

CHAPTER 8

Restorative Justice: A Paradigm of Possibility

Rick Sarre

The criminal justice systems of modern common law countries are premised upon the fundamental notion that the state should take whatever official action is required against criminal offenders. While it is theoretically possible for a citizen to launch a private criminal action in the common law tradition, it is extremely rare. This has not always been the case. Prior to the eleventh century, victims, or their kin, were principally responsible for the legal pursuit of offenders in response to criminal violations of the victims' families or their property. The desire for compensation was probably at least as common as the urge to retaliate. Indeed, in Roman law—upon which much Anglo common law is based—if a guilty person accepted his or her guilt and made restitution, then the case was settled between the parties and no further punitive action was required. These principles, however, did not survive the Norman Conquest 1,000 years ago. Crime moved away from being a private or community affair and became an offense against the state, and victims were referred away from the criminal courts for their grievances to be heard elsewhere, if at all.

The upshot of this for latter day societies is that victims, their families, their supporters and communities in general have lost any crucial role that they may once have enjoyed in the penal process. Informal communities, such as religious, ethnic, social or geographical communities, have lost whatever power they may formerly have had to influence proceedings. As a corollary, and for all intents and purposes, modern criminal justice systems have lost what could, with the value of hindsight, have been described as their *restorative* edge. That is, they have sought to drive a wedge between offenders and their communities, rather than to allow reconciliation and restoration of relationships to occur.

It is the purpose of this chapter to reflect upon the possibilities presented by a renaissance of thought in respect of restorative principles. The reasons for the resurrection of these themes are many and varied, but one can locate them most readily within Mennonite activism (eg. Lederach, 1999) and victim groups (Sarre, 2000a). Be that as it may, it is useful to begin by reviewing restorative themes and then contrasting them with the more traditional "retributive" themes.

Restorative Principles

Restorative principles are expressed in different ways, but some clear themes emerge. In models of restorative justice there is:

1. shared responsibility for resolving crime and for one another;
2. the use of informal community mechanisms in addition to the involvement of criminal justice professionals;
3. the inclusion of victims as parties in their own right;
4. an understanding of crime as injury, not just lawbreaking;
5. an understanding that a state monopoly over the response to crime is inappropriate (Justice Fellowship, 1989; Sarre, 1997a).

A restorative system of criminal justice endeavors to listen to, and appease, aggrieved parties to a conflict and to restore, as far as possible, right relationships between antagonists. In restorative models, crime is defined as a violation of one person by another, the focus is upon problem-solving, dialogue and restitution (where possible), mutuality, the repair of social injury and the possibilities of repentance and forgiveness. The offence is understood in a range of dimensions including its moral, social, and political implications (Ministry of Justice New Zealand, 1995; United Nations Alliance, 1995).

The Distinction Between Retributive and Restorative Models of Justice

Retributive justice, in contrast, presents the conflict as one between the offender and the state in an adversarial environment and seeks to ensure that offenders atone for their sins through receiving their "just deserts." Crime is thus defined as a violation of the state, the focus is on blame and punishment, and the offense is defined in purely legal terms, devoid of moral, social and political dimensions. Under retributive justice, a form of "atonement" must occur in the life of the offender by appropriate punishment, regardless of any deterrent effect or any rehabilitative counter-effect. Lest it be said that

retribution is intrinsically harsh, however, it must be remembered that retribution provides a brake on the excesses of punishment; that is, it seeks to have punishment meted out only in direct proportion to the misdeed. The "eye for an eye" of the Judaic law in fact was a limiting feature in retribution. One could only take an eye for an eye, not two eyes or a life, for example (Bianchi, 1994).

It is not the case, of course, that our common law systems of criminal justice operate only upon retributive principles. There are clearly restorative notions in the concepts of rehabilitation, parole and probation, for example. But there is little doubt that the emphasis is on retributive, rather than restorative goals. Restorative principles play little part in the modern adversary systems of criminal justice. This has led and continues to lead to some problems. For crime is first and foremost a conflict between people. Yet under traditional models, crime is treated and deemed to be something that has happened only between the state and an offender. Such models ignore the fact that crime often occurs between people who may be in continuous contact, and may be in intimate relationships with each other. It often fails to take into account that many offenders are victims as well.

For example, cases of assault, theft, or damage between parties who are familiar with each other or who have an ongoing relationship with each other, are dealt with on the basis, largely, that only one party is legally culpable. That is rarely the case. The party singled out for attention may have been responding as part of an ongoing acrimonious relationship with the other party. While provocation associated with criminal acts may be a mitigating feature in sentencing, it cannot and does not exculpate the assailant.

Moreover, cultural and gender issues are, for the most part, officially irrelevant to traditional criminal proceedings although they may, in fact, be crucial both to the etiology of the incident and to the ultimate outcome. For example, a racist or sexist taunt may lead to an assault. Even though, legally speaking, the criminal conviction is recorded and the case is "concluded," the racism or sexism may persist. In fact, the taunts may continue given the trouble that the victim placed the offender in. Both parties to the conflict are no better off. Thus, at the end of the day, many parties tend to view the criminal justice system experience as one that leaves them embittered, burdened with costs and often determined to seek further action. This is a common experience amongst many victims, offenders, and their families alike (e.g., Rose, 1996:51; Bottoms, 1994).

If policymakers were to attempt to mediate hurt and restore parties to a right relationship with each other, then the retributive adversarial system would be the last choice they would make. More enduring solutions and satisfactory outcomes are likely to occur, say the renaissance theorists, in a restorative, non-adversarial environment. Not only that, adversarial encounters are criticized as contributing to costs, delays, over-servicing and poor accountability (ALRC, 1997:8).

Early Development of the Notion of Restorative Justice

The moves to engender a "restorative" milieu have thus been explored enthusiastically in the past 20 years, but most recently by American social scientists and policy-advisers (e.g., Zehr, 1985; Van Ness, 1990; Van Ness & Strong, 1997; Umbreit, 1994; Bazemore & Umbreit, 1994). Australia is able to boast one of the harbingers, the late John Freeman (1988) as well as some contemporary key thinkers in the field (e.g., Braithwaite, 1999; Moore, 1996; Strang, 2000).

The *concept* of restorative justice, however, finds its roots earlier in the twentieth century, and indeed earlier in ancient religious faiths if one were to delve into matters theological (Sarre, 1999a). In 1917, the American social psychologist George Herbert Mead highlighted the inadequacy of the punitive system of justice.

The concentration of public sentiment upon the criminal which mobilizes the institution of justice, paralyses the undertaking to conceive our common goods in terms of their uses . . . [and] we see society almost helpless in the grip of the hostile attitude it has taken toward those who break its laws and contravene its institutions. Hostility toward the lawbreaker inevitably brings with it the attitudes of retribution, repression, and exclusion. These provide no principles for the eradication of crime, for returning the delinquent to normal social relations, nor for stating the transgressed rights and institutions in terms of their positive social functions (Mead, 1917:226-227).

In the 1970s, the Danish criminologist Nils Christie again explored the notion of putting "justice" in context, and returning criminal conflicts to their "rightful" owners, an evolution of people's sense of power over the legal process:

[The current system is] a loss of opportunities for a continuous discussion of what represents the law of the land . . . Lawyers are . . . trained into agreement on what is relevant in a case. But that means a trained *incapacity* in letting the parties decide what they think is relevant (emphasis in the original) (Christie, 1977:8).

From this time on, the recognition that relationships are crucial to the criminal justice process began to gain some currency. In 1977, psychologist Albert Eglash coined the term "restorative justice," writing:

The reparative effort does not stop at restoring a situation to its pre-offence condition, but goes beyond: Beyond what our own conscience requires of us, beyond what a court orders us to do,

beyond what family or friends expect of us, beyond what a victim demands of us, beyond any source of external or internal coercion, beyond any coercion into a creative act, where we seek to leave a situation better than it ever was (Eglash, 1977:95).

Restorative justice soon emerged as a legitimate justice model,

... designed to provide the context for ensuring that social rather than legal goals are met. The expected end result is that communities and individuals are empowered in dealing with their problems and in influencing the direction of the criminal justice process, so formal punishment and incarceration become less relied upon sanctions (La Prairie, 1995:78).

The Reluctance to Embrace the Concept

There has been some resistance to the notion of restorative justice. There are probably seven main reasons one can identify.

1. *Rehabilitation by another name*

There are ongoing doubts about the success of the 1960s and 1970s "rehabilitation" models of punishment and correction, especially since Martinson's (1974) damning critique that has reified and persisted despite all attempts to clarify it (Sarre, 2000b). It is thought that perhaps restorative justice is just another name for rehabilitation, with its perceptions of failure, and its paternalistic overtones.

2. *Excuses*

Those on the political "left" are of the opinion that restorative models excuse too much men's violence against women and children. Those on the political "right" believe that proponents of restorative models are too keen to excuse offenders' behaviors, and are thus "soft" on crime.

3. *Private outcomes*

There are grave concerns that the privatization implicit in some restorative models, for example, the lack of publicity of "family conference" outcomes, are anathema to the concept of an open system of justice. There is a perceived danger that safeguards need to be in place to protect offenders and victims alike from the perils of so-called "informal" justice and the way in which it can co-opt unwilling participants to engage in dialogues they simply do not wish to have (Laster & Erez, 2000; Strang, 2000:31).

4. *Retributive public attitudes*

There is little doubt that the public in general sees the purpose of the criminal justice system first and foremost as an agent of retribution and deterrence, and anything that looks likely to undermine those concepts, and undermine a strong statement against criminal conduct, is likely to be viewed with suspicion.

5. *The traditional legal expectations*

The adversarial encounter is entrenched in the current style of legal education and thus expected by legal practitioners and clients alike. One is taught to think that disputes are best solved in an adversarial contest. There is still a strong assumption in the public domain that legal reasoning is distinct from ethical or political discourse in general, as a method for reaching "correct" results (ALRC, 1997:51).

6. *Certainty and consistency have deep appeal*

There is great power in the symbolic function of the law as being certain and consistent. Restorative models are, *ipso facto*, variable, based upon the players and stakeholders themselves reaching outcomes. Many people, however, prefer to live under a concept of legal (if not moral or philosophical) certainty even when it is said or suspected that such certainty may be ill-conceived (Sarre, 1994:29; 1999b).

7. *Restoration to a status quo may be inadequate or harmful*

There is an argument, put persuasively by Harry Blagg, that restorative models are not always readily assimilable into existing bureaucratic and administrative frameworks. For example, there may be an unwillingness on the part of indigenous peoples to be involved in a restorative justice practice that seeks to have an offender "restored" to an unsatisfactory status quo (Blagg, 1998:6). For this reason some theorists prefer the term "relational" justice (e.g., Burnside & Baker, 1994; Townsend, 1994). or "transformative" justice (e.g., Moore, 1996). These terms allow for relationships to become the focus of any transformations that need to occur.

Restorative Justice in Practice

Notwithstanding the above caveats, there is good reason to suspect that restorative models have great possibilities to enhance and improve the options available to criminal justice administrators. For a start, restorative options are usually potentially cheaper (cf Editorial, 1996:3). A trial costs the state a great deal more money than outcomes derived through mediation and private restitution, for example. Moreover, there is some evidence in the examples following that more lasting outcomes (and hence cheaper outcomes) are more likely where restorative principles are in place. Policymak-

ers thus are inclined in a number of fields of justice practice to explore opportunities for the implementation of restorative goals.

The following examples are presented not as models of distinctly restorative practice, but as restorative-style alternatives to traditional models.

Family Conferencing

The well-researched "family group conference" juvenile justice model provides an ideal example of a restorative justice forum separate and apart from the formal system. It has shown encouraging evidence of success (e.g., Strang, 2000:24). Under this model, offender(s), their extended families and advocates (if appropriate), victim(s) and their supporters, and police are brought together with an independent facilitator. Offenders are required to confront their wrongdoing (for the most part the less serious offences) while being empowered to develop their own negotiated settlement. The aim of the process is to bring about reconciliation, not to exact punishment. Communities are thereby being asked to seek their own solutions to problems rather than relying upon the state to take center stage (Braithwaite & Mugford, 1994). In this respect, consistency is not as important as "democratic creativity" (Braithwaite, 1994:203). It has been found in evaluative studies that offenders are more likely to respond to their justice experience positively when they perceive it to be fair, and the evidence is clear that conferencing programs do give rise to favorable perceptions (Strang, 2000:27). The experiment of family group conferencing has been warmly embraced in Australia, and the subject of much research in its implementation (e.g., Alder & Wundersitz, 1994; Bagen, 1995; Fisher et al., 1992; La Prairie, 1996; Moore, 1993; Polk, 1994; Sarre, 1999c; Warner, 1994; Wundersitz, 1996).

Family Violence Court

The family violence court was piloted in 1997 in South Australia as an interventionist court designed to reduce violence in the home. Essentially, magistrates (all male, by design) in these courts use their powers under the *Bail Act (SA)* to ensure that recipients of bail orders or restraint orders are not inflamed into further acts of violence thereby. Police refer to the court all family matters that appear to have a family violence component. At the first hearing, guilt and innocence are irrelevant. Men who are a danger to their families are referred to an appropriate agency to deal with violence issues, such as anger management programs and substance abuse treatment. Final orders are made when the matter is returned to court, at which time the magistrate is better able to consider the alleged offender's future prospects in light of the immediate history of the matter. The aim is to minimize the possibilities of repeat victimization.

Mental Health Court

A joint initiative of the South Australian Department of Human Services and the Department of Justice, this court, which commenced operation in 2000, takes referrals from police, legal counsel, and magistrates. It is designed to, amongst other things, prevent persons who may border on being unfit to plead from being drawn inextricably into the legal system. In that sense, it is capable of being deemed "restorative." Matters are selected on the following criteria: the cases must be able to be finalized in the summary courts, the accused must admit the objective elements of the offense, and he or she must not be suffering from severe mental incapacitation nor be facing a serious charge. In the final analysis, a person is only given an order of the court if the magistrate is satisfied that the program set out for the accused can achieve something, and that he or she can cope with whatever regime is prescribed. Once the accused is admitted to a program, the matter is adjourned until called on again, if at all.

Drug Assessment and Aid Panels

The South Australian Drug Assessment and Aid Panel, established in 1985 under the auspices of the *Controlled Substances Act (SA) 1984*, is a pre-court diversionary program designed to divert people caught with possession of illicit drugs for personal use away from the courts and to the Panel, placing pre-eminence upon the medical, rather than criminal, nature of the problem. There has been, in this context, specific attention given to Aboriginal offenders (ADCA, 1996a:8). Unless offenders wish to defend the matter in court, fail to adhere to the requirements of the Panel or are found unsuitable by the Panel, their matters are not referred to the courts and no conviction is recorded (ADCA, 1996b:14). The continued operation of the Panel bears testimony to its practitioners' perceptions of its ability to reduce criminality through an offender-focused, restorative treatment regime.

Problem-Solving Policing

Western governments have, in the last two decades, adopted a notion of public policing which incorporates so-called "problem-solving" policing. This model encourages greater flexibility in policing, allowing greater levels of community involvement and input and thus has the potential to encourage non-adversarial policing to prevail. There is some reason to suspect that the transfer of power from authorities to communities has not happened in the manner often maintained in the rhetoric (Sarre, 1996:36). But academics who have reviewed the policing needs in the new South Africa (e.g., Brog-

den & Shearing, 1993) have highlighted the greater possibilities currently alive in that country for a police vision that places less emphasis upon police *forces* and greater emphasis upon the self-policing abilities of communities themselves.

Aboriginal Court Day (the "Nunga" court)

The \$40 million Royal Commission into Aboriginal Deaths in Custody (Royal Commission, 1991) was a milestone down the continuing road of justice reform in Australia. The key conclusion to come out of this report was that too many Indigenous Australians were being drawn into the formal justice setting. Its key recommendation, therefore, was to encourage jurisdictions to consider ways to reduce Aboriginal rates of imprisonment (Cunneen & McDonald, 1997). The notion of a Nunga court day, while not mooted in the 1991 report specifically, is an example of a contemporary idea that would have received acclaim from the Commissioners as involving a significant degree of Indigenous input in its planning and execution (South Australia, 1999a). The court in South Australia, which commenced in 1999, sits one day per fortnight, for sentencing, not trials. The magistrate is guided by input from a range of sources, and sits not above the court but at the bar table, with an Aboriginal elder. Each of the matters is dealt with on a case by case basis, with the outcome firmly determined by what the magistrate considers is in the best interests of the offender, in order to ensure his or her rehabilitation in so far as it is not inconsistent with the interests of the community.

Likewise, a memorandum of understanding was signed in September 1999 between the South Australian State government and the elders of the Anangu Pitjantjatjara Lands. It is designed to enable the Umuwa community to self-supervise offenders on community service orders, parole, and probation. It is another example of the creation of a less formal justice setting designed to encourage attendance at court and to reduce re-offending (South Australia, 1999b).

The Recognition of Customary Law in Sentencing

In the Aboriginal Community Justice "scoping" document (South Australia, 1999b) is to be found a range of projects that are designed to build partnerships with the community, "that foster understanding, involvement and ownership in criminal justice system processes and programs" (South Australia, 1999b:i). The report encourages the use of tribal and customary law to solve justice issues within Indigenous communities. There is a good case to be made for the greater recognition of Indigenous law in sentencing:

Recognition must be given . . . to the existence (and survival) of customary law. As Indigenous cultures are organic (rather than static), customary law may exist (albeit in an evolved/evolving format) in contemporary communities, as well as in their more traditionally orientated counterparts. As Australian society examines socially just ways of dealing with its Indigenous peoples, and as Aboriginal and Torres Strait Islander peoples continue to demand the right of more culturally appropriate responses, the importance of customary law cannot be underestimated (Social Justice Commissioner, 1995, ¶ 31). (See also ALRC, 1986; Royal Commission, 1991, ¶104; Sarre, 1997b).

What is crucial here is an understanding that for restorative justice to have any resonance in the administration of justice for indigenous peoples, it must be contextualized by any political and legal forces at play (Cunneen, 1998).

Offender and Victim Reconciliation

While this notion has attracted a good deal of attention in North America (e.g., Marshall & Merry, 1990) and Europe (e.g., Hartmann, 1996), it is still very much in a nascent form in Australia (cf. MacRae, 1994, Fisher, 1993). The concept is designed to put in place a mediation process to bring about "right" relationships, in contradistinction to the imposition of pain as a deterrent. It endeavors to repair social injury and encourage mutuality. Offenders are encouraged to understand the impact of the crime and to take responsibility for it. The work of Zehr (1985; 1990), outlining the Victim Offender Reconciliation Program (VORP) in the USA and Canada has been emulated in Australia to some degree. The Victorian Law Reform Committee (Victoria, 1993:137) supports both pre-court and post-conviction models for both adult and young offenders and has had a pilot program since October 1993. The Western Australian Department of Corrective Services (Western Australia, 1992) has explored a post-conviction model and has a pilot pre-sentence victim-offender (adult only) conciliation program operating. Queensland has a similar pilot project applying to both adults and juveniles (Murray, 1991).

Evaluating the Evidence

How does one test the success of a concept as broad as restorative justice, using examples of practices as varied as those above? The "success" of a justice system based upon restorative notions, say its adherents, is not necessarily measured by the final outcome or legal result,

but rather by the degree to which people feel they have an impact, that they have been treated fairly, that they have understood each other, that they have better mechanisms for making decisions and handling their differences, and that their key issues have been addressed. In particular [is there] an enhanced level of participation in decision-making that affects people's lives. If successful, the participants feel that they are a valued part of their community (Lederach & Kraybill, 1995:368).

The dilemma for those hoping to find concrete evidence of the "successes" of restorative options, however, is that there is a lack of definition and a lack of data, for example, on the manner in which communities value participation and the way that victims may feel that they are included. Evaluations of these sorts of criteria in the manifestations of some of the ideas presented above are only now becoming available, and their conclusions remain guarded and tentative (e.g., Braithwaite, 1999). As theoretical developments occur, and as the literature grows, there is, however, good reason to hope that a better picture of the practical realities of restorative justice may soon begin to emerge and that its strengths and weaknesses may eventually become more apparent.

Summary

The current themes of criminal justice that place great store on retribution and adversarial encounters have not provided an environment that is conducive to the possibilities of better relationships between offenders, victims, and their communities. The possibilities will exist more often, claim the proponents of restorative options, if policymakers can enjoin communities, prosecutors, judges and governments to embrace more life-affirming themes and choose restorative means, where they are available, rather than retributive ends. Of course, we need to find out a lot more about the performance of each restorative model in order to determine whether it can "support the hopes of its proponents or . . . succumb to the criticisms of its detractors" (Strang, 2000:31).

To the extent that, at the very least, thinking about restorative options can draw us away from an assumption that the only workable and effective systems of criminal justice are based upon retributive and adversarial notions, restorative justice is worth further exploration. Evaluations of its practical manifestations and applications should continue apace.

Discussion Questions

1. Distinguish between restorative and retributive justice. Are these terms mutually exclusive?
2. In the context of restorative justice, examine the strengths and weaknesses of family group conferences.
3. Could/should conferences be extended to the adult justice system?
4. Are the traditional institutions of law so steeped in their own self-importance that they impede restorative justice?
5. Can restorative practices achieve restoration, or are there limits?
6. What may be the difficulties associated with a criminal justice system embracing restorative justice entirely to the exclusion of retributive themes?
7. If the difficulties seen in the previous question appear insurmountable, is there some preferred middle ground for policymakers?
8. "Although the law is created and enforced to ensure that justice is done, very often the opposite occurs. For example, just ask any victim, or member of any marginalized group." Comment on the ability of restorative themes to overcome this anomaly.
9. Is the term "restorative justice" to be preferred to, say, "relational justice"?
10. Find out what you can about the differences between restorative justice and "transformative justice."