

Restorative justice: There is nothing new under the sun
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“There is nothing new under the sun but there are lots of old things we don't know.”

[Ambrose Bierce](#), *The Devil's Dictionary*
US author & satirist (1842 - 1914)

Introduction

National surveys show that the public's fear of crime is increasing. In 2006, 37 percent of Americans said there was an area within a mile of their home where they would be afraid to walk alone at night. This measure had peaked at 48 percent in 1982, then gradually fell to 30 percent in 2001 before beginning to go back up. Consistent with this trend in fear of crime, 68 percent of Americans believed there was more crime in the U.S. in 2006 than the year before, and 51 percent believed that crime in their local areas had increased during the past year. Both measures of the perceived level of crime have increased since 2001. (Saad, L., 2006)

Yet, there is evidence that the crime rate has actually been decreasing.

- The violent crime rate declined by 41% and the property crime rate fell by 32% over the 10-year period.
- The violent crime rate in 2008—19.3 victimizations per 1,000 persons age 12 or older—was statistically unchanged from the previous year's estimate of 20.7 per 1,000 persons.
- The property crime rate of 135 victimizations per 1,000 households in 2008 was lower than the rate of 147 per 1,000 households in 2007. (Rand, M., 2009)

The gap between perception of crime and actual victimization has been called by some the “reassurance gap”. It would seem to call for us to reconfigure our understanding of crime and its causes and the relationships that occur between victims, their community and wrongdoers. (1)

There is also evidence that the fear and concern over crime have resulted in harsher responses by the criminal justice system.

- At yearend 2008, there were 1,610,446 prisoners under state and federal jurisdiction.
- At yearend 2008, the sentenced imprisonment rate was 506 prisoners per 100,000 U.S. residents.
- On December 31, 2008, over 2.3 million inmates were in custody of state and federal prisons or local jails.
- At yearend 2008, the total incarcerated population reached 2,424,279 inmates.
- The number of people in federal prisons increased by 44.3% from 2000-2008, compared to the 12.8% rise in state prison populations.
- More than half the federal prison population is comprised of drug offenders, compared to about 20% in state prisons. Bureau of Justice Statistics. (2009)

Harsher sentences and greater imprisonment do not seem to mitigate fear and concern over crime. Rather, in some cases when combined with heavy media coverage of violence and punitive responses to criminals it may even enhance fears. Highly publicized and sensational crime cases usually emphasize the evilness of the perpetrators and frighten the ordinary citizen. The percentage of both the federal and state prison populations that involves drug offenders is noteworthy. It may be that there could be alternate methods of response to these offenders with much safer results as has been seen in some drug courts and alternative sentencing.

This paper explores the possibility that restorative justice principles could be used more effectively in alternative justice processes and in case disposition. The title of this paper reflects my opinion that most elements of restorative justice are drawn from historical and current aboriginal practices throughout the world, particularly in North America, Australia, New Zealand, Latin America and Africa. Key examples of some of these elements are examined in detail by Rupert Ross in his seminal books, *Dancing with a Ghost* and *Returning to the Teachings*, which are attempts to

distinguish the philosophies of aboriginal communities and the Eurocentric justice systems in Canada. (2) Other examples that incorporate restorative justice elements are the truth commissions that have been held to address concerns with deep national conflicts and gacaca in Rwanda.

Some would argue that conflict mediation processes involve restorative justice. This is a dominant view in Europe. However, while conflict mediation does involve both victims and perpetrators, it often does not use restorative techniques.

There is general agreement that restitution should be a part of restoration and it is clearly considered relevant in historical justice systems. The Code of Hammurabi being one of the first cited by many scholars. While the phrase an “eye for an eye” clearly derives from the Code and the intent of King Hammurabi was to “establish justice” among other things, restitution as seen in today’s world is much different. (3)

Even today, the definition and implementation of restitution processes differ widely from jurisdiction to jurisdiction. The processes may or may not meet the goals of restoration.

This paper will examine some general concepts and theories of restorative justice. It will then look at some examples of practices of restorative justice. Finally it will explicate some proposed principles of restorative justice that merge many of the singular ideas from the concepts and practice into a cohesive whole for use in practical application.

Overview of Restorative Justice Concepts and Theories

Restorative justice generally refers to a paradigm that is a major alternative to retributive justice within a criminal justice system. It seeks to use peaceful approaches to disagreements, conflicts and violations of the social order.

“Violence as a way of achieving racial justice is both impractical and immoral. It is impractical because it is a descending spiral ending in destruction for all. The old law of an eye for an eye leaves everyone blind. It is immoral because it seeks to humiliate the opponent rather than win his understanding...”

Martin Luther King, Jr.

Most restorative justice theories explicitly or implicitly use crime as the primary point of reference. In most theories the targets for the application of restorative justice are property and white-collar crime or violent offenses, up to and including cases of genocide. However, there have been instances where communities have employed restorative justice precepts to deal with what some call “minor crimes” or violations of social order. (4) It is not based on an adversary system, but rather focuses on reconciliation among the parties and restores victims -- individuals or communities to the center of any controversies, rather than the state.

Restorative justice is concerned not only with fair processes but with effective outcomes and consequences for those involved. It does not necessarily conform to any dominant perspectives on legal prescriptions or the administration of law. Indeed, it can be argued that the concept of the rule of law may be the antithesis of justice if justice is equated with moral principles of respect, dignity and compassion for others -- such as those enunciated through internationally recognized human rights. (5) It is often used in conjunction with other justice systems.

Some of the issues that arise from various theories of restorative justice address:

- response to victims’ suffering and trauma;
- concepts of shame and remorse;
- accountability and responsibility;
- appropriate responses to wrongdoing;
- forgiveness or mercy;
- relationships between victims, wrongdoers and communities;
- the role of victims, wrongdoers and communities in the processes of justice;
- reparations for harm done to victims or communities; and
- reintegration of the wrongdoer or the victim back into society.

I will consider each of these issues in turn.

Response to victims’ suffering and trauma

Many theories in restorative justice view victim needs and perspectives as central to resolution of justice issues. A first problem in this context is definitional. If a crime or wrongdoing has taken place -- Who are the ones who are harmed – the victims? Who are the wrongdoers? What are the appropriate consequences?

A second problem is that there is a lack of understanding about those needs and perspectives. Victims have two primary needs after the restoration of physical safety and the alleviation of imminent threat. The first is a need for a sense of emotional safety in response to the fear of what happened and what might happen again. The second is the need for protection, justice or fairness within the context of the trauma that has been experienced.

A description of the traumatic impact of victimization is beyond the scope of this paper, but the emotional impact can be summarized as fear, anger, confusion, guilt, shame and grief. The cognitive reactions, synthesized with the emotional responses are manifested through a lack of a sense of control, powerlessness and an inability to understand not only what happened but why it happened.

Victims' perspectives on these two needs can only be felt and articulated by them. Since every experience is different, victims are the only people who can tell their own stories. They each have their own memory of what happened, obscured by mental and emotional overlays as well as their personal and cultural history. They need to be able to organize these feelings and thoughts into a working narrative so that they can begin to integrate this event into their lives.

Justice and its systems play a key role in the eventual restoration of victims to a functioning role in society. It can offer protection, information, clarity, and, hopefully, fairness. Victims want social acknowledgment of their suffering and the fact that they have been violated. This is most clear in criminal, terrorist or war events, but is also an issue in other disputes or conflicts and for survivors of disasters.

It is remarkable how many victims and survivors of all kinds of catastrophes can adapt to the situations. It is significant; however, that many succumb to despair. Barriers to achieving justice can seem and sometimes are insurmountable. This is why compensation or reparations are

symbolically important beyond their critical practical utility. It is also why justice processes should include such things as accurate and appropriate information on the event and the aftermath, participation in processes of justice and expectations for the future in the social and political order.

Victims want to regain control over their lives and a sense of power in shaping their future. Empowerment of victims is a crucial factor in victim restoration since victimization renders powerless individuals and communities. They may want a voice, a role and opportunities for effective participation in whatever happens to them in the aftermath of victimization. Their victimization occurred as a result of wrongdoers taking power away from them and exerting control over their person or property. Power is often further diminished when the criminal justice system takes control over their lives in the “processing” of justice. They want vindication that they were not to blame for what happened. (6)

Concepts of shame and remorse

Many theories of restorative justice focus on shaming wrongdoers and the role of remorse and apology by wrongdoers in the restorative process. This is problematic in several ways. Shame as a result of an external force such as judgment by others may be resented by a wrongdoer. It may reinforce a desire by the wrongdoer to join with other wrongdoers in anti-social behaviors to rebel against those who judge them. This might in part be the genesis for gang formation since gangs provide an alternative culture to the one that shunned them.

Being shamed can be considered punitive by both wrongdoers and those who shame them. Shame is a cultural phenomenon. It is dependent upon cultural values. What may be shameful in one culture may be considered heroic in another.

How one deals with shame has two aspects. It can be positive if, once internalized, it motivates one to modify behavior in conformance to positive relationships within a community. The behavior modification must be acknowledged and by mutual agreement put into the past. But, the negative results of shame often outweigh positive motivations because it can result in anger and resentment when it is stigmatizing and degrading. Even genuine sorrow over what has been done may turn to bitterness if it is rejected by others.

If shame comes from an internal feeling of conscience, usually as a consequence of feelings of guilt, then it may lead to a sincere way to finding a method of showing remorse.

Remorse is another complicated issue. For example, someone may say, "I am sorry," in response to the person who says, "You should be ashamed," or "You can't know the grief you caused me." Is that a response of remorse? Maybe, but in many cases it is offered merely to placate the person offended and to avoid retribution.. Expressions of remorse are always more convincing when offered as acts of remediation, as when a wrongdoer says, "What can I do to help repair the damage I have caused?" (FN)

Accountability and responsibility

These concepts are very blurred in the context of restorative justice. I think they should be distinguished. Responsibility should refer to how all peoples behave with respect to each other in both every day life and in their actions in the public sphere. They have a duty to uphold universal standards of human rights. These help define humans' duties to one another.

Accountability refers to how someone is held to those duties of human rights. If a person violates such rights, then there should be consequences. Such consequences should be considered in terms of the seriousness of any violation as well as the age of the violator and the impact on the victim. Consequences should be focused on the outcomes for the victim, the community and tempered by education, compassion and the treatment of a violator with dignity.

Consequences should be based on mutual respect that can motivate people to act constructively because of a need to belong and feel part of a group. (See Dreikurs, R., 1964, and Maslow, A.H., 1987) All people have a desire to feel they have value and to feel they can contribute to others. They also want to know that others appreciate them.

There can be two types of consequences: autocratic or relational. Autocratic consequences are perceived by wrongdoers as dominating or demanding. Relational consequences allow wrongdoers to seek ways to resolve their behaviors with those harmed. They focus on acknowledgment

of harm and restitution for damage done and cooperation between all parties. (Dreikurs, 1968/1993)

Appropriate responses to wrongdoing

Case disposition and sentencing proceedings are the most common judicial/quasi-judicial forums for the appearance of restorative justice practices. It is the basis for family group conferencing, circle sentencing and for practices in transitional justice systems.

Most such processes involve victims, families (sometimes communities) and wrongdoers in decision making. All parties should have an opportunity to participate in reasonable discussions of an outcome. Outcomes for victims should involve reparations and services from society to the individual harmed and the community as a whole. The array of services should include opportunities for crisis and trauma counseling, employment, housing and education.

Responses to the perpetrator should not be punitive but rather educational and healing. Responses should also be specific and meaningful to the wrongdoer. This type of response would call into question two aspects of current response in the United States: the use of determinant sentencing and incarceration. There is little evidence that incarceration is a meaningful experience for perpetrators the way it is implemented in the American prison system. There is little opportunity for rehabilitation or effective reintegration into society.

Determinant sentencing cannot take into account mitigating factors in most cases and may create mixed feelings in jurors or judges. Two recent cases in Oregon illustrate this complication. Oregon law makes it a crime to allow a child to die when medical intervention is called for and available. In both of these cases, the parents did not take their children to a doctor when it was clear their health was impaired. They relied upon faith healing instead. In all other respects, they appeared to be caring parents. They were prosecuted and received relatively light sentences, and the public was left to wonder what type of justice would have been appropriate for the children and the parents.

Forgiveness or mercy

“I have been bowled over by the incredible humility one has experienced from the victims, both black and white, who have suffered as much as they have. By rights they should have been hate-ridden by lust for revenge. They have exhilarated me by how ready they are to forgive. I have come to see that. Yes, of course you have an acknowledgment by the wrong-doer that they have done something that was very wrong, that they owe to us confession so that the victim, the survivor be enabled to forgive. But I have come to believe fervently that forgiveness is not just a spiritual and ethereal thing unrelated to the real world, the harsh world out there. I have come to believe very fervently that without forgiveness, there is no future.”

– *Archbishop Desmond Tutu*

Forgiveness is a central theme of some forms of restorative justice. Many victims and their advocates in the United States find this difficult to accept. I think the problem lies in the definition of forgiveness. If it means that victims must accept an apology from the wrongdoer; accept and love; and simply say “what is done is done,” it may be impossible for some victims. It can create a situation where victims may be made to feel guilty if they cannot bring themselves to forgive.

If forgiveness means releasing rage against the violation, it may be more accessible. In this case, it does not excuse the violation nor does it diminish it, but rather integrates it and its consequences into the narrative of the victim’s life. It can allow life to go forward rather than be mired in a past that cannot be changed. It can also differentiate between rage at the violation and rage at the violator. Remaining in a state of rage locks one into a state of victimhood and a dependent relationship with the wrongdoer. It is corrosive of the human spirit and future relationships with others.

Forgiveness cannot and should not be demanded of victims. Victims must find their own understandings of forgiveness and decide how they will act in response. Some victims view forgiveness as a process that is never complete. Some view it as a spiritual matter that must be resolved. Some find they can’t forgive since it would damage relationships they have with family, friends or community members.

Victims may be able to find mercy for wrongdoers when they employ their capacities of empathy or compassion. They might be able to say, “I

cannot forgive you for what you took from me – my son’s life or my peace of mind – but I do not want you to die or go to prison for that deed, I want you to learn a better way of life.”

Relationships between victims, offenders and communities

If a community is to exist, it must be founded upon positive relationships. Restorative justice seeks to rebuild fractured relationships and to build trust among community members. Here, the key word is trust. If an individual or a community is harmed by the actions of another, it is hard to continue trusting that person.

Some action must be taken by the violator that shows a willingness to acknowledge and reconsider his or her actions. It is reasonable justice processes to result in some type of consequences

Some action should be taken by the violated persons to show a willingness to accept the reconsideration by the violator and his or her desire to become a part of the community again. This does not mean the victim must forgive or even show mercy to a wrongdoer but the victim should be accepting of community efforts to reintegrate the violator into the community if that reintegration and restoration is sought. This difficult in violent crime but it is a truism that most wrongdoers will either stay in the community or be returned to it after a prison sentence. If there is no reconciliation to that fact, victims, the community and the offender will continue to suffer.

Some action should be taken by the communities affected by the wrongdoing – both those directly impacted by what happened and those to which the wrongdoer may return or stay. Restoration may be helped by spiritual guidance, counseling, drug or alcohol treatment, educational opportunities, employment (volunteer or paid) opportunities, suitable housing or alleviation of circumstances of poverty. These restorative elements should be available to both victims and wrongdoers. (In today’s economic environment some of these may be difficult to achieve, but they should be restorative goals.)

An experimental program in the United States called “Puppies behind Bars” is an example of how wrong-doers can find ways to exhibit their remorse and to learn new ways to trust in themselves and others. It provides young puppies to inmates who learn to train the puppies as service dogs for

veterans or to search for drugs. The inmates must take care of the puppies for up to two years (24 hours and 7 days a week). The puppies “reward” the inmates with unconditional love and trust. The inmates learn that their care insures the health and welfare of their dogs and the gratitude and respect of a community to which they will return.

The role of victims, offenders and communities in the processes of justice

An essential tenet of restorative justice is the need for all parties in the processes of justice to participate. Some restorative processes do not include communities. This may be because a community is difficult to identify or it may be that the justice processes are unwilling or unable to include large numbers of people in their procedures. Ideally, however, community members should be given the opportunity for participation since it is almost axiomatic that they are affected.

Participation should be voluntary. Coercive or mandatory participation is counter-productive (and thus, restorative justice programs should always have other justice mechanisms in place to work with). Participation is predicated on access to justice as well as information about what is going on.

Participation should be focused on respect for human dignity. This does not mean that participants cannot express emotions, indeed, in most cases, it is an expectation that both victims and wrongdoers may express emotions that are often exceedingly stressful and painful. However, an atmosphere of acceptance of such emotions can be maintained with clearly articulated goals of restoration and rules of civility.

Reparations for harm done to victims or communities

There are two primary reasons for wrongdoers to provide reparations to victims or communities: restoring resources and acknowledgment of harm done. Both are concerns for restorative justice. They are complicated by the lack of resources, in many cases, to provide adequate recompense for harm done and to provide that recompense in a fair way.

The first reason for reparations is to restore resources (usually monetary) to victims so that they can live a life that is similar to what they did before they suffered from crime or disaster. While this may seem

simple if it involves replacing a stolen bicycle, it is fraught with difficulties in the aftermath of major crimes or disasters. The initial difficulty is assessing the value of the loss. Values placed on human life are random and arbitrary. Arguably, the value of a family wage-earner is greater than a person who does not produce any financial contributions to a family. A counter-argument might place value on sentimental attachments that rest with an elderly person or future expectations that rest with a child. Destroyed property may be more objectively appraised (though its replacement cost may far exceed its appraised value), but here, too, the perceived value may depend upon the ties victims may have with the property or the environment around them.

The second reason for reparations is to serve as a source of symbolic social recognition for victim suffering. Even if victims do not receive reparations that equate to what they think they lost, they can feel vindicated that the loss was acknowledged. A crime victim may feel a sense of justice upon receiving reparations even if the traditional system of justice did not respond in ways they had hoped. A disaster victim is acknowledged for his or her suffering through reparations.

The real question in reparations is who should be responsible for it. In crime or acts of terrorism where there is a known perpetrator, it seems natural for the perpetrator to pay reparations. In the United States this is called restitution.

Restitution is sometimes objected to because the perpetrator doesn't have the means to pay. Victim advocates often counter that argument by the fact that if offenders have a choice between paying restitution or going to prison, they will typically find the money for restitution. A far better way of reasoning is that restitution is a debt owed and should be in response to all costs of the crime to victims.

If wrongdoers cannot pay immediately, restitution should be ordered and levied against whatever earnings or assets they may accumulate over time.

A victim should have the right to select a restitution option that meets monetary issues, timing of pay-back and any services that might be bestowed by the offender to the victim or the community. Options may include monetary payment over time for damage done rather than more

immediate reimbursement. In a case in Virginia where the daughter of a couple had been killed by a drunk driver, they asked for payment of expenses, \$1 at a time every month until the restitution order had been fulfilled. Their reasoning was that the offender would have to remember their daughter every month and every year while he wrote the check to them.

Restitution should not include “community service” unless it is a public service of the victim’s choice or it is a sanction with a separate rationale. As indicated below, “community restitution” is a different type of service from volunteer services performed by community members. Restitution should not include such things as writing a letter of apology to the victim or participating in treatment or educational programs. These are separate duties or privileges and may be symbols of accountability but are not what victims are owed monetarily by the offender or the state.

In addition, perpetrators should be ordered to pay restitution to the community. They have violated the rules of civilized conduct and in most cases have cost the community monies for the involvement of police, judicial and correctional involvement. Such monies should be repaid in either cash or services. I avoid the term “community service” since this is often confused with non-reparative services rendered by volunteers. The idea that perpetrators should provide both victim restitution and community restitution is controversial.

If the perpetrator does not or can not repay victims, who should? In a restorative justice paradigm, compensation would be available from the state when a perpetrator is unable to make the victim whole. It can fill in the gaps in resources that have been lost to the victims due to harm done. In crime situations, it can be argued that it is owed to them by society. It honors society’s contract of protection. As Jeremy Bentham wrote:

“Has a crime been committed? Those who have suffered by it, either in their person or their fortune, are abandoned to their evil condition. The society which they have contributed to maintain, and which ought to protect them, owes them, however, an indemnity when its protection has not been effectual.” (*The Works of Jeremy Bentham*. New York: Russell and Russell, 1962, p. 589)

In situations where thousands or millions have been harmed by the abuse of power or genocidal conduct, it seems that some government or an international body might take responsibility for the harm that was done and could offer some compensation to victims. This would be the highest form of acknowledgment of violations to the victims. This type of compensation is fraught with difficulties, but one of the methods that the Rwandan government has explored in the aftermath of the genocide in 1994 is the possibility of using monies to expand free schooling or health services for children throughout the country. The idea would be that it would benefit the whole population, all of whom were traumatized in some way by the genocide.

There is similar justification for the Victims Trust Fund established through the International Criminal Court (ICC). The goal of the ICC is to provide a foundation for rebuilding society through prosecution of perpetrators and restoring victims after mass violence such as genocide or war. Victim restoration is to be pursued through restitution, compensation and rehabilitation. It has been said that the ICC should be a model for jurisdictions seeking to establish victim rights since it addresses participation and support for victims in the judicial process as well as reparations. It might also be said that it could be a model for many efforts to establish restorative justice in its full scope. This is due to the fact that it addresses the most egregious perpetrators and there seems to be little interest in the reintegration of most of them back into society.

Reintegration of the wrongdoers or victim back into society

Restorative justice seeks to integrate both perpetrators and victim with other societal and community members. Perpetrators are often given health, education and employment opportunities, subject to certain conditions. Perpetrators may have misbehaved, but can become repentant or at least outwardly remorseful.

Victims are rarely given support in developing a new life. They are rarely afforded the same opportunities as perpetrators. Victims did not misbehave, in most cases, but in many cultures they are commonly stigmatized and blamed for their own destruction. Even in cultures that putatively reject victim-blaming, it still occurs. (McFarlane, 1996) It is not unusual for a parent of a murdered child in the United States to be asked what they did to contribute to the murder of their child. It is not unusual for

a sexual assault victim to be cross-examined on her sexual history or her everyday manner of dress, use of alcohol or her friends and associations in order to impugn her. It is not unusual for a family with a lost home to be censored for building a house in a hurricane zone.

Can reintegration work? Can a person ever think of his neighbor who raped his wife with fondness or without hostility? Can the wife ever think of her neighbor without fear or anger? I don't know the answer, but I do know that the lack of civility and actions of destruction are devastating to the human spirit. I don't know whether the impetus to restore relationships is enough. But, a cultural value system and philosophy of restoration is essential for attempting reintegration of both parties.

In some parts of the world where victims or perpetrators have the advantage of resources and mobility, they may leave the community in which an offense took place and start a new life without stigma or blame. But, in many parts of the world, victims and perpetrators must remain in the community where the harm is done. In the latter case, it is essential that there be some kind of rapprochement that mitigates fear for the victim, promotes safety, and allows the perpetrator to be afforded some basic human dignity to pursue a decent existence. This is where the community becomes essential as a source of protection and support to the victim and as a source of reassurance to the offender. It is important to remember that reintegration does not necessarily mean all parties involved like each other but rather it may simply mean that they tolerate each other.

Basic justice should seek to provide victims with their internationally accepted human rights. As Irvin Waller has written:

“Being treated with dignity and respect is a human right for the victims of crime. It should be protected like any other right by legal remedy. We must ensure that victims are treated respectfully by police who are first in aid, by support services that make a difference, by courts that order and enforce fair restitution, and by constitutions that guarantee participation and representation even in a criminal court. These must be universal not just a patchwork.” (Waller, 2006, p.121)

Practices in Restorative Justice

Victim-offender mediation

Victim-offender mediation usually takes place through a face-to-face meeting between the victim of a crime and the offender. It is monitored by a trained mediator who has met with both participants beforehand. It is typically used when the accused tentatively agrees to admit his guilt for purposes of exploring a consensus resolution as a sentence, or after a court decision as to the guilt of the offender but has not determined the sentence. The mediation usually involves only the victim and the offender, although both may have a supporter if they desire in most systems. It is most often used as a part of deciding possible alternative court sanctions to prison confinement. In the United States some judges have ordered mandatory mediation. This has been resisted by the general victims' movement which believes that mediation should only be used on a voluntary basis by both the victim and the offender.

Victim-offender dialogue

The purpose of victim-offender dialogue is not to resolve a conflict. It is predicated on several ideals: to promote the offenders' understanding of the impact of victimization on the victim; to help pursue answers to victims' questions such as why they were attacked or what happened to them; and to allow offenders to express any remorse they may have. In some models, victims are asked to make a statement of forgiveness to the offender at some point in the discussions. Dialogue often takes place in a prison or jail over a period of time and can precipitate relationships between the victim and the offender. Both victims and offenders spend time in preparatory sessions so that expectations are kept to a minimum and any safety concerns can be addressed. Often volunteers are trained as facilitators for this process.

It is possible to see the use of "victim impact panels" in sentencing or in educational sessions with inmates as an extension of victim-offender dialogue. Victims in these settings have an opportunity to talk about the impact of the crime they suffered from with offenders and to hear back from them. Here victims may not be addressing their personal offenders – like the drunk driver who caused the death of her child – but rather a group of recently adjudicated drunk drivers. Many victims who volunteer for this service find it gratifying.

Family group conferencing

Family group conferencing involves people connected to the victim, the offender, and others connected to the both the victim and offender, for example, family members, friends, and community members. The use of family group conference most often appears in the juvenile justice system and is part of statutory schemes in New South Wales, Australia, through the Young Offenders Act 1997, and in New Zealand under the Children, Young Persons, and their Families Act 1989.

Family group conferencing provides victims an opportunity to tell about their experiences during the crime and in the aftermath. They can develop their own narratives and understandings of the event. They can also ask questions about what happened and the perspective of the offender.

Family group conferencing uses public officials rather than trained volunteers as facilitators. It involves more community members in any meeting called to discuss the offense, its effects, and how to remedy the harm. By involving a broader range of people affected by the crime, it allows both primary and secondary victims to participate in decision-making. Community members can help to provide enforcement of decisions and ongoing support to victims and offenders.

Circle sentencing

Circle sentencing designation used to denote a practice that has evolved from aboriginal concepts of justice and the practice of “talking circles” to resolve conflicts and disputes. It is unique in its focus on holistic approaches to human understanding and human behavior. The philosophy behind circle sentencing is on healing, restoration of social harmony and balance within a community. It is significant that many aboriginal languages do not even have a word for “justice” as it would be defined in legal terms. Offenders may be viewed as “out of balance” within themselves – their physical, mental, emotional and spiritual dimensions are disconnected. The goal of sentencing is to help them restore their internal balance and adjust their behaviors so as to reduce harm to the community. In the restoration of social harmony, balance must also be restored for victims. This may be done in a variety of ways but restitution, support and service for victims become community responsibilities. The centrality of the spiritual dimension of human nature is a major factor in finding new pathways of existence for offenders and victims.

Circle sentencing can follow different kinds of procedures but most involve addressing a crime or a social violation through community discussions that involve a wide range of representatives from the community, victims, offenders and their families. The discussions take place under a series of rules that allow participation from all members of the circle help ensure that communication is respectful and dignified. Some circles are conducted with spiritual rituals. Goals are often identified and established. Circles that initially are formed may come together again and again over time to modify goals and to adjust to new circumstances.

Most circles operate in cooperation with formal justice systems with the processes done separately and recommendations for any sentencing or consequences recommended to judicial forums made when necessary.

Transitional Justice as a form of Restorative Justice

At times restorative justice methods are used by international tribunals or in transitional justice systems in their design and implementation. “Transitional justice” is used to describe policies and institutions that provide nation-states with methods to address past human rights violations. Its goals are to help rebuild social trust and a sense of community. One of the primary objectives of transitional justice is to end a culture of impunity in the face of corrupt and insidious rulers. Another objective is often touted as establishing democratic governance but, the definition and perception of democracy in this context is highly disputed.

These are difficult goals for populations that have suffered oppression, civil conflict, atrocities, war, and corruption of their justice system. The goals are even more complex since in many cases, the offending party was the state and the “rule of law” may very well be an abrogation of human rights. Justice in this context must be more than criminal justice. It must include social, cultural and distributive justice. Due to its relationship with human rights, transitional justice must be is focused primarily on victims.

Since these goals usually involve a change in government and policy, the obstacles to justice are many. The new government must find methods to deal with the perpetrators of the human violations and to construct a new social and political order. This requires a new justice process that can resolve conflicts without corruption and in accordance with the precepts of international human rights. Usually it involves some type of reparations for

those harmed, although reparations may be severely limited due to lack of resources. Any type of reparations to whole populations inevitably confronts problems of equitable and expeditious distribution.

Other acknowledgments of past violence and violations may include memorials that are erected to recognize the dead, wounded and traumatized. Memorials offer their own challenges since there is hardly ever consensus around the type and manner of memorialization. It is not unusual for educational programs to be developed to accommodate both the understanding of the past; acknowledge the suffering; and design new pathways for the future.

“Truth and reconciliation” processes are most often referred to as transitional justice systems. They involve most of the elements of restorative justice and they incorporate many of the problems. They aim to identify the truth of the past, but there can be no universal truth since each individual and collectively each community will have their own perspective on the past. Many times those who were a part of instituting violations also were victimized. Conflicts between population groups can become transferred inter-generationally causing continuing sources of violence and violation.

Forgiveness or mercy is very difficult for whole populations to internalize and for individuals who have suffered extreme losses of home or property, dismemberment or the death of families, friends and whole communities. Traditional sanctions such as imprisonment or executions are nearly impossible to implement universally. There are disparities in the application of sanctions and efforts to provide fairness and impartiality in decision-making. Reparations can never meet the cost or ameliorate the pain of damage done.

The Truth and Reconciliation Commission in South Africa is probably the most famous such body. It was established after the abolition of apartheid primarily to try to reconstruct the truth of harm that was done under the apartheid system. Violations of human rights were the central targets of the investigations that were completed.

Victims of apartheid violence were encouraged to come before the Commission and tell their stories so that they would be on record and know that the Commission listened to them. These stories could be used to revise

official histories of violent periods as well as serve to provide lessons from the past to help create new and more just methods of governing. The value of giving testimony has often been found to be therapeutic for victims. (See: Van Dijk, J.A., Schoutrop, M.J., Spinhoven, P. (2003); Schauer, M. / Neuner, F. / Elbert, T. (2005).)

Perpetrators of violence could give testimony and request amnesty from prosecution, if it were determined that the perpetrators fully disclosed their part in violence and were remorseful.

While the Commission has often been used as a model for other similar bodies, there has been criticism of it as well. The primary criticisms have focused on the provisions for amnesty, the sense that justice was not done in many cases, and the fact that in a multi-linguistic environment, many stories lost some of their impact in translation.

There have been seventeen countries that have set up truth commissions with varying degrees of success. Most have community members and are parallel to other formal justice processes so that in extraordinary cases, perpetrators can be referred to the formal justice system for prosecution and formal sentences when amnesty is thought to be inappropriate.

Gacaca courts were established in Rwanda after the 1994 genocide. They are similar to truth commissions but function somewhat differently. The goals of the Gacaca courts include:

- To let the truth be known about what happened during the genocide
- To accelerate genocide trials and to deal with nearly 150,000 prisoners incarcerated after the genocide without trials
- To eradicate the culture of impunity
- To promote reconciliation among Rwandans and the strengthening of their unity.

Gacaca proceedings are well defined. Community judges are elected to serve as the reviewing body for alleged offenders. The panels of judges can range in number from 8 to 12. Lower-level offenses are all dealt with in Gacaca, and do not include those committed by leaders of the genocide or acts of rape. Those are dealt with in the classic justice system.

Community members are required to attend a Gacaca court when it is held in their area. To ensure attendance, all shops and businesses are shut down in the designated area. This can mean an assemblage of hundreds of people who may testify about their observations of genocidal acts. Victims particularly are asked for their input.

Offenders are asked to state the facts of their offenses for the judges. Judges can ask questions of the offenders and request input from victims. The judges then make a determination regarding penalties and sanctions for the offenders. Lawyers are not allowed in the Gacaca courts so there has been some concern that alleged perpetrators may not have adequate protections for their rights and interests.

A special feature of the Gacaca courts is the “concession programme.” This program requires an accused to name of all those who participated along with him or her in return for a lighter sentence. This increases the numbers of accused that would be subject to trials and would probably make it impossible to bring all who are accused to account in the process.

While reconciliation is one of the goals of Gacaca, it is unclear whether it is being accomplished. Many victims and witnesses have been intimidated if they choose to speak or testify and there have been reports of retaliation through murder or rape.

Model Principles of Restorative Justice

Having reviewed concepts and some commonly used practices of restorative justice, some key principles can be gleaned.

1. The first principle of restorative justice is that justice should be conceived not only as the doing of justice to an offender but also as the doing of justice for the victims and the community. This means that a violation of the social order must be seen as an offense against society generally – the traditional “social compact” view – and as an action that harms individuals. The focus is on any wrong, even a noncriminal offense, which contributes to the weakening of social ties or interferes with community living. The victims of such violations may be defined as the individual – typically the “complaining witness” in the U.S. – but they include family and community members harmed by the wrongdoing as well.

2. The second principle is that, while governments may establish criminal and civil laws that set the standards of behavior for the general society, communities should be the locus of implementing those standards in order to be responsive to the cultural nuances that vary by racial, ethnic, geographic, religious, and other backgrounds – provided that the norms of international human rights are maintained.

3. Third, the “community” from this perspective is more than a cultural filter for sorting out and prioritizing crimes in its midst; the community and its justice partners are to become engaged in defining and attacking community problems, a process that strengthens the important role of community institutions in a democratic society.

4. The fourth principle is that, by responding to malfeasance, crime and violence skillfully, quickly, and locally, those providing justice interventions improve the chances that offenders and their victims alike will be restored to harmonious relationships with their neighbors.

5. The fifth principle is that people, individually and collectively, have relationships to each other and consequent responsibilities. These responsibilities include treating each other with dignity and compassion and pursuing peace and justice within the social order. These can be framed as reasonable expectations to three audiences: offenders – accountability for their actions; victims – responsibility to the community; communities – accountability to victims, responsibility to offenders.

6. The sixth principle is that justice should aspire to the restoration of both individual dignity and community relationships.

Conclusion

Restorative justice is difficult to define or describe. But, I believe the principles that underlie the concepts and practices of such justice are sound. They present challenges in implementation. There are also barriers and resistance to the ideas. They require a willingness to change our understandings of victims, perpetrators, communities and justice itself. Change takes time and often creates fear, so it will take determination to confront our choices and increase our compassion and respect for all those we deal with.

Someone once said that “courage is nothing less than the power to overcome danger, misfortune, fear, injustice, while affirming that everything is meaningful even if it is beyond our understanding.” The idea of justice is ubiquitous and understanding it may be beyond our ken. It seems easier to identify danger, misfortune, fear and injustice. But whether we seek to establish justice or to overcome injustice. We will need courage.

Notes***

1. Wrongdoer or perpetrator is used throughout this paper rather than offender since offender is most often used in criminal justice terminology. The discussion here also would address those who violate the social order and do not commit a crime and those who do not commit a crime under national or state law but can be considered to violate human rights.
2. Of particular interest here is Ross's examination of linguistic differences that affect cultural traditions regarding justice with regard to philosophical groundings in the Canadian First Nations and Eurocentric Canada.
3. The code has 282 entries covering all sorts of civil interactions, from inheritance to theft to slave ownership. Compensation for specific injuries is included as well as a scale of punishments for assault and theft. In the [prologue](#) to his code, the King declares his desire to "establish justice, " and at the end he declares that through his enactments "the strong shall not injure the weak, and the orphan and the widow shall receive justice."
4. Violations of social order include activities such as landlord-tenant disputes, property rights disputes, truancy, loitering, noise disruptions and the like.
5. Universal human rights are described by The Universal Declaration of Human Rights (1948) and its associated Covenants (1966) which seek to give legal weight to the prescriptions in Declaration. Together they are referred to as the International Bill of Rights (IBR). In regards to victim rights, two documents are primary: The UN Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) and the Statute of Rome (????)
6. This is a distinctive feature of Eurocentric societies (most of which follow principles based upon a "Just World" philosophy). It may not be as important in more fatalistic cultures or those that believe in a world occupied by good and bad spirits over which we have little control.

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