# New Directions in Restorative Justice

Issues, practice, evaluation

Edited by

**Elizabeth Elliott** and
**Robert M. Gordon**

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# Contents

# Notes on contributors

**John Boersig** is the Assistant Secretary, Indigenous Law and Justice Branch in the Commonwealth Attorney-General's Department, Canberra. Prior to taking this appointment he was a Senior Lecturer in the Faculty of Law, University of Newcastle, New South Wales. His research work there focused on clinical legal education and indigenous legal aid policy; his current research interest is in the relationship between restorative and indigenous justice. Over the past 20 years he has worked closely with many indigenous organisations, particularly Aboriginal Legal Aid services, as a lawyer and in policy development. Until recently he was also a part-time presiding member of the Guardianship Tribunal of New South Wales.

**Serge Charbonneau** is the co-ordinator of the Regroupement des organismes de justice alternative du Québec (Courrier électronique: scharbonneau@rojaq.q.c.ca). Holder of a master's degree in Criminology, he is particularly interested in questions related to restorative justice and mediation. He is currently working in developing a program on citizen-driven mediation and conflict resolution, and he is involved in mediations between offenders and victims of serious crimes.

**Don Clairmont** is Professor Emeritus and Director of the Atlantic Institute of Criminology at Dalhousie University. His research has always focused on social problems and social policy and, more particularly in recent years, on social movements and the justice system. He has published extensively on native justice issues and race/ethnic patterns in the criminal justice system. He has been the official evaluator of the Nova Scotia Restorative Justice Program over the past four years. Current research projects deal with restorative justice, native justice and the problem-solving court, linked by underlying philosophical and organizational commonalities.

**Bob Cormier** has a PhD in Psychology and has 30 years of experience in the field of criminal justice. He began his career as a psychologist at Kingston Penitentiary, and has occupied various positions in research, program development and policy at Public Safety and Emergency Preparedness Canada (formerly Solicitor-General Canada) since moving to Ottawa in 1982. His current position is Senior Director, Research and Community Development. He was also a member of the Canadian Delegation at the 8th (1990), 9th (1995), and 10th (2000) UN Congresses on the Prevention of Crime and the Treatment of Offenders.

**Kathleen Daly** is Professor of Criminology and Criminal Justice at Griffith University, Queensland. She writes on gender, race, crime and justice; and on restorative justice and indigenous justice. Her book, *Gender, Crime and Punishment* (1994) received the Michael Hindelang award from the American Society of Criminology. From 1998 to 2004, she received three major Australian Research Council grants to direct a program of research on restorative justice and the race and gender policies of new justice practices in Australia, New Zealand and Canada. She is Vice-president of the Australian and New Zealand Society of Criminology.

**Arlene Groh (**RN, BA) has been a Case Manager for the Home Care Program/Community Care Access Centre since 1990 with experience in both hospital and community settings. She was the Coordinator of the Restorative Justice Approaches to Elder Abuse Project (2000–2004). Currently she is the Elder Abuse/Restorative Justice Resource Consultant for the Elder Abuse Response Team; she is also a board member for Victim Services of Waterloo Region and for Focus for Ethnic Women.

**Dave Gustafson** (MA, RCC) is the founding and Co-Director of Fraser Region Community Justice Initiatives Association (CJI) in Langley, B.C. CJI specializes in training, program development, conferencing and victim–offender mediation across the spectrum from minor schools

conflicts to the most serious offences in the Canadian criminal code. Dave is Adjunct Professor in the School of Criminology at Simon Fraser University, Burnaby, British Columbia, where he teaches upper level courses on peace and justice-making theory, restorative models and practices; he also maintains a small psychotherapeutic private practice specializing in trauma recovery and is a doctoral candidate (KLU, Leuven, Belgium).

**Gabrielle Maxwell** is currently a Senior Associate in the Institute of Policy Studies and was previously Director of the Crime and Justice Research Centre at Victoria University Wellington, Senior Researcher at the Office of the Commissioner for Children and a Senior Lecturer in Psychology at University of Otago. Her current research focuses on youth justice, restorative justice, and family violence.

**Brenda Morrison** is a research fellow at the Centre for Restorative Justice, Research School of Social Science, Australian National University. She is currently seconded to the University of Pennsylvania, where she is working on developing restorative justice initiatives in schools in Philadelphia. Her primary interests are the development of restorative justice in schools and the psychology of restorative justice, specifically the process of shame management and identity management.

**Melissa Ouelette** has experience in the field of restorative justice including a work term in a victim–offender mediation program in Sheffield, England as part of an exchange she participated in while completing her Bachelor's degree at Simon Fraser University in Burnaby, BC. In addition, she co-ordinated a restorative justice program for youth in Vancouver, BC for three years. Most recently she completed a Master of Arts degree in the School of Criminology at Simon Fraser University. She is currently working as a research consultant for Indian Residential Schools Resolution Canada (IRSRC). ISRSC is a federal department that centralizes and focuses federal efforts on resolving claims associated with the legacy of the Indian Residential school system.

**Jonathan Rudin** is the Program Director at Aboriginal Legal Services of Toronto. He has written widely on restorative justice in general and aboriginal justice in particular. In particular he was commissioned to write for the Commission on Systemic Racism in the Criminal Justice System, the Ontario Legal Aid Review, the Royal Commission on Aboriginal Peoples and Ipperwash Inquiry into the Death of Dudley George.

**Tanya Rugge** has a BA in Law and an MA in Psychology. Currently, she is a doctoral candidate in Psychology at Carleton University, examining the impacts of restorative justice processes on participants. She joined the Corrections Research team of Public Safety and Emergency Preparedness Canada (formerly Solicitor-General Canada) in 1997 and is currently a Senior Research Officer. Over the past several years she has interviewed numerous offenders and victims, conducted risk assessments, worked clinically with female offenders and conducted research on recidivism, high-risk offenders, young offenders and Aboriginal corrections.

**Josephine Savarese** is an Assistant Professor in the Department of Justice Studies at the University of Regina, Saskatchewan, Canada and a practising member of the Saskatchewan Bar. She earned her LL.M from McGill University in Montreal. Her current research interests include the analysis of restorative sentencing from the perspective of gender and the implications of legal reforms on women receiving social assistance on the Canadian prairies.

**Inge Vanfraechem** is a researcher at the Research Group on Juvenile Criminology, at the Katholieke Universiteit Leuven (Belgium). She is chair of the Research Committee of the European Forum for Victim–Offender Mediation and Restorative Justice. She is a member of the COST-Action A 21 'Restorative Justice in Europe' and was partner in a Grotius project on 'Victim–Offender Mediation for Juveniles in Europe' (2002–2003). She is currently preparing a PhD on conferencing for juvenile delinquents.

**Lode Walgrave** is Emeritus Professor of Criminology at the Katholieke Universiteit Leuven (Belgium), and Director of the Research Group on Youth Criminology. He has also been the Chair of the International Network for Research on Restorative Justice for Juveniles. He has recently (co)edited or written several volumes, book chapters and articles on restorative justice.

**Howard Zehr** joined the graduate Centre for Justice and Peacebuilding (formerly the Conflict Transformation Program) at Eastern Mennonite University in 1996 as Professor of Sociology and Restorative Justice and is now Co-Director of the program. Prior to that he served for 19 years as Director of the Mennonite Central Committee US Office on Crime and Justice. He received his BA from Morehouse College (Atlanta, GA), his MA from the University of Chicago and his PhD from Rutgers University.

# Acknowledgements

The papers in this collection have been culled from the 6th International Conference on Restorative Justice, held in Vancouver, British Columbia, Canada on June 1–4, 2003. The authors would like to thank a number of people whose work through the Centre for Restorative Justice in the School of Criminology at Simon Fraser University made the conference a successful and useful event for practitioners, academics and government representatives. We first acknowledge the significant contributions of the Centre's coordinator, Meredith Egan, who in addition to the regular responsibilities of developing and operating the Centre, assumed a large bulk of the conference organizing workload. We particularly appreciate the manner in which she maintained a balance or 'head and heart' in all of her work, while modelling the values and principles of restorative justice for everyone involved in the planning and hosting of the conference.

We also recognize the work of the individuals on the conference steering committee, of which the authors were also members. The committee included: Dianne Brown, Ray Corrado, David Gustafson, Margaret Jackson, John Konrad, Neil Madu, Kay Medland, Margit Nance, Andrea Rolls, Penny Southby, Vince Stancato, and Jeff Wiebe. The steering committee members dedicated many hours to the event's planning and fundraising. The conference also benefited from the work of several students in the School of Criminology, who were involved in myriad preparations and provided hands-on support during and after the

## Introduction

# Restorative justice and best practices

*Elizabeth Elliott and Robert M. Gordon*

In the past 30 years, the beliefs and practices that together have become known as 'restorative justice' have re-energised the research and policy dialogues in the fields of criminology and public policy. Understood in various ways and on different terrains, restorative justice is found in practices as diverse as criminal justice system diversion programmes and other alternative measures, and in conflict resolution strategies addressing both school discipline issues and changes in school culture aimed at reducing conflict. Restorative justice has been seen both as a guiding philosophy for the practices of making and keeping peace in communities, and as a set of practices that provoke philosophical reflection about the meaning of key concepts such as 'justice' itself. These variants, among others, mark the journey of exploration that has affected thoughts, beliefs and practices in restorative justice.

Restorative justice has been described as 'one of the few big ideas in criminal justice', 'an important movement with huge benefits' and 'a genuine and powerful new idea about justice and crime'.[1] With only a few years of accumulated history, restorative justice is an idea that has found expression in various practices. Ongoing dialogue about the manner of this expression encompasses a spectrum of perspectives that speak to the relative consonance of practice with restorative justice philosophy. Howard Zehr notes that restorative justice 'is a kind of coherent value system that gives us a vision of the good, how we want to be together' (in Coben and Harley, 2004: 268). Embedded in this description is the

reminder that restorative practices will ideally embody and reflect the core values espoused in the ideas that inform them (Elliott, 2002).

Since the first implementation of victim–offender mediation in Elmira, Ontario in 1974,[2] restorative justice has been primarily associated with the realm of criminal justice. In Canada, victim–offender mediation was first characterised as an alternative to incarceration rather than as 'restorative justice',[3] which was then seen as restitution within the existing, formal, criminal justice system. Nils Christie (1977) was to expand this notion of 'restoration' through the idea that conflicts were 'property' stolen from their 'owners' by 'professionals', and that the significant losses incurred by this 'theft' were the learning and human development opportunities afforded to 'property owners' by inclusive conflict resolution practices. This opening of a socio-cultural development dimension to restoration also created interesting questions for 'justice' as an almost exclusively legal concept. The result has been a continuing exploration of the challenges posed by both the coexistence and conflation of restorative justice practices and the criminal justice system, and the potential co-optation of the former by the latter.

In the 1980s, the 'alternatives to incarceration'[4] perspective coincided with the emergence of a victims' rights movement that challenged the capacity of the criminal justice system to respond to the needs of victims. By the end of the 1980s, the concerns of these two groups became, at least in part, conflated in the perspective that came to be known as restorative justice. In New Zealand, in 1989, the passage of the Children, Young Persons and their Families Act marked the first legislative attempt to implement restorative justice practices in child welfare and youth justice policy through family group conferences (Hassall, 1996). Later, in 1991, in Wagga Wagga, Australia, the New South Wales police implemented a variation of the New Zealand model that focused upon 'reintegrative shaming' and used a scripted method (Crawford and Newburn, 2003).

Meanwhile, in Canada, pioneering efforts in British Columbia in the early 1990s were focused upon the use of restorative justice, post-sentence, in cases of serious crime.[5] In the mid-1990s, in Sparwood, BC, the Royal Canadian Mounted Police began to implement conferencing using the Wagga Wagga approach in a model that has become known as 'community justice forums' (Chatterjee and Elliott, 2003). Simultaneously, in the Canadian North, attempts by the formal court system to facilitate justice processes that were more culturally sensitive to Aboriginal communities resulted in a hybrid model known as 'circle sentencing' (Stuart, 1996).

The interest in circles has moved beyond the confines of criminal justice to other areas of peacemaking and dialogue (Elliott, 2004a), both inside

and outside Aboriginal communities. In New Zealand, Canada and the United States,[6] Aboriginal perspectives on justice have influenced, to varying degrees, the practices of restorative justice. By the early 2000s, restorative justice philosophy and practice was being referenced in Supreme Court of Canada decisions,[7] and reflected in key provisions of the new, federal Youth Criminal Justice Act 2003 (Elliott, 2004b).

After many years of theorising and practice, several conferences have examined the state of restorative justice and how it has delivered on its promises. In 2003, Simon Fraser University's Centre for Restorative Justice[8] hosted a conference – the 6th International Conference on Restorative Justice – in Vancouver, BC, which brought together practitioners and researchers to engage in dialogue on various themes selected for their resonance and controversy. These themes included youth, Aboriginal justice, victimisation and evaluation, and the chapters in this book are a compendium of ideas and research on these topics.[9]

The authors of the chapters represent a number of approaches to understanding restorative justice and include the views of practitioners, theorists and researchers. In many cases, the authors wear more than one hat. The voices of practitioners offer the wisdom of experience and reveal the subtle nuances of restorative practices, as expressed in the chapters by Serge Charbonneau, Jonathan Rudin, Arlene Groh, Melissa Ouellette and David Gustafson. Theoretical insights are also offered in different topic areas, particularly in the perspectives of Lode Walgrave, John Boersig, Josephine Savarese and Howard Zehr. Evidence from empirical research studies is provided in the chapters by Brenda Morrison, Gabrielle Maxwell, Kathleen Daly, Don Clairmont, Tanya Rugge and Robert Cormier, and Inge Vanfraechem.

The first modern renditions of restorative justice were generated within the realm of child welfare and youth justice. The focus on youth has been particularly profound over the years, notably since the late 1980s. Since youth are generally seen as a more promising group for diversion and for other alternatives to the formal criminal justice system, this is not surprising. It follows that most of the research on restorative practices has also been focused upon youth and Part 1 of this book covers four aspects of restorative justice involving young people.

Lode Walgrave begins with an examination of the potential, and the limitations, of the restorative approach for renovating youth justice in 'Towards restoration as the mainstream in youth justice' (Chapter 1). He describes the pressures on rehabilitative juvenile justice to deliver both punishment and lowered recidivism rates, contrasting this to the potential of restorative justice to meet the needs of both victims and offenders leading to greater satisfaction with justice goals. In line with many practitioners and researchers, Walgrave notes that future challenges lie in

the dialectical process of addressing the tensions that are produced when implementing participatory, *informal* dialogical restorative processes within a *formal* legal system. Given this, he notes that the work ahead requires the development of good practice in consonance with sound normative and explanatory theory in restorative justice.

Commonly encountered in the domain of criminal justice, restorative justice has also made significant inroads into the realm of public education. Conventional disciplinary methods, coupled with a trend towards 'zero tolerance' policies on violence in schools, have not yielded the results anticipated in creating safe school environments. Brenda Morrison, in 'Restorative justice in schools' (Chapter 2), presents a framework for developing safe school communities using John Braithwaite's notion of responsive regulation, coupled with a focus on shame and identity management in addressing school bullying. Youth interventions based upon restorative principles are presented in the school context, in the implementation of preventative practices of building inclusive communities, and attending to smaller concerns and conflicts before they mushroom into serious incidents of violence. Morrison then offers a regulatory framework within which to place a range of interventions for youth in the school setting. The significance of this work may well be in the unspoken benefits of shifting the attitudes of youth about both peaceful conflict resolution and ways of being with each other, cultivating a more pervasive, normative awareness of restorative philosophy in the institutions of both schools and criminal justice for future generations.

One of the more seasoned researchers in the area of restorative justice and youth is Gabrielle Maxwell, who offers another significant contribution to the literature in 'Achieving effective outcomes in youth justice: implications of new research for principles, policy and practice' (Chapter 3). This chapter presents the findings of a three-year follow-up study in New Zealand involving 520 interview subjects who had participated in youth conferences between 1998 and 2001/2002. Maxwell notes that the results of this research 'are a strong validation of restorative justice theory; repair, reintegration, fairness and respect, participation and empowerment, and forgiveness are key elements in effective outcomes while punitive and restrictive sanctions and stigmatic shaming are counterproductive.' Her discussion reminds us of the importance of bringing core values of restorative justice to life in the practices employed to address youth offending. The research results also point to the perennially overlooked issue of harm prevention through a supportive and healthy rearing of children, something often missing in the lives of youth who later reoffend as adults.

The last contribution in Part 1 is by Serge Charbonneau. He examines the implications of Canada's new youth justice legislation from the perspective of practitioners in Chapter 4: 'The Canadian Youth Criminal Justice Act 2003: A step forward for advocates of restorative justice?' Charbonneau's analysis elevates concerns often raised about the bureaucratisation and professionalisation of restorative justice when communities and instruments of governance are expected to collaborate on matters of common interest. While restorative justice is not mentioned per se in the Youth Criminal Justice Act, it is clear that the Act is informed by existing restorative principles and practices. However, concerns are raised about other provisions of the Act that contradict the restorative perspective, particularly the raising of youth offenders to adult courts, with the prospect of concomitant adult punishments.

Part 2 of this collection focuses upon Aboriginal justice, another significant and influential stream in restorative justice philosophy and practice. The influence comes from at least two sources. First is the now widespread recognition that Aboriginal peoples around the world are over-represented in the courtrooms and prison populations of retributive justice systems. Second, Aboriginal traditions in peacemaking have much to offer restorative justice, particularly in shifting ways of understanding conflict and community through a deeply rooted orientation to relationships and holistic responses to harm. While Maori and North American Indian observers of restorative justice have many valid criticisms and queries to level at restorative justice for the partial and often distorted appropriations of their cultural traditions, the impact of Aboriginal ways on many renditions of restorative justice is significant.

Jonathan Rudin begins this part with his thoughtful discussion of the need for Aboriginal autonomy in 'Aboriginal justice and restorative justice' (Chapter 5). Here the discussion hinges on the impact of restorative justice on Aboriginal justice in Canada, as part of the continuum of problems generated within Aboriginal communities, post colonialism. Based upon his experiences with Aboriginal Legal Services of Toronto, Rudin notes that the integral component of community building in Aboriginal justice makes it difficult for Aboriginal organisations to respond meaningfully to the demands of criminal justice-based restorative initiatives. Rudin points to the three systemic problems of unrealistic timeframes for the set-up and implementation of programmes, the effects of elite accommodation within criminal justice that work against Aboriginal initiatives, and the difficulty of funding projects with needs that traverse many different government jurisdictions and mandates. The way forward, he argues, is for government funding agencies and justice personnel to relinquish some control over Aboriginal justice programmes

and to recognise the need for Aboriginal communities to develop and control their own initiatives.

Writing from an Australian perspective, John Boersig addresses the over-representation of indigenous youth in the formal criminal justice system, a familiar issue in North America. In Chapter 6, 'Indigenous youth and the criminal justice system in Australia', Boersig writes from the basis of postcolonial theory, and highlights the symbiotic relationship between law and colonialism in the disproportionate criminalisation of indigenous peoples. He argues that the orthodox approach of sentencing juvenile offenders has failed to accommodate the holistic, child-centred focus of indigenous cultures, the purpose of which 'is to engender happy children'. The potential of restorative justice to remedy this situation hinges on the ability of restorative processes to alter the relationships of power based upon race. Like Rudin, Boersig concludes 'if restorative justice does provide a pathway to justice then it must be an initiative embraced and controlled by indigenous people.'

The final chapter in Part 2 addresses one of the key Supreme Court of Canada decisions invoking restorative justice in the context of Aboriginal peoples. In *R. v. Gladue*, the court endorsed sentencing alternatives that reflect the unique circumstances of Aboriginal offenders, a decision that has been seen as judicial support for restorative justice generally. Josephine Savarese, however, argues in 'Gladue was a woman: the importance of gender in restorative-based sentencing' (Chapter 7) that since the appellant is a woman the court could have expanded the sentencing directives in the decision to include factors unique to Aboriginal women. Within the formal criminal justice system, Aboriginal women are disadvantaged both as women and Aboriginals. Savarese traces the decisions in other Canadian cases involving race and gender, and argues that for restorative justice to work for Aboriginal women a strong focus on more equitable social policies is necessary.

One of the key strengths of restorative justice is the locating of the victim, at least theoretically, in the centre of justice processes. The ability of restorative processes to remain true to this tenet, however, is challenged and often compromised by the offender-focus of retributive justice systems. In Part 3, the topic of victimisation in restorative justice is raised and the chapters address different aspects of victimisation that are illuminated by the tension between restorative and retributive approaches. Voluntariness and vulnerability are two main themes in this part. Questions still remain about the role of victims in criminal cases where restorative processes are subjugated to the demands of formal justice. Simultaneously, other questions are raised around the vulnerability of both victims and offenders created by dialogical

restorative processes where information that is shared might result in legal interventions that are not wanted by the parties involved.

Kathleen Daly begins this part with her examination of two restorative justice studies and the implications for victims. In this comparison, she reveals the complexity of victim involvement and the hazards of a 'one size fits all' expectation of victim satisfaction. 'A tale of two studies: restorative justice from a victim's perspective' (Chapter 8) demonstrates that while the courts have a limited ability to vindicate the concerns of victims, restorative conferencing is limited by the individual victim's capacity to engage in meaningful communication with the offender. In the latter instance, Daly notes that meaningful victim involvement is enhanced when victims are less distressed in the aftermath of the harm they have experienced. In the second study, which focused on sexual assault cases, victims reported more favourable experiences in conferences than in courts. The findings of these studies challenge practitioners and researchers to consider the nuances of human engagement from the victim's perspective in the responses to crime and other harms.

Another aspect of victim voluntariness is considered by Arlene Groh in 'Restorative justice: a healing approach to elder abuse' (Chapter 9). Groh's work with older adults was the experiential foundation for the development of an innovative project in Waterloo, Ontario where restorative justice processes are used to address abuses of the elderly by their caregivers. These cases often fall into the realm of the 'dark figure' of crime: crimes that go unreported to the criminal justice system. Abuses that are reported may be discounted by the authorities, and even if they are not discounted there may be no effective remedies for victims. The chapter highlights the evolution of the project, and how the attention on relationships and justice in circle processes help to meet the needs of elderly victims in a manner that does not cause them further harm.

The topic of restorative justice in cases of serious crime is the focus of Chapter 10, 'Exploring treatment and trauma recovery implications of facilitating victim–offender encounters in crimes of severe violence: lessons from the Canadian experience'. The author, David L. Gustafson, is a practitioner who developed, with a colleague, a restorative process designed to address the needs of victims and offenders in cases of serious violence where both parties wanted to work towards a mediated encounter. In this chapter, the focus is upon the success of this work with victims, which is attributed to the attention paid in the programme to the symptoms of post-traumatic stress syndrome. A case study is presented that illustrates the effects of post-sentence interventions guided by a healing, supportive practice that attends to the participants as survivors of trauma. Evaluations of this approach have demonstrated 'unanimous

support' from both victim and offender participants, each of whom have participated on a voluntary basis. The implications of this work for criminal justice as a whole are significant, and suggest many avenues for policy and practice research.

The last chapter in Part 3 offers insight into a dimension of restorative justice processes that is often not considered: the legal claims of indirect victim stakeholders. In 'The involvement of insurance companies in restorative processes' (Chapter 11), Melissa Ouellette examines the involvement of insurance companies as stakeholders in restorative processes, particularly in cases of potential civil litigation. Motor vehicle accidents figure prominently in these cases, along with personal injury claims. As non-legislated restorative processes generally require an accused person to accept some measure of responsibility for the harm caused as a condition of participation, the person is put in a position of culpability and liability when participating in restorative processes. Ouellette considers the options for involving insurance companies in restorative processes, and suggests that this issue provokes questions for restorative justice practitioners about who the stakeholders in restorative processes are and how they should be involved.

Finally, and perhaps appropriately, the theme of evaluation and restorative justice is the focus of Part 4. Many years ago, Thorsten Sellin[10] commented that 'beautiful theories have a way of turning into ugly practices' (in Cullen and Gilbert, 1982: 152). More recently, and specifically on the topic, Crawford (2002) has expressed concern that restorative justice literature is much like 'butterfly collecting', where 'the examples sought are "pretty" or "exotic" ones that seek to illustrate the case for restorative justice, rather than engage with the less attractive aspects of social arrangement and human relations' (Crawford, 2002: 111). If restorative justice is to gain further credibility, especially among the sceptics, it also must be accountable as a theory and as a practice. It must display coherence and demonstrate its effectiveness in achieving its objectives. To this end, a number of authors have offered empirical and theoretical contributions that suggest both ways of evaluating restorative justice and future challenges for the area.

Part 4 begins with Don Clairmont's analysis of the Nova Scotia Restorative Justice Initiative in 'Penetrating the walls: implementing a system-wide restorative justice approach in the justice system' (Chapter 12). This chapter follows the implementation of an ambitious initiative to operationalise restorative justice throughout the justice system of one Canadian province. Initial consultations with non-profit agencies and justice system leaders revealed that despite other best-case scenarios, restorative justice would still encounter two walls of resistance: uncertain

collaboration with criminal justice system personnel, and wariness on the part of victims and their advocates. With these walls in mind, Clairmont provides some outcomes of the data analysis generated to date, and highlights several process issues that demonstrate both successes and quandries for restorative justice programmes within a system-wide implementation strategy.

On a smaller scale, an evaluation of one programme – the Collaborative Justice Project (CJP) in Ottawa, Ontario – is the focus of Chapter 13: 'Restorative justice in cases of serious crime: an evaluation'. This chapter, by federal government researchers Tanya Rugge and Robert Cormier, examines the research into the effectiveness of a specific court-based restorative justice programme and provides an analysis of the results of participant interviews together with a one-year follow-up review of the criminal histories of the offenders. The CJP works with cases of serious crime for which a period of incarceration of two years or more is possible, at the post-plea (guilty), pre-sentence stage of the formal criminal justice process. As such, it is a good example of restorative justice at work within the conventional system. Rugge and Cormier conclude that over three-quarters of both victims and offenders indicated that their needs had been met by the project and almost all of them noted that they would choose restorative justice over the more conventional process in the future.

Another single project evaluation addressing serious crime is the focus of Chapter 14: 'Evaluating conferencing for serious juvenile offenders' by Inge Vanfraechem. In this chapter a conferencing project in Belgium is examined to determine the satisfaction levels of participants, the involvement of participant support networks and recidivism rates. The process model of conferencing is reviewed, noting that the presence of criminal justice professionals – particularly police and defence lawyers – is not unusual for the project. Vanfraechem then presents the results of action-research that examined both 58 juvenile files and the views of victims and practitioners. The evidence suggests that only about one half of victims attend these conferences, that only a few of these victims know about victims' assistance services generally, that a single conference for co-offenders is better for process integrity than separate conferences, and that recidivism rates are lower for young offenders who participate in the project.

A fitting conclusion to the book is provided by Howard Zehr, a long-standing and respected contributor to restorative justice theory and practice. Zehr extends his typical curiosity into the realm of evaluation, carrying with him many years of work with both victims and offenders. 'Evaluation and restorative justice principles' (Chapter 15) addresses several general issues and concerns with restorative justice theory and

practice, from the perspective that evaluation is an element of restorative justice accountability. Zehr identifies four critical issues that speak to the need for continuing evaluation: formal methods using transformative guidelines; the conscious and structured accountability of board and committee inclusion; regular dialogue with various sectors; and the conscientious checking of restorative processes to ensure principled practice. Consistent with these concerns, he concludes: 'Restorative justice is above all about respect for all, and that such respect requires humility … Only if we are grounded in respect and humility can we prevent the restorative approach to justice that seems so liberating to us from becoming a burden or even a weapon to be used against others, as has happened so often with the reforms of the past.' We could not have said it better.

## Notes

1  Taken from Butler (2004a). Respectively, the authors of these statements are David Daubney (Co-ordinator of the sentencing review team at the Department of Justice, Canada), Julian Roberts (Department of Criminology, University of Ottawa) and Kent Roach (Faculty of Law, University of Toronto).

2  The Victim–Offender Reconciliation Program (VORP) was the creation of Mark Yantzi and David Worth of the Mennonite Central Committee in Ontario, Canada. The case that catalysed the development of VORP involved two young men who went on a drunken spree and vandalised 22 properties; they agreed to meet with the property owners to apologise and make reparations. See Zehr (1990) and Butler (2004b).

3  The term 'restorative justice' was first coined by Albert Eglash (Llewellyn and Howse, 1999: 4) in the specific context of restitution (Eglash, 1977).

4  Alternatives to incarceration were motivated not only by a larger de-institutionalisation movement in the 1970s and 1980s, but by a penal abolition initiative that challenged the punitive mandate of formal justice responses to crime.

5  Fraser Region Community Justice Initiatives, in Langley, British Columbia, had been offering the VORP program as an alternative measure since 1982. In the early 1990s, Co-Directors Dave Gustafson and Sandi Bergen began offering similar services post-sentence to people involved in cases of serious harm, such as violent sexual assault, robbery and homicide. See Chapter 10 in this book.

6  In the US, Navajo traditions underpin community peacemaking courts (Navajo Peacemaker Courts) that have been in operation since 1982. See Yazzie and Zion (1996).

7  See, for examples, *R* v. *Gladue* [1999] 1 SCR 688; *R* v. *Proulx* [2000] 1 SCR 61, 2000 SCC 5.

8  Centre for Restorative Justice, School of Criminology, Simon Fraser University, 8888 University Drive, Burnaby, British Columbia, Canada V5A 1S6. Also at www.sfu.ca/crj.
9  The 6th International Conference on Restorative Justice was held in Vancouver, 1–4 June 2003. For further information on the conference check the Centre for Restorative Justice (School of Criminology, Simon Fraser University) website at www.sfu.ca/crj.
10 Sellin is recognised for producing seminal theoretical work on culture conflict: *Culture, Conflict, and Crime* (1938).

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**Part I**

# Youth and Restorative Justice

# Chapter 1

# Towards restoration as the mainstream in youth justice

*Lode Walgrave*

**Abstract**

Youth justice systems all over the world have been under pressure because of an ongoing debate about balancing treatment and punishment in the response to youth crime. The discussion seemed to be repetitive and dead-locked until the emergence of restorative justice opened new possibilities. Restorative justice increasingly appears to be a source of renovating practices and empirical evaluation, a central issue in theoretical and policy debates, and a ubiquitous theme in juvenile justice and criminal justice reforms worldwide. Restorative practices are being inserted into most crime response systems, especially those aimed at youth crime. In this chapter, both the potential and the limits of restorative justice for renovating juvenile justice are explored. In the first section, the essentials of restorative justice are presented. The second section asks which criticisms make a fundamental reform of juvenile justice systems necessary. The third section combines both issues and examines whether the restorative approach can respond satisfactorily to the criticisms. The final section reflects upon the conditions on which the further incorporation of restorative ideas into juvenile justice systems will depend.

**Restorative justice**

Restorative justice is rooted in multiple origins, such as victims' movements, communitarianism and critical criminology (Van Ness and Strong, 2002). It now appears as a complex domain covering a wide realm of practices, a challenging subject for legal and normative reflection and debate, and a fruitful field for theorising and empirical research. Restorative justice also is a social movement and a field of social science experimentation. Adding to the confusion are apparently similar visions that appear under banners such as 'transformative justice', 'relational justice', 'community justice' and 'peacemaking justice'. In this chapter, restorative justice is characterised as an option for doing justice that is primarily focused on repairing the harm that has been caused by a crime.

*Outcome-based definition*

This definition is clearly outcome-based. Probably most 'restorativists' prefer a process-based definition (Zehr, 1990; McCold, 2004). Well-conducted restorative processes indeed offer a powerful sequence of social and moral emotions like shame, guilt, remorse, empathy, compassion, support, apology and forgiveness in the offender, the victim and other participants (Braithwaite and Mugford, 1994; Maxwell and Morris, 1999; Harris, Walgrave and Braithwaite, 2004). Restorative justice may favour a common understanding of the harm and suffering caused, and an agreement on how to make amends; it may enhance the willingness of the offender to fulfil these agreements. It may produce satisfaction on the part of the victim, reintegration of the offender and restored assurances of rights and freedoms in society. Such a sequence is the ideal, which is often far from being fully achieved.

However important such processes may be, associating restorative justice with them is perhaps going one step too far. Why are such processes more restorative: because the expressions of remorse, compassion, apology, and forgiveness promote respect, peace and satisfaction? These feelings are outcomes. Voluntary processes are valued, not because of the process as such, but because of their possible restorative impact on the participants and the reparative outcomes they help to achieve. One cannot evaluate restorative processes without taking account of the restorative outcomes they explicitly or implicitly promote. Process-based definitions confuse the means with the goal and limit the possible means to achieve (partial) restoration.

Arguably, restorative justice must give maximal priority to such voluntary, deliberative processes, but restorative justice does not end when they are not possible. When voluntary processes cannot be achieved

or are judged to be insufficient, pressure or force must be considered. These coercive interventions also should serve restoration (Wright, 1996; Walgrave, 2002a; Dignan, 2002). Possible judicial procedures should be oriented to enforce obligations or sanctions in view of (partial) reparation through, for example, material restitution or compensation to the victim, paying a fine to a victims' fund, or community service. Such sanctions can have an explicit reparative meaning, though their restorative impact will be reduced. Restorations are not a black-and-white option. Between fully restorative processes and not-at-all-restorative reactions, degrees of restorativeness exist (Van Ness, 2002; McCold, 2000).

### Harm

A focus on repairing harm and not on what should be done to the offender is the key to understand restorative justice and to distinguishing it from both the punitive and the rehabilitative justice responses; that is why it is another paradigm (Zehr, 1990; Bazemore and Walgrave, 1999; McCold, 2000). It offers a distinctive 'lens', to use Zehr's term, to define the crime problem and how to solve it. Crime is defined by the harm it causes and not by its transgression of a legal order. Responses to crime should not, primarily, punish or rehabilitate the offender but set the conditions for repairing as much as possible the harm caused.

The harm considered for reparation includes all prejudices caused by the crime: the material damage; psychological and relational suffering by the victim; social unrest and community indignation; uncertainty about the legal order and about the authorities' capacities to assure public safety; and the social damage the offender causes to himself. The only limitation is that the harm considered by the restorative process must be caused by the particular offence. Social exclusion, for example, or psychological problems in the offender may cause the offending but are not caused by the offence. They should, therefore, not be included as primary objectives in the restorative justice process. However, not everyone accepts this limitation. Some believe that restorative processes must also address the underlying causes of offending as primary objectives. This would, how-ever, risk a shift from a harm-focused to an offender-focused programme, degrading the victim into being a tool in the service of the offender's rehabilitation and not respecting the victim as a party on his own. The problems and needs of the offender need to be addressed, but they are not the primary objective of the restoration.

Restorative justice deals with crimes, which are also public events traditionally dealt with by criminal law. This is one of the difficult issues to be resolved in restorative justice theorising. What makes an offence a collective or a public event? After a burglary, for example, restitution or

compensation for the individual victim's losses could be private, to be arranged through the civil law, but there is also a public side. We all are concerned that the authorities intervene and try to make things right. If the authorities did nothing, it would hurt all citizens' trust in their rights to privacy and to property. It has been proposed elsewhere (Walgrave, 2003) that the concept of 'dominion', first introduced by Braithwaite and Pettit (1990), be used to try to grasp the public aspect of crime in restorative terms.

### Restoration

Different processes may lead to restorative outcomes, but not all are equally appropriate. As mentioned above, the most suitable processes are those that consist of voluntary deliberation between the main stakeholders. Many deliberative processes are currently available (McCold, 2001; Morris and Maxwell, 2001): mediations between the individual victim and offender, most of which are face-to-face, but some of which are intermediated by a go-between; various forms of conferencing in which the victim and the offender are supported by their communities of care (some also include participation by police or community representatives); and sentencing circles, in which the local, indigenous community as a whole is a part of a meeting on the occasion of a crime in its midst.

Besides a healing impact on the participants, the formal agreement after such processes may include a wide range of actions such as restitution, compensation, reparation, reconciliation and apologies. They may be direct or indirect, concrete or symbolic, and the degree of the offender's willingness to undertake such actions is crucial. It expresses his or her understanding of the wrong committed and his or her willingness to make up for it. For the victim, it means the restoration of his or her citizenship as a bearer of rights, and possibly also a partial material redress. For the larger community, it contributes to assurances that the offender takes rights and freedoms seriously and will respect them in the future.

Deliberative processes hold the highest potential for achieving restoration, but if voluntary agreements cannot be accomplished, coercive obligations in pursuit of (partial) reparation must be included in the restorative justice model. Restorative sanctions, enforced by judicial procedures as a result of assessed accountability for the consequences of offending, seem to leave few or no differences between such sanctions and traditional punishments (Daly, 2000; McCold, 2000). There are, however, some essential differences (Walgrave, 2003).

First, punishment is a means in the eyes of law enforcement and it is morally neutral. It does not include any message about the moral value of

the enforced law itself. Some political regimes use punishment to enforce criticisable or even immoral laws. Restoration, on the other hand, is a goal and different means can be chosen to achieve it. The goal of restoration itself expresses an orientation toward the quality of peaceful social life, which is an intrinsic moral orientation.

Second, 'punishing someone consists of visiting a deprivation (hard treatment) on him, because he supposedly has committed a wrong' (Von Hirsch, 1993: 9). The pain is intentionally inflicted. An obligation to repair may be painful but is not inflicted with the intention to cause suffering; it may be a secondary effect only (Wright, 1996). Painfulness in punishment is the primary yardstick, while painfulness in restorative obligations is a secondary consideration only.

Third, the intentional infliction of pain 'involves actions that are generally considered to be morally wrong or evil were they not described and justified as punishments' (de Keijser, 2000: 7). The justifications in penal theories (Von Hirsch, 1998) do not convincingly demonstrate the need for systemic punishment. The a priori position that crime must be punished is itself dubious from an ethical standpoint. Thorough exploration is thus needed on alternative ways to express blame, to favour repentance and to promote social peace and order.

Restorative justice proponents advance their approach as being more promising. Deliberative processes, if possible, or obligations with a view to reparation, if necessary, are socially more constructive: they do not respond to crime-caused harm by inflicting further harm on the offender, but by aiming at the repair of the harm. When 'restorativists' consider imposing restoration this is ethically more acceptable than deliberately inflicting pain.

### Doing justice

Restorative justice is also about justice. Justice has two meanings here. On the one hand, justice refers to a feeling of equity, of being dealt with fairly, according to a moral balance of rights and wrongs, benefits and burdens. In retributive justice, this balance is achieved by imposing suffering on the offender that is commensurate with the social harm he or she caused by his or her crime. In restorative justice, the balance is restored by taking away, or compensating, the suffering and harm. Victims feel that their victimisation has been taken seriously and that the compensation and support are reasonably in balance with their sufferings and losses. Offenders feel that their dignity has not unnecessarily been hurt and are given the opportunity to make amends constructively. All participants, including the community, feel reassured that rights and freedoms are taken seriously by their fellow citizens and by the authorities.

The best way to guarantee that the losses are well understood and that the reparation is adequate is to leave the decision to those with a direct stake: victims, offenders and others who are directly affected. 'Justice' is what those concerned experience as such. However, the state cannot withdraw completely; if it did, it would leave the parties alone to find a solution. In a voluntary restorative deliberation, the state must be present at least in the background to ensure that the deliberation takes place and results in an acceptable outcome, to guarantee a power balance in the deliberation, and to provide an opportunity to the parties to leave the deliberative process and turn to the traditional judicial response if one of them feels that their interests are not adequately acknowledged. Authorities then demonstrate that they take the victim's and the offender's rights and freedoms seriously, and safeguard the collectively assured set of rights and freedoms.

### Legal justice

Justice also encompasses legality. Restorative justice means that the processes and their outcomes respect legal safeguards (Van Ness, 1996; Walgrave, 2002a; Dignan, 2002). Legal safeguards protect citizens against illegitimate intrusions by fellow citizens and by the state. This is obvious in coerced interventions, but it applies also in voluntary settlements. Participation may not be imposed. Agreements must be accepted by the parties and be reasonable in relation to the seriousness of the harm and to the parties' accountability and capacities. How to make sure rights are observed is a matter of debate among restorative justice proponents. Some rely fully on the potentials of communities. They fear the state's power to invade the process and undo its informal, humane and healing potentials. Others try to find a balanced social and institutional context, which allows maximum space for genuine deliberative processes but also offers full opportunities for all parties to appeal to judicial agencies if they do not feel respected in the process.

In a coercive procedure, all legal guarantees must be observed. A traditional criminal justice procedure offers safeguards such as legality, due process and proportionality, but it is not evident that these legal safeguards also apply unchanged in a system premised on restoration. The main function is different, the actors are partly different, and the social and judicial context is different. Contrary to the top-down approach of the traditional process, a restorative system should allow ample space for a bottom-up approach. Thinking about a legal context that combines maximum space for deliberative conflict resolution with complete legal safeguards is only a beginning (Braithwaite, 2002; Walgrave, 2002b; Von Hirsch et al., 2003). It is a crucial challenge for restorative justice development in the future.

**The rehabilitative juvenile justice model under pressure**

By the beginning of the twentiety century, most states and countries had developed jurisdictions and laws for children who committed offences (Mehlbye and Walgrave, 1998; Winterdyk, 2002). They focused more upon treatment or re-education of the young offender than on determining appropriate punishments for offences. Juvenile justice systems were seldom challenged until the end of the 1960s. By then, several forms of criticism were being advanced, which can be clustered under the following four headings.

*Doubtful effectiveness*

In juvenile justice it was believed that treatment-oriented courts could help endangered youths become conforming and useful citizens. Clinical and sociological research was undertaken in order to 'unravel' juvenile delinquency. Social work, educational programmes and clinical treatments sought to correct the deviant development of youthful offenders (Rothman, 1980). In the critical 1960s and 1970s, the courts and treatment programmes appeared to be biased by social and ideological prejudices to the disadvantage of the poor and ethnic minorities (Platt, 1969). Evaluations of treatments did not produce encouraging results (Sechrest, White and Brown, 1979). Indeed, some studies pointed to negative results, which were explained mostly through labelling theory. Diversion, however, led to net-widening and left court interventions untouched (Albrecht and Ludwig-Mayerhofer, 1995; McCord, Spatz Widom and Crowell, 2001).

Pessimism about treatment programmes has become more nuanced in the past two decades. A series of meta-evaluations suggest that under some conditions (notably proper staff training and expertise, and proper implementation and assessment), some programmes work (McGuire and Priestley, 1995; Lipsey and Wilson, 1998). It remains difficult, however, to generalise these conclusions. Firstly, the studies measure only quantifiable aspects of the interventions and seldom include context-oriented interventions, such as community building and its influences on social environment. Secondly, the evaluations mostly explore experiments in exceptionally optimal conditions. The step toward routine practices, in general, seriously reduces the gains of the evaluated programmes. Finally, the 'what works' analyses do not address ethical questions about the acceptability of lengthy and intensive restrictions of liberty, which often seem disproportionate to the modest seriousness of the offences committed, and which are of doubtful effectiveness.

Questions thus remain about the generalisability of treatments, about how far the judicial setting helps or hinders these programmes, and about how programmes can be combined with adequate legal safeguards. That