless convincingly excused, draws down our accounts of esteem and self-esteem' (1993: x). He says that we 'feel bound to return kindness and we feel frustrated when we are prevented from returning wrongs' (p. 6). Thus reciprocity gives rise not only to social obligations, but also to our drive for justice.

This chapter begins with a look at basic ways of redressing injustice and then at the nature of reparation – forms it can take, what it can

accomplish and optimal conditions for achieving those results. From there, the chapter turns to a discussion of several key issues related to reparation in restorative justice.

Ways of redressing wrong

Philosopher Peter French points out that ‘we have certain attitudes toward those who do not treat us with goodwill and respect or esteem or who act toward us with contempt, indifference, or, especially, malevolence’ (2001: 81). When such things happen, he says, our attitudes about them reflect the way we perceive ourselves to be treated as measured against a standard of expectations related to our concepts of right and wrong. One of these attitudes is resentment: ‘When we perceive or recognize that someone has injured or slighted us or failed to render to us what we regard as proper respect, we resent the offender’ (French 2001: 81). A second attitude occurs when resentment is felt vicariously on behalf of people with whom we have some affinity, or when it is generalized in response to the way other people are treated; the attitude in that case is indignation. A third attitude occurs ‘when one turns one’s moral scrutiny on oneself and recognizes or perceives oneself to be morally wanting. In such cases, the feeling is neither resentment nor indignation. It is either guilt or shame’ (p. 81).

French goes on to explain that ‘the reactive attitudes, especially resentment, indignation, and shame, trigger the response mechanisms that give the moral qualities of actions causal power in human affairs’ (2001: 82). In other words, the moral judgements we make – our ‘recognition of the moral qualities of both action and actor’ (p. 82) – are rooted in these primary attitudes. Taking French’s work a step further, we can see these three attitudes underlying the primary ways by which humans redress injustice: vengeance, retribution and repair. Redress is crafted by the victim when it takes the form of vengeance, by a responsible authority when the form is retribution and by the offender in the case of repair.

Vengeance – i.e. revenge, or retaliation – repays like for like, reciprocating injury with injury. Vengeance essentially says ‘You have wronged me and I will not stand for it. I will do to you as you did to me.’ Taking revenge is primarily a personal act, triggered by the attitude of resentment that comes of feeling oneself (or someone with whom one’s identity is closely linked) to be the target of insult or injury. Martha Minow says this ‘is the impulse to retaliate when wrongs are done. Through vengeance, we express our basic self-respect’ (1998: 10). We commonly associate vengeance with violence, but revenge is not always extreme. As Robert Solomon says, ‘The more usual act of revenge is a negative vote in the next department meeting, a forty-five minute delay in arriving to dinner, or a hurtful comment or letter’ (1990: 276).

Retribution, the second form of redress, also repays injury with injury but in this case the motivating attitude is indignation on behalf of others. Blameworthiness is expressed and responsibility is indicated (Walgrave 2004: 55) for the sake of asserting moral truth (Hampton 1988: 137). The goal,

Minow says, is not 'the vengeful, self-help response of tit-for-tat, [but rather] the deliberate, retributive use of governmentally administered punishment to vindicate the victim's value' (1998: 151, n. 13). The potential destructiveness of vengeance is 'curbed by the intervention of someone other than the victim and by principles of proportionality and individual rights' (Minow 1998: 12). Whatever punishment is administered through retribution, the offender is expected to accept it as appropriate and the victim is expected to accept it as sufficient.

Repair, the third primary way of redressing injustice, does something for the victim rather than to the offender. As with vengeance and retribution, a basic aim is to reduce the inequity created by injustice. But here the strategy is to decrease suffering for the victim rather than increase suffering for the offender. This form of redress also has a different source. Whereas revenge and retribution both originate in a judgement that someone else's behaviour has been wrong, repair originates in a recognition that one's own behaviour has been wrong. The judgement comes from within.² Redressing injustice through repair says, 'I created a situation you should not have to bear, and I regret it. I cannot undo my behaviour, but I want to minimize the damage it caused.'

Each of these forms of redress – vengeance, retribution and repair – is an effort to reduce the inequity created when one person gains something at the expense of another. A victim can retaliate by repaying the offender in kind, an authority can impose some kind of equivalent suffering or an offender can give back as much as possible of what was taken from the victim. (Or redress may take more than one form. As noted later in this chapter, many people believe that repair alone is insufficient in cases of willful harm.) Reparation has a role both in retribution and in repair, although its role and its effect can be quite different in the two. Before turning to those differences, it will help to look at the basic nature of reparation.

The nature of reparation

Reparation has been a vehicle for justice throughout human history. Ancient societies, recognizing that retaliation could lead to costly cycles of mutual destruction, turned to restitution or some form of compensation as their primary form of redress (Weitekamp 1999: 76, 79; Johnstone 2002: 40). As societies grew more complex, they began developing legal codes that identified appropriate reparation for various kinds of harm (Weitekamp 1999: 83–9), including limits on what could reasonably be demanded (Zehr 1990: 103; Brunk 2001: 39).

Reparation still has a role in contemporary legal systems. In Western civil law, which deals with individuals' offences against one another, the focus is on the monetary value of an injury or loss, and reparation takes the form of financial compensation (Johnstone 2003: 11). Reparation has had a smaller role in Western criminal justice, which deals with behaviour classified as offences against the state and operates primarily from a retributive philosophy. However, reparation has become more common in recent decades as a judicial sentencing option (Bazemore 1998: 773; Van Ness and Strong 2002: 86).

Reparation also has a role in the political arena, when governments make amends for hostilities against other nations or for policies that are harmful to their own people. Brownlie defines reparation as 'all measures which a plaintiff may expect to be taken by a defendant state: payment of compensation (restitution), an apology, the punishment of the individuals responsible, the taking of steps to prevent a recurrence of the breach of duty, and any other forms of satisfaction' (2003: 442). An example of such reparation is the US government's payments to the surviving Japanese Americans who were interned during the Second World War.

Types of reparation

Reparation can take many forms. In general, reparations are described as being either material or symbolic, although the two categories overlap to a large extent. Material reparation can have a symbolic function, conveying an acknowledgment of responsibility and thus having the effect of an apology, while symbolic reparation can make a substantial difference in a victim's life. Still, the two differ in terms of their primary function: material reparation generally addresses the specific harms (tangible or intangible) that result from wrongdoing, while symbolic reparation speaks to the wrongness of the act itself.

Material reparation offers something concrete to repair a specific harm or to compensate for the damage or loss associated with that harm. Material reparation may reduce the extent of the harm done by a crime, may reduce the victim's cost for dealing with that harm, or both. This type of reparation often takes the form of goods (e.g. the return of stolen property) or financial payments (such as to cover the cost of medical treatment or psychological therapy). It also can take the form of concrete action, perhaps to repair a damaged structure or to provide a service that reduces the victim's burden (such as delivering groceries while a victim recovers from injuries). These goods or actions might address a crime's primary or most direct harm (Van Ness and Strong 2002: 91), or the secondary harms set in motion by the crime. Thus reparation could include things like counselling, transportation, training, financial assistance, employment, day care, new housing or drug treatment (Herman 2004: 81).

Material reparation often takes the form of restitution or compensation. While each of these terms is sometimes used in other ways, restitution is usually the broader term: 'Restitution is made by returning or replacing property, by monetary payment, or by performing direct services for the victim' (Van Ness and Strong 2002: 85–6). In the larger context of injustice to a people or cultural group, restitution typically means the return of 'wrongly appropriated property, artifacts, and human remains' (Minow 1998: 117). Compensation usually has a narrower meaning, referring to a financial payment (Brownlie 2003: 442) that makes up for property that cannot be returned or repaired, or that acknowledges a fundamental loss such as the violation of human rights. Some use this term specifically in reference to payments made by a government or another third party (e.g. Van Ness and Strong 2002: 85, n.13), such as through victim compensation funds.³

As important as material reparation can be in enabling a victim to recover from the effects of a crime, symbolic reparation (sometimes called emotional reparation) can be even more significant. As Heather Strang says: 'Victims studies over the past decade repeatedly show that what victims want most is not material reparation but instead symbolic reparation, primarily an apology and a sincere expression of remorse' (2004: 98).⁴

Apology is the primary form of symbolic reparation, but there are other forms as well. For example, victims may implicitly hear responsibility and remorse during a restorative justice dialogue as an offender explains how and why the crime occurred and respectfully listens to the victim's experience of it (Marshall 2003: 32). Or symbolic reparation might be expressed through actions like buying a gift, providing a service for the victim, donating time or money to a charity of the victim's choice, doing community service or entering treatment in order to address the roots of criminal behaviour (Duff 2002: 90, 94; Johnstone 2003: 11; Marshall 2003: 32; Strang 2004: 102). Partial restitution sometimes is called symbolic reparation because it conveys an offender's willingness to make amends even when full restitution is beyond that person's means.

What reparation can accomplish

Reparation is only one of many factors that may help a victim recover from a crime; healing might also depend on the support of loved ones, on medical or psychological therapy, on the satisfaction of feeling that justice has been served, or even on the effect of time. Yet the role of reparation can be pivotal to recovery because it achieves four things: it can help to repair damage, vindicate the innocent, locate responsibility and restore equilibrium.

Repairing the damage caused by a crime is important for the same reasons it is important to repair damage caused by accident or natural wear: to restore function, to make something safe to use again or to help preserve its value. Whether hit by a hailstone or a hammer, a broken tail-light needs to be fixed – to comply with the law requiring that a car have two functioning brake lights, to prevent being rear-ended, or in order to get a better price when selling the car. Repairing intangibles can be equally important for the same reasons. Therapy can help a victim function well again at school or work, or make it feel safe again to go to sleep at night; an apology might help preserve a relationship that has been important, or strengthen someone's damaged self-worth.

A second function is that reparation can vindicate the innocent, giving victims 'a moral statement to the community that they were right and that the other person was wrong' (Zehr 2003: 75). It gives victims a recognition that the wrong suffered was in fact a wrong (Strang 2004: 102), and that the victim was not somehow at fault (Bazemore and Schiff 2005: 51). Victims might find vindication in the support of other individuals, through expressions of sympathy or assurances that what happened was not acceptable. Or they may find it through the criminal justice system, in that criminal prosecution confirms that certain behaviours are not tolerated by the community (Daly 2002: 62; Duff 2002: 91–2). But vindication is most powerful when it comes from the offender, and reparation helps convey it.

Thirdly, reparation locates responsibility. 'When you commit a crime,' says Howard Zehr, 'you create a certain debt, an obligation, a liability that must be met. Crime creates an obligation – to restore, to repair, to undo' (2003: 79), and reparation meets at least part of that obligation. As Dan Van Ness and Karen Heetderks Strong explain, 'Something given or done to make up for an injury... underscores that the offender who caused the injury should be the active party' in redressing it (2002: 47).

Fourthly, reparation can help victims regain the equilibrium so often lost after a crime. Victims commonly find that their physical, mental or emotional well-being is disrupted; they may be unable to eat or sleep normally and may be preoccupied, anxious or fearful. Susan Herman reports that crime victims suffer a loss of confidence, reduced academic performance and work productivity, and increased rates of mental illness, drug and alcohol abuse, and suicide (2004: 77). By repairing a crime's primary and secondary harms, material reparation can play a significant role in helping victims integrate the trauma and heal its effects, regaining stability and confidence. Symbolic reparation, by acknowledging the wrongness of the behaviour and expressing regret for it, returns to the victim some of the power seized by the offender in committing the crime. Minow says: 'By retelling the wrong and seeking acceptance, the apologizer assumes a position of vulnerability before not only the victims but also the larger community of literal or figurative witnesses' (1998: 114).

The fact that reparation accomplishes these things does not link it exclusively to one form of redress. For reasons discussed in the next section, reparation is most powerful when it reflects a genuine desire to repair. But reparation can also have a role in retribution; a court might require the payment of restitution or compensation in order to punish an offender, irrespective of the victim's needs.

Optimal conditions for reparation

If justice is, as Howard Zehr says, properly rooted in a concern for victims' needs and offenders' obligations (2002: 22–4), and if reparation is the vehicle by which offenders meet those obligations, then it follows that reparation would be most effective under certain circumstances. Those circumstances characterize restorative justice: when the reparation is tailored to meet a victim's particular needs, when the terms of the reparation are chosen by those most directly involved and when it is offered rather than ordered.

Tailored

The point of reparation is to repair damage caused by wrongdoing. Reparation therefore is most effective when it directly addresses the specific harms done in a particular situation. For example, Gerry Johnstone points out that if a youth has damaged a fence, washing police cars would have no relevance to the harm done and thus would constitute punishment more than reparation (2003: 12). Conrad Brunk points out that if a husband wants to make amends for abusing his wife, joining the effort to end domestic

violence or raising money for a women's shelter has 'far more psychological, sociological, and moral power in "righting the wrong" or "restoring justice" than does simple financial payment' (2001: 52). The importance of tailoring reparation to address victims' specific needs is just as relevant when a community is the victim. Van Ness and Strong point out that community service is likely to be no more than a rhetorical phrase if the exact harm done to the community has not been defined (2002: 88). They note that this does not mean community service is inappropriate, but 'it does require that we clarify the nature and extent of the harm done to society at large, as well as the most appropriate means for the offender to repair that harm' (2002: 89).

While there are consistencies in the kinds of things victims experience as a result of crime, the particular harms to be repaired cannot reliably be predicted by knowing the nature of the crime; one victim might come out of a crime with post-traumatic stress syndrome, while someone else harmed in the same crime might recover quickly and easily. It also is impossible to predict a victim's priorities for reparation; even victims are often surprised to discover that receiving an apology is more valuable than the restitution they had thought mattered most. Tailoring reparation so that it best meets a victim's needs, therefore, depends first on learning from the victim the full range of harms he or she has experienced and, secondly, on finding ways an offender can at least contribute to the repair of those harms.

Determined by stakeholders

Some repairs are straightforward: a broken window on a new house usually needs to be replaced with an identical one. Other repairs involve choices: the owner of a heritage home might opt to replace a broken window either with new glass, with antique glass or with reproduction glass; replacing the window might be a task the offender could do or help with, or it might require an expert glazier. Regaining a sense of safety after a break-in and assault might require new lighting or it might require therapy; the victim's insurance might cover the cost of that therapy, or it might need to be paid for by the offender. Reparation is most effective when such choices are made by those who have a stake in what the repair involves or how it turns out – primarily the victim, who will live with the outcome, and the offender, who is responsible for the repair, as well as others who might also be affected. There are several reasons why stakeholders' participation is significant to the effectiveness of reparation.

First, as Van Ness and Strong point out, 'Being victimized is by definition an experience of powerlessness – the victim was unable to prevent the crime from occurring' (2002: 38). A victim can regain some sense of control through the experience of describing the harms he or she suffered, identifying what he or she needs as a result, and helping to determine what reparation would be appropriate. Control also is found in having the opportunity to gauge the sincerity of the offender's apology and weigh its strength against the magnitude of the harm. In Minow's view, as important as it is for the offender to take full responsibility for wrongdoing, it is equally important that the victim be

granted the power to accept, refuse or ignore the offender's apology. Whichever choice they make, 'The survivors secure a position of strength, respect, and specialness' (1998: 115).

Secondly, an offender who has a voice in the decision is more likely to understand why a given repair is needed and what difference it might make for the victim, and also more likely to follow through on the commitment to make reparation (Schiff 1999: 331; Johnstone 2002: 143). Beyond these practical benefits, there is a deeper reason why reparation is most effective when it is determined by the stakeholders. The primary rationale for putting the decision in their hands takes us, once again, to the primary significance of reciprocity. A crime either changes the relationship between the victim and offender (if they already knew each other) or puts them into relationship with each other (if they had been strangers). And relationships are bound by reciprocity. In order to restore whatever equilibrium they had in relation to each other before the crime, the harm must be reciprocated – either by the victim through some form of vengeance, by others in the form of punishment or by the offender through some kind of repair. Repair initiated by a third party – such as a court or a community justice panel – may achieve partial reparation but it is necessarily limited. Repair that comes from outside the victim-offender relationship cannot meet the requirement of reciprocity. To be effective, it must come from the offender – which can happen even when reparation is ordered by a judge or another third party, if that offender recognizes its importance and feels good about providing it.

Offered

Reparation that is offered by an offender – or at least readily agreed to – can accomplish more for offenders as well as for victims than reparation carried out under duress. Voluntarily assuming responsibility can help an offender develop a more prosocial value system (Van Ness and Strong 2002: 41), and those who take an active helping role in making amends tend to experience more positive behavioural change than those who carry out reparation that is required of them or imposed as punishment (Bazemore and Schiff 2005: 51). Johnstone (2002) explains why this might occur. One factor is that making repairs helps offenders realize the harm they have caused, which is a crucial step towards reintegration (p. 102). More specifically, voluntarily repairing the harm they have caused helps to appease the anger and indignation that victims and the public may feel towards them, perhaps even turning this into respect (p. 102). Drawing on the work of Sir Walter Moberly, Johnstone also argues that repentance and voluntary reparation can help to reverse an offender's own moral degradation and the social harm caused by the crime (2002: 104).

For victims, there are occasions where coerced reparation is as effective as when it is voluntary. The return of a rare art object may be the only way to restore the value of a prized collection, and the victim may not care how the offender feels as long as the object is returned. More often, however, a victim finds more value in an offender's demonstrated willingness to make amends

than in receiving the actual reparation, even if the person is unable to follow through and complete the promised reparation (Bazemore and Schiff 2005: 50). What makes the offender's willingness so significant is that this is what constitutes symbolic reparation.

Symbolic reparation can do two things that material reparation cannot. One is that it can help redress harms that cannot be repaired, such as permanent injury or death. Secondly, symbolic reparation can go to a layer underneath specific harms, redressing the injury of injustice itself. Whenever one person gains something at the expense of another – which is what happens in wrongdoing – that gain and loss create an unfair imbalance between the victim and offender. As seen earlier in this chapter, reciprocity demands that proper balance be restored, at least to the extent possible. In expressing one's responsibility and a feeling of remorse, an offender renounces the advantage gained and offers the respect that was denied in the course of the wrongdoing.

Material reparation can be coerced, but symbolic reparation cannot. Someone can be ordered to write a letter of apology, but victims tend to be very good at gauging whether apologies are genuine, and quick to reject those that are not. Reparation delivered reluctantly may be better than none at all. But the reparation that achieves the most is reparation that comes from a true sense of regret.

In general, restorative justice processes facilitate the optimal conditions for effective reparation, insofar as they involve all interested stakeholders, help victims articulate the full range of harms they have experienced and assist offenders in finding ways to make amends. Yet there are issues to consider for anyone offering restorative justice to that end.

Issues related to reparation in restorative justice

Reparation is a simple idea that holds considerable complexity. Within the context of restorative justice, some of that complexity is evident around three issues in particular. Two bear on the practice of restorative justice and a third relates to the breadth of activity found in restorative justice programmes. First, how difficult should reparation be? Secondly, how important is proportionality? Thirdly, must restorative justice concern itself with systemic injustice?

Must reparation be burdensome?

Two arguments have been prominent in restorative justice since this approach began to emerge. On the one hand we insist that restorative justice is fundamentally different from retributive justice with its philosophy of just deserts. At the same time we assure sceptics that being accountable directly to one's victim is anything but soft on crime. How consistent are these claims? Johnstone frames this issue when he says:

It is important to be clear about the reason for demanding that the offender repair harm in restorative justice. Is our main concern that the harm be repaired, as in the civil law model? Or, is our main concern

that the perpetrator be made to suffer some burden, as in the criminal law model? (2003: 12).

The restorative justice literature is divided in response to this question. Some authors say that if our priority really is to repair harm rather than to punish offenders, then it is irrelevant whether or not that repair is burdensome. Randy Barnett takes this view, arguing for pure restitution over punitive restitution: 'This represents the complete overthrow of the paradigm of punishment... No longer would the criminal deliberately be made to suffer for his mistake. Making good that mistake is all that would be required' (2003: 50).⁵ Martin Wright also rejects the notion of punishment in reference to any measure that is primarily intended to help the victim, and which may also help the offender. Wright recognizes that reparative sanctions may involve the loss of liberty or money but says this should occur by consent if possible, rather than being imposed (2003: 7).

Others say that, while outcomes may sometimes feel burdensome to the offender, what matters is the intention behind that choice of outcome. As Walgrave says: 'There is a crucial difference between obligations that are inevitably painful, like paying taxes or compensation, and obligations that are imposed with the purpose of imposing pain, like paying a fine' (2004: 48). Brenda Morrison also focuses on intent rather than on the actual hardship of a sanction. She says: 'School suspensions (as opposed to permanent exclusion), for example, could constitute a restorative justice practice if it is seen as legitimate opportunity, by all involved in the process, to "make things right"' (2001: 203).

Still others believe that punishment has as legitimate a role in restorative justice as repair does. Kathleen Daly argues that retribution and restoration are not the opposites they are often assumed to be. For her, retribution is a clear and important denunciation of wrong, for the sake of vindicating the victim (2002: 72, 84). Similarly, Antony Duff argues that a clearer understanding of the concepts of punishment and restoration would dissolve the apparent conflict between the two. In his view, 'Criminal punishment should aim at restoration, whilst restorative justice programmes should aim to impose appropriate kinds of punishment' (2002: 83). For Duff, punishment is what gives an apology its requisite moral weight:

The reparation I undertake must be something burdensome – something that symbolizes the burden of moral injury that I laid on my victims and would now like (if only I could) to take on myself; the burden of wrongdoing that I laid on myself; and the burden of remorse that I now feel (2002: 90).

The question of whether reparation must be burdensome is a crucial one in restorative justice because it hinges on the central distinction between retribution and repair as forms of redress. As Johnstone notes, the argument that punitive restitution is more appropriate than pure restitution 'may be inconsistent with the notion that restorative justice is a new *paradigm* in criminal justice' (2003: 22, emphasis in original).

Must reparation be proportionate?

Proportionality is the principle underlying light sentences for minor crimes and progressively harsher sentences for more serious crimes. Barry Feld says that 'As long as the criminal law rests on a moral foundation, the idea of blameworthiness remains central to ascribing guilt and allocating punishment. Penalties proportionate to the *seriousness* of the crime reflect the connection between the nature of the conduct and its blameworthiness' (1999: 32, emphasis in original). Feld also notes that 'Because punishment entails censure for blameworthy choices, the *proportionality* of sentences reflects actors' culpability rather than just the harm their behavior caused' (1999: 33, emphasis in original).

Proportionality aims to achieve fairness in sentencing, such that the severity of a sanction correlates to the severity of a wrong. Clearly it would not be right to punish a shoplifter more severely than an armed robber who hurt and traumatized several victims. For Nigel Walker, though, the chief benefit of proportionality is consistency in sentencing (1991: 104–5) such that two people causing comparable harm would experience the same kind and degree of punishment. But if punishment were not part of the equation – if repair were all that mattered – would proportionality still be important?

Martin Wright and Guy Masters say no. They acknowledge that 'fairness dictates that the reparation should not be excessive, even if a contrite offender agrees to it' (2002: 55), but they do not see proportionality as an appropriate criterion for reparation. In their view, 'Restorative justice aims to reach a conclusion which is satisfactory to a particular victim and offender, which need bear no relation to what is appropriate for any others who may appear similarly placed' (2002: 55). In other words, because crime harms persons and victims' needs are unique, it is appropriate for reparation also to be unique, even if the result is that similar wrongs are dealt with very differently.

This particularity is a strength of restorative justice, focusing as it does on unique needs and tailored repair. Wright says: 'The idea of restorative justice is that any reparative acts by the offender are if possible agreed by the victim and the offender. They therefore are not necessarily proportionate to the seriousness if the victim does not feel this to be necessary' (2003: 11). But this particularity also creates a risk. Wright's claim assumes that the victim and offender both have a good understanding of the harms to be repaired, and each is fully empowered to make a fair agreement with the other. Els Dumortier (2003) points to a number of concerns, based on the experience of juveniles who meet with their victims and then carry out reparation as set out in their agreements. She says, for example, that a focus on material reparation can mean that an offender does more to make up for a minor crime like graffiti than for a more serious crime like break and enter; because older youth often earn higher wages per hour, younger offenders may have to work longer in order to pay an equivalent amount of financial reparation. Too, offenders sometimes accept unreasonable terms for reparation; they do so in order to avoid criminal prosecution, out of ignorance or in response to parental pressure (pp. 200–1). Offenders sometimes end up working more

than is deserved, because some victims demand unreasonable damage claims (Braithwaite 2002a: 165; Dumortier 2003: 200).

Because of such concerns, a number of people suggest setting outside boundaries for restorative justice agreements, within which victims and offenders could arrive at whatever terms seem fair to them – whether or not those terms are proportionate and whether or not they are comparable to agreements made by other victims and offenders. Some recommend setting two boundaries, to specify both minimum and maximum outcomes (Crawford 2002: 125; Eliaerts and Dumortier 2002: 210). A minimum threshold might be reassuring to those who want to ensure that community standards are affirmed and that unacceptable behaviours are unequivocally denounced. But might it violate the primacy of the victim's needs as the basis for reparation? Wright and Masters note cases where victims and offenders both felt it was unfair that judges imposed community service after they had agreed that an apology was sufficient. The authors suggest that 'this is another example of retributive thinking undermining the restorative ideal' (2002: 56).

Others recommend setting only an upper limit. For Walgrave, this upper limit should be proportionate – not linking the reparation to the seriousness of the crime, but linking the seriousness and kind of harm to a maximum of reasonable restorative effort (2002: 213). John Braithwaite offers a more traditional view in support of an upper limit. He says: 'Within the social movement for restorative justice, there is and always has been absolute consensus on one jurisprudential issue. This is that restorative justice processes should never exceed the upper limits on punishment enforced by the courts for the criminal offence under consideration' (2002b: 150).

If Braithwaite is right (and I believe he is) that this point is broadly accepted in the restorative justice field, then we may need to examine the implications of linking restorative boundaries to a retributive scale: is it safe to assume that limits on punishment are reasonable limits on repair? Walgrave offers what may be a crucial reminder: 'Due process proportionality and other principles remain respectable, but they must be critically checked as to their meaning in a restorative justice context, and possibly be reformulated, rejected or replaced' (2002: 216).

Must reparation address systemic injustice?

With its emphasis on repairing harm, and on bringing people into dialogue where they deepen their empathy, interdependence, and accountability, restorative justice has been seen as a vehicle for the redress of social as well as criminal injustice (Zehr and Toews 2004: 375–6). At issue is whether the field also has a responsibility to work towards that redress.

Part of this issue is whether or how reparation might contribute to social justice at the individual level – a question that invites taking a broader view of the harms connected to a crime. Van Ness and Strong distinguish contributing injuries – 'those that existed prior to the crime and that prompted in some way the criminal conduct of the offender' – from resulting injuries – 'those caused by the crime itself or its aftermath' (2002: 40). For Morris, restoration requires attention to both kinds of injuries: 'Restoring

means that action needs to be taken to address both the factors underlying their offending in the first place and the consequences of that offending' (2002: 605). Braithwaite and Parker similarly caution that the outcomes agreed to in restorative justice processes should be 'grounded in dialogue that takes account of underlying injustices' (1999: 109). Delens-Ravier suggests that well designed reparation can help to accomplish that goal: 'Encounters between adults and young people during the performance of community service represent a form of indirect reparation, constituting a veritable promise by society for youths deprived of human, non-pecuniary relationships' (2003: 155).

A larger part of this issue is what difference restorative justice might be able to make in regard to injustice that occurs on a larger scale – either through egregious wrongs like slavery, genocide and other mass atrocities, or through systemic wrongs that insidiously harm classes of people on an ongoing basis. Chris Cunneen points out that 'perhaps the greatest crimes in the twentieth century causing direct human harm have been committed by governments' (2001: 90), or at least have been supported by state institutions (p. 93). Such crimes include slavery in the USA, and the practice of removing indigenous children from their families and communities in Australia and Canada. When such harms are redressed, reparation usually has an important role in confirming responsibility. 'If unaccompanied by direct and immediate action, such as monetary reparations', Minow says, 'official apologies risk seeming meaningless' (1998: 117). Here in particular, regarding reparations for wrongs that have devastated whole peoples, the simple idea of repairing harm becomes complicated and difficult. As Minow asks, when those most clearly responsible or those most directly harmed are no longer alive, who is in a position to issue a true apology, and to whom? And who is in a position to accept such an apology, or to refuse it (Minow 1998: 112–5)?

Reparation for mass atrocities is not a concern for most restorative justice practitioners or programmes. Yet the effects of such harms may be a regular presence in any restorative justice practice. The fact that marginalized groups are over-represented in the criminal justice system is something that many see as evidence of continuing postcolonial trauma (Behrendt 2002; Blagg 2002; Kelly 2002).

Cunneen points out that family problems are individualized through child welfare or criminal justice casework, and that 'restorative justice advocates can make a real contribution in this area by supporting welfare and justice practices which allow for the deeper meanings of harm and responsibility to emerge' (2001: 96). Discerning those deeper meanings may equip us to tackle something Jeffrie Murphy points to. 'One tends to think that all demands for repentance must be addressed to the criminal. But surely the community, through its patterns of abuse, neglect and discrimination, sometimes creates a social environment that undermines the development of virtuous character and makes the temptations to crime very great' (2003: 54). We might ask what reparation will look like when we decide to redress that wrong.

Conclusion

Reparation, both material and symbolic, has a primary role in redressing wrong. As such, it is central to restorative justice. Restorative justice theory calls for engaging all of what reparation helps to achieve – repair, vindication, the location of responsibility and the restoration of equilibrium – and for keeping them in balance with one another. Too strong an emphasis on repair or vindication could fuel the charge that restorative justice is soft, unable to redress injustice effectively. Too strong a focus on accountability might encourage the co-optation of restorative justice and turn repair into retribution. A preoccupation with restoring equilibrium could accommodate communities or systems whose norms are harmful. But tending to all these functions and keeping them in proportion may help us reduce our reliance on retribution and cultivate greater skill with repair. Doing so may be a crucial step towards transforming our understandings, and thus our experience, of justice.

Selected further reading

- Minow, M. (1998) *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*. Boston, MA: Beacon Press. This book explores the ways that nations have developed for responding to mass atrocities, including trials, truth commissions and reparations. In looking at the complex struggles involved in facing what has happened, holding people accountable for it, and moving beyond it, Minow highlights the personal as well as the social and political challenges that result from the worst of what humans do to one another.
- Walgrave, L. (2004) 'Has restorative justice appropriately responded to retribution theory and impulses?', in H. Zehr and B. Toews (eds) *Critical Issues in Restorative Justice*. Monsey, NY: Criminal Justice Press and Cullompton: Willan Publishing. After exploring retribution as an argument for criminal punishment, Walgrave claims its only justification lies in the censure of wrongful behaviour, which he says is more effectively achieved through restoration.
- Wright, M. (2003) 'Is it time to question the concept of punishment?', in L. Walgrave (ed.) *Repositioning Restorative Justice*. Cullompton: Willan Publishing. This essay offers a detailed review of arguments that punishment has a role in restorative justice, that sanctions must be punitive and that sentencing can be proportional and fair. Wright concludes with a framework for reducing harm and for responding to it effectively.

Notes

- 1 The definitions and connotations set out in this chapter are drawn from *The Oxford English Dictionary, New Edition*; *Webster's Third New International Dictionary, Unabridged*; the *Stanford Encyclopedia of Philosophy*; and from the way terms are used in my reading of relevant literature outside as well as inside the restorative justice field. The constructs behind these terms are complex and overlapping, and I do not claim my interpretations as definitive.
- 2 This distinction between external and internal judgement is a crucial one. As French says, guilt or shame is a feeling that occurs when our own behaviour

falls short of our standards for right and wrong (2001: 81). It does not follow from being told by others that one is morally wanting – as happens when people dispense ‘shaming’ in ostensibly restorative processes.

- 3 Some argue that the victim’s community has a responsibility to offer compensation. Allison Morris says: ‘Full monetary restoration is not always achieved as many offenders have limited resources. However, if we as a community take restorative justice seriously, this type of restoration could, and perhaps should, be a community (state) responsibility’ (2002: 604).

This view is also found within the conventional criminal justice system. Van Ness and Strong point out that a British magistrate was the first in modern times to suggest that the state compensate crime victims, arguing that when a government has taken on a responsibility for public order, it also takes on an obligation to compensate victims when it fails to protect them from crime (2002: 85, n. 13). Van Ness and Strong note that ‘few governments have been willing to recognize victim compensation as an obligation they owe to victims, but many have implemented victim compensation schemes’ (2002: 85, n. 13).

Susan Herman advocates parallel justice, where ‘compensating victims for their losses would be a responsibility shared by offenders and society at large. Restorative justice programs should continue to promote the payment of restitution by offenders, but we should also use tax revenue to meet victims’ needs’ (2004: 80).

- 4 A victim’s hunger for apology can sometimes put that person at risk. Because an apology expresses regret for past choices, an apology – even if sincerely meant – can give a victim false confidence that the offence will not be repeated, leading him or her to re-enter a dangerous situation. This is a pattern in cases of repeated harm that occurs in ongoing relationships, such as in situations of domestic violence (Barnett *et al.* 1997: 237; Herman 1997: 83; Griffing *et al.* 2002: 313).
- 5 In overthrowing the paradigm of punishment, Barnett would also dispense with the criminal justice system as we know it, replacing it with a purely reparative model based on civil (tort) law.

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The ideas of engagement and empowerment

Jennifer Larson Sawin and Howard Zehr

From the earliest days of the restorative justice movement, advocates have criticized conventional criminal justice, especially as practised in Western societies, for its failure to engage and empower those most directly affected by crime. Indeed, it was argued, those affected by a crime were often excluded almost entirely from the criminal justice process, an exclusion which had very damaging results. Restorative justice emerged, then, as an effort to engage more fully and empower those involved in or affected by criminal wrongdoing.

In recent years, restorative justice has found applications in many arenas including schools, the workplace, even situations of mass violence. However, since its origins were in the criminal justice arena and the restorative justice field is most developed there, the following discussion will focus primarily on the concepts of engagement and empowerment within criminal justice.

Engagement and empowerment: the principles

Origins

The following story is well known in the field of restorative justice.¹ In 1974, in the town of Elmira in the Canadian province of Ontario, two young men pleaded guilty to 22 counts of willful damage, following a drunken Saturday night vandalism spree. Prior to their sentencing, two probation workers, Mark Yantzi and Dave Worth, had been mulling over more creative responses to crime in that town. At some risk to his reputation as a probation officer, Yantzi (who had been assigned to prepare pre-sentence reports for the young men) made a suggestion to the judge that had no basis in law: that it might be valuable for the two young men to meet personally with the victims of their several offences.

One might imagine the judge's reaction. Indeed, the judge's initial response was that he did not think it was possible for him to ask the offenders to do this. But something about this idea must have caught the judge's attention because he was eventually persuaded and ordered a one-month remand to enable the pair to meet the victims and assess their losses, with the assistance of Dave Worth and Mark Yantzi. The two offenders subsequently visited and spoke to all but one of their victims (one had moved) and discovered that they had caused over \$2,000 damage, of which half had been recovered through insurance policies. The judge then fined each offender \$200 and placed them on probation, with one of the conditions being that they make restitution to their victims. Within a few months of sentencing, the two young men had revisited their victims and had made restitution accordingly.

Strictly speaking, the facilitated encounter approach in this story represents only one expression of restorative justice principles in practice. Moreover, one might point to a number of roots of restorative justice principles and practice; many claim, for example, that the origins of restorative justice are located in indigenous traditions.² However, we place the narrative here because it did play a prominent role in the emergence of restorative justice as a field, and it is an illustrative case study of the two restorative principles of engagement and empowerment.

Stakeholders

Nils Christie, a Norwegian criminologist who influenced many early restorative justice theorists, famously describes conflict as property (1977). Christie argues that lawyers and other professionals in our justice system 'steal' the property of conflict and its aftermath from those to whom it should rightly belong. This view of conflict provides an important theoretical basis for the argument that individuals and communities need to be more fully engaged and empowered in justice.

However, in order to discuss engagement and empowerment, we must first introduce the subjects, or *who* is being (dis)engaged and (dis)empowered in any story of justice. The field of restorative justice has adopted the term 'stakeholder' to describe the parties who have been most affected by wrongdoing. It tends to distinguish 'direct' stakeholders – the victim and offender – from 'indirect' stakeholders, such as family members and friends of each, the surrounding community or even members of the judicial system who are drawn into the event by some relationship to the victim and offender. It may be helpful to think of the stakeholder positions as emerging in concentric rings from the pivotal event of wrongdoing that lies at the centre.

If we return to the story from Elmira, direct stakeholders would include victims of the vandalism whose personal property had been destroyed. Of course, the two young men who had offended are also direct stakeholders in that they were personally responsible for the vandalism that took place. Indirect stakeholders in this event may have been family members and perhaps friends of the victims and offenders, and more official figures such as a community youth worker, a sports coach, a schoolteacher, the presiding

judge, lawyers for the accused men and an arresting officer. Some have called certain members of this latter group the 'community of care' (McCold and Wachtel 1998), a term that emerged as restorative justice practitioners and theorists sought to identify the appropriate people to include in a restorative conferencing process. This 'community of care' or 'micro-community' is distinguished, by McCold and Wachtel, from the larger community of citizens indirectly affected by the crime (the 'macro-community').

Although early proponents of restorative justice saw it as a way of returning conflicts to the community, the initial practice of restorative justice in the USA tended to engage primarily the victims, offenders and facilitators. Some limited provision was made for involvement of communities of care, especially family members, but the macro-community was supposedly represented by the presence of volunteer facilitators and community-based organizations. Subsequently, new restorative approaches, such as family group conferencing and peace-making circles, emerged, which made more explicit provision for participation by both micro- and macro-community members (Zehr 1990: 256–62).

The Western legal system

Restorative justice advocates have argued not only that the various stakeholders need to be engaged and empowered, but also that the Western criminal justice disengages and disempowers them. The book *Changing Lenses* (Zehr, 1990) was among a group of early reflections on this phenomenon of restorative justice.³ In this widely cited text, Howard Zehr (co-author of this chapter) sets forth a 'new focus for crime and justice' and invites readers to consider restorative measures rather than retributive ones. He proposes that the current justice paradigm (at least in the West) is preoccupied with identifying the wrongdoer, affixing blame and dispensing an appropriate punishment or pain to the offender.⁴ The system, as any organized activity, engages specific people in the pursuit of justice. Police officers are employed to investigate crime, apprehend wrongdoers, interview witnesses, collect evidence and so on. In the trial phase – affixing blame – prosecutors assume the role of victim and craft a case to present the evidence linking the accused to the particular crime. Other lawyers will speak on behalf of the accused and defend them against the charges brought. Crime victims may be invited to testify if the prosecution believes that their testimony will assist the prosecution case. A judge or jury will hear both sides of the story during the trial. If the offender is found guilty, a sentence proceeding will dictate a proportional punishment of prison time, community service, probation or a fine.

In this generalized scenario of criminal wrongdoing, one might ask, 'Who is engaged?' as well as 'How are they engaged?' Certainly members of the justice system serve a prominent role in the process, from the first arresting police officer to the probation officer. The offender will appear marginally and will rarely speak on his or her own behalf, unless called to testify. The views of offenders, and the story they would tell about the particular wrongdoing or crime, are almost always filtered by legal professionals through the

vocabulary of law and the grammar of relevant statutes. Representation by proxy is the standard, and those who decline counsel and choose to act in their own defence are deemed unwise. The focus of the process is on establishing guilt, and the state has the burden of proof. Moreover, the concept of guilt is highly technical. For these reasons, offenders are often inclined to deny responsibility and the degree of engagement is usually passive or oppositional.

Most glaringly absent from this process are the victims. Since the state is declared the victim in criminal cases, victims are often almost entirely excluded from the process except when needed for testimony. Victim impact statements in some jurisdictions do allow input. However, victims generally are unable to control – and indeed are not informed about – the use to which their statement will be put. More generally, there tends to be a lack of clarity about the relevance of victim impact statements in a process oriented towards retributive justice. Due to the success of the victims' rights/services movement in the past decades (especially in the USA and the UK), victims have been able to obtain increased information, services and rights in many areas. Nevertheless, the fundamental definition of crime – an offence against the state – continues to limit meaningful involvement of victims.

In addition, it is the exception rather than the rule that the community is meaningfully involved in the justice process. While the state occasionally sends a message to the community about a wrongdoing, typically through the media in periodic press statements on progress of the case or rationales for pressing charges, the community rarely has the opportunity to participate directly in the justice-seeking deliberations.

The question of who is engaged in a justice event points to the deeper, sometimes more unsettling, question: 'Whose interests and needs are valued in the process of seeking justice?' If one reviews the above scenario, it is clear from the number of state representatives present that the state interest is paramount. As the ostensible custodian of social order, the state's duty is to denounce the wrong, ensure that the offender receives the 'hard treatment' he or she deserves and take steps to assure that no further harm will be committed. The state carries out this duty by discovering the source of wrongdoing (the offender), condemning the act and extracting assurances that the offences will desist, either through imprisonment, monitoring, treatment or reform. Much of this is done in the name of the larger or macro-community, but rarely is the community actually consulted or involved in any meaningful way.⁵ Moreover, the reality that the individual victims are sidelined indicates that their needs and roles have not found a comfortable place in the architecture of justice.

It would seem reasonable to assume that those most affected by wrongdoing should be the ones engaged and empowered to assist in seeking justice; indeed, the restorative justice field has argued that engagement is crucial to meeting the needs of both victims and offenders and to holding offenders accountable. As we have seen of the current justice system, those who have been directly harmed are excluded. As a result, many people – victims in particular – find some of our justice forms and processes bewildering. For

instance, with regard to the legal practice of designating criminal cases as 'The Queen versus [the offender]', one Canadian victim's strong reaction was: 'The charges were pressed in the name of the Queen, her Crown and dignity, and I was just a witness. I didn't like that bullshit – this happened to me. It didn't happen to the fucking Queen!' (Zehr 2001: 144).⁶ On the other hand, many victims say that if they are included at all in the justice system, they typically experience further harm and disempowerment. Judith Lewis Herman, a specialist in the field of trauma, writes: 'If one set out to design a system for provoking intrusive post-traumatic symptoms, one could not do better than a court of law' (1992: 72).

Yet restorative justice advocates argue that some of the victims' most critical needs cannot be met without genuine engagement and empowerment; these include the need to tell one's story and to obtain authentic information related to the case. A victim may wish to know: why was my loved one hurt? What were his or her final words? Where are the items that were stolen from me? Why were we specifically targeted? Such questions as well as their need for assurance of safety are not particularly relevant to the finding of guilt in a courtroom. They may want to ask: is my home safe now? Who will be on the lookout for my well-being? Besides these practical and physical concerns, one aspect of trauma of crime is that the offence and the offender take away power over one's emotional life. A critical need, then, is for an experience of empowerment.

At least in principle, offenders do have their legal interests represented in that a lawyer may defend them against the case presented by the prosecution. However, offenders will usually lack the power or the encouragement to take full responsibility for their wrongdoing, even if they wish to. While there may be an opportunity to enter a formal plea of no contest or guilt, there is rarely a place or time to apologize meaningfully and there are few mechanisms to make direct amends to the victims. As defined by restorative justice, accountability would encourage offenders to develop understanding of their offence and empathy for the victim, and then take active steps to right the wrong, symbolically or practically. In fact, some argue that real accountability would encourage offenders to have some responsibility in deciding what is needed as an adequate outcome. Clearly the Western legal system does not leave much room for such gestures.

Finally, the absence of an assigned place for the community, both micro- and macro-, in justice proceedings means that it also lacks a full measure of power to serve the victim and offender, to find reassurances of its own well-being or to explore the social and moral issues highlighted by the situation. Of course civic-minded individuals in the community may come to the aid of both victim and offender in significant ways. Neighbourhood Watch programmes can extend a helping hand to someone who has been robbed. A prison ministry may assign a pastor to visit the offender. These moves are important indications of a resilient community where connections between people are valued and cultivated. Yet only in the most exceptional cases is there a place for systematic or institutionalized responses by either micro- or macro-communities to victims and offenders after wrongdoing.