

Perspectives on Achieving Satisfying Justice: Values and Principles of Restorative Justice¹

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Imagine that we have decided to build a house. It doesn't matter what kind of house. In fact, we are probably all imagining rather different houses, reflecting our different cultures, experiences, locales, aesthetic tastes, and so on. Perhaps the house you are imagining is built of boards or logs. It may be a cape cod, like mine, or a farmhouse, or a longhouse. It doesn't matter. Just imagine that we have decided to build a house.

What are the key things we will need to think about as we get started? Let me suggest three. First, we will need to think about the land under the house. Will it support the structure? Is it smooth enough? Is there clay in the soil that could lead to mudslides in heavy rain? Do we need to do some work there before we do anything else. In other words, what kind of foundation will we need?

Second, how will we support the walls and roof of the house? We need something strong enough to hold it all up and keep it straight. We need something on which we can attach the wall covering, whether that is insulation and aluminium siding or wattle and daub. Let's call these supports our cornerposts. The second question we will have to ask ourselves is what kind of cornerposts we need.

Finally, we need to cover our house to keep out rain and snow and to protect us from the heat of the sun. We need some sort of roof. And that is the third thing we will need to consider as we build our house. What kind of roof will it have?

Now, let's imagine that we are constructing a restorative programme. I know from the book Satisfying Justice, and from reading the programme for this conference, that many different programmes come to mind when we imagine a restorative response. Just as the houses we think of are different, so the programmes that come to mind when we think of restorative justice are different. But behind those differences, we notice what we might call structural similarities. In certain important ways, these programmes seem to reflect common principles, values and vision. If we can name those, it may be easier for us to understand just why these programmes are "satisfying", and to consider ways in which they might become even more restorative. That is a major task before us, and what I would like to do is help start that process by suggesting what I think the structural elements might be. I'll use the image of a house,

¹ Adapted from Daniel W. Van Ness and Karen Heetderks Strong, *Restoring Justice* (Cincinnati, OH: Anderson Publishing Co., 1997).

and organise my discussion around the foundation, the cornerposts and the roof; the fundamental principles of restorative justice, its values and its vision.

First, the foundation, the fundamental principles, of restorative justice.

What do we mean by restorative justice? How is it different from what we do today? Tony Marshall has suggested that it is “a process whereby the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.”² This describes something so different from contemporary criminal justice that some of us have called it a “paradigm shift” or, to use Edward de Bono’s term, a new “pattern of thinking”.³ In order to begin building our house, we must start with a new understanding of crime. Crime is far more than lawbreaking; it also causes injuries to victims, communities and even to offenders. If that is true, let me propose three fundamental principles of restorative justice that follow.

Foundational principle 1: If crime is more than lawbreaking, then justice requires that we work to heal victims, offenders and communities who have been injured by crime. We are used to thinking of crime as lawbreaking, rather than peacebreaking, and the injured party with a legal interest as the government, rather than the victim or surrounding community. This is a result of the historical division of criminal law and civil law. Civil suits are brought in the name of the victim and their purpose is to provide redress to that victim. Criminal cases are brought in the name of the government, and their purpose is to uphold the authority of laws enacted by the government.

Restorative justice resists this distinction of civil vs. criminal remedies and interests, and instead asserts that as we deal with those who have violated the criminal law, we must work to heal those who have been harmed by those criminal acts.

Foundational principle 2: If crime is more than lawbreaking, then victims, offenders and communities should have opportunities for active involvement in the justice process as early and as fully as possible. Virtually every aspect of our criminal justice system seems to reduce victims, offenders and communities to passive participants. The stars of the show are the professional players: the police, judges, attorneys, corrections professionals and others who manage the process. The victim is a witness. The offender sit quietly next to his or her lawyer. (In the US, lawyers are sometimes called “mouthpieces”, a suggestive name.) The community’s role is even more limited, consisting almost exclusively of service on juries.

Restorative justice affirms efforts to enable these parties, so directly affected by the crime, to participate in meaningful ways as early in the process, and as fully, as possible. I will say more on how this restorative insight might apply in the formal system in a few moments.

Foundational principle 3: If crime is more than lawbreaking, then we must rethink the relative roles and responsibilities of the government and the community. In broad terms, let me suggest that in promoting justice, government is responsible for preserving a just order and the community for establishing a just peace. In political

² Correspondence with Paul McCold in connection with the UN Working Party on Restorative Justice attempt to define the term.

³ Edward de Bono, *Conflicts: A Better Way to Resolve Them* (NY: Penguin Books, 1991).

rhetoric, “order” is used as a synonym for public safety. We hear cries for law and order to end crime on our streets. But safety can be achieved in other ways. When there is peace, there is safety. That peace need not be imposed (as order is) but instead can grow dynamically within the community. Peace involves a community commitment to the well-being of its members and to helping resolve conflicts among them. It also requires that the members of that community respect community interests even when they may conflict with individual interests. This mutual respect and deference happens all the time, far more than we usually realise. In strong communities, the shared values of members of that community can reduce the need to resort to order, to the formal judicial processes with their written rules, established procedures and overt coercion.

Order is not the same as peace. Order can suppress conflict, but not resolve it. On the other hand, peace may not be just. The norms and values of a community are not inherently right, even though they are widely held. But in general a peaceful society will require less coercion. A law-and-order society will offer less freedom. A safe society is the result of government and the community playing their parts in upholding a just order and establishing a just peace.

There are important implications here for programme design. If this is indeed a principle of restorative justice, then it suggests a governmental role in relation to community-based programmes -- in essence to enable them, and to use its coercive powers as little as necessary and only when the community response is not resulting in a just peace. It also means that there may be ways of infusing restorative values into the governmental response to crime.

The foundation of restorative justice, then, lies in the understanding that crime is more than lawbreaking, it also results in injury to victims, communities and even to the offender. Therefore, justice requires that we work to heal victims, offenders and communities who have been injured by crime. In doing that, we should give victims, offenders and communities early and extensive opportunities for active involvement in the justice process. Finally, in promoting justice, government is responsible for preserving a just order and the community for establishing a just peace.

That is the foundation. What about the cornerposts, the values, of restorative justice? What do restorative programmes appear to esteem, to value, as we observe them in operation? These are the cornerposts of our house, and I would like to discuss four.

The first is encounter. Restorative programmes place a high value on the parties to the crime -- the victim, the offender, and perhaps the affected community -- actually meeting with each other. Unlike joint presence in court, in which the parties may be aware that the other is there but not given a chance to interact, restorative encounters are (at least figuratively and usually literally) face-to-face. During the course of that meeting, each person is given the opportunity to speak, to tell the story of the crime from their own perspective. During their narratives, they are able to talk about the things that concern them. They may become emotional. There is high emotion in courtrooms, as anyone who has worked there knows. But the emotion is generally regarded as an impediment to a fair and impartial result. In restorative encounters, on

the other hand, emotion is expected, accepted, and valued as an important element of an appropriate response to crime.

But an encounter accomplishes more than venting. The purpose of the meeting is for the parties to develop understanding -- of the crime, of the other parties involved, and of the steps needed to make things right. There may even be a degree of empathy that develops between them. Whether that is achieved or not, the meeting concludes with an agreement that is both particular to this dispute, and achievable by the parties. The harm done cannot be undone, but steps -- particular steps -- can be taken toward redressing it.

These are some of the elements of a restorative encounter: meeting, narrative, emotion, understanding and agreement. Encounter is one of the cornerposts of restorative justice.

A second value of restorative justice is reparation. Reparation means making amends, and it can be by paying money, in-kind services, returning or replacing property, or in any other way agreed to by the parties in the course of an encounter. In a sense, of course, full reparation is always impossible. I have had people ask me how reparation can be made in the case of homicide, for example, or other serious crime. One cannot bring back a person who is dead, or return to innocence a child who has been sexually assaulted. For that matter, one cannot bring back the half-day spent filling out insurance forms after a property crime, or erase the memory of anger and fear that can arise in even the least significant violations.

But the point of reparation is not that time has been turned back, but that a debt has been paid. In any society there are currencies we use to express the relative worth of intangibles. The obvious currency is monetary, and as symbolic as that may be, financial restitution offers certain advantages. Randy Barnett and John Hagel,⁴ Charles Abel and Frank Marsh,⁵ and many others have written about the advantages of a judicial response to crime which is restitutionary in purpose. But even informal mechanisms such as victim and offender reconciliation/mediation incorporate reparation, financial and otherwise, as a means of making things right.

A serious commitment to reparation leads to a host of thorny issues. I won't address these this morning, but I want to remind us of them. Who should be entitled to reparation? Should the reparation reflect the seriousness of the offence or the seriousness of the injury that resulted? Some harms cause a virtual chain-reaction of injuries; are there limits to how far down that chain we should go in determining reparation? Is reparation a feasible sanction, given the economic circumstances of many offenders? What if reparation is made difficult or impossible because other purposes such as incapacitation lead decisionmakers to incarcerate the offender? I won't take the time to address these now, other than to say that answers to each of those questions have been suggested by a number of writers.

⁴ Randy E. Barnett and John Hagel, eds. *Assessing the Criminal: Restitution, Retribution and the Legal Process* (Cambridge MA: Ballinger Publishing Co., 1977).

⁵ Charles F. Abel and Frank H. Marsh, *Punishment and Restitution: A Restitutionary Approach to Crime and the Criminal* (Westport, CT: Greenwood Press, 1984).

In fact, the most important question about reparation is not whether it is feasible, but is whether we really want to take it seriously. A restorative response is more concerned with repairing harm than with punishment which ignores the need and obligation to make reparation. It also attempts to reduce the likelihood of future harms, and this means that incarceration or other restraint may be required to restrain exceptionally high-risk individuals. But the criminal justice process must maximise the likelihood of timely reparation to victims even as it attempts to manage the potential risk that offenders pose to society. Too often this is treated as an either/or proposition. Restitution is imposed in “lightweight” cases in which the sentence will be probation anyway. Or restitution is added on to prison sentences but little effort put into making it possible for the offender to pay.

In a system that values punishment, reparation will be an add-on. In a restorative response to crime, the non-reparative elements of a sanction will be managed in such a way that reparation -- our second cornerpost -- is feasible.

The third cornerpost, the third fundamental value, of restorative justice is reintegration. By reintegration I mean the re-entry of a person -- it could be a victim or an offender -- into community life as a whole, contributing, productive person. This means more than simply tolerating the person’s presence or making room for them. As John Braithwaite has said, it means establishing relationships that are characterised by respect, commitment and intolerance for -- but understanding of -- deviant or irrational behaviour.

Usually when we speak of reintegration we think of offenders. Braithwaite’s reintegrative shaming is an insightful approach to dealing with wrongdoing and at the same time building community norms.⁶ But offenders are not the only ones who need reintegration. Victims may need it as well.

I am not equating victims and offenders. Their needs are different and their moral positions in relation to the crime are certainly different. But both often share a common problem, and that is stigmatisation. Each can be treated as an outcast by the community. Each may find that others around them are threatened because of the fear they engender in others. Susan Salasin writes of the victim experience: “Since most victims are stigmatised by family, friends, and the public, who often blame the victim for his or her own plight so that they do not have to confront the fact that it could happen to them, victims learn to hide their status, not to speak of what occurred, not to share their feelings. These actions increase a sense of shame and rejection, compounding the victim trauma response.”⁷ Jim Austin and John Irwin write of the offender experience: “The general society has always held convicts in some contempt Consequently, most prisoners are acutely aware that they are among society’s leading pariahs, and this awareness has greatly increased their alienation from conventional society.”⁸

⁶ John Braithwaite, *Crime, Shame and Reintegration* (NY: Cambridge University Press, 1989).

⁷ Susan Salasin, “Introduction: A Blow of Redirection,” in Shelley Neiderbach, *Invisible Wounds: Crime Victims Speak* (Binghamton, NY: Harrington Park Press, 1986) 3.

⁸ John Irwin and James Austin, *It’s About Time: America’s Imprisonment Binge* (NY: Oxford University Press, 1994), 84.

Braithwaite's work has been criticised on the grounds that urbanised and individualistic societies are not effective in achieving reintegrative shaming. Often the specific concern is that such communities lack shaming power -- an offender is less likely to be ashamed in an atomised society. But the real challenge in my mind has more to do with reintegration than with shaming. The problem we face is less how to shame, and more how to reintegrate. Where should we look for persons willing to offer victims and offenders the respect, commitment and the "understanding intolerance" of deviance that is needed for reintegration? One answer is in self-help and support groups. These communities of people with similar experiences can become substitute families, and have a powerful impact on the individuals who find them. The groups themselves are made of people with common experiences, who find themselves linked through a common alienation from society.

Are there other alternatives? I wonder whether faith communities could become reintegrating communities for those who have been touched by crime? Because of their history, traditions and presence, they ought to be that kind of community. Too often, regrettably, they have not been. I say this as a follower of Christ, and as one who has seen members of my faith community demonstrate both the potential and the failure of that community to help reintegrate both victims and offenders. Prison Fellowship has seen churches around the world respond with sensitivity, remarkable dedication, and support to the needs of prisoners and victims. Faith communities are a resource that should be drawn into the restorative justice movement by those who wish to see the reintegration of those who are touched by crime.

I have mentioned three cornerposts so far, three values, of restorative justice: encounter, reparation, and reintegration. The last one is participation.

I mentioned earlier that traditionally the victim and the offender play very structured and minimal roles in a criminal case. The victim may testify and be cross-examined like any other witness. The offender will sit at the counsel's table, will stand when told to do so, will say "not guilty" when instructed, and may testify if his or her attorney feels it will help.

The defendant, and in some jurisdictions the victim, may have an opportunity to say something at sentencing, but it is not always clear why what they may want to say is relevant to the proceedings at all. What should a judge do with a compelling victim impact statement which recounts the devastating effect of the crime? Should the judge impose more time in prison on that offender than on an offender whose victim is less articulate, or who fails to come? And if the judge does not, then what is the point in asking the victim to speak? Victims may have something to say; does the criminal justice system have a reason to listen?

Relevance is important to satisfying justice. It makes a difference when what I have to say actually matters to the outcome. A characteristic of restorative programmes is that the direct participation of the parties is made relevant because the purpose is to arrive at an agreement which will bring resolution. In such a context, hearing how the crime has affected the victim becomes relevant because it helps gauge the extent of harm. Hearing why the offender did the crime is relevant because it answers questions the victim may have, and because it helps everyone understand what led to the crime, and hence what steps toward peace are indicated. Hearing the

observations of community representatives, or family members, is relevant because they are also affected by the crime and because they are persons who will play key roles in the reintegration process.

Voluntary participation is also important. There is likely to be more genuine interaction during an encounter when all parties are willing to be there. But we must also be realistic. Not all offenders or victims will *want* to participate. Furthermore, it is difficult to refer to any process as truly voluntary when its context -- the criminal justice process -- is highly coercive. The parties may “volunteer” to participate in order to avoid a more onerous alternative. And programme operators need to be careful, since in their zeal to attract victims, offenders and communities into restorative programming they may adopt tactics which are experienced as coercive.

There are many more opportunities for direct participation in a restorative process than in the formal justice system. But even there more could be done to permit relevant, voluntary participation by those who have been affected by crimes. Using a mechanism such as the *partie civile* procedure in France, for example, victims could be permitted to participate in criminal proceedings in order to recover restitution. Their interest as civil claimants would provide a standard under which the relevance of their testimony, witnesses and other interventions could be analysed.⁹

The jury was historically a mechanism for community involvement in determining what actually took place when someone was charged with a crime. In my country we have moved away from the notion of juror knowledge in an attempt to ensure impartiality. But there are other ways of getting impartial juries, and there might be a real advantage, at least in some instances, in having jurors assess the evidence who are familiar with the individuals and communities involved.¹⁰

In New Zealand, status hearings are held in relatively minor cases in which rules of evidence and formal procedures are relaxed. Called “talk court”, these hearings give offenders and victims an opportunity to describe in their own words what happened, and the judge explains in lay language what the charges are, what the possible sentence may be and the implications of either pleading guilty or proceeding with a trial. Many of these status hearings result in a negotiated plea of guilty. What makes this different from typical plea bargains is that the discussion is carried out by the parties rather than by their lawyers.¹¹ This kind of approach needs to be carefully thought through, but it is an example of an attempt to make the traditional criminal justice procedure more amenable to participation.

Those are our four cornerposts, four values of restorative justice. Encounter, reparation, reintegration and participation. Now we are ready for the roof, the vision of restorative justice. The word I will use here is borrowed from a Canadian, Ruth Morris.¹²

⁹ See, for example, Patrick Campbell, “A Comparative Study of Victim Compensation Procedures in France and the United States: A Modest Proposal.” *Hastings Int'l. and Comp. Law Rev.* 3 (1980):321-348.

¹⁰ See for example, Daniel W. Van Ness, “Preserving a Community Voice: The Case for Half-and-Half Juries in Racially-Charged Criminal Cases,” *John Marshall Law Rev.* 28 (1994):1-56.

¹¹ Robert Mannion, “Talking Back in Court”, *The Dominion*, Nov. 28, 1996, p. 13.

¹² Ruth Morris, *A Practical Path to Transformative Justice* (Toronto: Rittenhouse, 1994).

Our vision is transformation. Crime is not simply the violation of persons and relationships. It also offers the opportunity for a transformation of those people and relationships that can lead to increased community peace. This is an important insight. Faced with crime, the typical response is self-protection. We put bars on our windows, alarms on our doors, and restrictions on our own behaviour. We cut ourselves off from the community around us, since we are not certain where the threat to our well-being lies. Crime can contribute to the deterioration of lives and communities.

But it does not need to. Nor does our vision need to be limited to repairing those injuries or minimising the harm. We can aspire to more than that -- to the transformation of perceptions, structures, and people. We can work to transform individual conflict into community peace.

Vision can be catalytic. It is also convicting. Far more is required of us if we choose to participate in a restorative response than in traditional criminal justice. It is satisfying, but it is also costly. Whenever I speak about restorative justice, I run the risk of *saying* more than I *know*. And I am acutely aware that I *know* more than I *live*. I, too, have recompense to pay, reconciliation to seek, forgiveness to ask and healing to receive.

Transformation of the world begins with transformation of ourselves. And that, as Richard Quinney reminds us, is a spiritual issue.

All of this is to say, to us as criminologists, that crime is suffering and that the ending of crime is possible only with the ending of suffering. And the ending both of suffering and of crime, which is the establishing of justice, can come only out of peace, out of a peace that is spiritually grounded in our very being. To eliminate crime -- to end the construction and perpetuation of an existence that makes crime possible--requires a transformation of our human being. . . . When our hearts are filled with love and our minds with willingness to serve, we will know what has to be done and how it is to be done.¹³

May our hearts be filled with love, may our minds be filled with willingness to serve. May we know what has to be done, and may we do it.

Thank you.

¹³ Harold Pepinsky and Richard Quinney, eds. *Criminology as Peacemaking* (Bloomington: Indiana University Press, 1991), 12.